SUPREME COURT OF QUEENSLAND

CITATION:	*R v George* [2013] QCA 302
PARTIES:	**R** **v** **GEORGE, Farlane** (applicant)
FILE NO/S:	CA No 191 of 2013 DC No 243 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	Application for Extension (Sentence)
ORIGINATING COURT:	District Court at Cairns
DELIVERED ON:	Orders delivered ex tempore 1 October 2013 Reasons delivered 11 October 2013
DELIVERED AT:	Brisbane
HEARING DATE:	1 October 2013
JUDGES:	Margaret McMurdo P and Mullins and Henry JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**Delivered ex tempore on 1 October 2013:** **1. Application for extension to apply for leave to appeal granted and time extended to 6 August 2013.** **2. Application for leave to appeal granted.** **3. Appeal allowed.** **4. The sentences imposed below are set aside.** **5. Instead, it is ordered that:** **a. The applicant be sentenced to 3 months imprisonment for the offence of assault occasioning bodily harm.** **b. The applicant be convicted but not further punished for the offence of deprivation of liberty.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PROCEDURE – NOTICES OF APPEAL – TIME FOR APPEAL AND EXTENSION THEREOF – where the applicant pleaded guilty in the District Court to one count of deprivation of liberty and one count of assault occasioning bodily harm – where the applicant was sentenced to concurrent sentences of six months imprisonment for the

offence of deprivation of liberty and 18 months imprisonment for the offence of assault occasioning bodily harm – where at sentence the applicant was the subject of an interim detention order under the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) – where the sentencing judge had regard to the interim detention order in sentencing the applicant and did not fix a parole eligibility date pursuant to s 160B of the *Penalties and Sentences Act* 1992 (Qld) – where the applicant was in custody for the offences for a period of approximately 15 months – where no regard was given to the time the applicant had spent in pre-sentence custody at sentence – where the applicant seeks an extension of time to appeal against his sentence on the ground it is manifestly excessive – whether the application for an extension of time should be granted – whether the sentence imposed was manifestly excessive

Corrective Services Act 2006 (Qld), s 199
Criminal Code 1899 (Qld), s 668E
Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld), s 24, s 51
Penalties and Sentences Act 1992 (Qld), s 9(7B), s 159A, s 160B(3), s 160G(3)

R v Ainsworth [2000] QCA 163, applied
R v Armstrong [2001] QCA 559, cited
R v Cannon [2005] QCA 41, applied
R v King [2006] QCA 466, cited
R v Skedgwell [1999] 2 Qd R 97; [1998] QCA 93, applied

COUNSEL: C Reid for the applicant
S J Farnden for the respondent

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

[1] **MARGARET McMURDO P:** For the reasons given by Henry J, I joined in this Court's orders on 1 October 2013 granting the application for an extension of time and the application for leave to appeal against sentence, setting aside the sentences imposed below and instead ordering that the applicant be sentenced to three months imprisonment for the count of assault occasioning bodily harm and be convicted but not further punished for the count of deprivation of liberty.

[2] **MULLINS J:** I agree with the reasons of Henry J.

[3] **HENRY J:** The applicant pleaded guilty in the District Court on 11 December 2012 to one count of deprivation of liberty and one count of assault occasioning bodily harm. He was sentenced to concurrent terms of six months imprisonment and 18 months imprisonment respectively.

[4] A solicitor representing him in contravention proceedings under the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) later detected there had been a legal

error in the sentencing process and the applicant therefore seeks an extension of time within which to seek leave to appeal his sentence.

[5] At the hearing of the application on 1 October 2013 this court granted the application for extension of time, granted the application for leave to appeal, set aside the sentences imposed below and instead ordered the applicant be sentenced to three months imprisonment for the count of assault occasioning bodily harm and be convicted but not further punished for the count of deprivation of liberty. The court indicated it would publish its reasons.

[6] As the reasons that now follow indicate, the sentences imposed on appeal arise from the novel circumstances of this case and the need to make proper allowance for a lengthy period of pre-sentence custody.

Background

[7] The offences were committed against a 34 year old lady who was visiting the applicant's unit. She indicated she wanted to leave in order to visit a family member but the applicant stood in the unit entrance and told her to stay. She was fearful and stayed until the following day when the applicant went to the toilet and she fled the unit, climbing down a drainpipe. The applicant pursued and caught her and punched her to the head and torso. He pushed her and she fell down concrete stairs, hitting her head. He dragged her back up the stairs punching her head and torso. Neighbours intervened and the police attended and arrested the applicant. As a result of the attack the complainant suffered multiple lacerations, swelling and bruising to her face and body, a subgaleal haematoma and fractured ribs.

[8] The applicant was 46 at the time of the offending and is now 48. He has a serious and lengthy criminal history for offences including assault, assault occasioning bodily harm, grievous bodily harm, aggravated assault on a female and rape. He has served multiple periods of imprisonment.

The approach taken at first instance

[9] The appropriate head sentence, identified below by reference to *R v Armstrong*[1] and *R v King*,[2] was said to be two years imprisonment in respect of the assault occasioning bodily harm with a lesser concurrent term for the deprivation of liberty.

[10] At the time of sentence the applicant was the subject of an interim detention order under the *Dangerous Prisoners (Sexual Offenders) Act*. Both counsel submitted that because of that order his Honour could not fix a parole release date as otherwise required under s 160B(3) of the *Penalties and Sentences Act* 1992 (Qld). The learned sentencing judge had regard to the interim detention order in sentencing the applicant. His Honour reasoned, consistently with the submissions of both counsel below, that as the applicant would not be eligible for parole because of the interim detention order, the applicant's plea of guilty should be taken into account by reducing the two year head sentence, which would otherwise have been imposed, to a head sentence of 18 months.

[11] As to pre-sentence custody, the applicant was arrested on 9 September 2011, the date of the offending, and remained in custody for the ensuing 15 months up to the date of sentence. Defence counsel at first instance submitted that this period of pre-

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1 [2001] QCA 559.
2 [2006] QCA 466.

sentence custody was "not declarable due to the breach action in relation to the supervision order". By that counsel obviously meant the period of pre-sentence custody could not be declared, under s 159A of the *Penalties and Sentences Act*, to be time served under the sentence because the applicant had also been in custody under the interim detention order for almost the entirety of that period. Neither counsel submitted that the court should take the period of pre-sentence custody into account in determining the appropriate sentence to impose. There was no declaration or other allowance made in respect of the period of pre-sentence custody.

[12] The learned sentencing judge's approach in sentencing below was entirely consistent with the submissions of counsel before him. Regrettably, those submissions were infected with errors that in turn infected the sentence imposed.

Failure to fix parole release date

[13] The interim detention order was an irrelevant consideration and did not preclude the fixing of a parole release date. Section 9(8) (now s 9(7B)) of the *Penalties and Sentences Act* provided:

> "(8) In sentencing an offender, a court must not have regard to whether or not the offender—
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> (a) may become, or is, the subject of a dangerous prisoners application; or
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> (b) may become subject to an order because of a dangerous prisoners application." (emphasis added)

[14] Both counsel at first instance had positively urged the conclusion the applicant was not eligible for a court ordered parole order by reason of the interim detention order and s 51 of the *Dangerous Prisoners (Sexual Offenders) Act*. Section 51 relevantly provides:

> "A prisoner is not eligible for parole under the Corrective Services Act 2006 or the Penalties and Sentences Act 1992 and can not be issued a parole order under those Acts if— …
>
> (b) the prisoner is subject to a continuing detention order or interim detention order, whether or not the order has taken effect."

[15] However the requirement in s 160B(3) of the *Penalties and Sentences Act*, that the sentencing court "must fix a date for the offender to be released on parole", applied here. The sentencing judge's obligation under s 160B to fix a date for the applicant to be released on parole was not inconsistent with the applicant not then being eligible for parole by virtue of s 51 of the *Dangerous Prisoners (Sexual Offenders) Act*. Section 51 only becomes relevant as and from the date on which a prisoner would otherwise be eligible for release on parole or has been ordered to be released on parole.

[16] Section 51's preclusion of the issue of a parole order does not preclude a judge from making an order under s 160B(3). Such an order is not a "parole order" which has been "issued" within the meaning of s 51. The *Penalties and Sentences Act* does not define the term "parole order", however at s 4 it defines "parole" as meaning "parole under a parole order granted under the *Corrective Services Act 2006*". The parole order which would be issued in consequence of the fixing of a parole release

date under s 160B must be issued by the Chief Executive under s 199 of the *Corrective Services Act* 2006 (Qld). While such an order is called a "court ordered parole order"[3] it is not an order issued by the court, it is an order issued by the Chief Executive. Even where a court fixes the parole release date as being the day of sentence, pursuant to s 160G(3) of the *Penalties and Sentences Act*, it remains for the offender to obtain a court ordered parole order from the probation and parole office and such an order cannot be obtained by an offender under an interim detention order because its issue is precluded by s 51 of the *Dangerous Prisoners (Sexual Offenders) Act*. In short, s 51 does not preclude the court from fixing a parole release date as required under s 160B(3) of the *Penalties and Sentences Act*. Rather, it precludes the subsequent issue of a parole order by corrections authorities.

[17] In summary, the learned sentencing judge erred in having regard to the interim detention order, contrary to s 9(8) (now s 9(7B)) of the *Penalties and Sentences Act*, and not fixing a date for the applicant to be released on parole, as required by s 160B(3) of the *Penalties and Sentences Act*.

Failure to take 15 months pre-sentence custody into account

[18] The other area of error, which is ultimately more significant, relates to a failure to take pre-sentence custody into account.

[19] On the information before his Honour the applicant had been in custody for about 15 months because he was on remand for the charges before the court and also because of the interim detention order. Had this information been correct, it would have been necessary to determine whether or not the applicant had been in custody in relation to proceedings for the present offences and for no other reason. That would have been necessary to in turn determine whether there should have been a declaration, pursuant to s 159A of the *Penalties and Sentences Act*, that the 15 months was imprisonment already served under the sentence.

[20] In urging a conclusion that the detention under the interim detention order should be ignored for the purposes of s 159A the applicant's counsel, on this appeal, drew the court's attention to s 24 of the *Dangerous Prisoners (Sexual Offenders) Act*, which has the effect of suspending interim supervision orders when a prisoner is detained on remand. However an interim supervision order is one under which a prisoner is released from custody, whereas the applicant was the subject of an interim detention order under which a prisoner is detained in custody. There appears to be no provision similar to s 24 which has the effect of suspending interim detention orders when a prisoner is detained on remand.

[21] In any event, the question whether detention under an interim detention order should be ignored for the purposes of s 159A does not require determination because the above information was deficient in another respect. The applicant's period of pre-sentence custody also related to charges of wilful damage, assault or obstruct a police officer and contravention of a supervision order, all arising in connection with the episode which also attracted the charges dealt with in the District Court. The applicant was sentenced to an effective term of three months imprisonment for those other matters in the Magistrates Court, subsequent to his sentencing in the District Court. Their present relevance is that, even ignoring the interim detention order, the applicant had not been in pre-sentence custody solely

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[3] Per *Corrective Services Act* 2006 (Qld) s 199 and definition at sch 4.

for the matters dealt with in the District Court. Therefore counsel below were at least correct in submitting a s 159A declaration could not be made.

[22] However it was not submitted that the sentence should be reduced to take account of the lengthy period of pre-sentence custody. In the normal course, where an offender has been in custody for mixed reasons but is not actually serving a term of imprisonment, that period should be taken into account on the first opportunity arising on the sentence of the offender.[4] Applying that principle here and accepting that the appropriate head sentence after discounting to allow for the plea of guilty was 18 months imprisonment, this should have resulted in a substantially lesser sentence at first instance. There should have been a reduction of the head sentence by another 15 months and the imposition of a head sentence of about three months.

Extension of time, leave and re-sentencing

[23] The applicant cannot be expected to have known of these legal errors. Given the erroneous course taken was actually submitted for by the applicant's counsel at sentence it can be readily accepted the applicant's legal representatives did not advise him of the errors. The errors were detected by a different legal representative at a time after the expiration of the period within which an application for leave to appeal sentence should have been filed. Once the errors were discovered there was no material delay in the filing of an application for an extension of time within which to seek leave to appeal the sentence.

[24] The errors discussed above are not inconsequential. The latter error, in particular, gave rise to a significantly longer sentence than that which should have been imposed.

[25] The errors warranted the granting of the extension of time and leave to appeal the sentence and the fresh exercise of the sentencing discretion.

[26] It was ultimately common ground before this court that a head sentence of two years reduced to a notional head sentence of 18 months to take the plea of guilty into account was an appropriate starting point before discounting to allow for the pre-sentence custody. Such a starting point is moderate given the seriousness of the attack and the applicant's history of crimes of violence. It was appropriate to adopt it in the context of re-sentencing on this appeal.

[27] Given the appellant had spent 15 months in pre-sentence custody then, consistent with the principle discussed above, the notional head sentence of 18 months ought be further reduced by that time to three months imprisonment. That sentence ought attach to the offence of assault occasioning bodily harm. It was common ground that a sentence of six months would have been appropriate for the offence of deprivation of liberty and the applicant had already been in custody for substantially longer than that period awaiting sentence. It is therefore appropriate that on that charge the applicant be convicted but not further punished.

[28] Substitution of the sentences imposed below[5] with sentences of three months imprisonment for assault occasioning bodily harm and conviction without further punishment for deprivation of liberty has the practical effect that the applicant is taken to have been sentenced to three months imprisonment as at 11 December

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4 *R v Skedgwell* [1999] 2 Qd R 97; *R v Ainsworth* [2000] QCA 163; *R v Cannon* [2005] QCA 41.

5 Per *Criminal Code* s 668E.

2012, the date of his sentence in the District Court. That was over nine months ago. He has therefore served the entirety of that sentence.

[29] Had the applicant actually been sentenced to three months imprisonment at the time of the sentence in the District Court it would have been necessary to then fix a parole release date pursuant to s 160B(3) of the *Penalties and Sentences Act*. However the requirement of s 160B(3) is cast in the future tense, requiring the court to fix a date for the offender "to be released on parole". Because the applicant has now served the full period of imprisonment imposed it is no longer possible for him to serve any part of that sentence on parole. It follows the time has passed within which it would have been possible to make an order fixing a date for the applicant "to be released on parole" and thus no such order should be made.