SUPREME COURT OF QUEENSLAND

CITATION:	*R v Fabre* [2008] QCA 386
PARTIES:	**R** **v** **FABRE, Hugo Charles** (applicant/appellant)
FILE NO/S:	CA No 270 of 2008 SC No 162 of 2008
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	4 December 2008
DELIVERED AT:	Brisbane
HEARING DATE:	1 December 2008
JUDGES:	Keane, Muir and Fraser JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Application for leave to appeal granted.** **2. Appeal allowed.** **3. Vary the sentence on count 1 by substituting 20 January 2009 for the parole release date of 19 June 2009 fixed by the sentencing judge.** **4. Vary the sentence on count 2 by substituting the period of three months for the period of eight months ordered by the sentencing judge as the period of time after which the term of imprisonment is to be suspended.** **5. In all other respects confirm the sentences imposed by the sentencing judge.**
CATCHWORDS:	CRIMINAL LAW – SENTENCE – RELEVANT FACTORS – TIME SPENT IN CUSTODY – where applicant sentenced for two offences – where applicant had been held in pre-sentence custody prior to sentencing in relation to the relevant two offences and for a number of other offences – where the pre-sentence custody could not be declared pursuant to s 159A of the *Penalties and Sentences Act* 1992 (Qld) – where the sentencing judge did not exercise his discretion to take the pre-sentence custody into account in arriving at the appropriate sentences to impose – where the

sentencing judge observed that it was likely that there would be a future situation where the applicant would be given credit for the time he had served – whether the sentencing judge ought to have taken the pre-sentence custody into account in arriving at the appropriate sentences to impose

Penalties and Sentences Act 1992 (Qld), 159A

R v Ainsworth [2000] QCA 163, applied
R v Cannon [2005] QCA 41, applied
R v Renzella [1997] 2 VR 88, referred to
R v Skedgwell [1999] 2 Qd R 97; [1998] QCA 93, cited
R v Wade [2005] VSCA 276, cited

COUNSEL: D J Walsh for the applicant/appellant
M J Copley for the respondent

SOLICITORS: A W Bale & Son for the applicant/appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **KEANE JA:** I agree with the reasons for judgment prepared by Fraser JA and with the orders proposed by his Honour.

[2] **MUIR JA:** I agree with the reasons of Fraser JA and with the orders proposed by his Honour.

[3] **FRASER JA:** On 20 October 2008 the applicant was convicted on his pleas of guilty of possession of a dangerous drug in excess of two grams (count 1) and possession of things used in the commission of the crime of possessing a dangerous drug (count 2). On count 1 he was sentenced to two and a half years imprisonment with a parole release date fixed on 19 June 2009, after eight months in custody. On count 2 he was sentenced to one and a half years imprisonment, suspended after eight months for an operational period of three years.

[4] The applicant applies for leave to appeal against sentence on the ground that the learned sentencing judge erred in not taking into account the time spent by the applicant in pre-sentence custody. At the hearing of the application the applicant's counsel abandoned the other proposed ground of appeal set out in the application, that the sentences are manifestly excessive.

[5] The circumstances of the offences may be stated briefly. On 23 November 2006 police stopped a vehicle in which the applicant was a passenger. He was found with $1,745 in cash which he claimed to have won at a casino. Under his seat was a set of electronic scales and police also found a mobile phone and keys to a hire car on the applicant's person. A search of messages on the phone revealed evidence about the buying and selling of drugs. The police found the hire car outside the hotel and in it a wallet containing papers in the applicant's name and $2,905 in cash. They also found four clip seal bags of white powder in the vehicle. The powder weighed 14.462 grams and the calculated pure weight of the methyamphetamine was 6.798 grams. The purity ranged from 37 per cent to 78 per cent. Police also found another mobile phone and a set of scales in the hire car.

[6] The applicant declined to answer questions and was arrested. After a full hand up committal on 30 August 2007 on a charge of trafficking, the indictment charging the possession offences to which the applicant pleaded guilty was presented on 29 February 2008 and the matter was listed for sentence on 20 June 2008. The applicant was sentenced on the footing that he was entitled to the benefit of a very early plea of guilty.

[7] The applicant was 38 years old at the time of the offences to which he pleaded guilty and 40 years old at the time of sentence. He had a significant criminal history including drug offences involving cannabis sativa. He had the benefit of a supportive family.

[8] The learned sentencing judge took all of the matters I have mentioned into account in arriving at the sentences his Honour imposed. No issue in that respect is raised by either party in this application. Each party accepts that the sentences are appropriate, apart from the effect of the sentencing judge's failure to take into account any of the time the applicant had spent in custody before he was sentenced.

[9] The applicant was held in custody between 24 March 2007 and 31 August 2007, a total period of 161 days. The applicant was held in that pre-sentence custody both because he had been charged with the two offences to which the applicant pleaded guilty and for which the applicant was sentenced in this matter and because he had also been charged with a number of other offences. At the sentence hearing the applicant's legal representative initially indicated that the applicant intended to plead guilty to at least some of those other alleged offences but, after the matter was stood down for a period, the applicant's newly retained counsel conveyed the applicant's instructions that he intended to plead not guilty.

[10] The prosecutor and the applicant's counsel both submitted and the sentencing judge accepted that s 159A(1) of the *Penalties and Sentences Act* 1992 (Qld) did not require the period of pre-sentence custody to be taken to be imprisonment already served under any sentence of imprisonment imposed for the two offences here in issue. Subsection 159A(1) requires that only where an offender is held in custody in relation to proceedings for the offence for which he or she is sentenced and "for no other reason": the charges to which the applicant had not pleaded guilty provided another reason for the applicant having been held in pre-sentence custody.

[11] Nevertheless, as the sentencing judge recognised, a sentencing court retains a discretion to take the period of pre-sentence custody into account in arriving at the appropriate sentence. So much was confirmed by this Court's decision in *R v Skedgwell* [1999] 2 Qd R 97; [1998] QCA 93.

[12] In that respect, the prosecutor and defence counsel submitted to the sentencing judge that the period of pre-sentence custody should be taken into account by reducing the time the applicant was required to serve in custody in respect of any term of imprisonment imposed by the court. The sentencing judge rejected those submissions. His Honour observed that it was not likely that there would be a future situation where the applicant would not be able to be given credit for the time which he had served and that, if such a situation did arise, an application could be made under the *Penalties and Sentences Act* to re-open the sentence. The sentencing judge concluded that because it seemed likely that the applicant would be dealt with at a future time on the basis of some further offending it was

appropriate to leave the time served to be taken into account at a time when the applicant was dealt with for that future offending.

[13] It is to be noted that this approach was necessarily premised on the view that it was likely that the applicant would be convicted of at least some of the other alleged offences in respect of which his counsel had communicated the applicant's instructions that he intended to plead not guilty.

[14] Unfortunately his Honour's attention was not drawn to the decisions of this Court in which it has been held that, although it is not mandatory, it is generally desirable to take into account periods of pre-sentence custody which are not declarable under s 159A of the Act at the first opportunity: *R v Ainsworth* [2000] QCA 163 and *R v Voss* [2000] QCA 176. In those decisions the Court referred with approval to the approach taken in Victoria under analogous legislation in decisions including *R v Renzella* [1997] 2 VR 88 and *R v Arts & Griggs* (1997) 93 A Crim R 56. This Court has recently endorsed that general approach: see *R v Cannon* [2005] QCA 41. I note that the Victorian Court of Appeal has also continued to endorse the same general approach: see *R v Wade* [2005] VSCA 276, *R v Black* [2007] VSCA 82, and *R v Rosenow* [2007] VSCA 265.

[15] That general approach should continue to be followed in Queensland. It has the advantage that if the offender is subsequently acquitted of the other charges an application for re-opening of the sentence will not be necessary: that accords with the strong policy of the law that there be an end to litigation. Further, if credit for the pre-sentence custody has been given at the first opportunity and the offender is subsequently convicted of the other charges which also justified the offender being held in custody, it ordinarily should be simpler for the subsequent sentencing court to impose cumulative terms of imprisonment where that is warranted by the circumstances.

[16] The manner in which the discretion is to be exercised of course depends upon the particular facts of each case, which are infinitely various. In some cases the circumstances may militate against the exercise of the discretion at the first opportunity. But in my respectful opinion, the grounds assigned by the learned sentencing judge for declining to take into account any part of the substantial period of pre-sentence custody in this case were irrelevant. The sentencing judge's reliance upon a view that the applicant would probably be convicted of the other alleged offences, in respect of which his counsel had signalled his intention to plead not guilty, was inconsistent with the presumption of innocence to which the applicant was entitled; and his Honour's reference to the potentially curative effect of an application to re-open the sentence in case that view should prove to be incorrect failed to give effect to the policy of the law that favours an end to litigation.

[17] The respondent does not contend that this is a case, such as *Ainsworth* and *Voss*, in which the sentence imposed should be upheld on the footing that it fell within the sentencing discretion even if the whole of the period of pre-sentence custody were taken into account. Rather, the respondent supports the submission on behalf of the applicant that the generally desirable course of taking into account pre-sentence custody should have been adopted in this case.

[18] For these reasons it is necessary to exercise the sentencing discretion afresh. In that exercise I would accept as correct the premise of both parties' submission that the terms of imprisonment imposed by the sentencing judge are generally appropriate apart from any impact of the pre-sentence custody.

[19] The period of pre-sentence custody of 161 days amounts to five months and 11 days. The applicant's counsel submits that the whole period, including the 11 days, should be taken into account by way of a reduction of the period during which the applicant will be required to be held in custody under these sentences. In the circumstances of this case the submission involves an unrealistic degree of arithmetical exactitude in these sentences. In my view the appropriate course is to vary the sentences imposed below by reducing by five months the period during which the sentences of imprisonment will require the applicant to remain in custody.

Orders

[20] I would grant the application for leave to appeal and allow the appeal. I would vary the sentence on count 1 by substituting 20 January 2009 for the parole release date of 19 June 2009 fixed by the sentencing judge. I would vary the sentence on count 2 by substituting the period of three months for the period of eight months ordered by the sentencing judge as the period of time after which the term of imprisonment is to be suspended. In all other respects I would confirm the sentences imposed by the sentencing judge.