SUPREME COURT OF QUEENSLAND

CITATION:	*R v Hesketh; ex parte A-G (Qld)* [2004] QCA 116
PARTIES:	**R** **v** **HESKETH, Louise Jane** (respondent) **EX PARTE ATTORNEY-GENERAL OF QUEENSLAND** (appellant)
FILE NO/S:	CA No 411 of 2003 SC No 89 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Appeal by A-G (Qld)
ORIGINATING COURT:	Supreme Court at Cairns
DELIVERED ON:	23 April 2004
DELIVERED AT:	Brisbane
HEARING DATE:	14 April 2004
JUDGES:	McPherson and Williams JJA and Holmes J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal allowed** **2. The indictment is to be amended by deleting the word "amphetamine" and inserting in lieu thereof "methylamphetamine"** **3. Set aside the sentence below and in lieu thereof order that the respondent be imprisoned for two and a half years to be suspended as from 27 August 2004 with an operational period of five years to run from 27 November 2003** **4. Order that a warrant issue for the arrest of the respondent but order that it lie in the Registry for a period of 72 hours**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – APPEAL BY ATTORNEY-GENERAL OR OTHER CROWN LAW OFFICER – APPLICATIONS TO INCREASE SENTENCE – OTHER OFFENCES – where respondent convicted of possessing more than two grams of methylamphetamine – where sentenced to 12 months imprisonment to be served by

way of intensive correction order – where extensive drug-related criminal history – whether sentence imposed manifestly inadequate

Penalties and Sentences Act 1992 (Qld), s 113

R v Campbell [2002] QCA 109; CA No 315 of 2001, 21 March 2002, considered
R v Christie [2000] QCA 165; CA No 430 of 1999, 8 May 2000, cited
R v Kennedy [2000] QCA 140; CA No 23 of 2000, 14 April 2000, cited
R v Skinner; ex parte A-G (Qld) [2001] 1 Qd R 322; [1999] QCA 521; CA No 307 of 1999, 17 December 1999, considered

COUNSEL: M J Copley for the appellant
A W Moynihan for the respondent

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

[1] **McPHERSON JA:** I agree with the reasons of Williams JA and the orders he proposes for disposing of this appeal.

[2] **WILLIAMS JA:** The respondent pleaded guilty in the Supreme Court at Cairns on 27 November 2003 to a charge of possessing methylamphetamine with a circumstance of aggravation, namely that the quantity of methylamphetamine exceeded two grams. The prosecution did not proceed on the additional charge on the indictment, namely that the respondent had in her possession scales, clip seal bags and a sum of money used in connection with the commission of the crime of possession of a dangerous drug, but there was no challenge before the sentencing judge to the fact that such items were found in the respondent's possession at the material time. Though the prosecution asked for a custodial sentence because of the quantity of methylamphetamine involved, the learned sentencing judge recorded a conviction and ordered that the respondent be imprisoned for 12 months to be served by way of an intensive correction order with a condition that she undergo such psychiatric, psychological, medical testing and other treatment and drug testing as may be directed. From that the Attorney-General has appealed contending that the sentence imposed was manifestly inadequate.

[3] The indictment to which the respondent pleaded alleged the dangerous drug was "amphetamine" but in alleging the circumstances of aggravation referred to "methylamphetamine." All the material and submissions before the sentencing judge, including the certificate of analysis, referred to methylamphetamine. To regularise the proceedings counsel for the Attorney-General asked that the indictment be amended to allege "methylamphetamine." Counsel for the respondent consented to that, and such amendment should be ordered.

[4] The respondent's house was searched by police on 4 November 2002. They located a number of plastic bags containing powdery substances. At the request of the police, the respondent opened a locked box which contained more plastic bags with

powdery substances in them. On analysis, nine of the bags contained methylamphetamine. One bag contained 82.248 grams of powder of which the pure weight of methylamphetamine was 50.418 grams; the purity was 61.3 per cent. In total, the respondent was found to be in possession of 57.347 grams of pure methylamphetamine; the purity in the bags ranging from 36.5 per cent to 61.3 per cent. The police also located the total sum of $3,550 in cash hidden in various places around the house.

[5] The plea of guilty was an early one, initially indicated at the committal hearing.

[6] The respondent had a relevant criminal history. Between 1980 and 1983 she was convicted on four occasions for property offences (stealing, receiving, wilful damage) and was mainly given community based orders. In November 1996, she was dealt with for possessing property suspected of being stolen and unlawfully possessing a motor vehicle. A fine was imposed for the first offence with an additional pecuniary penalty, and no conviction was recorded with respect of the second. She was also fined for an offence against the *Weapons Act* in May 1996. Of more significance are a number of convictions for drug offences. In January 1992, she was convicted and fined for supplying a dangerous drug. Then in October 1996, she was again fined for possessing methylamphetamine and cannabis. Another fine was imposed on 10 February 1997 for possession of a dangerous drug. Her most recent conviction was in February 1999 for assault occasioning bodily harm, entering a dwelling and committing an indictable offence. With respect to those offences, she was convicted and fined and ordered to pay compensation and restitution.

[7] The respondent was born on 11 December 1962, making her aged 39 when the offence occurred and 40 when sentenced. She was the sole carer of a five year old child and also was caring for her 75 year old mother who was in poor health.

[8] Methylamphetamine is now a Schedule 1 drug, and the circumstance of aggravation was established because the quantity exceeded two grams, the amount specified in Schedule 3 of the *Drugs Misuse Regulation* 1987. Section 9 of the *Drugs Misuse Act* 1986 fixed the maximum term of imprisonment for such offence as 20 years where the person convicted was drug dependent, and 25 years in other cases.

[9] On behalf of the respondent it was put to the sentencing Judge that she was in possession of the drug primarily for her own use; it was said that she purchased in bulk in order to get a better price. Her counsel submitted to the sentencing judge that the large amount of cash found in her possession was the product of a garage sale she conducted from her premises the weekend prior to the search. In order to support that an advertisement in the local newspaper was tendered referring to the garage sale; the only items indicated in the advertisement as being on sale were: “Lots of goodies.”

[10] The learned sentencing judge referred to the above matters in the course of his remarks and then made other observations relevant to the issue of sentence. He referred to the fact that there was one large bag of methylamphetamine which on the respondent’s case had been purchased for $9,000 “as a single one off sale”. But he then went on to say that the “other quantities in the bags are quite different to that. They are of weights of powder which one would think would be fairly typical for a person who had an addiction as deep as yours.” That led him to conclude that the

large bag "has all the hallmarks of a commercial activity, but it might well be that you used it as a one off buy because, (a), it was available and (b), it would save you having to look for the drug for a period of time." He then went on to express his concern about the $3,550 found in the premises. After referring to the alleged garage sale he concluded that the "large denomination of notes did not seem to be the typical proceeds of a garage sale. That too, to my mind, is an indicator that you may have been engaged in some commercial activity." But having said that he came to the view "that your activities probably embrace one of those occasions where there is a mixing of your possessions and acquisition of drugs are primarily for the satisfaction of your addiction, but with that there is the opportunity of engaging in some trade to support the addiction, and also some sharing with friends upon whom you might be able to go to when you are short of supplies." He then referred to the fact that the respondent had explained her access to large sums of money by referring to an amount of damages she had recovered in court proceedings, but the learned sentencing Judge was "not prepared to accept that the money that was in your possession can be explained by that order of damages so long ago.".

[11] There was some evidence before the learned sentencing Judge that after her apprehension on 4 November 2002 the respondent had taken steps to rehabilitate herself. A report from a drug addiction help agency and a psychologist were placed before the court. In that context the learned sentencing Judge referred to the fact that the respondent was looking after her aged and physically frail mother as well as her five year old child.

[12] All of that resulted in the respondent being told that ordinarily she would be sent to jail "for a couple of years" but that the learned sentencing Judge had decided to impose the sentence which he ultimately did. He said that he did so "with a feeling that my sentence is very lenient. I do so, mainly having regard to the efforts that you have made about rehabilitation, your early plea of guilty, and I do it in the face of what is a bad criminal record".

[13] Counsel for the appellant, the Attorney-General, contends that the sentence is manifestly inadequate. Reference was made to sentences imposed in the matters of *Kennedy* [2000] QCA 140, *Christie* [2000] QCA 165 and *Campbell* [2002] QCA 109. All of those sentences were imposed at a time when methylamphetamine was a Schedule 2 drug; it became a Schedule 1 drug on 21 September 2001. The first two of those cases involved a much smaller quantity of methylamphetamine yet the offender was obliged to serve an actual term of imprisonment. *Campbell* involved a greater quantity (120 grams of methylamphetamine) and the sentence imposed in this court was four years imprisonment with parole after 18 months.

[14] Particularly given the fact that methylamphetamine is now a Schedule 1 drug, and the fact that such a large quantity of pure methylamphetamine was involved in the commission of this offence, an actual custodial sentence was called for. There was at least a commercial element to the possession. The scales, plastic bags and cash in her possession pointed to that. The garage sale was also highly suspicious.

[15] The main thrust of submission by counsel for the respondent is that the respondent has performed well pursuant to the intensive correction order and this court ought, bearing in mind well established principles, be reluctant to impose at the appellate stage a custodial sentence. The reluctance of an appellate court to impose a sentence of actual custody where a non-custodial sentence was imposed at first instance is

understandable. But that must give way when the sentence under review is so inadequate as to evidence error on the part of the sentencing Judge.

[16] In my view the sentence in fact imposed was in all the circumstances manifestly inadequate. Given the respondent's criminal history and the extremely large quantity of Schedule 1 drug found in her possession a sentence requiring her to serve an actual period in custody was called for. The matters referred to by the learned sentencing Judge (in particular the respondent's attempts at rehabilitation and her caring for a five year old child and ailing mother) warrant keeping the custodial sentence to a minimum.

[17] The broad range of imprisonment for an offence such as that involved here would be from about two and a half years to about four years imprisonment. Given all the circumstances of this case the appropriate sentence would be two and half years imprisonment suspended after nine months with an operational period of five years.

[18] The problem which must now be addressed is how should the court give credit for the fact that the respondent has been subject to the intensive correction order since 27 November 2003, a period of over four and a half months. Section 113 of the *Penalties and Sentences Act* 1992 provides that the effect of such an order is that "the offender is to serve the sentence of imprisonment by way of intensive correction in the community and not in a prison". The section goes on to expressly provide that provisions relating to "remission of sentence do not apply to the offender in relation to a sentence . . . served by way of intensive correction in the community". In *R v Skinner; ex parte Attorney-General* [2001] 1 Qd R 322 at 325 this court said: "The provisions of Part 6 of the *Penalties and Sentences Act*, therefore, appear to require that, for the purposes of the *Corrective Services Act*, a sentence ordered to be served by way of intensive correction is a sentence to a term of imprisonment." The court went on to say that there is "some awkwardness in the application of some of the provisions of the *Corrective Services Act* to intensive correction orders on the assumption that they are sentences to a term of imprisonment. That is a consequence of the statutory fiction created by Part 6 of the *Penalties and Sentences Act* that an order which permits a person to remain in the community is a sentence to a term of imprisonment."

[19] Because it must be regarded as a term of imprisonment, an intensive correction order, when regard is had to s 154 of the *Penalties and Sentences Act*, begins on the day on which the court imposed the imprisonment; in this case the respondent has therefore notionally been imprisoned since 27 November 2003.

[20] It follows that this court should calculate the nine months imprisonment which the respondent should actually serve as having commenced on 27 November 2003. That would make the term of nine months expire on 27 August 2004. To give effect to that it is desirable that this court suspend the sentence as from that date, rather than say the sentence is to be suspended after serving nine months.

[21] The orders of the Court should therefore be:

(i) Appeal allowed;

(ii) order that the indictment be amended by deleting the word "amphetamine" and inserting in lieu thereof "methylamphetamine";

(iii) set aside the sentence imposed below and in lieu thereof order that the respondent be imprisoned for two and a half years to be suspended as from 27 August 2004 with an operational period of five years to run from 27 November 2003;

(iv) order that a warrant issue for the arrest of the respondent but order that it lie in the Registry for a period of 72 hours.

[22] **HOLMES J:** I agree with the reasons of Williams JA and with the orders he proposes.