Commentary on P*enalties and Sentences Act* s. 161 – time held in pre-sentence custody to be deducted

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by

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Prior to 21 November 2005, the *Penalties and Sentences Act* s.161(1) provided that:

> "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."

Penalties and Sentences Act s.161(4) then provided that:

> "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 pre-sentence custody must be taken, for the purposes of sub-section (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."

In *R v Guthrie* (2002) 135 A Crim R 292; [2002] QCA 509 the significant inadequacies in s.161 (as then enacted) were starkly illustrated.

Mr Guthrie pleaded guilty to 18 out of 20 counts of an indictment which alleged various drugs and drug-related counts, and to a two-count indictment alleging possession of dangerous drugs. The plea was dealt with on 9 July 2002, and the most serious offence dealt with was count 8 on the 20-count indictment, which alleged drug trafficking over a period of some 4½ months.

As at the date of sentence, Mr Guthrie had spent a period of 1,121 days in pre-sentence custody. However, during 21 days of that pre-sentence custody, Mr

Guthrie was in custody not only in respect of the charges which were the subject of the two indictments before the sentencing Court, but was also in custody for a period of some 21 days pursuant to warrants of apprehension issued from Victoria. In addition, when Mr Guthrie eventually pleaded guilty in the Supreme Court, he did not enter a plea in respect of two counts from the 20-count indictment, and the Crown accepted his pleas to all other charges in full discharge of the two indictments.

His Honour Williams, JA concurred in dismissing Mr Guthrie's appeal (which turned substantially on other matters) and said the following:

> "[3] The facts of the case do, however, raise concerns about the effectiveness in practice of s 161(4) of the *Penalties and Sentences Act* 1992.
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> [4] It was obviously the intention of the legislature in enacting s 161 that a declaration that time spent in custody should be counted as part of the sentence was a preferable approach to that previously adopted by sentencing judges of making a reduction from the notional head sentence to take account of time already spent in custody. To make that desired approach work in practice it was necessary to deal with the situation where, as is more often than not the case, the offender was arrested on more than one charge.
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> [5] If, as Pincus JA considered in *R v Fox* [1998] QCA 121, the word "series" implies some sort of connection between the offences, then the operation of s 161(4) is extremely limited. Frequently an offender will be arrested on a number of charges where it is difficult to say that there is some connection between them. That is particularly so when the legislation gives no guidance as to what might be regarded as a sufficient connection; is it sufficient that the offences are broadly of the same type. It is difficult to see why the section should not apply to the situation where the offender was arrested for a number of offences even though it is not possible to categorise them as a "series". (See also *R v Massey* [2002] QCA 312).
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> [6] Further, the use of the term "continuously" in s 161(4)(b) seriously restricts the scope of operation of the provision, as the facts of this case demonstrate. Here the applicant was in pre-sentence custody for a period of 1,121 days which, apart from the period 11 June 1999 (date of arrest) until 2

July 1999, related solely to what could reasonably be classed as a "series" of offences. Two warrants of apprehension with respect to the applicant were issued out of Victoria on 16 November 1998 requiring him to be held in custody. The material indicates that for the period 11 June to 2 July 1999 the applicant's custody was also with respect to those Victorian warrants. It is for that reason that the requirement of s 161(4)(b) cannot be satisfied; the applicant was not in custody continuously since arrest on charges of the offences and for no other reason.

[7] Given the philosophy behind s 161 it is difficult to see why a declaration should not be made with respect to the 1,100 days the applicant was in custody after 2 July 1999 solely with respect to the series of offences in question.

[8] As was pointed out by this Court in *Fox*, and as is exemplified by the facts of this case, s 161(4) can have little effective operation in practice. The words "series" and "continuously" impose unrealistic restrictions on the operation of the section.

[9] Given the reasons behind the introduction of s 161 it would be far better if a sentencing judge could make a declaration that, for example, in this case the applicant had spent 1,100 days in pre-sentence custody, rather than forcing the sentencing judge to adopt the method of calculating a deduction from a notional head sentence to reflect time already spent in custody.

[10] Legislative amendment should be seriously considered."

Justice Mullins (with whom Williams JA agreed) stated, at para [42]:

"At least from the time that the applicant was charged with the fourth group of offences and his custody ceased to be referable to the warrants, the applicant was in the position of being held in custody for no reason other than the first, second, third and fourth groups of offences, of which he was not convicted of two only of the offences, because the respondent did not proceed in respect of those two offences. Although the intent of s 161(4) of the Act would be to give effect to that time of continuous presentence custody in respect of the first, second, third and fourth groups of offences as

> time already served under the sentences imposed in respect of those offences (other than for the two of which he was not convicted), the wording of s 161(4) of the Act precludes giving effect to that intent in respect of the applicant, because his custody commenced on 11 June 1999. I agree with the observations of Williams JA on the operation of s 161(4) of the Act and the need for legislative amendment to be considered."

The sentencing Judge at first instance, took the view that the appropriate sentence, in the circumstances, was a sentence of 13 years. To reflect the fact that there was a period of 3.1 years spent in pre-sentence custody which could not be declared, the learned sentencing Judge reduced the head sentence to 9 years in order to achieve a roughly equivalent result to that which would have occurred if the pre-sentence custody had been capable of being declared.

In eventual response to that criticism, *Penalties and Sentences Act* s.161 was recast. The provisions of s.161(1) remain the same, with the default provision being that the pre-sentence custody must be taken into account as time served unless the sentencing Court otherwise orders. The amendments then include by way of the new s.161(4) this ameliorating provision:

> "If –
>
> (a) an offender is charged with a number of offences committed on different occasions; and
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> (b) the offender has been in custody since arrest on charges of the offences and for no other reason;
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> the time held in pre-sentence custody must be taken, for the purposes of sub-section 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 one or more of the number of offences with which the offender is charged."

Section161(10) relevantly defines "proceedings for the offence" to include "proceedings that relate to the same, or same set of, circumstances as those giving rise to the charging of the offence."

As his Honour Judge Robertson concluded in the Queensland Sentencing Manual[1]:

> "If the offender is charged with a number of offences committed on different occasions, and the offender has been in custody since arrest on charges of the offences and for no other reasons, the time in pre-sentence custody must be taken (for the purposes of s.161(1)) to start when the offender was first arrested on any of those charges, even if the offender is not convicted of that offence."

The provisions of s.161(4A) obligate the "prosecuting authority" (defined as being the Director of Public Prosecutions in the Supreme or District Courts, and the Prosecutor in the Magistrates Court) to "give to the Court a pre-sentence custody certificate." Such a certificate is defined in s.161(10) to mean "a certificate in the approved form signed by the Chief Executive (Corrective Services) or an authorised Corrective Services Officer, that –

(a) states the offence or offences for which the offender was held in custody; and
(b) states the dates between which the offender was held in custody for each of those offences; and
(c) calculates the time that the offender was held in custody."

I have already heard anecdotally, and experienced personally, the difficulties encountered by the Department of Corrective Services in ensuring the accuracy of such pre-sentence custody certificates. In particular, I have noticed that time spent in pre-sentence custody in the watchhouse is not always recognised by such certificates, even though the offender may well have been in custody since the date of arrest.

Where a Court is satisfied that a declaration under s.161(3) is not correct, then a procedure is outlined in ss.161(5)-(9) to enable either the offender, the prosecuting authority, or both to apply to the Court to amend the sentence, declare the correct time and advise the Chief Executive of the Department of Corrective Services of the sentence amendment, without the necessity to seek a re-opening under *Penalties and Sentences Act* s.188[2].

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[1] Para 15.640
[2] Robertson J, Queensland Sentencing Manual, para 15.645

It is to be hoped that the post-21 November 2005 amendments to s.161 will facilitate defendants getting as close to full credit as possible for time spent in pre-sentence custody.

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