SUPREME COURT OF QUEENSLAND

CITATION:	*R v Stevens* [2006] QCA 361
PARTIES:	**R** **v** **STEVENS, Robert Wayne** (applicant)
FILE NO/S:	CA No 256 of 2005 DC No 2782 of 2005 DC No 2305 of 2001 DC No 26 of 2000 DC No 27 of 2000 DC No 2748 of 1998
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	22 September 2006
DELIVERED AT:	Brisbane
HEARING DATE:	28 August 2006
JUDGES:	McMurdo P, Wilson and Douglas JJ Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application for leave to appeal against sentence refused**
CATCHWORDS:	CRIMINAL LAW - APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION - APPEAL AND NEW TRIAL - APPEAL AGAINST SENTENCE - APPEAL BY CONVICTED PERSONS - APPLICATIONS TO REDUCE SENTENCE - WHEN REFUSED - GENERALLY - where applicant spent 250 days in pre-sentence custody but sentencing judge in 2001 was unable to declare this period as time already served in relation to the relevant offences - where judge nevertheless took this period into account in determining head sentence and in ordering its suspension 250 days short of two years - whether undeclared 250 days of pre-sentence custody made it unjust for the sentencing judge in 2005 to order that applicant serve entire remaining suspended term of imprisonment imposed in 2001 - whether sentence was manifestly excessive in all the circumstances *Penalties and Sentences Act* 1992 (Qld), s 147, s 161, s 188
COUNSEL:	Applicant appeared on his own behalf C W Heaton for respondent

SOLICITORS: Applicant appeared on his own behalf
Director of Public Prosecutions (Queensland) for respondent

[1] **McMURDO P:** The applicant pleaded guilty before his Honour Judge Howell on 23 September 2005 to two counts of fraud (counts 1 and 2), one count of stealing (count 3), two counts of unlawful stalking with a circumstance of aggravation (counts 4 and 5) and eight summary offences. All but count 1, which occurred in August 2001, were committed between February and October 2004 during the operational period of a suspended sentence imposed by his Honour Judge O'Brien on 28 August 2001 for 16 counts of passing valueless cheques, seven counts of fraud, nine counts of false pretences, one count of common assault, one count of wilful damage, one count of aggravated fraud, one count of unlawful use of a motor vehicle, three counts of breaching a domestic violence order, three counts of breaching the *Bail Act* 1980 (Qld) and one count of possession of tainted property. Judge Howell ordered that the applicant serve the remaining unserved terms of the suspended sentences imposed by Judge O'Brien of three years and 250 days. On counts 4 and 5 on the new indictment he was sentenced to 25 months imprisonment to be suspended after four months with an operational period of 25 months and to lesser concurrent terms of imprisonment for counts 1 to 3. He was convicted and not further punished on the summary offences. Judge Howell ordered that these new terms of imprisonment be served cumulatively upon the activated suspended sentences. Three hundred and thirty-five days of pre-sentence custody were declared as time served in relation to all matters. The applicant, who is self-represented in this application, contends that the effective sentence imposed by Judge Howell, especially in the activation of the suspended sentences, was manifestly excessive.

[2] The applicant was 52 years old at sentence and between 47 and 51 when he committed the most recent offences. He has a very significant criminal history commencing in 1981 and 1984 for drink-driving. His first offences for dishonesty were recorded in 1985: 67 counts of false pretences for which he was sentenced to 20 months imprisonment. In 1988 he was sentenced to eight years imprisonment for two counts of rape and to lesser concurrent sentences for one count of indecent assault on a female and one count of assault occasioning bodily harm. In July 1998 he was fined and sentenced to four and six month terms of imprisonment suspended for three years for multiple breaches of domestic violence orders. As I have noted, he was effectively sentenced by Judge O'Brien on 28 August 2001 to five years imprisonment suspended after 480 days for five years for the pot pourri of offences set out earlier. The determination of the applicant's present contentions requires a review of the sentencing submissions made on that occasion.

The sentence proceedings before Judge O'Brien on 28 August 2001

[3] The prosecutor submitted that it was concerning that the applicant committed many of the offences whilst on parole for the rape offences. His parole was briefly cancelled in respect of another matter; he was returned to custody and released again on parole. He then reoffended whilst subject to both parole and bail orders. He continued to offend on bail until finally he was refused bail. The total amount of property involved in the offences exceeded $60,000 the bulk of which was not recovered. The prosecutor submitted that the 250 days of pre-sentence custody served by the applicant could not be declared under s 161 *Penalties and Sentences Act* 1992 (Qld) ("the Act") because it had not been served in respect of the two most

recent counts.[1] The prosecutor accepted, however, that the 250 days pre-sentence custody should be taken into account in imposing sentence and submitted that an effective head sentence of five years imprisonment suspended after two years less the 250 days of pre-sentence custody, that is, 480 days, was an appropriate penalty for all the applicant's offences. The prosecutor conceded that the guilty plea had saved the State of Queensland very substantial expense. He submitted that in respect of the offences committed whilst on parole a fine should be imposed with no time to pay to avoid the automatic cancellation of the parole period which would otherwise follow.

[4] Defence counsel, whilst agreeing with the prosecutor's submission as to the effective sentence of five years imprisonment suspended after 480 days, submitted that the judge should impose terms of imprisonment for the offences committed whilst on parole but fully suspend them so that the parole period was not revoked.

[5] His Honour acceded to counsels' request as to the effective sentence, noting that the applicant had spent 250 days in pre-sentence custody between 11 June 1999 and 15 February 2000 and that although he could not make a declaration under the Act in respect of that period he intended to take it into account in imposing sentence. His Honour fully suspended the terms of imprisonment imposed for the offences committed whilst on parole and the offences for breach of bail. On the remaining counts his Honour sentenced the applicant to five years imprisonment suspended after 480 days (two years less the 250 days spent in pre-sentence custody not the subject of a s 161 declaration).

The applicant's contentions on appeal

[6] The applicant's written submissions and supporting affidavit material are contained in 100 typewritten pages; they are bulkier than the record book itself. His submissions do not meet the requirements of par 22 of Practice Direction No 1 of 2005 and much of the submissions contained in them is repetitive and irrelevant.

[7] The applicant seemed to contend in his written submissions that recent legislative changes made the sentence imposed by Judge Howell manifestly excessive. During the hearing the applicant accepted that this Court cannot take into account subsequent legislative changes to the prison system in determining whether a previously imposed sentence was manifestly excessive. In the end he did not press this submission.

[8] In his oral submissions he made plain that his principal complaint is that Judge Howell's sentence did not give credit for the 250 days of the pre-sentence custody which Judge O'Brien considered could not be the subject of a declaration under s 161 of the Act; Judge O'Brien took it into account by an early suspension but not in reducing the head sentence so that Judge Howell should have reduced by 250 days the period of suspended imprisonment to be served.

The s 188 proceedings

[9] The applicant first sought to have that issue dealt with in an application to Judge Howell to reopen the sentence under s 188 of the Act. Judge Howell heard this application on 23 June 2006. Judge Howell correctly appreciated and articulated that the question then before him was whether he should only have activated three

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[1] The correctness of that submission may be questionable but this is not an application for leave to appeal from Judge O'Brien's sentence imposed on 28 August 2001.

years of the remaining portion of the sentence suspended by Judge O'Brien on 28 August 2001 instead of three years and 250 days. Judge Howell did not have the benefit of the transcript of counsels' submissions to Judge O'Brien on 28 August 2001, which the applicant supplied to this Court during the hearing. Judge Howell felt he was unable to look into Judge O'Brien's mind: it was not clear from Judge O'Brien's sentencing remarks whether he had taken the 250 days pre-sentence custody which could not be the subject of a declaration into account in determining the head sentence as well as in determining the period of custody to be served before suspension; Judge O'Brien may well have taken the 250 days into account in reducing the head sentence to five years so that he could partially suspend the sentence. Judge Howell understandably determined that the best course was to have the matter mentioned before and determined by Judge O'Brien.

[10] The matter was listed before Judge O'Brien on Friday 25 August 2006. For reasons which have not been explained to this Court, the applicant, who was then represented by solicitors and did not appear personally, chose not to proceed with that application.

The applicant's most recent offences

[11] Before turning to Judge Howell's exercise of the judicial discretion under s 147 of the Act on 23 September 2005 in dealing with the applicant's breach of the operational period of the suspended term of imprisonment imposed by Judge O'Brien, it is necessary to set out the circumstances of the applicant's most recent offences.

[12] On 18 August 2001 the applicant paid for the delivery of turf with a cheque for $726 which was subsequently dishonoured (count 1). This offence pre-dated the applicant's appearance before Judge O'Brien on 28 August 2001 and so was not a breach of the operational period of that suspended sentence.

[13] On 6 February 2004 the applicant moved into furnished rented premises at Banyo. He paid his bond and first two weeks rent with a cheque for $1,080 which was subsequently dishonoured (count 2). The following month the lessor commenced legal proceedings to have him evicted. On a date unknown between 26 February and 3 March 2004 the lessor attended at the house having been told that the applicant had vacated. A TV, fan, knives and other small items had been stolen and the house keys were missing (count 3).

[14] The first count of stalking (count 4) occurred between 6 May and 26 October 2004. The complainant and his wife (the complainant in count 5) became friendly with the applicant. The wife began a sexual relationship with the applicant in early 2004. They moved into their new residence on 26 June 2004. The applicant began stalking the husband, phoning him and behaving in a threatening, abusive or vulgar way. He phoned about 20 times on one day. In all he phoned the complainant 182 times. During the first month of the period of the stalking, the applicant came to the complainant's home without permission and had to be forcibly removed. The circumstance of aggravation was that he threatened to use violence on the male complainant on three occasions. The applicant also threatened the man's 18 year old son who resided with his father after the separation. The applicant made threats like "I'm going to kill you and your kids". The stalking continued until 24 October 2004 and included a telephone call concerning the female complainant after she had obtained and served the applicant with a domestic violence order.

[15] The second count of stalking (count 5) was of the complainant wife after her relationship with the applicant broke down in September 2004. The relationship had been violent and when it ended the woman sought refuge in a Safe House before returning to her previous home. The stalking included about 200 phone calls to her mobile, her home and her place of work. The applicant broke and entered her property on a number of occasions. On one occasion she woke up to find him at the foot of her bed. He wrote lewd messages on a pair of her underpants. He sent unwanted taxis and deliveries of concrete to her home. He arranged for a hire company to collect her fridge. He stopped her bank cards and phoned her finance company. She changed her phone numbers and arranged for Telstra to trace incoming calls. The circumstance of aggravation was that on four occasions he damaged her property and on one occasion he threatened to hurt her. She took out a domestic violence order which was served on him. He was arrested that day and released on bail subject to conditions, all of which he subsequently breached. He continued to make obscene phone calls to her over the following days. He was arrested again for breaching the domestic violence order on 25 October 2004 and was in custody until his sentence on 23 September 2005.

[16] A victim impact statement from the female complainant in count 5 set out the very significant detrimental effect the applicant's behaviour had on her life and the life of her family. The prosecutor added that the male complainant had also been severely detrimentally affected by the applicant's stalking.

The sentence proceedings before Judge Howell on 23 September 2005

[17] The prosecutor at sentence submitted that the outstanding part of the suspended sentence of three years and 250 days should be fully activated and up to two years imprisonment should be imposed in respect of the new offences.

[18] Defence counsel submitted that the applicant had made significant efforts at rehabilitation whilst in prison. He had completed numerous courses and undertaken counselling with Alcoholics Anonymous. He had obtained a trusted position of employment within the prison as the Inmate Bail Clerk. References and certificates to this effect were tendered. He had stayed out of trouble under the period of the suspended sentence for two and a half years before reoffending.

[19] Judge Howell referred to the applicant's bad criminal history and the seriousness of his new offences, particularly the offences of stalking. His Honour determined that the appropriate sentence was to impose a cumulative term of imprisonment on the fully activated previously suspended terms of imprisonment, with the cumulative term moderated by early suspension. The judge was impressed by the applicant's efforts at meaningful rehabilitation. Neither the judge nor counsel adverted to the relevance of time served in pre-sentence custody that was not the subject of a declaration by Judge O'Brien under s 161 of the Act or the potential relevance of this to the judicial exercise of discretion under s 147 of the Act in sentencing the applicant for the breach of the suspended sentence imposed by Judge O'Brien.

The exercise of discretion under s 147 of the Act

[20] Section 147 relevantly provides:

> "(1) A court ... that deals with the offender for the suspended imprisonment may -
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> ...

(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.

(3) In deciding whether it would be unjust to order the offender to serve the whole of the suspended imprisonment the court must have regard to -

(a) whether the subsequent offence is trivial having regard to -

(i) the nature of the offence and the circumstances in which it was committed; and

(ii) the proportion between the culpability of the offender for the subsequent offence and the consequence of activating the whole of the suspended imprisonment; and

(iii) the antecedents and any criminal history of the offender; and

(iv) the prevalence of the original and subsequent offences; and

(v) anything that satisfies the court that the prisoner has made a genuine effort at rehabilitation since the original sentence was imposed, including, for example -

(A) the relative length of any period of good behaviour during the operational period; and

(B) community service performed; and

(C) fines, compensation or restitution paid; and

(D) anything mentioned in a pre-sentence report; and

(vi) the degree to which the offender has reverted to criminal conduct of any kind; and

(vii) the motivation for the subsequent offence; and

(b) the seriousness of the original offence, including any physical or emotional harm done to a victim and any damage, injury or loss caused by the offender; and

(c) any special circumstance arising since the original sentence was imposed that makes it unjust to impose the whole of the term of suspended imprisonment.

(4) If the court is of the opinion mentioned in subsection (2), it must state its reasons.

... "

[21] Under s 147(3) the only matters which appeared to assist the applicant were that he had not committed further offences for a two and a half year period of the suspended sentence and that Judge Howell apparently accepted that he had made substantial efforts at rehabilitation. On the other hand, the applicant had committed

very serious offences during the operational period (particularly the stalking offences), reverting to criminal conduct similar to that committed by him in the past and then continued to breach his bail by committing offences. He had a concerning criminal history and the original offences were numerous and serious involving $60,000 of largely unrecovered property. Time spent in pre-sentence custody before the imposition of the suspended sentence not the subject of a declaration under s 161 is not a matter which the court "must have regard to" under s 147(3) in deciding whether it would be unjust to order the offender to serve the whole of the suspended imprisonment.

[22] Whilst s 147(3) refers to the matters which must be considered by a court in determining whether it would be unjust to order the offender to serve the whole of the suspended imprisonment, the subsection does not require that they be the only matters to be taken into account in determining whether it will be unjust to order the offender to serve the whole of the suspended imprisonment. If, for example, the offender had served a period of pre-sentence custody which could not be the subject of a declaration, and the judge took this period into account in determining the period of suspension but not in moderating the head sentence, this may be a relevant factor in determining whether it would be unjust to make an order under s 147(1)(b).

[23] Judge O'Brien's sentence in August 2001 was lenient considering the number and seriousness of the applicant's offences; that some were committed whilst he was on parole for an eight year sentence for counts of rape; that he repeatedly reoffended whilst on bail; that over $60,000 worth of property was involved, the bulk of which was not recovered; and that the applicant was a mature man with a bad criminal history. The effective five year head sentence, which allowed suspension at a fixed time, and Judge O'Brien's merciful structuring of the sentences for the offences which the applicant committed on parole by fully suspending the terms of imprisonment to avoid the otherwise automatic revocation of parole, suggests that Judge O'Brien adequately took into account the time spent in pre-sentence custody which was not the subject of a declaration under s 161 in determining the head sentence of five years imprisonment as well as in suspending it 250 days short of two years. In those circumstances I am not persuaded that the undeclared 250 days of custody served before Judge O'Brien imposed sentence on 28 August 2001 made it unjust for Judge Howell to order that the applicant serve the whole of the unserved suspended imprisonment imposed by Judge O'Brien under s 147(1)(b). This contention fails.

[24] The applicant has not established that the sentence imposed by Judge Howell, either in ordering that he serve the whole of the suspended period of imprisonment imposed by Judge O'Brien or in sentencing him on the new counts, was manifestly excessive in all the circumstances pertinent here. The application should be refused.

[25] **WILSON J:** I agree with the order proposed by the President and with her Honour's reasoning.

[26] **DOUGLAS J:** I agree with the reasons of the President and with the order proposed by her.