

SUPREME COURT OF QUEENSLAND

CITATION: *R v Ehlers* [2017] QCA 44

PARTIES: **R**
v
EHLERS, Vincent Norton
(applicant)

FILE NO/S: CA No 320 of 2016
DC No 490 of 2016

DIVISION: Court of Appeal

PROCEEDING: Sentence Application

ORIGINATING COURT: District Court at Brisbane – Date of Sentence: 1 November 2016

DELIVERED EX TEMPORE ON: 22 March 2017

DELIVERED AT: Brisbane

HEARING DATE: 22 March 2017

JUDGES: Gotterson and Philip McMurdo JJA and Mullins J
Separate reasons for judgment of each member of the Court, each concurring as to the orders made

ORDERS: **1. Application for leave to appeal against sentence granted.**
2. Appeal allowed.
3. Delete the order that the date Mr Ehlers is eligible for parole be fixed at 1 February 2017 and insert in lieu the order that the date Mr Ehlers is released on parole be fixed at 22 March 2017.
4. Otherwise confirm the sentences imposed in the District Court on 1 November 2016.

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – POWERS OF APPELLATE COURT – GENERALLY – where the applicant pleaded guilty to one count of burglary and stealing and one count of common assault – where the sentence of imprisonment was 18 months for each count served cumulatively on a sentence of two years’ imprisonment for the dangerous operation of a vehicle imposed previously in the Magistrates Court – where pre-sentence custody of 206 days was declared – where a parole eligibility date was fixed – where a successful appeal by the applicant reduced the sentence of two years’ imprisonment imposed in the

Magistrates Court to 18 months' imprisonment – whether a parole release date rather than a parole eligibility date should have been fixed

Penalties and Sentences Act 1992 (Qld), s 160B, s 160C

Ehlers v Queensland Police Service [2017] QDC 6, related

COUNSEL: R A East for the applicant
C W Heaton QC for the respondent

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

MULLINS J: Mr Ehlers' application for leave to appeal against sentence was overtaken by an intervening event. The respondent, therefore, supports the granting of the application for leave to appeal against sentence and the allowing of the appeal to the extent of deleting the parole eligibility date of 1 February 2017 and substituting a fixed parole release date as of today, 22 March 2017.

On 1 November 2016, Mr Ehlers pleaded guilty in the District Court to one count of burglary and stealing and one count of common assault. He was sentenced to imprisonment of 18 months for each count, which was ordered to be served cumulatively upon the sentence of two years' imprisonment that he was then currently serving for the offence of dangerous operation of a vehicle and adversely affected by an intoxicating substance committed on 9 June 2016. That was imposed in the Brisbane Magistrates Court on 1 August 2016. The parole release date that was fixed for the sentence imposed in the Magistrates Court was 1 February 2017.

In the District Court, a declaration was made under s 159A of the *Penalties and Sentences Act 1992 (Qld)*, the Act, that 206 days spent in pre-sentence custody between 5 August 2015 and 26 February 2016 was deemed time already served under the sentences imposed on 1 November 2016.

On the basis the period of imprisonment that resulted from the sentence of 18 months' imprisonment imposed in the District Court, being cumulative on the sentence of two years'

imprisonment imposed in the Magistrates Court, exceeded three years, the learned District Court Judge fixed a parole eligibility date of 1 February 2017, applying s 160C(3) of the Act.

On 17 January 2017, Mr Ehlers successfully appealed against the sentence imposed for the dangerous operation of a motor vehicle, with a sentence of imprisonment of 18 months being substituted for the sentence of two years' imprisonment: *Ehlers v Queensland Police Service* [2017] QDC 6.

The only aspect of the sentence imposed in the District Court that Mr Ehlers was seeking to appeal was the fixing of a parole eligibility date rather than a fixed parole release date.

The reduction of the Magistrates Court sentence to 18 months means that the accumulated total of the Magistrates Court sentence of imprisonment and the District Court sentence of imprisonment is one of three years or less, to which s 160B of the Act applies, requiring the fixing of a parole release date.

When Mr Ehlers was sentenced in the District Court, he was then currently serving the Magistrates Court sentence, for which he had been held on remand since 9 June 2016. The period of 51 days spent in pre-sentence custody was taken to be imprisonment already served under the Magistrates Court sentence pursuant to s 159A(1) of the Act. Mr Ehlers' current period of imprisonment, therefore, commenced on 9 June 2016.

The pre-sentence custody of 206 days that was declared in relation to the District Court sentence was in respect of a period spent in custody that was not continuous with the period of imprisonment that commenced on 9 June 2016. The effect of the cumulative District Court sentence was to add a term of 18 months less 206 days already served onto the imprisonment imposed in the Magistrates Court. Even before Mr Ehlers' successful appeal in respect of the Magistrates Court sentence, his period of imprisonment, as defined in s 4 of the Act and supplemented by the definition in s 160 of the Act, was less than three years, requiring the fixing of a parole release date rather than a parole eligibility date.

Whether before or after the successful appeal against the Magistrates Court sentence, Mr Ehlers' District Court sentence required correction to substitute a fixed parole release date for the parole eligibility date. That could have been done by reopening the sentence under s 188 of the Act. As the parties are agreed as to the course that should now be followed and are both before this Court, it is convenient to make these orders:

1. Application for leave to appeal against sentence granted.
2. Appeal allowed.
3. Delete the order that the date Mr Ehlers is eligible for parole be fixed at 1 February 2017 and insert in lieu the order that the date Mr Ehlers is released on parole be fixed at 22 March 2017.
4. Otherwise confirm the sentences imposed in the District Court on 1 November 2016.

GOTTERSON JA: I agree.

PHILIP McMURDO JA: I agree.

GOTTERSON JA: The orders of the Court are the four orders just pronounced by Justice Mullins.