SUPREME COURT OF QUEENSLAND

CITATION:	*R v Griffiths* [2003] QCA 79
PARTIES:	**R** **v** **GRIFFITHS, Terrence Clifford** (applicant)
FILE NO/S:	CA No 348 of 2002 SC No 66 of 2002 SC No 396 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	7 March 2003
DELIVERED AT:	Brisbane
HEARING DATE:	17 February 2003
JUDGES:	McMurdo P, Jerrard JA and Mackenzie J Separate reasons for judgment for each member of the Court; each concurring as to the orders made
ORDERS:	**Application for leave to appeal allowed. Appeal allowed.** **Sentences imposed on 11 October 2002 set aside and the following sentences substituted in lieu thereof, all of which are to be served concurrently:** **On indictment 66 of 2002** **(a) Counts 1 and 2: 3 years imprisonment suspended on and from 11 April 2003 with an operational period of 4 years;** **(b) Counts 3 to 6: 12 months imprisonment;** **It is directed in respect of each count that 236 days, from 3 December 1999 to 3 July 2000 and from 8 July 2000 to 30 July 2000 be taken into account as time already served.** **On indictment 396 of 2002** **(a) Counts 1 and 3: 18 months imprisonment;** **(b) Counts 2 and 4: 2 ½ years imprisonment;** **in each case suspended on and from 11 April 2003 with an operational period of 3 years;**

It is directed that in respect of each count 236 days from 3 December 1999 to 3 July 2000 and from 8 July 2000 to 30 July 2000 be taken into account as time already served.

On indictment 295 of 1999

(a) It is ordered that the offender serve 6 months of the suspended imprisonment ordered on 15 July 1999.

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AGAINST SENTENCE – APPEAL BY CONVICTED PERSONS – APPLICATIONS TO REDUCE SENTENCE – WHEN GRANTED – PARTICULAR OFFENCES – OTHER OFFENCES – where applicant sentenced to multiple drug offences including possession and production of methylamphetamine for personal use and possession of things used in connection with production – where offences involved breach of a suspended sentence – where whole of suspended sentence was activated and sentence of 4 ½ years imprisonment also imposed – where applicant was held in custody for those offences – where applicant released from custody under the belief that the charges would not be proceeded with – where charges were reactivated 18 months later – where applicant had rehabilitated himself during that period – whether sentence was manifestly excessive in the circumstances

Penalties and Sentences Act 1992 (Qld), s 146, s 147, s 154(a)

R v Denton [1999] QCA 343; CA No 168 of 1999, 20 August 1999, followed
R v L; ex parte Attorney General (1996) 2 Qd R 63, applied

COUNSEL: M J Byrne QC for the applicant
D L Meredith for the respondent

SOLICITORS: Bernard Bradley & Associates for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **McMURDO P:** I agree with the reasons for judgment of Mackenzie J and with the orders proposed by him, and with the additional observations of Jerrard JA.

[2] **JERRARD JA:** I have read and respectfully agree with the reasons for judgment and orders proposed by Mackenzie J. By reason of s 154(a) of the *Penalties and Sentences Act,* the terms of imprisonment imposed by the substituted sentences ordered by this court will have started on 11 October

2002. The 236 days time already served applies to indictments numbered 66 and 396 of 2002, but not to indictment number 295 of 1999.

[3] **MACKENZIE J:** This is an application for leave to appeal against sentence. The applicant pleaded guilty to offences in two indictments. One was an *ex officio* indictment alleging one count of possession of methylamphetamine on 10 May 1999 and three counts of production and possession of methylamphetamine and possession of glassware, chemicals and other things used in connection with the production of the drug on 1 November 1999. The facts relating to the offence on 10 May 1999 are that police found 1.641 grams of methylamphetamine, some of which was in a syringe, in the applicant's possession when his vehicle was intercepted in the early hours of the morning. The offences on 1 November 1999 were revealed when police were called after an argument between the applicant and a woman friend. She showed them glassware and chemicals, which she said were not hers, in a shed. The equipment had traces of methylamphetamine and its precursor chemicals on it. They also found 3.03 grams of the drug.

[4] The second indictment contains six counts relating to offences committed on 1 December 1999, the offences being possession of amphetamine, cocaine and cannabis sativa, producing amphetamines and possession of equipment and instructions used in connection with producing methylamphetamine. The quantities of cocaine and cannabis were small. The total amount of methylamphetamine in all offences was 4.671 grams. Glassware and other items of equipment were found in the boot of the applicant's car, with traces of methylamphetamine and precursors on them. Three books relating to aspects of manufacture of the drug and clipseal bags of the other drugs were also found.

[5] The convictions for these offences constituted a breach of a suspended sentence of three years with an operational period of three years imposed by the same judge on 15 July 1999 for two counts of possession of dangerous drugs and possession of things used in connection with the commission of the crime of producing dangerous drugs. The first offence in breach of the suspended sentence therefore occurred less than four months into the period of suspension.

[6] The statement of facts relating to the offences which led to the suspended sentence is rather limited, but it can be gleaned from the record that the applicant was sentenced for manufacturing amphetamines for personal use and that at the time he was drug addicted and living a nomadic and unproductive life. The learned sentencing judge advised him on that occasion to abandon that lifestyle and to revert to his previous lifestyle in which he had a good job and family relationships. He also warned him forcefully that if he committed further similar offences it would be inevitable that he would be imprisoned, probably for a long time.

[7] The learned sentencing judge activated the whole of the 3 year suspended sentence and sentenced the applicant to 4 ½ years imprisonment for what he considered to be the most serious of the offences in the two new indictments, which, he said, took into account the other counts in them. No recommendation for early eligibility for post-prison community based release

or for early suspension was made in relation to the offences in the two indictments. Although there was some ambiguity in the endorsement on the indictment it was conceded that the sentences were intended to be served concurrently. The applicant had served 236 days in custody which was declared to be time served with respect to all but the activated suspended sentence.

[8] But for events that are inadequately explained on the record and remain uncertain, the present complexities would not present themselves. What happened was that the applicant had been released on 30 July 2000, after serving 240 days in custody, 236 of which were for the present offences and no other reason, following written advice to his solicitor and, by inference, by communication to the police that may have been interpreted as meaning that the charges were not to be proceeded with. He was released on Supreme Court bail on 30 July 2000. There were other charges in the Magistrates Court, but according to his criminal history, they were never finalised.

[9] What the letter advised was that a decision had been made that the DPP would not be proceeding on charges which correlate, with one possible exception, to those in the indictments. The letter then said:

> "The police have been advised that there was no evidence to support the production charges and to proceed summarily on the remaining charges."

The letter also referred to a decision that certain offences of dishonesty were not being prosecuted by the DPP but that a charge of imposition was to be proceeded with summarily by the police.

[10] It may be inferred from what happened that, despite some ambiguity in it, that advice was taken to be an indication that none of the drug charges were to be proceeded with. In any event, by a process which was not adequately explained, a decision was taken by the DPP to reactivate the charges and an indictment relating to 1 December 1999 offences was presented on 15 February 2002 and an *ex officio* indictment relating to the other offences was presented on 23 August 2002. It should be noted that there is some ambiguity in the record (R16 L 40 to 60) but we were informed by counsel that advice that the matters were being reactivated was conveyed to the applicant only shortly before presentation of the first of those indictments. Therefore it is probable that at least 18 months had passed before there were grounds for believing that the charges now proceeded on were to be reinstated.

[11] The applicant was sentenced on 11 October 2002 on the basis that there was no commercial element in the production. The learned sentencing judge's remarks indicate that he took a serious view of the early relapse into the same kind of offending behaviour that had led to the suspended sentence and that he took the view that, for the subsequent offences, a further period of imprisonment in addition to the reactivated suspended period of imprisonment should be imposed. The Crown Prosecutor proposed, and defence counsel did not dispute, that a 4 ½ year term of

imprisonment was within a proper sentencing range for the subsequent offences.

[12] However, both before the learned sentencing judge and in this Court reliance was placed on evidence of rehabilitation of the applicant over the period when he believed the charges were not being proceeded with. It was stated by defence counsel below and not challenged by the Crown Prosecutor that the applicant had been in no further trouble in that period of over 2 years, that he had been working in a full-time job as a concreter with his brother for 2 years and that he had re-established relationships with his three children aged 19 to 13. Two certificates, one dated 16 April 2002 and the other 8 October 2002 showing the absence of drugs in his urine were produced.

[13] It was submitted below that the applicant had undergone 8 months imprisonment and had resolved successfully to get his life in order after he was released. It was submitted that a recommendation for early eligibility for post prison community based relief or suspension after 18 months was appropriate to reflect his rehabilitation. It was implicit in this submission that he had decided to abandon his previous life style in circumstances unlike the usual case where rehabilitation begins in a period when the offender expects to be dealt with for the offences and realises the benefit of having undergone such a process in regard to sentence.

[14] Counsel for the applicant, who was not counsel below, submitted that the orders made with regard to sentence were manifestly excessive and failed to take into account properly the personal circumstances of the applicant. The three major features were said to be the time that had elapsed since the offences had occurred and the delay in their disposition, the applicant's cooperation and timely pleas of guilty, and the circumstances of the offences and the purpose of punishment. Reliance was placed on *R v L: ex parte Attorney-General* (1996) 2 Qd R 63 at 66 where it was said:

> It is difficult to see why lapse of time between commission of an offence and sentence should be a mitigating factor in sentence unless that delay has resulted in some unfairness to the offender. There are two obvious cases in which that will be so and in which, consequently, it has been said that that unfairness should mitigate the sentence which should otherwise be imposed.
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> The first is where there is delay between the date of apprehension of the offender, or first indication to him by some person in authority that he is likely to be prosecuted, and the date of sentence, in consequence of which the offender may have had his liberty curtailed or his reputation called in question or, at least, left in a state of uncertainty caused by a failure to prosecute his case more quickly.
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> The second is where the time between commission of the offence and sentence is sufficient to enable the court to see

> that the offender has become rehabilitated or that the rehabilitation process has made good progress.

[15] The second category was principally relied on. It was submitted that the applicant's criminal history showed that his problems with the law centred upon a period from 1996 to 1999 when he was in the grip of drugs. It was submitted that the present offences were, effectively, in the same period as the offences for which the suspended imprisonment was imposed. All of the drug offences related to personal use, not commercial enterprises. The evidence established that the applicant had now recovered from his drug abuse and had demonstrated rehabilitation and reintegration into the community during the period of delay in the matters coming before the court.

[16] It was submitted that there was a difficult and complex scenario before the sentencing judge. The court had to consider the type and extent of the punishment that would be just to the applicant and which would further his rehabilitation. It was submitted that it was unjust in the circumstances to order the applicant to serve the whole of the suspended imprisonment. Further, it was submitted that the level of sentence imposed was akin to sentences for commercial trafficking, not for personal use by an addicted person. It was submitted that the appropriate order would have been that the applicant serve part of the suspended term of imprisonment, up to 12 months, coupled with a further order in relation to the present offences which would encourage ongoing rehabilitation. It was submitted that a wholly suspended sentence or an intensive correction order would be appropriate for consideration. It was submitted that because the 8 months imprisonment on remand could not be declared as part of the earlier suspended sentence, an order that the applicant serve 4 months of the suspended sentence would be the equivalent of his serving 12 months of the suspended sentence.

[17] The respondent submitted that the sentence of 4 ½ years was within range for the offences for which the applicant was sentenced, having regard to the sequence of events. It was submitted that after committing offences in February 1999, the applicant was on bail and committed further offences on 10 May 1999. Then he was dealt with for the offences committed in February 1999 on 15 July 1999. Less than 4 months afterwards he committed a further group of offences and, a month later, further offences of a similar kind to the others. It was submitted if all matters had been dealt with at the one time and if the later offences had been treated as breaches of bail rather than as breaches of a suspended sentence a sentence of 5 to 6 years imprisonment would have been appropriate.

[18] It was conceded that allowance had to be made for the applicant's plea of guilty and for the fact that the applicant had taken the opportunity to rehabilitate himself. It was submitted that this had happened, however, at a time when he knew that he would be eventually facing the court. It was submitted that the second series of convictions should call for a greater sentence than was imposed on the first occasion. Imposing an additional 18 months imprisonment in addition to the suspended sentence was adequate allowance for the applicant's circumstances.

[19] The seriousness of the conduct at the time by reason of its repetitiveness and disregard, within a very short time, of the consequences of a suspended sentence being breached should not be underestimated. But for the highly unusual circumstances of the case, little complaint could be made if a suspended sentence were to be fully activated in circumstances like the present and a further term of imprisonment, moderated in observance of the principle of totality from what may have been imposed if the offence stood alone, was imposed. The only issue is whether in the unusual circumstances of the case the sentence is manifestly excessive.

[20] When a person is convicted of a further offence for which imprisonment may be imposed within the operational period of a suspended sentence the offender must be dealt with for the suspended imprisonment (s 146(1) & (2) *Penalties & Sentences Act* 1992 (Qld)). Section 147(1) sets out the sentencing options available to the court. Section 147(2) requires the offender to be ordered to serve the whole of the suspended sentence unless it is considered unjust to do so. In deciding whether it is unjust, the court is required by s 147(3) to have regard to a number of matters the weight of which will vary from case to case.

[21] Section 147(3)(a) depends on whether the subsequent offence is trivial having regard to a number of criteria. Even on the most relaxed or artificial definition of triviality, it cannot be said that the offences were trivial. The offences included activities of the same character as those for which the applicant was originally sentenced. They are inherently non-trivial offences especially to the extent that drug laboratories were involved. There was a repetition of the offences in disregard of a court order made only a short time before the subsequent offences were committed. The applicant had demonstrated no attempt or intent to rehabilitate himself in the period between imposition of the suspended sentence and the recommencement of offending. His motivation was to continue to feed his drug addiction.

[22] It follows that there is no basis for the application of s 147(3)(a). In terms of s 147(3)(b) the original offence was serious enough to warrant a suspended sentence of imprisonment being imposed. It is therefore of no assistance to the applicant. Section 147(3)(c) requires regard to be had to any special circumstance arising since the original sentence was imposed that makes it unjust to impose the whole of the term of suspended imprisonment.

[23] The applicant's case that it was unjust to activate the whole three years of the suspended sentence must rest upon s 147(3)(c). Ordinarily, a submission that disregard of an order of the court imposing a suspended sentence was due to inability to confront drug addiction would not be a particularly persuasive argument in favour of leniency. The issue in the present case is whether the demonstrated process of rehabilitation over an extended period that commenced after the experience of spending time in prison, during a period when, on the facts before the court, he believed that he was no longer under the threat of being dealt with for the indictable offences makes the circumstances sufficiently special to require a finding that it would be unjust to order the applicant to serve the whole of the suspended sentence. The matter was not analysed in that way before the

learned sentencing judge, but in my view it was a matter that merited consideration. The record does not suggest that it was considered.

[24] For that reason the sentencing process miscarried and this Court must approach the matter afresh. The structure of the substituted sentence should be that some portion, but not all of the suspended sentence should be activated and a sentence reflecting the criminality of the other offences imposed as a head sentence. At first glance, the sentence may seem relatively light unless the reason for and overall effect of imposition of the particular sentences is understood.

[25] In my view it would in the circumstances of the case be unjust if the applicant served the whole of the suspended period of imprisonment. There are special circumstances arising since the original sentence was imposed. They are that the applicant, on the information before the court, had achieved substantial rehabilitation in the period of about 2 years 3 months between the time of his discharge from custody, in the belief that the charges would not be proceeded with as indictable offences, and the sentencing in the Trial Division. On the information before the court the process of rehabilitation continued after the time when the applicant became aware, probably about 9 months before the sentence, that the charges would be proceeded with.

[26] In the circumstances an order that the applicant serve 6 months of the suspended sentence concurrently with the sentences for the offences referred to in paragraph 1 would be appropriate. In reality he will have served about 14 months, since he served 8 months in custody before being released on bail. Consistently with the structure of these sentences, he should be given credit for that period. The effect of the order will be that the applicant will be released at the time when the suspension of the other sentences takes effect since he will have already been in custody for 6 months since the sentence for the suspended sentence was originally imposed.

[27] With regard to the drug offences, the learned sentencing judge imposed a sentence of 4 ½ years imprisonment. The offences were related to personal use of amphetamines. In imposing a sentence at that level, the learned sentencing judge, with the acquiescence of both counsel as to the appropriate level, acted on the basis that the applicant should receive a heavier penalty than that imposed for the offences for which he was originally sentenced because they represented further similar offences within a short time of the original offences.

[28] In principle that is a supportable approach. However, it remains to be considered whether a sentence of 4 ½ years imprisonment for possession of equipment for use as a drug laboratory and associated production is in itself manifestly excessive even when the offences are repetitive, where the use to which the equipment was to be put was personal use to feed a then existing drug addiction and where it appears that the applicant has since recovered from that addiction. The second proposition in *R v L* (supra) has to be considered in this context as well.

[29] Comparison with cases involving use of drug laboratories for a commercial purpose suggests that a sentence of 4 ½ years with no recommendation for early release is somewhat high for an offence of a like nature but for personal use, even if it involves repetition (See e.g. *R v Welch* [2002] QCA 36, *R v Hall* [2002] QCA 438 and the first instance decisions of *R v Browning,* 11 February 2000, Mackenzie J and *R v Schatz,* 31 August 1998, Wilson J). The case which appears to be of most assistance is *R v Denton* [1999] QCA 343 where there was a breach of suspended sentence for unlawfully using a motor vehicle, a group of three drug offences including possession of methylamphetamine and further similar offences committed while the offender was on bail for the first group of drug offences.

[30] On the first occasion 0.3g of methylamphetamine was found along with 24 grams of ephedrine and laboratory equipment. The accused said that he had allowed someone else to manufacture the drugs on his premises. He was released on bail but 4 months later was caught in the act of cooking a batch of amphetamines. There was enough material to produce 27 grams of amphetamine worth thousands of dollars if the process produced to its potential. The sentencing judge had imposed 11 months, being the whole of the suspended sentence for unlawfully using a motor vehicle and 2 ½ years cumulative upon the 11 months sentence for the first offences and another 2 ½ years cumulative for the last offences. The recommendation made had the effect of providing for early release after 4 years. It was conceded by the Crown that in that instance the total sentence seemed a little high and that fixing 4 years as the date by which consideration of parole might occur could not be defended.

[31] In the course of delivering reasons for judgment, with which McMurdo P and Pincus JA agreed, Thomas JA said the following:

> The difficulty faced by the applicant is that because of his persistent re-offending, including further production of methylamphetamine when he was already bailed on earlier similar charges, some cumulative component in the sentence was not only justifiable but was overall a necessary consideration. The appropriate total sentences would rightly be greater than the level that might be found in a sentence of a comparable offence for a single series of similar offences.
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> I recognise that there are many ways in which the present sentences could validly be structured. However in my view the best way to formulate the sentences in this case is to look at the individual and collective seriousness of the offences, fix the terms and then decide what part of the total the applicant must serve. In my view the overall sentences were manifestly excessive. I consider that a sentence of four years with respect to those offences in the second indictment sufficiently embodies recognition of the total criminality for which he had to be sentenced. That sentence may be seen as the operative term and should be fixed in respect of those three offences.
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> I would agree that the 11 months of the suspended sentence should be ordered to be served, but consider that it should be

> concurrent, having regard to the overall effective sentence that I have nominated. Similarly the sentences for the first indictment concerning drug offences should be concurrent sentences of two and a half years.

[32] Comparison with *Denton* indicates that a sentence of 4 ½ years with no recommendation for early release is manifestly excessive in the present case. Because of the limited quantities of the reagents found and the absence of any suggestion of commercial potential in the present case *Denton* seems a somewhat worse case than the present. In addition, the present case has particularly unusual facts including the factors referred to above. The relatively short period before suspension will take effect reflects the very unusual circumstances of the case. The length of the operational period of suspension provides a safeguard if the premise upon which the sentence has been crafted, that the applicant has recovered from drug addiction and intends to lead a crime free lifestyle, is falsified by subsequent events. Because of the somewhat disparate nature of some of the offences, I consider it is appropriate to impose specific sentences with regard to them rather than simply impose, as the sentencing judge did, a global sentence for all of the offences.

[33] I would therefore allow the application for leave to appeal. I would allow the appeal, set aside the sentences imposed on 11 October 2002 and substitute in lieu thereof the following sentences, all of which are to be served concurrently:

1. On indictment 66 of 2002:
    a) Counts 1 and 2: 3 years imprisonment suspended on and from 11 April 2003 with an operational period of 4 years;
    b) Counts 3 to 6: 12 months imprisonment;

    It is directed in respect of each count that 236 days, from 3 December 1999 to 3 July 2000 and from 8 July 2000 to 30 July 2000 be taken into account as time already served.

2. On indictment 396 of 2002:
    a) Counts 1 and 3: 18 months imprisonment;
    b) Counts 2 and 4: 2 ½ years imprisonment;

    in each case suspended on and from 11 April 2003 with an operational period of 3 years;

    It is directed that in respect of each count 236 days from 3 December 1999 to 3 July 2000 and from 8 July 2000 to 30 July 2000 be taken into account as time already served.

3. On indictment 295 of 1999
    a) It is ordered that the offender serve 6 months of the suspended imprisonment ordered on 15 July 1999.