SUPREME COURT OF QUEENSLAND

CITATION:	*R v Carter* [2016] QSC 86
PARTIES:	**R** (respondent) **v** **STEPHEN WAYNE CARTER** (applicant)
FILE NO:	Indictment No 587 of 2000
DIVISION:	Trial Division
PROCEEDING:	Application to reopen sentence
DELIVERED ON:	14 April 2016
DELIVERED AT:	Brisbane
HEARING DATE:	1 April 2016
JUDGE:	Mullins J
ORDER:	**The application to reopen the sentence imposed on 17 July 2003 is refused.**
CATCHWORDS:	CRIMINAL LAW – SENTENCE – SENTENCING ORDERS – OTHER MATTERS – where the applicant applied to reopen a sentence of life imprisonment for murder – where a declaration was made that 54 days spent in presentence custody be deemed time already served under the sentence – where the applicant submitted that a further 487 days of custody should have been declared time already served under the sentence – where the 487 days in custody was not presentence custody, but custody that related to sentences being served by the applicant for other offences – whether there was a discretion to make a declaration for presentence custody not otherwise declarable *Justice and Other Legislation Amendment Act* 2004 (Qld), s 80, s 83 *Penalties and Sentences Act* 1992 (Qld), s 159A, s 188, s 212 *R v Carter* [2002] QCA 431, related *R v Carter* [2003] QCA 515, related *R v Guthrie* (2002) 135A Crim R 292; [2002] QCA 509, considered *R v McCusker* [2015] QCA 179, considered
COUNSEL:	The applicant appeared in person M T Whitbread for the respondent

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

[1] Mr Carter was found guilty after trial of one count of murder. I sentenced him on 17 July 2003 to life imprisonment. A declaration was made that 54 days spent in presentence custody between 14 September 2002 and 6 November 2002 be deemed time already served under the sentence.

[2] That was Mr Carter's retrial for the offence of murder. At the first trial, Mr Carter pleaded guilty to aiding one Smyth in killing himself and to one count of supply of the dangerous drug heroin to Smyth, but was found guilty after trial of the offence of murder. He successfully appealed that conviction and the retrial was ordered: *R v Carter* [2002] QCA 431.

[3] At the first trial Mr Carter was sentenced to imprisonment for one year on the supply dangerous drug, imprisonment for two years on the aiding suicide, and life imprisonment for murder. A declaration was made that 70 days spent in presentence custody between 24 March 2000 and 1 June 2000 be imprisonment already served under the sentence. At the time that declaration was made, the period of 70 days was credited as presentence custody for all three sentences that were imposed at the same time and were being served concurrently. The date that Mr Carter would have been released from custody for the offence of aiding suicide (but for serving the concurrent sentence of life imprisonment for murder) would have been 14 September 2002. When his appeal against conviction for the murder was allowed on 18 October 2002, he was then remanded in custody. On 6 November 2002, he was released from custody on bail.

[4] It had been an issue on the sentencing hearing before me, as to what was the appropriate period that should be the subject of the presentence custody declaration. Counsel who then appeared for Mr Carter raised the possibility that the then s 161(4) of the *Penalties and Sentences Act* 1992 (Qld) (*PSA*) (which is now s 159A) may have permitted a declaration to be made in respect of the time that Mr Carter had been serving the concurrent life imprisonment sentence with the other sentences up to 14 September 2002. I rejected that argument on the basis that the period up to 14 September 2002 was time served under the sentences imposed on 24 July 2001 for the offences (other than murder). It was not presentence custody for the offence of murder, but actual custody on account of the sentences for the offences of supply and aiding suicide which were not affected by the successful appeal against the murder conviction.

[5] Mr Carter appealed against his conviction of murder on the retrial, but that appeal was dismissed: *R v Carter* [2003] QCA 515. Mr Carter did not apply for leave to appeal the sentence and, in particular, against the making of the presentence custody declaration for only 54 days, rather than backdating the presentence custody until the time of the commencement of his period of imprisonment, as a result of being sentenced at the first trial.

[6] The Department of Corrective Services considers that Mr Carter's current parole eligibility date is 24 May 2018. This is calculated on the basis that his sentence for murder

commenced on 17 July 2003, but he obtained the benefit of the declaration of 54 days for presentence custody. Mr Carter wishes to reopen his sentence and obtain the benefit of a further presentence custody declaration of 487 days which would cover the period of 70 days which was the subject of the presentence custody declaration made in his first trial and the period of 417 days he was in custody between 24 July 2001 and 13 September 2002. This would result in a parole eligibility date of 24 January 2017. In substance, what Mr Carter is seeking is credit against his current sentence of life imprisonment for the period of 487 days that he served as imprisonment on account of the sentence imposed for the offence of murder at the first trial which was served at the same time as he was serving the sentences for the supply and aiding suicide offences.

[7] Mr Carter applies to the court pursuant to s 188 of the *PSA* to reopen his sentencing proceeding on the basis that the sentence imposed was not in accordance with the law at the time and/or the court imposed a sentence decided on a clear factual error of substance. It is implicit in his application that, to the extent that it is necessary, he is also seeking leave to bring the application at such a late stage after the sentencing.

[8] Mr Carter appeared for himself on the application and relies on his affidavit affirmed on 29 January 2016 in which he has set out at length the provisions of the law and the authorities on which he is relying to assert a factual error in my sentencing of him and to develop his argument that he has been prejudiced by the manner in which the presentence custody declaration was made in respect of his current sentence of life imprisonment. He submits that, having regard to his current age of 55 years, his chances of finding employment will diminish, if he cannot bring forward his parole eligibility date from 24 May 2018 to 24 January 2017.

[9] The respondent opposes the reopening on the basis that there was no factual error at the time of the sentencing and the sentence imposed was one that was in accordance with the law at the time, and remains the sentence that would be imposed by law.

[10] Rather than deal first with the issue of whether or not the application for reopening is the appropriate procedure, I will address the substantive issue raised by Mr Carter's application.

Relevant legislation

[11] At the time I sentenced Mr Carter, the relevant provision for dealing with presentence custody was s 161 of the *PSA* (Reprint No 8). The relevant parts of that provision were:

> "**(1)** If an offender is sentenced to a term of imprisonment for an offence, any time that the offender was held in custody in relation to proceedings for the offence and for no other reason must be taken to be imprisonment already served under the sentence, unless the sentencing court otherwise orders.
>
> ...
>
> **(3)** If an offender was held in custody in circumstances to which subsection (1) applies, the sentencing court must—

(a) state the dates between which the offender was held in presentence custody; and

(b) calculate the time that the offender was held in presentence custody; and

(c) declare the time calculated under paragraph (b) to be imprisonment already served under the sentence; and

(d) cause to be noted in the records of the court—

(i) the fact that the declaration was made and its details; and

(ii) unless the court otherwise orders under subsection (1), the fact that the declared time was taken into account by it in imposing sentence; and

(e) cause the chief executive (corrective services) to be advised of the declaration and its details.

(4) If—

(a) an offender is charged with a series of offences committed on different occasions; and

(b) the offender has been in custody continuously since arrest on charges of the offences and for no other reason;

the time held in presentence custody must be taken, for the purposes of subsection (1), to start when the offender was arrested even if the offender is not convicted of the offence for which the offender was first arrested or any other offences in the series."

[12] Section 161 was amended substantially by s 80 of the *Justice and Other Legislation Amendment Act* 2004 (Qld) to address some of the anomalies that had arisen with the application of s 161. The transitional provision inserted by s 83 of the 2004 Act into the *PSA* as s 212 included subsection (2) relevant to the application of the amendments to s 161:

"The amendment of section 161 by the 2004 Amendment Act applies in relation to a declaration to be made under section 161(3)(c) or (3B)(c) after the commencement of the amendment—

(a) whether the offences were committed before or after the commencement of the amendment; and

(b) whether the offender was convicted of the offences before or after the commencement of the amendment."

[13] The effect of that transitional provision is that for the purpose of determining whether the presentence custody declaration that was made when I sentenced Mr Carter on 17 July 2003 was in accordance with the law, the law that applied was s 161 as it stood before the 2004 Act.

[14] In the explanatory memorandum for the 2004 Act the general principle of s 161 was confirmed in these terms, even though subsection (1) was not amended by the 2004 Act:

> "Section 161(1) sets out the general principle that will apply to taking into account presentence custody, that is, all time spent in presentence custody in relation to the offence will form part of the imprisonment served, unless the court otherwise orders."

[15] The change to subsection 4 was explained in these terms:

> "Section 161(4) has been redrafted to replace the term 'series of offences' with 'a number of offences' to clarify that a connection between the offences is not required, and to remove the requirement in existing section 161(4)(b) for the offender to be in custody 'continuously' from arrest."

[16] Section 161 was renumbered in 2006 and became s 159A. Subsection (4) is now in the following terms:

> "(4) If—
>
> (a) an offender is charged with a number of offences committed on different occasions; and
>
> (b) the offender has been in custody since arrest on charges of the offences and for no other reason;
>
> the time held in presentence custody must be taken, for the purposes of subsection (1), to start when the offender was first arrested on any of those charges, even if the offender is not convicted of the offence for which the offender was first arrested or any 1 or more of the number of offences with which the offender is charged."

[17] A definition of "proceedings for the offence" was inserted in subsection (10):

> "**proceedings for the offence** includes proceedings that relate to the same, or same set of, circumstances as those giving rise to the charging of the offence."

[18] The vice at which the amendments made by the 2004 Act were directed had been illustrated by a number of decisions, including *R v Guthrie* (2002) 135 A Crim R 292 at [5]-[6], where the restrictive terms of s 161, as originally enacted, precluded the making of a presentence custody declaration where the offender had been arrested on a series of charges, but not all charges proceeded to sentence.

[19] What can be noted about s 159A of the *PSA* (and s 161 as it stood when Mr Carter was sentenced at the trial) is that its focus is on giving credit to an offender for "presentence" custody, while the proceedings for the relevant offences have not been finalised. In general terms, it does not apply to presentence custody where an offender is held on remand for a particular offence at the same time as serving an actual sentence for another offence.

McCusker

[20] The operation of s 159A was considered by the Court of Appeal in *R v McCusker* [2015] QCA 179.

[21] Mr McCusker was sentenced on 16 March 2015 to imprisonment of six years three months for the offence of manslaughter. He applied for leave to appeal against sentence. One of the grounds was in relation to how the sentencing judge dealt with non-declarable presentence custody. McMeekin J (with whom the other members of the court agreed) concluded that the presentence custody was, in fact, declarable and as an error had been made in the sentencing, then proceeded to resentence Mr McCusker.

[22] Mr McCusker had been sentenced to a wholly suspended sentence of 18 months imprisonment for an operational period of three years on 22 November 2010. On 1 January 2012 he killed the victim in circumstances which resulted in his eventual plea of guilty to manslaughter. In March 2012 he committed break and enter offences for which he was sentenced together with other offences on 10 November 2012 for a total period of imprisonment of two years three months with a parole release date of 10 September 2013. The suspended sentence that had been imposed on 22 November 2010 was also fully activated on 10 November 2012. On 3 December 2012, Mr McCusker was charged with murder in respect of the death of his victim that had occurred on 1 January 2012.

[23] Mr McCusker was not released on his fixed parole release date of 10 September 2013, because he was on remand for the offence of murder. Section 199 of the *Corrective Services Act* 2006 (*CSA*) prohibited the chief executive from acting on the court ordered parole, as Mr McCusker was also detained on remand for another offence for which he did not have bail. The sentence imposed on 10 November 2012 ended on 9 February 2015. When Mr McCusker was sentenced for the offence of manslaughter on 16 March 2015, the only time that was declared as presentence custody was the period between 10 February and 16 March 2015.

[24] Mr McCusker was seeking credit for the period that he spent in custody serving the balance of the sentences imposed on 22 November 2010 while he was held on remand for the offence of murder from the date the court ordered parole would have taken effect for the sentences imposed on 22 November 2010. This was the period between 10 September 2013 and 9 February 2015.

[25] McMeekin J concluded (at [15]) that, by virtue of s 199 of the *CSA*, the only reason that Mr McCusker was held in custody post 10 September 2013 until 9 February 2015 was because he was charged with the offence of murder for which he was on remand and which precluded his obtaining the benefit of court ordered parole that would otherwise have taken effect automatically on 10 September 2013, but for the charge of murder. McMeekin J found (at [21] and [22]) that both aspects of the reason for holding Mr McCusker in custody during that period (namely the remand on the murder charge and the consequential loss of court ordered parole due to being held on remand for murder) were "inextricably bound up with the charge that was before the court". It was therefore held (at [26]) that Mr McCusker was entitled to have the entire period in presentence custody from and including 10 September 2013 declared as time taken to be imprisonment already served under the sentence for the offence of manslaughter.

[26] *McCusker* represents an exception to the general rule that a declaration for presentence custody is not made where an offender is held on remand for a particular offence at the same time as serving an actual sentence for another offence. The exception was justified, however, by reference to the effect of s 199 of the *CSA*.

[27] Mr Carter did, in fact, get the benefit of a presentence custody declaration on the basis of analogous reasoning to *McCusker* in respect of the period he had been in presentence custody between 14 September and 6 November 2002 on the basis that he would have been released from custody for the offence of aiding suicide on 14 September 2002.

Mr Carter's arguments

[28] Mr Carter submits that s 161(4) of the *PSA* (as it stood at the time of his sentencing after the retrial) should apply, even though all his offences were committed on the one occasion, as it would be a nonsense to exclude the series of offences committed on the one occasion from the general sense and intention of s 161(4) that applies to a series of offences committed on different occasions. In addition, there was a discretionary power conferred by the words "otherwise orders" at the conclusion of s 161(1) which should have been exercised in his favour.

[29] Mr Carter also submits that s 155 of the *PSA* should be applied to him and all his offences which were committed on the same occasion should be treated as served concurrently.

[30] Another argument put forward by Mr Carter is that the totality principle should have been considered in calculating the presentence custody and the effect on the change of date upon which he would be eligible for parole, as a result of being sentenced again for the offence of murder after the retrial.

[31] He also argues that he has been penalised, as a result of exercising his legal right to appeal after the first trial and being granted a new trial which will result in his serving 16 years 4 months before he becomes eligible for parole, instead of the period of 15 years that he should serve in respect of the sentence of life imprisonment before he is eligible for parole.

Should Mr Carter have received the benefit of a declaration for a further 487 days as presentence custody?

[32] Section 161 of the *PSA* (as it stood before the 2004 Act) was the source of power for making the presentence custody declaration at the retrial. The effect of Mr Carter's successful appeal against the conviction of murder at the first trial was that the sentence for life imprisonment that he had served concurrently with the sentences for supply and aiding suicide no longer counted as time served for the offence of murder. The entire period of 487 days for which Mr Carter now seeks credit was attributable to the other sentences imposed at the first trial. When Mr Carter came to be sentenced again for the offence of murder at the retrial, the period prior to 14 September 2002 during which he had been imprisoned was not presentence custody for the offence of murder within the meaning of s 161(4). As Mr Whitbread of counsel points out in his written submissions,

Mr Carter's arguments do not take into account that there did exist a different reason for the prior period of imprisonment which were the other sentences imposed at the first trial.

[33] Although in a colloquial sense that imprisonment prior to 14 September 2002 was "presentence" in respect of the sentence imposed for the offence of murder at the retrial, it was not "presentence" in the sense in which that term is understood for the purpose of the then s 161 of the *PSA*.

[34] Mr Carter misunderstands the purpose of the words "otherwise orders" at the conclusion of s 161. That provision mandates that a declaration for presentence custody must be made by the court, if there is declarable presentence custody, unless the sentencing court otherwise orders. There is no discretion conferred to make a declaration in respect of presentence custody, where it is not declarable in accordance with the terms of the provision.

[35] In the normal course, where an offender who is being sentenced has been held on remand, but cannot get the benefit of presentence custody which is not otherwise attributable to any sentence, but for some other reason is not declarable under s 159A, it is usual for the sentencing judge to take that non-declarable presentence custody into account by reducing the sentence and/or the period before which the offender is eligible for parole. In the case of a sentence for murder where both the head sentence and the period which must be served before eligibility for parole arises are mandatory, there is no room for this alternative course for dealing with non-declarable presentence custody.

[36] The arguments advanced by Mr Carter in respect of the totality principle and concurrent sentences have no application to his situation which arises as a result of the imposition of a mandatory sentence of life imprisonment for the offence of murder at the retrial where the then s 161 did not permit a declaration to be made in respect of the period of 487 days that Mr Carter served on account of the sentences for the other offences committed at the same time as the murder.

[37] There was no error made in the sentence imposed on Mr Carter for the offence of murder at the retrial.

Order

[38] There is no point in dealing with the respondent's arguments on whether the application for the reopening was the appropriate procedure for Mr Carter to raise his arguments, as I am of the view that, even if the sentence were reopened, Mr Carter cannot show that there are grounds for imposing any different presentence custody declaration than was imposed at the retrial.

[39] It follows that the order which should be made is:

The application to reopen the sentence imposed on 17 July 2003 is refused.