

SUPREME COURT OF QUEENSLAND

CITATION: *The Queen v Hall* [2018] QSC 101

PARTIES: **THE QUEEN**
v
GRAHAM WILLIAM MCKENZIE HALL
(defendant)

FILE NO: Indictment No 0348/18

DIVISION: Trial

PROCEEDING: Ruling at sentence

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 18 May 2018

DELIVERED AT: Brisbane

HEARING DATE: 11 May 2018

JUDGE: Dalton J

RULING: **Section 160B(2) of the Penalties and Sentences Act 1992 applies in this case**

CATCHWORDS: CRIMINAL LAW – SENTENCE – POST-CUSTODIAL ORDERS – PAROLE – OTHER MATTERS – where the defendant committed an offence whilst on parole – where s 160B of the *Penalties and Sentences Act 1992* (Qld) requires the Court to fix a parole eligibility date when the offender has a Court ordered parole order cancelled under s 209 of the *Corrective Services Act 2006* (Qld) during the offender’s period of imprisonment – whether the term of imprisonment passed on the second sentencing occasion constitutes part of an ‘unbroken period of imprisonment’ within the meaning of s 4 of the *Penalties and Sentences Act 1992* (Qld) – whether the Court was obliged to fix a parole eligibility date

COUNSEL: E O’Hanlon-Rose for the Crown
K McArthur for the defendant

SOLICITORS: The Office of the Director of Public Prosecutions for the Crown
Karsas Lawyers for the defendant

- [1] A point arose during the sentencing of this offender as to the effect of my imposing a sentence for an offence committed whilst he was on parole. Defence counsel contended that I was not obliged to fix a parole eligibility date, but could fix a parole release date. The point is troublesome partly because of the language of the *Penalties and Sentences Act* 1992 (PSA) and also partly because of some paragraphs at the end of the judgment in *R v Smith*.¹ These paragraphs are inconsistent with the later decision of the Court of Appeal in *R v Bliss*.² It appears that there is some diversity in the interpretation of *Smith*, at least in the District Court (see below). For this reason, having reserved my decision on this point I think it is worthwhile to publish it. My conclusion is that s 160B(2) of the PSA does require me to fix a parole eligibility date.

Facts of this Case

- [2] On 11 March 2016 Mr Hall was sentenced by a Magistrate to a period of imprisonment with early release on parole. His full-time release date on that sentence was 4 December 2016. He was released on parole and on 19 September 2016 committed an offence for which I was to sentence him.
- [3] Slightly complicating matters, because Mr Hall is a recidivist offender, he committed further offences, and on 24 November 2016 the Parole Board revoked his parole and returned him to jail to serve the last part of the Magistrate's March 2016 sentence (between 24 November 2016 and 4 December 2016). He was then released.
- [4] On 11 May 2018 he pled guilty before me to:
- (a) the offending of 19 September 2016, committed while he was on parole;
 - (b) trafficking between 2 October 2016 and 22 December 2016. This offending began while he was on parole. Apprehension caused authorities to revoke his parole and return him to jail. Undeterred, he resumed trafficking when he was released, and
 - (c) offending between 17 and 21 December 2016.
- [5] Defence counsel's submission was that in sentencing Mr Hall I could fix a parole release date and was not compelled by s 160B(2) of the PSA to fix a parole eligibility date.
- [6] Section 160B(2) of the PSA provides:
- “If the offender has had a court ordered parole order cancelled under the *Corrective Services Act 2006*, section 205 or 209 during the offender's period of imprisonment, the court must fix the date the offender is eligible for parole.” (my underlining)
- [7] For this subsection, s 160 of the PSA provides that:

¹ [2013] QCA 397.

² [2015] QCA 53.

“Period of imprisonment means the period of imprisonment that includes the term of imprisonment mentioned in section 160A.”

- [8] The term mentioned in s 160A is the term of imprisonment which I impose as the sentencing Judge for the offending between 19 September 2016 and 21 December 2016.
- [9] More generally, “period of imprisonment” is defined by s 4 of the PSA as meaning:
- “The unbroken duration of imprisonment that an offender is to serve for 2 or more terms of imprisonment, whether –
- (a) ordered to be served concurrently or cumulatively; or
- (b) imposed at the same time or different times,
- and includes a term of imprisonment.”
- [10] The defence argument was that the term of imprisonment I would impose would not be part of any longer unbroken period of imprisonment imposed by a Court and therefore the requirement imposed by the underlined words in s 160B(2) above was not met. That argument was based on paragraphs [34]-[37] of *Smith* (above) and some obiter in *Szucs v Queensland Police Service*.³ I note that the annotations to *Carter’s Criminal Law of Queensland* also cite *R v Bond*⁴ as a case which supports that argument.

Facts in R v Smith

- [11] On 24 July 2012, Ms Smith was sentenced by a Magistrate to imprisonment with immediate parole release. Her full-time release date was 17 May 2013. She re-offended on 3 September 2012 and 6 September 2012, and then committed a series of thefts between 8 February and 18 May 2013. She committed another offence on 18 May 2013.
- [12] When she was sentenced for the offending between 3 September 2012 and 18 May 2013 the primary Judge set a parole eligibility date. The Court of Appeal dismissed an appeal in which it was contended that a parole release date ought to have been set.

Reasoning in R v Smith

- [13] The starting point really is ss 214 and 215 of the *Corrective Services Act 2006* (CSA). They provide, respectively, that a prisoner released on parole is still taken to be serving the sentence imposed on them, and that such a prisoner is taken to have served their sentence of imprisonment if the parole order expires without it having been cancelled.
- [14] Section 209(1) of the CSA provides that a prisoner’s parole order “is automatically cancelled” if the prisoner is sentenced to another period of imprisonment for an offence committed during the period of the order. It is the imposition of the sentence which acts as the trigger to cause the automatic cancellation of the parole order. Subsection (1)

³ [2015] QDC 190, [48]-[51].

⁴ [2009] QDC 28.

applies even if the period of the parole order has expired by the time of sentence – s 209(2).

- [15] Sections 210(3) and 211(2) of the CSA show that the legislative intention is that upon cancellation of a parole order the offender is to return to jail. They are to serve a period of time equal to the period between the date of the commission of the offence for which the triggering sentence is imposed, and the full-time release date on the original sentence. There is however a provision allowing the Queensland Parole Board to direct that the offender serve only part of that period of time – s 211(3).
- [16] I agree with the statement of Morrison JA in *Smith* that these sections provide “for a coherent system where a prisoner commits an offence during the period of a parole order” – [30].
- [17] Having regard to the legislative provisions just detailed, the primary Judge in *Smith* was right to impose a parole eligibility date pursuant to s 160B(2) of the PSA. At the time the primary Judge imposed a sentence, Smith began a term of imprisonment pursuant to that sentence. As well, because some of the offences for which Smith was sentenced had taken place during Smith’s release on parole, at the time the sentence was pronounced Smith also began to serve part of the term of imprisonment imposed on 24 July 2012. Thus, when sentence was pronounced by the primary Judge in *Smith*, the defendant began serving a period of imprisonment consisting of these two terms. When sentence was pronounced, that triggered the cancellation of the parole order under s 209 of the CSA. In that sense the cancellation happened “during the offender’s period of imprisonment” within the meaning of s 160B(2) of the PSA. That period of imprisonment was an unbroken period of imprisonment including both the term imposed by the primary sentencing Judge (in accordance with the definition at s 160 of the PSA) and the term imposed by the Magistrate in July 2012.
- [18] However, the primary sentencing Judge in *Smith* made an additional, and slightly unusual, order as part of the sentencing, and that order led to some problematic statements in the final paragraphs of *Smith*.

Final Paragraphs in Smith

- [19] The primary sentencing Judge in *Smith* ordered that his sentence on the stealing offences was to start at the end of the term of imprisonment imposed by the Magistrate on 24 July 2012.
- [20] At paragraphs [34]-[37] of *Smith*, Morrison JA deals with the order that Smith’s sentence for stealing was to start at the end of the period of imprisonment imposed in July 2012. He says that the effect of that order was to “backdate” the sentence imposed on 27 September 2013 so that it commenced immediately upon the expiry of the July sentence and concludes:

“That means that the term of imprisonment ending on 3 September 2012 and the term of imprisonment imposed on 27 September 2013 constitute one ‘unbroken duration’ of imprisonment. ...

The result is that under s 160B(2) of the PSA, ... the court was required to fix an eligibility date for parole.”

- [21] If and insofar as these paragraphs imply that, absent the order which “backdated” the stealing sentence, s 160B(2) would not have applied,⁵ then they are, with respect, incorrect. In the absence of the “backdating” order, a parole eligibility date was nonetheless required for the reasons given at [17] above. This is consistent with the decision in *Bliss* which was relevantly on all fours with *Smith* factually, except that there was no “backdating” order.

R v Bliss

- [22] The first sentence imposed in *Bliss* was imposed by a Magistrate in July 2012. Mr Bliss was sentenced to a term of imprisonment with a full-time release date of 1 September 2014, but with earlier release on parole.
- [23] The primary sentencing Judge in *Bliss* sentenced Mr Bliss on 10 September 2014 for an offence committed on 29 October 2012; ie., after Mr Bliss had been released on parole, but before his full-time release date under the Magistrate’s July sentence.
- [24] Jackson J wrote the main judgment in the Court of Appeal with which President McMurdo and Holmes JA agreed. Jackson J said:

“... the effect of the sentences of [10] September 2014 was to cancel the applicant’s parole on the 25 July 2012 sentences retrospectively to 29 October 2012. Accordingly, the 28 day period between 29 October 2012 and 26 November 2012⁶ when the applicant had been released on parole for those sentences became time he was required to serve in prison. That time period became part of the applicant’s period of imprisonment within the meaning of s 160B(2) of the *Penalties and Sentences Act 1992 (Qld)*. That subsection required the court to fix a parole eligibility date on 14 September 2014.” (my underlining)

- [25] There was no question of any “backdated” sentence in *Bliss*, nor any other complicating factor. It is clear from the underlined part of the reasons of Jackson J that his reasoning was in accordance with that outlined at [17] above. With respect, that must be the correct approach; the application of s 160B(2) cannot depend on stochastic factors such as whether or not there is an order of the type made by the primary Judge in *Smith*; whether there was a declaration of time served,⁷ or whether the full-time release date of the prior sentence had passed at the time of the second sentencing occasion.

⁵ There are at least two District Court cases which interpret *Smith* this way (*Szucs* and *Bond*, above). The annotations dealing with *Smith* in *Carter’s* also seem to interpret *Smith* that way.

⁶ The statement of facts in the Court of Appeal does not reveal it but the appellant must have been returned to custody on 26 November 2012. The schedule of offending at [7] of the judgment shows 26 November 2012 was the date of further offending by the applicant whilst on parole and before imprisonment.

⁷ See *Szucs* (above) [49].