SUPREME COURT OF QUEENSLAND

CITATION:	*R v Houkamau* [2016] QCA 328
PARTIES:	**R** **v** **HOUKAMAU, Leighton Maurice** (applicant)
FILE NO/S:	CA No 270 of 2016 DC No 180 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Toowoomba – Date of Sentence: 21 September 2016
DELIVERED ON:	9 December 2016
DELIVERED AT:	Brisbane
HEARING DATE:	29 November 2016
JUDGES:	Gotterson and Morrison and Philippides JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Leave to appeal against sentence is granted.** **2. The appeal is allowed.** **3. The sentence is varied by imposing a term of four years and four months in lieu of the term of five years imprisonment imposed on count 2.** **4. The date on which the applicant is eligible to apply for parole is 21 July 2017 (after serving approximately 20 months in total).** **5. Pursuant to s 159A of the *Penalties and Sentences Act* 1992 (Qld), 45 days is declared as time already served under the sentence.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL – JUDGE ACTED ON WRONG PRINCIPLE – where the applicant was convicted, on his own plea of guilty, of one count of robbery in company with violence and one count of causing grievous bodily harm – where the applicant was sentenced to four years imprisonment in respect of count 1 and five years imprisonment in respect of count 2, to be served concurrently and with a parole eligibility date set at 10 months after sentence was imposed and 20 months after the applicant was first taken into custody – where, in fixing the parole eligibility date, the sentencing judge indicated that his Honour

took into account a period of approximately nine and a half months of pre-sentence custody – where only 45 days of this pre-sentence custody could be declared, and was not declared, pursuant to s 159A of the *Penalties and Sentences Act* 1992 (Qld) – where the sentencing judge determined that five years was an appropriate head sentence – whether the sentencing judge erred in failing to adjust the head sentence to account for the nine and a half months spent in pre-sentence custody – whether the exercise of the sentencing discretion miscarried

Penalties and Sentences Act 1992 (Qld), s 159A

Attorney-General (Qld) v Kanaveilomani [2015] 2 Qd R 509; [2013] QCA 404, cited
R v Anthony [2013] QCA 95, cited
R v Lappan [2015] QCA 180, cited
R v MKL [2016] QCA 249, cited
R v Neilson [2011] QCA 369, cited
R v Skedgwell [1999] 2 Qd R 97; [1998] QCA 93, cited
R v Timotl [2003] QCA 96, cited
R v Tomkins and Gunning [2001] QCA 68, cited
R v Wishart and Jenkins [1994] 2 Qd R 421; [1993] QCA 563, cited

COUNSEL:	A D Anderson *(sol)* for the applicant (pro bono) G P Cash QC for the respondent
SOLICITORS:	Anderson Fredericks Turner for the applicant Director of Public Prosecutions (Queensland) for the respondent

[1] **GOTTERSON JA:** I agree with the orders proposed by Philippides JA and with the reasons given by her Honour.

[2] **MORRISON JA:** I have read the reasons of Philippides JA and agree with those reasons and the orders her Honour proposes.

[3] **PHILIPPIDES JA:** The applicant was convicted and sentenced on 21 September 2016, on his own plea, of one count of robbery in company with violence (count 1) and one count of causing grievous bodily harm (count 2). The applicant was sentenced to four years imprisonment in respect of count 1 and five years imprisonment in respect of count 2. These sentences were imposed to be served concurrently with a parole eligibility date of 21 July 2017. This date was 10 months after the sentence was imposed and 20 months after the applicant was first taken into custody.

[4] In fixing the parole eligibility date, the sentencing judge indicated that he took into account a period of approximately nine and a half months of pre-sentence custody, of which only 45 days could be the subject of a declaration under s 159A of the *Penalties and Sentences Act* 1992 (Qld). The 45 days pre-sentence custody was not declared to be time already served under the sentence, however.

[5] The applicant sought leave to appeal against the sentence imposed on the basis that the sentencing judge erred in failing to give effect to the pre-sentence custody in imposing the head sentence. He contended that the sentence imposed should be

varied by imposing a term of four years and four months imprisonment in lieu of the term of five years imprisonment imposed on count 2.

Circumstances of the offending

[6] The respondent accepts as accurate the applicant's summary of the circumstances of the offending, which are as follows.

[7] In the evening of 24 November 2015, the applicant and a female co-offender attended a hotel in Toowoomba. The complainant was also in attendance at the hotel. He knew neither the applicant nor the co-offender.

[8] The complainant won two amounts of cash by playing the poker machines, which was noticed by the applicant and the co-offender, who engaged the complainant in conversation and eventually began asking him for money, to which the complainant acceded.

[9] At around 9.00 pm the complainant and the applicant had a conversation whereby an arrangement was made for the applicant to drive the complainant home and the complainant would pay $20 for petrol. The complainant then left the hotel with the applicant and his co-offender.

[10] After paying for the petrol, the applicant continued driving the complainant home. As the vehicle was driving down the street where the complainant had directed, he heard the central locking in the vehicle activate and noticed that his door was locked.

[11] The complainant pointed to a block of units nearby and told the applicant to stop the car, which he did. The complainant was able to open the door but as he attempted to exit the vehicle the applicant grabbed him by the right arm and said "Give me all your money or I'll smash your face in". The applicant punched the complainant three or four times on the right side of the face. During the ensuing struggle, the applicant held the complainant in a headlock with his arm and the co-offender assisted the applicant by grabbing the complainant. The complainant freed himself and got out of the vehicle. The applicant also got out, tackled the complainant to the ground and then punched and kicked complainant.

[12] During the attack, the complainant felt hands reaching into the pockets of his jeans, where his wallet was. The complainant's wallet was taken, although it was unknown who took the wallet (the applicant or his co-offender). The applicant then again held the complainant in a headlock. Suddenly, the applicant let go of the complainant and left with the co-offender in the vehicle.

[13] The complainant called 000, telling the operator that he had been robbed and bashed and provided details of the car. An ambulance attended. The complainant sustained a right mandibular fracture for which he underwent surgery.

[14] The police investigation established a compelling case against the applicant, who was located and arrested on 7 December 2016. He declined to be interviewed about the offences.

[15] A victim impact statement tendered at the sentence showed the significant impact the offences have had on the complainant. There were adverse consequences to his family life as well as to his employment. Due to being off work without pay, he failed to pay rent and was evicted from his home. The complainant also moved from Toowoomba as he no longer felt safe living there.

Applicant's antecedents

[16] The applicant was born on 24 November 1974. He was 40 years old at the time of the offending and 41 at the time of sentence.

[17] The applicant had a Queensland criminal history, which was conceded to be a "significant criminal history" by counsel for the applicant at sentence. The offending occurred while the applicant was subject to a 12 month probation order imposed by the Ipswich Magistrates Court.

[18] The applicant's parents separated when he was 12 years old. Following the separation of his parents, the applicant grew up watching his father drink alcohol every night. Counsel for the applicant described how the applicant had been physically abused while in the Westbrook Youth Detention Centre. He had received compensation for the mistreatment that he experienced.

[19] His father died on 11 September 2002 and soon after the applicant was left by his then partner. After that point, the applicant turned to drugs. Many of the applicant's prior convictions related to property offences that reflected his ongoing drug addiction. While in pre-sentence custody, the applicant had stayed clean of drugs.

[20] The applicant has one child of his own with whom he does not have a close relationship, due to the relationship ending with the mother of the child. A reference in support of the applicant from his mother spoke about his prospects for rehabilitation. His mother stated that the applicant's changed attitude, current long-term relationship and the prospect of stable accommodation with her, meant there was prospect for change in the his behaviour.

Submissions at sentence relevant to the ground of appeal

[21] At sentence, the Crown tendered the pre-sentence custody certificate. It was indicated to the sentencing judge that 45 days pre-sentence could be declared, between 7 December 2015 and 21 January 2016. It was explained that, after 21 January 2016, the applicant was also remanded for other offences and so the remaining time could not be declared. He had spent 289 days on remand.

[22] The Crown accepted that "the time that he served on remand should be taken into account though in terms of the sentence".[1] There were no further submissions by the Crown prosecutor with respect to the way the pre-sentence custody of the applicant ought to taken into account by the sentencing judge.

[23] Counsel for the applicant submitted that a head sentence of five years imprisonment was appropriate in all the circumstances of the case and, having regard to the plea of guilty, that parole eligibility ought to be set at one third of the sentence.

[24] For the applicant, it was submitted that the 289 days the applicant had served in pre-sentence custody could be taken into account in the following way:[2]

> "So what your Honour would probably or what I will be submitting that your Honour should sentence the accused to in this case is the five years minus either nine or 10 months and set a parole eligibility date

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1 AB 14.27.
2 AB 34.17.

> after substituting nine or 10 months from the 20 months that he would otherwise be required to serve. So the 10 months would have him being able to apply for parole on the 21st of July 2017 and the nine months, your Honour, would just be one month of difference in relation to that."

[25] The sentencing judge appeared to agree with the submission of defence counsel in relation to the reduction of the head sentence but indicated it would then be appropriate to set the parole eligibility at one third of the reduced head sentence. Counsel for the applicant opposed that course, stating that if that became the order, then the applicant would be required to serve approximately 26 months prior to being eligible for release on parole.

[26] When the issue was raised again during submissions, the following exchange occurred:[3]

> "HIS HONOUR: Well, you can't get the credit doubled. He can't get it on the head sentence or on the - - -
>
> MR JONES: Your Honour, my submission - - -
>
> HIS HONOUR: - - - parole eligibility.
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> MR JONES: My submission is that he should, and the reason for it is if there was time declared, it would come off both because if he breaches the parole, it's time he – whilst it can't be declared, it's time that he's served. And so there should be a reduction in the head sentence and also on the bottom."

[27] Counsel for the applicant maintained his submissions. However, in the light of the approach his Honour indicated would be taken, counsel advised that the applicant would seek the time spent in pre-sentence custody to be reflected in the parole eligibility date, rather than in the head sentence.

Error in failing to give effect to the pre-sentence custody in relation to the head sentence

[28] On appeal, the applicant's solicitor, Mr Anderson, submitted that the sentencing judge, having determined that five years was an appropriate head sentence, failed to adjust that term to deal with the nine and a half months the applicant had spent in pre-sentence custody. Although his Honour adjusted the date that the applicant would become eligible for parole, his Honour considered that an adjustment of both the head sentence and parole eligibility date would allow the applicant to have his "credit doubled".

[29] It was contended that by approaching the time spent in pre-sentence custody in this way, his Honour misapplied principle and erred in law. The applicant submitted that the notion of credit being doubled may arise from a time prior to s 159A of the *Penalties and Sentences Act* 1992 (Qld) (the PSA).[4] Reference was made to *R v Skedgwell* where the Court explained:[5]

> "Before s 161 (1) was enacted, it was practice in sentencing to take account of a period of pre-sentence custody as going to some extent in reduction or mitigation of the penalty being imposed. Sometimes this

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3 AB 46.25-46.35.

4 And, before s 159A, its predecessor s 161.

5 [1999] 2 Qd R 97 at 99.

> was done by reducing the head sentence, on other occasions by accelerating the recommended date for parole. There was some debate whether, when the first of these methods was adopted, the allowance for the period of pre-sentence custody should not be doubled. That was because, if that period of custody had been served as part of the sentence rather than before it was imposed, the prisoner would, to that extent, have been closer to the statutory half-way mark at which he would or could first be considered for parole. On that approach, a day in custody before sentencing was for some purposes treated as the equivalent of two days after sentence."

[30] The applicant argued that, contrary to the view expressed by the sentencing judge, the applicant's counsel at sentence sought to only place the applicant in a position where he received full credit for the time in pre-sentence custody. Allowing full credit required the applicant to be placed in the same position as if the time could be declared under s 159A of the Act.

[31] Furthermore, it was submitted the effect and utility of s 159A of the PSA is to backdate the sentence.[6] At sentence, it was contended that his Honour need not declare the 45 days which were declarable pursuant to s 159A of the Act. Counsel's submissions at sentence, however, were plainly directed towards an order that, nonetheless, placed the applicant in the same position.

[32] In the applicant's submission, the sentencing judge's approach deprived the applicant of the "backdating" of the sentence, both in respect of the declarable and non-declarable pre-sentence custody. The effect of this failure to backdate the sentence imposed is that the applicant will spend a total of five years and nine and a half months in custody if he is made to serve his full sentence. The applicant noted this was an illustration of the "different results" that ought to be avoided in sentencing offenders.[7]

[33] It followed that, given that time in pre-sentence custody was not declared under s 159A and, therefore, the sentence was not backdated, the sentence disadvantaged the applicant in a way that the sentencing judge did not seem to intend, as there was no adjustment to the head sentence, notwithstanding that would have been the automatic result of a declaration under s 159A of the PSA.

[34] The applicant contended that the sentencing judge's reference to credit being "doubled" is consistent with the sentencing judge intending to give full credit to the applicant for his time in pre-sentence custody. His Honour only rejected the notion that the applicant ought to be given double credit.

[35] Finally, reference was made to the case of *R v Lappan*[8] as an illustration of where a similar treatment of the period spent in pre-sentence custody was held to amount to error. It was argued that, as in *Lappan*, it is clear that his Honour commenced with a five year term for the head sentence (not affected by the pre-sentence custody), fixed the parole eligibility date one-third of the way through the period of the head sentence and then made allowance for the period of pre-sentence custody. The result in *Lappan* was that the applicant had imposed an effective head sentence longer than what the

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6 *R v Wishart and Jenkins* [1994] 2 Qd R 421 at 425-427 per Macrossan CJ and Pincus JA; see *Attorney-General for the State of Qld v Kanaveilomani* [2015] 2 Qd R 509 at [12] per McMurdo P; [53]-[61] per Morrison JA; [163] per Philippides J.

7 *R v Wishart and Jenkins* [1994] 2 Qd R 421 at 429 per Thomas J.

8 [2015] QCA 180.

sentencing judge had indicated was appropriate. The applicant submitted that the same error occurred in the present case with the result that it was appropriate for this Court to to re-sentence the applicant.

Discussion

[36] As the respondent rightly accepted, it appeared, in the light of the sentencing judge's statement that "I agree that the range is four to five years and in light of your criminal history, I think you should be sentenced at the top of that range of five years", that his Honour's intention was to set the maximum period the applicant might spend in custody at five years. The effect of the orders actually made, when regard was had to the pre-sentence custody, meant that the applicant might spend as long as five years and nearly ten months in gaol before release. The respondent conceded that this meant it was open to conclude that the orders pronounced did not give full effect to what the sentencing judge sought to achieve. Accordingly, the sentencing judge erred in the consideration of the pre-sentence custody.

Re-exercise of the sentencing discretion

[37] Given the error made by the sentencing judge, this Court is required to consider how to exercise its discretion afresh in relation to penalty.

[38] Leaving aside the issue of pre-sentence custody, the applicant accepted that a sentence of five years imprisonment with parole eligibility after serving one third of that sentence is appropriate in all the circumstances of the case. That submission accords with what was found to be the appropriate starting point in this case following a plea of guilty by the sentencing judge. Furthermore, such a sentence is in line with the exercise of the sentencing discretion as reflected in the cases of *R v Neilson*,[9] *R v Tomkins and Gunning*,[10] *R v Anthony*[11] and *R v Timoti*.[12]

[39] The applicant submitted that, adopting the principles in *R v MKL*,[13] it would be appropriate to take into account the pre-sentence custody in full in this case. That could be achieved by sentencing the applicant to four years and four months imprisonment on the grievous bodily harm count, with a parole eligibility date of 21 July 2017 and 45 days of pre-sentence custody declared as time already served under the sentence.

[40] I accept the applicant's submissions. A sentence structured in the way contended for by the applicant has the effect of backdating the approximately eight months of time that cannot be declared under s 159A of the PSA. As to the remaining 45 days, between 7 December 2015 and 21 January 2016, which are declarable, they ought to be backdated by operation of s 159A of the PSA as time served under the sentences.

[41] The Court acknowledges the assistance given in this matter by Mr Anderson, who appeared pro bono, and expresses its gratitude for his assistance.

Orders

[42] I propose the following orders:

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9 [2011] QCA 369.
10 [2001] QCA 68.
11 [2013] QCA 95.
12 [2003] QCA 96.
13 [2016] QCA 249 at [24]-[25] per Morrison JA, with whom Fraser JA agreed.

1. Leave to appeal against sentence is granted.

2. The appeal is allowed.

3. The sentence is varied by imposing a term of four years and four months in lieu of the term of five years imprisonment imposed on count 2.

4. The date on which the applicant is eligible to apply for parole is 21 July 2017 (after serving approximately 20 months in total).

5. Pursuant to s 159A of the *Penalties and Sentences Act* 1992 (Qld), 45 days is declared as time already served under the sentence.