SUPREME COURT OF QUEENSLAND

CITATION:	*R v Salles* [2003] QCA 127
PARTIES:	**R** **v** **SALLES, Aracati de Oliviera** (applicant)
FILE NO/S:	CA No 10 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	Application for Extension of Time (Sentence)
ORIGINATING COURT:	Supreme Court at Mackay
DELIVERED ON:	20 March 2003
DELIVERED AT:	Brisbane
HEARING DATE:	20 March 2003
JUDGES:	McMurdo P, McPherson JA and White J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Dismiss the application to extend time within which to apply for leave to appeal** **2. Declare that in giving effect to the sentence imposed on the applicant in the Supreme Court on 11th November 1996, the applicant is entitled to have the period of 157 days from 7th June 1996 to 11th November 1996 treated as time already served under that sentence** **3. The Registrar is directed to furnish a copy of these reasons to the Commission** **4. The Registrar is directed to provide a copy of these reasons to the applicant**
CATCHWORDS:	CRIMINAL LAW – JURISDICTION, PRACTICE & PROCEDURE – JUDGMENT & PUNISHEMENT – OTHER MATTERS – QUEENSLAND – pre-sentence time served and not declared under s 161(2) *Penalties and Sentences Act* 1992 (Qld) – whether application should be allowed where matter already appealed – whether court can make a declaration that time be considered as time served
COUNSEL:	The applicant appeared on his own behalf G C Davey for the respondent
SOLICITORS:	The applicant appeared on his own behalf Director of Public Prosecutions (Commonwealth) for the respondent

McPHERSON JA: The applicant was one of three Brazilian seamen who were arrested shortly after coming ashore at Hay Point on 7th June 1996 and found to be in possession of a large quantity of cocaine. On 11th November 1996 the applicant pleaded guilty to a charge of importing the drug contrary to section 233B of the Customs Act 1901 Commonwealth. He was sentenced to imprisonment for 20 years with a non-parole period of 10 years. In arriving at that sentence Demack J said he took into account the applicant's plea of guilty and the fact that he had been in custody for five months before being sentenced.

In May 1997 the applicant's application for an extension of time within which to appeal against sentence came before this Court. His explanation for the delay in applying was that his familiarity with the English language was limited and that he had not been aware of his right to apply for leave to appeal against sentence. On that occasion the applicant in presenting his submissions to this Court was assisted by an interpreter. It is evident from the Court's reasons published on 20th of May 1997 that his submissions were or included that his sentence was disproportionate to that of his co-offenders, having regard to the extent of their participation in the offence and to his plea of guilty, that the extent of his cooperation was greater than Demack J had given him credit for and overall that the duration of the sentence was excessive in comparison with other sentences in similar cases.

After considering these and other matters the Court on 20th May 1997 extended the time for applying for leave but dismissed the appeal against sentence saying, in conclusion, that the sentence imposed was within the limits of a sound sentencing discretion.

The applicant has now made a further application to extend the time for leave to appeal against sentence. His explanation for the delay is, again, that formerly his proficiency in English was poor and that he did not fully understand his rights. If he prepared his written outline in support of the application himself, then there is little doubt that his long sojourn in prison has markedly improved his grasp of the English language. On this occasion he has repeated his complaint that at the sentencing he did not receive a sufficient acknowledgement of his plea of guilty and for the saving of time and cost that it effected. It is, however, clear that these matters were taken into account by the learned sentencing Judge in November 1996 and by this Court in May 1997.

As to that, the applicant is simply seeking to re-argue something that was considered on previous occasions. With his improved skills in English he has now formed a closer acquaintance with the Penalties and Sentences Act 1992 Queensland. He points out that the provisions of section 161(3)(c) of the Act require the Court in sentencing an offender to imprisonment to declare the time he was held in

pre-sentence custody and that section 161(2) provides that that time:

> "must be taken to be imprisonment already served under the sentence, unless the Court otherwise orders."

The provisions of section 161(2) are extended to sentences imposed for Federal offences in the State by force of section 16E(1) of the Crimes Act 1914 (Commonwealth). In Sieu Beng Hoong (1994) 75 ACrimR 343, this Court applied section 161(2) of the State Act to a case in which the offender was being sentenced, as was the applicant here, for an offence of importation of drugs contrary to section 233B of the Customs Act 1901 (Commonwealth).

As has already been remarked, in sentencing the applicant in November 1996, Demack J said he took account of the applicant's period of pre-sentence custody in arriving at the sentence imposed. Before us, Mr Davey of counsel for the Director of Prosecutions (Cwth), submitted in his written outlines that in taking account of it in that way Demack J had "otherwise ordered" in terms of section 161(2) of the State Act. A similar submission was advanced and rejected in Sieu Beng Hoong (1994) 75 ACrimR 343 at 346. The Court there also considered that to "order otherwise" on the appeal when such order had been made at first instance would attract the rule in Neal v The Queen (1982) 149 CLR 305, that, on appeal against sentence, the sentence should not be increased without first affording the appellant or applicant an opportunity of withdrawing his appeal. In the end the Court in the case of Sieu Beng Hoong, while dismissing the application to appeal

against sentence, determined that the period for which the applicant had been held in pre-sentence custody must be taken to be imprisonment already served under the sentence:

> "That is, the term of imprisonment his Honour imposed of 14 years and the non parole period of seven years, have to be calculated from 17 September 1993, when custody had began."

(75 ACrimR 343, 347).

Their Honours added that the applicant:

> "is entitled to be treated by the Corrective Services Commission on that basis." and directed that the

Registrar send a copy of the Court's reasons to the Commission drawing attention especially to that paragraph of their reasons.

In the present case, the applicant faces an obstacle not present in the case of Sieu Beng Hoong which is that he has previously applied for and been refused leave to appeal. The authorities, which are cited in many decisions of this Court and most recently in R v Ali (QCA 18 March 2003), show that there is no jurisdiction to entertain a further application for leave to appeal against sentence after an earlier such application has been dismissed on its merits. It was open to the applicant to have drawn attention to the requirements of section 161(2) of the State Act and section 16E(2) of the Crimes Act to this Court when his application was before it in May 1997 or, indeed, at the sentencing hearing before Demack J. No doubt he would say that at that

time his knowledge of English and the intricacies of Australian sentencing lore were not as refined as they are now. Since then he has had some six or more years in prison in which to hone his skills.

In R v Pettigrew [1997] 1 QdR 601, there was held to be an inherent jurisdiction in the Court of Appeal to prevent injustice arising from the dismissal of an interlocutory order of the Court refusing leave to appeal against a sentence. The reason for exercising the power in that case was, however, to prevent injustice arising from a misapprehension about the effect of an ambiguous order or sentence which had been imposed. Here it is not possible to say that there has been any such injustice, for apart from other considerations, it is apparent from the sentencing remarks of Demack J that he took account of the applicant's period of pre-sentence custody in arriving at the overall sentence imposed. On the contrary, the applicant in invoking section 161(2) of the Act is relying on a rule of law which, through inadvertence, was overlooked in sentencing and on appeal. To give him the benefit of it now would or might therefore be in effect to double the advantage that would result to him from his period of pre-sentence custody.

Being a rule of law (and of statute law at that) it is however not possible for the Court simply to overlook the provisions of section 161(2) in this fashion. It applies to the sentence imposed here and its terms are mandatory. Any pre-sentence time during which the offender is held in custody in relation

to proceedings for the offence and for no other reason "must be taken to be imprisonment already served under the sentence unless the Court otherwise orders". The command is addressed as much to the Corrective Services Commission as it is to the sentencing Judge which is no doubt why in Sieu Beng Hoong the Court ordered that a copy of the reasons be forwarded to the Commission. Even if nothing was done by this Court to recognise or give effect to section 161(2) its provisions would continue to operate on the applicant's sentence and the Commission would be bound to give effect to them. The period of pre-sentence custody is 157 days and the applicant would be entitled to demand his liberty at a time being 157 days before the expiration of the non parole period fixed by his sentence unless, of course, he has done something to forfeit the benefit of that provision.

In these circumstances, it would be possible for us to follow the course adopted in Sieu Beng Hoong of simply requiring a copy of these reasons to be forwarded to the Commission in the doubtless well justified expectation that the Commission would act in accordance with what has been said here. To me, however, that represents a somewhat imperfect or partial response to the legal question now raised. The applicant is entitled to know with certainty what his legal rights and expectations are under the sentence imposed. What is raised before us is in substance a question of construction or interpretation of that sentence in the light of section 161(2) of the State Act. In that context the Court has power to make a declaration with respect to its meaning or effect, as was

done, for example, in R v Waters [1998] 2 QdR 442 at 446 and 447 and more recently by White J in Smith v Queensland Community Board [2000] QSC 396. It was also the Court's course adopted on 4 February 2002 in relation to the cognate case of R v Ferreira (CA 318 of 2001) to which Mr Davey for the Director referred us. While it is true that the application here must fail because of the absence of jurisdiction in the Court to entertain it, after the dismissal of his earlier application on 20 May 1997, the applicant has sought to invoke the exercise of this Court's jurisdiction, although in a manner that is outside our power to give effect to it. We could, no doubt, send him away to institute fresh proceedings claiming against the Commission a declaration that, in giving effect to the sentence imposed on 11th November 1996, he is entitled to have the period of 157 days treated as imprisonment already served under that sentence. To do so, however, would to my mind involve a needless waste of time, effort and expense, not only for the applicant and the Commonwealth and the Commission but for this Court.

I would therefore dismiss the application to extend time within which to apply for leave to appeal, but would declare that, in giving effect to the sentence imposed on the applicant in the Supreme Court on 11th November 1996, the applicant is entitled to have the period of 157 days from 7th June 1996 to 11th November 1996 treated as time already served under that sentence. From what Mr Davey has told us of the Commonwealth Director's efforts to achieve this result informally, it would appear that the Corrective Services

Commission may be doubtful about its power to give effect to 161(2).

I would therefore direct the Registrar to furnish a copy of these reasons to the Commission as was done in Sieu Beng Hoong. I expect that the applicant will receive a copy of the transcript in the ordinary course of events; but, if not, he too should be provided with a copy of these reasons. Those are the orders I propose.

THE PRESIDENT: I agree. The orders are as proposed by Mr Justice McPherson.

WHITE J: I agree.
