SUPREME COURT OF QUEENSLAND

CITATION:	*R v Cant* [2015] QSC 311
PARTIES:	**R** **v** **CRAIG CANT** (applicant)
FILE NO/S:	SC No 549 of 2013
DIVISION:	Trial Division
PROCEEDING:	Application to reopen sentence
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	3 November 2015
DELIVERED AT:	Brisbane
HEARING DATE:	22 September 2015, further submissions 29 September and 2 October 2015
JUDGE:	Ann Lyons J
ORDERS:	**1. Application pursuant to s 188(1)(c) of the *Penalties and Sentences Act* 1992 (Qld) to reopen the sentencing proceedings conducted on 22 April 2015 is granted.** **2. Sentence is varied by ordering that pursuant to s 159A(3) of the *Penalties and Sentences Act* 1992 (Qld), 176 days spent in pre-sentence custody between 7 August 2012 and 29 January 2013 be deemed time already served under the sentence.** **3. Sentence imposed is otherwise confirmed.**
CATCHWORDS:	CRIMINAL LAW – SENTENCE – SENTENCING PROCEDURE – FACTUAL BASIS FOR SENTENCE – GENERALLY – where the applicant pleaded guilty to one count of trafficking in dangerous drugs, nine counts of supplying a dangerous drug and two counts of producing a dangerous drug – where the applicant was sentenced to a period of eight years imprisonment in relation to the one count of trafficking in dangerous drugs and concurrent periods of 12 months imprisonment in relation to the nine counts of supplying a dangerous drug and two counts of

producing a dangerous drug – where the applicant argues that the agreed schedule of facts tendered at the sentencing hearing contained factual errors of substance – where the applicant argues that the sentence imposed lacked parity with the sentences imposed on his co-offenders – where the applicant argues that the head sentence of eight years imprisonment was excessive in the circumstances – where the applicant argues that time already served in pre-sentence custody should have been declared at the sentencing hearing – whether the sentence proceeded on a clear factual error of substance sufficient to invoke the reopening of the sentence

CRIMINAL LAW – SENTENCE – RELEVANT FACTORS – TIME SPENT IN CUSTODY – where it was indicated at the sentencing hearing that time spent in pre-sentence custody could not be declared pursuant to s 159A of the *Penalties and Sentences Act* 1992 (Qld) – whether time spent in pre-sentence custody should have been declared at the sentencing hearing

Penalties and Sentences Act 1992 (Qld), s 159A, s 188

Meissner v The Queen (1995) 184 CLR 132; [1995] HCA 41, followed
R v Cassar; ex parte Attorney-General (Qld) [2002] 1 Qd R 386; [2001] QCA 300, followed
R v Christensen [2007] QSC 173, followed
R v Davis (1999) 109 A Crim R 314, followed
R v Inns (1974) 60 Cr App R 231, followed

COUNSEL: The applicant appeared on his own behalf
G Cash for the respondent

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

[1] The applicant, Craig Cant, applies pursuant to s 188(1)(c) of the *Penalties and Sentences Act* 1992 (Qld) to reopen the sentence imposed on him on 22 April 2015. Section 188(1)(c) provides that a sentence can be reopened if the sentence imposed was decided on a "clear factual error of substance". The issue in this application therefore is whether the sentence proceeded on a clear factual error which was of "substance".

Background

[2] The applicant, together with Peter Hogan and Nigel Munt, was charged on indictment 549 of 2013 with one count of unlawfully trafficking in the dangerous drug methylamphetamine over a twelve month period. The applicant was also charged with nine counts of supplying the dangerous drug methylamphetamine and two counts of producing the dangerous drug cannabis. Nigel Munt was further charged on the indictment with twenty counts of supplying methylamphetamine. Peter Hogan was further charged on the indictment with two counts of producing the dangerous drug cannabis.

[3] The indictment was presented on 27 September 2013.

[4] On 21 March 2014, the charges against Peter Hogan were listed for sentence. On 19 May 2014, he pleaded guilty to all the charges against him and was sentenced to five years imprisonment suspended after serving a period of 17 months with an operational period of five years in relation to the one count of trafficking. In relation to the two counts of producing the dangerous drug cannabis, he was sentenced to concurrent periods of six months and three months imprisonment.

[5] On 12 September 2014, the remaining charges against Craig Cant and Nigel Munt were listed for trial in the sittings commencing 7 April 2015 with an estimate of seven to eight weeks.

[6] On 17 March 2015, counsel for Nigel Munt indicated that he would be entering a guilty plea. The trial against Craig Cant remained as listed.

[7] On 8 April 2015, Nigel Munt was arraigned and he pleaded guilty to all the counts on the indictment which involved him. He was sentenced on that date to 3 years imprisonment on the one count of trafficking. In relation to the twenty counts of supply, he was sentenced to concurrent periods of six months imprisonment on each count. The sentence was fully suspended with an operational period of 4 years.

[8] On 9 April 2015, the trial against Craig Cant remained as listed with a commencement date of 13 April 2015.

[9] On 13 April 2015, Mr Cant was arraigned before a jury panel and he pleaded "not guilty" to all the counts on the indictment which involved him. An application to adjourn the trial by counsel for Mr Cant was refused. A jury was then empanelled for the purpose of a trial.

[10] The trial before the jury was then adjourned to 14 April 2015 to allow a Basha hearing to take place in relation to the evidence of Mr Cant's co-accused, Nigel Munt, and to provide the defence with an opportunity to consider further telephone intercept evidence which had been provided to Mr Cant.

[11] On 14 April 2015, the trial was further adjourned to commence on 15 April 2015.

[12] On 15 April 2015, Mr Cant was re-arraigned and he pleaded guilty to all the counts against him on the indictment.

[13] The sentence was then adjourned to 22 April 2015 with the Crown Prosecutor indicating that he would provide the Crown's submissions to the Court and to counsel for Mr Cant by Friday, 17 April 2015.

[14] On 22 April 2015, the applicant was sentenced on the following counts:

(i) One count of unlawfully trafficking in the dangerous drug methylamphetamine between August 2011 and August 2012.

(ii) Nine counts of supplying the dangerous drug methylamphetamine on various dates over a ten month period between October 2011 and July 2012.

(iii) Two counts of producing the dangerous drug cannabis.

[15] In relation to the one count of trafficking, he was sentenced to a period of eight years imprisonment. In relation to the nine counts of supply and the two counts of production, he was sentenced to concurrent periods of 12 months imprisonment on each count. All of the sentences imposed were to be served concurrently with the sentence he was currently serving. No special recommendation was made in relation to parole.

Circumstances of the original plea

[16] The sentencing hearing proceeded on the basis of an agreed schedule of facts, which was made an exhibit in the sentencing proceedings, together with the outline of submissions from the Crown Prosecutor. That outline had previously been provided to defence counsel. During the sentencing hearing, the Crown Prosecutor made submissions in accordance with his outline of submissions and referred in detail to the schedule of facts upon which the sentencing hearing was proceeding. At the conclusion of the sentencing submissions by the Crown, sentencing submissions were made by the applicant's counsel.

[17] At the conclusion of his counsel's submissions, Mr Cant was asked if there was anything he wished to say before the sentence was pronounced upon him. At that point, he stated: "Yes, thank you, your Honour. I'd just like to point out that I don't agree with all the statement of facts. I – I think they've been made worse than what they really are – what really happened."[1] At that point, court was adjourned so that Mr Cant could give instructions to his counsel, Mr Reid. That adjournment is recorded as follows: [2]

> "HER HONOUR: All right. Mr Reid, do you need to take some instructions?
>
> MR REID: I'd - - -

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[1] Transcript of sentencing submissions dated 22 April 2015, 1-18 ll 35-37

[2] Transcript of sentencing submissions dated 22 April 2015, 1-18 ll 39-45 – 1-20 ll 1-12.

HER HONOUR: It would seem they've been reduced to a schedule and Mr - - -

MR REID: Mr Cant's - - -

HER HONOUR: - - - Cant has pleaded guilty on the basis of the schedule which has been reduced - - -

MR REID: Yes.

HER HONOUR: - - - to - - -

MR REID: And your Honour should take that view unless there was something quite different. Mr Cant had been shown those details at an earlier stage and indeed another document setting out some facts and I was confident that the schedule that was placed before your Honour was an appropriate summary, which wasn't to be challenged by myself today.

HER HONOUR: All right. So do you wish to speak to Mr Cant any further? We can adjourn the court and you can speak to him on the video link privately.

MR REID: Perhaps if your Honour adjourns. Do you think there's a need for us to discuss this, Mr Cant?

DEFENDANT: I – I could tell your Honour the things that I disagree with. Just from what Mr Cash has said.

HER HONOUR: All right. Mr Cant, it seems that we have embarked on the sentencing hearing on the basis of a schedule of facts. You pleaded guilty on the basis of that schedule. Aspects of that schedule were pointed out to me. I think your point is that referring to those aspects in isolation doesn't give me a – an entire picture of went on. If you're seriously disputing the facts that are in the schedule then there should be an adjournment of this sentence before I pronounce the sentence. So what I'm proposing to do is to have a short adjournment. To leave the video link on so that you can speak to Mr Reid. And then I'll resume when Mr Reid indicates that he's ready to proceed. And if you are in serious dispute about any matter then I think we might need to reconvene.

MR REID: Yes.

HER HONOUR: All right. We'll adjourn. Mr Cant, the video link will be open and what I'll ask is that your conversations with Mr Reid not be recorded by Auscript. That's a private conversation. Everyone will leave the room including the Bailiff. And Mr Reid or his instructor can indicate to the Bailiff – he'll be outside when you're ready for the court to resume. So - - -

MR REID: Thank you, your Honour.

HER HONOUR: We will adjourn to allow that to occur. Thank you.

ADJOURNED [10.53 am]

RESUMED [11.07 am]

HER HONOUR: Mr Reid?

MR REID: Thank you, for the opportunity to speak to Mr Cant. Mr Cant understands that your Honour will sentence him on the basis of the schedule that's been tendered. He wishes to make no other observations and is ready to be sentenced."

[18] After that submission, the sentencing hearing proceeded. The applicant was then sentenced to a head sentence of eight years imprisonment as outlined above to be served concurrently with the other sentences and with the sentence he was currently serving.

The applicant's submissions in relation to the reopening of the sentence

[19] At the hearing of the application to reopen the sentence, the applicant made it clear that he was not disputing his conviction and his pleas of guilty to the charges. However, he argued that the schedule of facts, which had been tendered at the sentencing hearing, made the case against him seem worse than it really was. He argued that his level of trafficking was no greater than that of his co-offenders, Mr Munt and Mr Hogan. The submissions of the applicant are contained in his outline of submissions dated 28 May 2015 and in his affidavit sworn on 15 May 2015.

[20] In those submissions, the applicant makes a number of submissions which can be placed into the following four categories:

(a) There were factual errors in the sentence. He argues that the facts as set out in the agreed schedule of facts upon which he entered his pleas of guilty on 15 April 2015 and upon which he was sentenced on 22 April 2015 are incorrect. In particular, the applicant argues that he was never involved in a plan to raise money to import pseudoephedrine; that most of the drugs were of an un-merchantable quality; that he made no money from the venture; and that Mr Munt funded most of the purchases which were for use by either him and/or Ms Taylor. He argues that no trafficking would have taken place if Mr Munt had not supplied the money to him.

(b) The sentence lacks parity with the sentences imposed on his co-accused and is too severe compared to the sentences of his co-accused. His sentence is far greater than that imposed on his co-offenders in circumstances where his level of offending was not more serious than the conduct of his co-offenders.

(c) A head sentence of 8 years is too high in circumstances where the supplies were at street level and no large transactions took place.

(d) Time already served in pre-sentence custody in relation to these offences had not been taken into account.

Respondent's submissions

[21] The respondent argues that in order to reopen a sentence pursuant to s 188, the applicant must show that he was sentenced on the basis of some fact or facts that were clearly wrong and which were of substance to the proceeding. There must be a clear error of substance and the section cannot be used to simply review a sentence. In relation to the schedule of facts which was tendered at the sentencing hearing, the Crown Prosecutor submits that the applicant's assertions are unsupported by the evidence and relies on an explicit submission by the applicant's counsel in open court where he stated "Mr Cant understands that your Honour will sentence him on the basis of the schedule that's been tendered. He wishes to make no further observations and is ready to be sentenced."[3] The applicant did not contradict that assertion when it was made in open court during the resumed sentencing hearing.

[22] At the initial hearing of the application to reopen the sentence on 22 September 2015, it was clear that one of the applicant's submissions was that he had served some time in pre-sentence custody which had not been taken into account. As the information at the time of the sentence was that there was no time which was declarable, the Crown Prosecutor undertook to make further inquiries and make further submissions in this regard.

[23] Further submissions were subsequently received in relation to the applicant's pre-sentence custody which made it clear that there were indeed days of pre-sentence custody which should have been declared.

Should the sentence be reopened?

[24] In this regard, there is no doubt that there is provision in s 159A(5) of the *Penalties and Sentences Act* 1992 (Qld) to correct erroneous declarations as follows:

> "**159A Time held in presentence custody to be deducted**
>
> …
>
> (5) If the sentencing court is satisfied that the time declared under subsection (3) was not correct, it must—
>
> (a) declare the correct time; and
>
> (b) amend the sentence accordingly; and
>
> (c) cause the chief executive (corrective services) to be advised of the amendment."

[25] In this case, however, there was in fact no "time declared" at the time of the original sentence and, accordingly, there is no declaration which can be corrected. Therefore, in

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[3] Transcript of sentencing submissions dated 22 April 2015, 1-20 ll 9-12.

my view, any correction will need to be made pursuant to s 188(1)(c) of the *Penalties and Sentences Act* 1992 (Qld).

[26] Section 188(1)(c) of the *Penalties and Sentences Act* 1992 (Qld) is in the following terms:

> "**188 Court may reopen sentencing proceedings**
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> (1) If a court has in, or in connection with, a criminal proceeding, including a proceeding on appeal—
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> …
>
> (c) imposed a sentence decided on a clear factual error of substance;
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> …
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> the court, whether or not differently constituted, may reopen the proceeding."

[27] It is clear that to succeed the applicant must show that he was sentenced on the basis of some fact or facts that were clearly wrong and which were of some substance in the proceedings. In *R v Cassar; ex parte Attorney-General (Qld),*[4] the Court of Appeal stated that for a sentence to be reopened pursuant to s 188, there needed to be a clear factual error of substance. The Court indicated the following:

> "[13] The jurisdiction to reopen sentencing proceedings under s. 188 depends on clear statutorily expressed criteria. There is no occasion to adopt anything but a strict approach to their applicability. Otherwise, the integrity of the sentencing process will be imperiled. The apparent extent of current recourse to s. 188, which one would think should only very occasionally be justified, warrants our adding these brief observations.
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> [14] Under s. 188(1)(c), it is the sentencing court which must have made the error, and the error must be 'clear factual (and) of substance'. There was no error here. Any 'error' constructed on 11 April 2001 by the learned judge in reopening the proceedings was neither clear ('I am inclined to favour that view') nor, of course, factual: it concerned, put at its highest, an expectation or forecast said to have been misplaced. It is necessary, for s. 188, to confine oneself to the approach of the sentencing court. A prisoner's disappointment over denial of parole is simply not to the point. For reasons already mentioned, furthermore, it is not possible to characterise the subject matter of a forecast or expectation entertained by a judge in relation to parole as covering matters of existing fact. (See also the observations of Mackenzie J in *R. v Abbott* 437/1999, 27 June 2001.) It is so obvious it should go without saying, in any event, that it does not

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[4] [2002] 1 Qd R 386, [14].

> follow that because a sentencing judge's expectation as to parole is not fulfilled, the sentencing process must be taken to have been affected by error – factual or otherwise. Judges' recommendations as to parole are not, and never have been, binding in the sense that the executive must implement them, although of course they should be accorded appropriate weight. If a judge intends that a prisoner's future release be more definitely provided for, there are other mechanisms for ensuring that, such as the suspending of the sentence of imprisonment.
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> …
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> [16] Attempts to review sentences, in light of subsequent events, by resort to a creative, non-literal construction of s. 188 must be strongly discouraged. The section may not be used as an avenue for the judicial review of administrative decisions. Sentences are reviewed through the appeal process, not by means of this provision, which is in the nature of a 'slip rule', to be used in the exceptional, limited circumstances to which in precise terms it refers."[5]

[28] It is clear therefore that the section must not be used to simply *review* a sentence which has been imposed. As Mackenzie J stated in *R v Christensen*,[6] "sentences are reviewed through the appeal process, not by means of s 188, which is in the nature of a 'slip rule' to be used in the exceptional limited circumstances to which, in precise terms, s 188 refers."[7] The scope to reopen is indeed very limited and narrow.

[29] It is also clear that the Court should not reopen a sentence unless the error alleged is clearly shown. In *R v Davis*,[8] Thomas JA stated:

> "Clearly the legislature has now given to the courts a useful tool which will enable both legal and factual errors to be corrected. The power is not to be hedged by unnecessary legal distinctions. I do not now think that the term 'clear factual error of substance' presents any particular difficulty. The use of the word 'clear' suggests that the court should not act unless the error is clearly shown, and the words 'of substance' suggests that this exceptional procedure should not be invoked in relation to pettifogging points for relatively minor mistakes. Those words suggest to me the need for something of sufficient importance as to be likely to call for some material alteration of a sentence."

Has there been a clear factual error of substance pursuant to s 188 of the *Penalties and Sentences Act* 1992 (Qld)?

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5 *R v Cassar, ex parte Attorney-General for Queensland* [2002] 1 Qd R 386, [13], [14] and [16].

6 [2007] QSC 173.

7 *R v Christensen* [2007] QSC 173, [4].

8 (1999) 109 A Crim R 314, [13].

[30] Turning then to the four bases upon which the applicant has argued for a reopening of the sentence.

[31] The first basis argued by the applicant is that he was sentenced on the basis of factual errors in the schedule of facts. There is no doubt from a perusal of the transcript of day three of the resumed trial on 15 April 2015 and the court order sheets that counsel for Mr Cant requested that the applicant be re-arraigned. The applicant then entered pleas of guilty in open court to one count of trafficking in the dangerous drug methylamphetamine, nine counts of supplying the dangerous drug methylamphetamine and two counts of producing the dangerous drug cannabis and the sentence was listed for 22 April 2015. At the commencement of the sentencing hearing on that date, the Crown Prosecutor indicated that the sentence would proceed on the basis of an agreed schedule of facts which was tendered and had been provided to Defence in advance of the hearing. The Prosecutor then referred to relevant aspects of that schedule of facts in the course of his submissions on sentence which had also been provided in advance.

[32] No issue was taken by counsel for Mr Cant to any aspect of the schedule of facts or any aspect of the outline of submissions during the sentencing hearing. When the applicant himself subsequently queried the facts after submissions on sentence had been made by his counsel, the Court adjourned for that issue to be clarified. The sentence then resumed on the basis of the submission from counsel for Mr Cant that Mr Cant agreed with the schedule of facts and the sentence could proceed. The applicant then allowed the sentencing hearing to proceed in light of that specific indication by his counsel that the Court was to sentence him on the basis of the agreed schedule of facts.

[33] In *Meissner v The Queen*,[9] the majority of the High Court had indicated that "A court will act on a plea of guilty when it is entered in open court by a person who is of full age and apparently of sound mind and understanding, provided the plea is entered in exercise of a free choice in the interests of the person entering the plea." In *R v Inns*,[10] Lawton LJ had also referred to the significance of a plea on arraignment stating that the whole basis of such a plea is that the accused freely says in open court what he is going to do and "that no further proof is required of the accused's guilt". The only exception being that if a person is pleading guilty under pressure or threats then he does not make a "free choice".[11]

[34] I note that the applicant has clearly stated that he does not wish to withdraw his pleas of guilty. It is clear therefore that he is not arguing that his pleas of guilty were not entered in exercise of a free choice.

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9 (1995) 184 CLR 132, 141 (citations omitted).

10 (1974) 60 Cr App R 231, 233.

11 *R v Inns* (1974) 60 Cr App R 231, 233.

[35] It is also clear that the change of plea came immediately after further telephone intercept transcripts had been provided to Mr Cant and after a Basha hearing had been held with respect to the evidence of his co-accused, Nigel Munt.

[36] Mr Cant was represented by an experienced senior criminal barrister at trial and at his sentencing hearing, who advised the Court at the time of the sentence that the schedule of facts was not being disputed and that Mr Cant had agreed to be sentenced on the basis of that schedule.

[37] I also note that the schedule of facts was provided in advance of the sentencing hearing and the outline of submissions based on that schedule was also provided in advance of the sentencing hearing. Mr Cant did not call any evidence at the application to reopen the sentence to dispute the clear evidence that he had agreed to the matter proceeding to sentence on the basis of the schedule of facts and had said nothing when the sentencing hearing resumed on that basis.

[38] No application was made to vacate the pleas of guilty on 22 April 2015 when the sentencing hearing commenced or when indeed it resumed after Mr Cant's barrister obtained his specific instructions. In my view, Mr Cant has not established by any evidence that his pleas of guilty in open court were not freely made. Accordingly, no error of fact has been established in this regard.

[39] I note that an application for leave to appeal against sentence was lodged by Mr Cant on 25 May 2015. In this application, however, he is seeking to argue the accuracy of some of the factual details of his offending. In this regard, I endorse the views of Mackenzie J in *R v Christensen*[12] that the section is to be used in the exceptional, limited circumstances to which s 188 refers and that it cannot be used to review a sentence which has been imposed. In my view, that is what the applicant is in fact seeking to do here and such an approach must be refused.

[40] Furthermore, it would seem to me that, in any event, even if there were errors in the schedule of facts as alleged, there is nothing on the face of it to suggest that any errors which could be identified would be "of substance". In this regard, I note the sentencing submission from Counsel for Mr Cant, which was that an appropriate sentence would be in the range of six to nine years[13] and that the sentence imposed of eight years was within that range.

[41] Accordingly, I am not satisfied that the applicant has demonstrated that there is any error in the schedule of facts which would require this Court to reopen the sentence imposed.

[42] In terms of the second argument, the applicant argues that the sentence imposed lacks parity with the sentences imposed on his co-offenders. That is an argument which

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12 [2007] QSC 173, [4].

13 Transcript of sentencing submissions dated 22 April 2015, 1-15 ll 29-30.

should be argued on appeal in relation to the severity of the sentence where a submission would be made that the sentence imposed was manifestly excessive. An issue of parity is not a matter which goes to an error of fact. Furthermore, any argument in relation to parity or severity had to contend with the fact that Mr Cant, unlike his co-offenders, had a significant criminal history and was still serving a significant sentence for drug trafficking when he committed these further drug offences. No doubt these are matters which Mr Cant will argue before the Court of Appeal.

[43] In relation to the third basis put forward by the applicant that the sentence was too severe because it was mainly street level offending where no substantial transactions were involved, this is once again a ground which should be argued on appeal in relation to the severity of the sentence. The imposition of a sentence which is argued to be excessive in the circumstances is a basis for an application for leave to appeal against sentence and not for a reopening of sentence. An issue as to the severity of a sentence is not a matter which can be accurately characterised as an error of fact. Once again, this is a matter which Mr Cant can argue before the Court of Appeal.

[44] In relation to the fourth basis, the applicant argues that time already served in pre-sentence custody in relation to these offences had not been taken into account. The Crown Prosecutor undertook further inquiries in this regard and further submissions were then received from the Crown on 29 September 2015 and from the applicant on 2 October 2015 in relation to the period of time the applicant had spent in custody after his arrest on 7 August 2012 and whether that time could be declared as having been already served in relation to the current charges.

[45] In relation to the applicant's pre-sentence custody, the Crown Prosecutor made the following submissions:

> "1. Since the hearing of this application to re-open sentence on 22 September 2015 it has become apparent that the applicant spent time in custody on remand that should be declared pursuant to section 159A of the *Penalties and Sentences Act 1992.*
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> 2. On 7 August 2012 the applicant was arrested in relation to the charges dealt with by A. Lyons J on 22 April 2015. He was remanded in custody as can be seen in the attached verdict and judgment records of the Magistrates Court dated 7 August 2012, 4 September 2012, 11 September 2012, 24 September 2012 and 17 December 2012.
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> 3. At the time the applicant was subject to a parole order under a sentence of imprisonment imposed for offences against the Commonwealth. It was understood at the time of sentence that the applicant was also being held in custody for allegedly breaching parole. This was not the case. On 29 January 2013 the applicant appeared before the Magistrates Court and his parole was revoked. A new parole date was set for the Commonwealth sentence. The time the applicant had spent in custody since August 2012 was expressly not taken into account.

4. As a result the applicant spent 176 days between 7 August 2012 and 29 January 2013 in custody in relation to the proceedings which were dealt with by A. Lyons J on 22 April 2015. This time should have been declared time already served pursuant to section 159A(3)."

[46] I am satisfied therefore that there was a clear error of substance in relation to the period of time Mr Cant had spent in custody in relation to the present sentence, as a submission was made that there was no declarable pre-sentence custody. This was clearly wrong as a period of 176 days should have been declared as time already served pursuant to s 159A(3) of the *Penalties and Sentences Act* 1992 (Qld).

[47] Accordingly, I am satisfied that pursuant to s 188(1)(c) of the *Penalties and Sentences Act* 1992 (Qld), the sentence should be reopened to correct that clear factual error and there should be an order that the application to reopen the sentence is granted. There should also be an order that 176 days spent in pre-sentence custody between 7 August 2012 and 29 January 2013 be declared as time already served under the sentence imposed on 22 April 2015.

[48] The sentence imposed on 22 April 2015 should, however, otherwise be confirmed, as no other clear error of substance has been identified.

Orders

[49] The orders of the Court are as follows:

1. Application pursuant to s 188(1)(c) of the *Penalties and Sentences Act* 1992 (Qld) to reopen the sentencing proceedings conducted on 22 April 2015 is granted.

2. Sentence is varied by ordering that pursuant to s 159A(3) of the *Penalties and Sentences Act* 1992 (Qld), 176 days spent in pre-sentence custody between 7 August 2012 and 29 January 2013 be deemed time already served under the sentence.

3. Sentence imposed is otherwise confirmed.