SUPREME COURT OF QUEENSLAND

CITATION:	*R v Reynolds* [2013] QCA 368
PARTIES:	**R** **v** **REYNOLDS, Isaiah Bahloo** (applicant)
FILE NO/S:	CA No 110 of 2013 DC No 71 of 2013 DC No 124 of 2013 DC No 138 of 2013 DC No 292 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Southport
DELIVERED ON:	10 December 2013
DELIVERED AT:	Brisbane
HEARING DATE:	6 September 2013
JUDGES:	Holmes and Fraser JJA and Margaret Wilson J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The application for leave to appeal against sentence is granted.** **2. The appeal is allowed.** **3. The sentence imposed below is varied by** **(i) deleting the declaration that the applicant had been in pre-sentence custody for 265 days between 13 May 2011 and 1 February 2012 and substituting "It is declared that the defendant was held in pre-sentence custody for 365 days between 13 May 2011 and 12 May 2012"** **(ii) adding "It is declared that the defendant was held in pre-sentence custody for 241 days between 7 August 2012 and 4 April 2013"** **(iii) adding "The period of 606 days is declared to be imprisonment already served under the sentence imposed".**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant pleaded guilty to

two counts of being in premises and stealing and was sentenced to two years imprisonment – where the offences were committed during the operational period of an earlier term of imprisonment for four years, suspended after one year and during a three year period of probation which was combined with 12 months imprisonment – where the sentencing judge activated the three year balance of the period of suspended imprisonment, revoked the probation order and imposed concurrent sentences of four years for those offences – where the sentences of two years for the stealing offences were made cumulative on those sentences – where the sentencing judge calculated parole eligibility on the basis that the applicant should be eligible after serving one third of the two year sentences and half the four year sentences – whether the mitigating circumstances of admissions and an early plea which were taken into account when the four year sentences were originally imposed should have been taken into account when the suspended sentence was activated, so as to result in a parole eligibility date set at one third of the cumulative sentences – whether the resulting sentence was manifestly excessive

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant pleaded guilty to two counts of being in premises and stealing and was sentenced to two years imprisonment – where the offences were committed during the operational period of an earlier term of imprisonment for four years, suspended after one year and during a three year period of probation which was combined with 12 months imprisonment – where the sentencing judge activated the three year balance of the period of suspended imprisonment, revoked the probation order and imposed concurrent sentences of four years for those offences – where the sentencing judge omitted to declare the applicant's time spent in pre-sentence custody in respect of the two year sentences imposed for the stealing offences – where the pre-sentence custody declaration made on the re-sentencing of the applicant for the offences on which he had breached probation should have reflected the fact that he had by then served 12 months of the sentence originally imposed – whether the sentence application and appeal should be allowed for the purpose of correcting the pre-sentence custody declarations

Penalties and Sentences Act 1992 (Qld), s 120, s 121, s 147

R v Norden [2009] 2 Qd R 455; [2009] QCA 42, cited

COUNSEL: R A East for the applicant
B G Campbell for the respondent

SOLICITORS: Legal Aid Queensland for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **HOLMES JA:** The applicant applies for leave to appeal against sentence. He pleaded guilty to two counts of being in premises and stealing and one count of possessing a thing for use in connection with possession of a dangerous drug, and, at the same time, to a summary charge of failing to take reasonable care and precautions in respect of a syringe. The stealing counts involved his making off with property from two stores; on the second occasion with rings valued at almost $50,000. He was sentenced to two years imprisonment on those charges and one months imprisonment in respect of each of the other two charges.

[2] More problematically for the applicant, the offences were committed during the operational period of an earlier term of imprisonment of four years, suspended after one year, and during a three year period of probation which had been combined with 12 months imprisonment. The sentence combining imprisonment and probation had been imposed in respect of two counts of burglary and stealing; the partially suspended sentence related to another eight counts of burglary and stealing and one count of wilful damage. It was necessary, therefore, for the sentencing judge to deal with the applicant under s 147 of the *Penalties and Sentences Act* 1992 for the suspended imprisonment and also, in accordance with ss 120 and 121 of the Act, to decide whether to revoke the probation order and, if it were revoked, to re-sentence in respect of the relevant offences.

[3] The sentencing judge activated the three year balance of the period of suspended imprisonment. He revoked the probation order and imposed concurrent sentences of four years for those offences, declaring time spent in pre-sentence custody on the sentences as 265 days. The sentences of two years imprisonment for the stealing offences were made cumulative on those sentences. (His Honour neglected to declare the time served in pre-sentence custody in respect of those offences, something which it was agreed should be remedied here. The declaration of 265 days on the offences which attracted probation also, in my view, requires correction, because at the time the judge came to re-sentence, the applicant had served the twelve months imprisonment component of the sentence as originally imposed.) His Honour fixed a parole eligibility date at 4 April 2014.

[4] The ground of the proposed appeal was that the sentence imposed was manifestly excessive, but the argument was put on a very narrow basis. The applicant did not take any issue with the two year sentences imposed on the stealing counts. Nor was there any argument with the imposition of those sentences cumulatively on the four year sentences. That approach is readily understood when one considers the applicant's criminal history. Although only 32 years old, he had committed an extraordinary number of offences of dishonesty - break, enter, steal, fraud, unlawful use of motor vehicles and receiving – since 1998. He evidently suffered from a drug addiction and had received the benefit of intensive drug rehabilitation orders. They appear not to have had any lasting effect; in 2011 he committed the series of offences which led to the imposition of the partially suspended sentence and imprisonment combined with probation. Allowing for time already served prior to sentencing, the applicant was released from custody in respect of those sentences in May 2012 and committed the stealing offences in July and August of that year.

[5] The point which the applicant did take was as to the setting of the parole eligibility date. The learned sentencing judge reasoned that the applicant should serve half of the four year sentences because of the circumstances of his offending while subject to the order of suspended imprisonment and so soon after he was released. On the two year sentences that he had imposed, his Honour said, he would, in the ordinary course of events, fix a parole eligibility date after one third. Ultimately, after allowing for the 12 months that the applicant had already served of the four year sentences and eight months (a third) that he had served of the two year sentences in pre-sentence custody, the learned judge fixed a date 12 months into the future, on 4 April 2014.

[6] The applicant's argument focussed on the suspended sentences. He argued that the activation of the unserved balance of the sentences was itself punishment for the breach; it was an additional and unwarranted punishment to defer parole eligibility to halfway through the four year sentences. The same mitigating factors that had applied to the original offending should have resulted in parole eligibility at the one-third mark. They were, that the applicant had made unprompted admissions to the offences he had committed in circumstances where there was a lack of other evidence and had entered an early plea of guilty.

[7] Because the applicant's submissions were directed to the suspended sentences, it is worth setting out s-ss 147(1) and (2) of the *Penalties and Sentences Act*:

> "**147 Power of court mentioned in s 146**
>
> (1) A court mentioned in section 146(2), (2A), (4) or (6) that deals with the offender for the suspended imprisonment may—
>
> (a) order—
>
> (i) that the operational period be extended for not longer than 1 year; or
>
> (ii) if the operational period has expired when the court is dealing with the offender—
>
> (A) that the offender's term of imprisonment be further suspended; and
>
> (B) that the offender be subject to a further stated operational period of not longer than 1 year during which the offender must not commit another offence punishable by imprisonment if the offender is to avoid being dealt with under section 146 for the suspended imprisonment; or
>
> (b) order the offender to serve the whole of the suspended imprisonment; or
>
> (c) order the offender to serve the part of the suspended imprisonment that the court orders.
>
> (2) The court must make an order under subsection (1)(b) unless it is of the opinion that it would be unjust to do so."

Sub-section (3) sets out a list of matters to be taken into account in deciding whether it would be unjust to order the offender to serve the whole of the suspended

imprisonment, but it is not an exhaustive list. The setting and timing of a parole release date is also a relevant consideration in deciding whether it is unjust to make that order.[1]

[8] The first difficulty with the applicant's submission is that it overlooks the fact that the sentencing judge was undertaking two separate exercises: one of determining whether it was unjust to require the applicant to serve the whole of the balance of the suspended sentence and the other of re-sentencing for the two offences for which the applicant had previously received probation. As to the second, s 121(2) of the *Penalties and Sentences Act* expressly required the judge in re-sentencing to take into account the extent to which the applicant had complied with the probation order.

[9] The extent of the applicant's compliance with probation was clearly negligible, given his almost immediate reoffending. Breaching the suspended sentence and probation order by yet more offences of dishonesty, thus requiring the sentencing process to be revisited, tended to negate any possible suggestion of genuine remorse for his prior conduct and constituted a further burden on the administration of justice. No other ameliorating features, in the form of youth, lack of criminal history, good character in other respects, or convincing prospects of rehabilitation, presented themselves. The sentencing judge was entitled in re-sentencing to regard the mitigating circumstances put before the original sentencing judge as having lost their former potence, and to conclude that there was no occasion for early release.

[10] Given that it was open to re-sentence in that way on the two counts where probation had previously been ordered, it is difficult to see the value of arriving at a different result in respect of the remaining counts which had been the subject of the suspended sentences. But in any event, the submission mischaracterises the role of the judge under s 147. It was necessary for him to decide whether it was unjust to activate the whole of the suspended sentence, factoring in the contemplated parole eligibility date as part of that consideration. In arriving at a view as to what was just, and the extent to which the requirement that the applicant serve the entire remainder of the sentence might be tempered by the setting of a parole eligibility date, he could properly take into account the applicant's behaviour on release after the served portion of the sentence.

[11] Ensuring a just result did not necessarily entail affording the applicant the lenience previously given and abused. The fact that the sentencing judge in part based his calculations on a view that, in the circumstances, the applicant should not receive an earlier release eligibility date than half way through the four year sentences did not render the sentences ultimately imposed manifestly excessive in the way contended.

[12] The application for leave to appeal against sentence should be granted and the appeal allowed for the purpose only of making the declarations as to time already served in custody.

[13] *Orders*

1. The application for leave to appeal against sentence is granted.
2. The appeal is allowed.
3. The sentence imposed below is varied by

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1 *R v Norden* [2009] 2 Qd R 455 at 459.

(i) deleting the declaration that the applicant had been in pre-sentence custody for 265 days between 13 May 2011 and 1 February 2012 and substituting "It is declared that the defendant was held in pre-sentence custody for 365 days between 13 May 2011 and 12 May 2012"

(ii) adding "It is declared that the defendant was held in pre-sentence custody for 241 days between 7 August 2012 and 4 April 2013"

(iii) adding "The period of 606 days is declared to be imprisonment already served under the sentence imposed".

[14] **FRASER JA:** I agree with the reasons for judgment of Holmes JA and the orders proposed by her Honour.

[15] **MARGARET WILSON J:** I agree with the orders proposed by Holmes JA and with her Honour's reasons for judgment.