SUPREME COURT OF QUEENSLAND

CITATION:	*R v Postic* [2004] QCA 301
PARTIES:	**R** **v** **POSTIC, George** (applicant)
FILE NO/S:	CA No 151 of 2004 SC No 128 of 2003 SC No 337 of 2003 SC No 99 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Sentence application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED EX TEMPORE ON:	19 August 2004
DELIVERED AT:	Brisbane
HEARING DATE:	19 August 2004
JUDGES:	McMurdo P, Helman and Dutney JJ Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDERS:	**1. Grant leave to appeal** **2. Allow the appeal** **3. Vary the sentences imposed by substituting a sentence of 6 and a half years imprisonment for the offence of unlawful trafficking in a dangerous drug (Count 8 on Indictment 128/03) and a sentence of 3 and a half years imprisonment for the offence of producing a dangerous drug (Count 1 on Indictment 99/04) and including a recommendation that the appellant be considered for post prison community based release on 10 December 2005**
CATCHWORDS:	CRIMINAL LAW – JUDGEMENT AND PUNISHMENT – SENTENCE – FACTORS TO BE TAKEN INTO ACCOUNT – CIRCUMSTANCES OF OFFENCE – where the accused was sentenced for trafficking in methylamphetamines and production of amphetamines – whether the accused was sentenced to seven years imprisonment and four years imprisonment to be served cumulatively – whether the production offences were

	committed when the accused was on bail for the trafficking offences – whether the sentences outside the range of a sound sentencing discretion – whether accumulating the sentences was a proper exercise of discretion – where offences discrete in time - whether a recommendation for early release should have been made to reflect the pleas of guilty
	Penalties & Sentences Act 1992 (Qld) Part 9A *R v Campbell* [2002] QCA 109; CA No 315 of 2001, 21 March 2002, cited *R v Denton* [1999] QCA 343; CA No 168 of 1999, 20 August 1999, cited *R v Everett* [1999] QCA 14; CA No 311 of 1998, 5 February 1999, cited *R v Grima* [2000] QCA 105; CA No 429 of 1999, 30 March 2000, cited *R v O'Connor* [2002] QCA 467; CA No 224 of 2002, 1 November 2002, cited
COUNSEL:	M J Byrne for the applicant M R Byrne for the respondent
SOLICITORS:	Ryan & Bosscher for the applicant Director of Public Prosecutions (Queensland) for respondent

DUTNEY J: On the 10th May 2004 the applicant was sentenced to a term of seven years imprisonment for trafficking in methylamphetamines. On the same indictment the applicant was convicted of a number of counts of supplying amphetamines for which no additional penalty was imposed, and on separate indictment of possessing money obtained from the supply for which a sentence of two years, to be served concurrently, was imposed.

On the same day but on a third indictment, the applicant was sentenced to four years imprisonment for production of amphetamines and a concurrent term of 18 months imprisonment for possession of chemicals and glassware.

The applicant pleaded guilty to all charges in what the sentencing Judge described as a timely manner. The applicant was arrested on the charge of trafficking and related charges in March 2002 and released on bail. The offence of production and the related charges were committed in August 2002 while the applicant was on bail for the trafficking.

In those circumstances, the sentencing Judge made the sentences of seven years and four years cumulative. The result was an effective sentence of 11 years imprisonment. Despite its length, the cumulative sentence does not fall within part 9A of the Penalties and Sentences Act 1992 because the production charge does not have the circumstance of aggravation required to make it an offence against a provision in the schedule, hence section 161C of the Act does not apply. The facts are quite straightforward. The applicant supplied drugs to a police undercover operative over a period from the 30th January 2002 until the 29th March 2002. The operative paid a total of $11,550 for 130.6 grams of powder containing 32 grams of pure methylamphetamine and 2.5 grams of ecstasy.

The learned sentencing Judge sentenced the applicant on the basis that he was a wholesaler. In sentencing the applicant to seven years imprisonment for the trafficking offence, the learned sentencing Judge took into account that the applicant had previous convictions for drug related offences and had been re-sentenced to six months imprisonment in March 2000

upon breach of a community based order imposed for producing methylamphetamine.

The applicant's criminal history was moderate. He had been convicted on four previous occasions for drug related offences, on three previous occasions for offences of dishonesty, twice for unlawful use of a motor vehicle, and once for possession of tainted property. These offences were committed between March 1986 and June 2001.

In relation to the production charge his Honour inferred, without any contrary submission from defence counsel, that the production was commercial. His Honour also noted particularly the destructive social effects of the illegal use of methylamphetamine. In the applicant's favour, his Honour noted that the applicant was himself an addict and had pleaded guilty.

The applicant was 43 years old at the time of sentencing. When arrested in August 2002 he was married with three children aged between nine and 17 years. On release his stated intention was to relocate to Cairns with the objective of making a fresh start.

He was born in Yugoslavia and came to Australia as a refugee at the age of 16. He was educated to grade 10 and had worked mainly in the building and fishing industries.

Looked at individually, it seems to me that sentences of seven years for trafficking in a schedule 1 drug and four years for production of the same drug, while high in the circumstances of this case are not so high as to be outside the range of a sound sentencing discretion. The decisions in *R v Everett* [1999] QCA 14, *R v O'Connor* [2002] QCA 467 and *R v Grima* [2000] QCA 105 support seven years as being within the range for the offence of trafficking.

While the first two of those cases had circumstances which might be argued as being somewhat worse than the present case and the third involved a lower sentence, all involved offences committed while methylamphetamine was a schedule 2 drug. Likewise the decisions of this Court in *R v Campbell* [2002] QCA 109, and *R v Denton* [1999] QCA 343 support the imposition of a sentence of four years for the production charge.

The only real issues in my view are whether it was a proper exercise of discretion to accumulate the two effective sentences and whether a recommendation for early release should have been made to reflect the pleas of guilty.

In relation to the first of those issues, the offences are quite discreet in time. The second group of offences were committed while the applicant was on bail for the first group. It seems to me that in those circumstances the decision to make the sentences cumulative was a proper one.

It then remains to look at the totality of the sentence. Because part 9A of the Penalties and Sentences Act does not apply, the applicant will be eligible for release after serving 5.5 years actual imprisonment. When sentenced, the applicant had already served 639 days in custody for which credit was given. Despite the fact of suggesting that a cumulative sentence was appropriate, there is no guarantee that early release would be granted.

A sentence of 11 years in total for these offences seems to me to exceed the range of a proper sentencing discretion having regard to the totality principle. The later offences, although discreet in time, appear to be part of an ongoing pattern of offending behaviour. In my view, if the sentences were to be made cumulative, some reduction in what might have been otherwise appropriate sentences should have been given to reflect the overall criminality.

I would reduce the sentence for trafficking and production by six months each making an overall reduction in the total sentence of 12 months.

The only remaining issue is whether the applicant should have received a recommendation for early release to reflect his pleas of guilty. In my view, his Honour should have given some reduction in the minimum sentence to reflect the pleas of guilty. There were a large number of charges. His Honour described the pleas as timely.

While his Honour expressly referred to the early pleas he did so in connection with the head sentences but did not appear to reduce those head sentences in consequence. No reasons have been given for not reflecting the guilty pleas either in the head sentence or in a recommendation for early release.

In my view, the applicant could reasonably have expected some benefit from his pleas in the absence of any identified disqualifying reason. In this case, I would make a recommendation after about a third of the total sentence. I would grant leave to appeal, allow the appeal, and vary the sentences imposed by substituting a sentence of six and a half years imprisonment on the offence of unlawfully trafficking in a dangerous drug, methylamphetamine, count 8 on indictment number 128 of 2003, and substituting a sentence of three and a half years imprisonment for the offence of production of the dangerous drug, amphetamine, count 1 on indictment 99 of 2004, and by recommending that the appellant be considered for post-prison community based release on the 10th December 2005.

THE PRESIDENT: The applicant has committed very serious criminal offences warranting salutary punishment. The effective sentence imposed, however, did not adequately reflect his relatively early pleas of guilty and nor was it moderated to take into account its cumulative nature.

I agree with the orders proposed by Justice Dutney and with the reasons he has given.

HELMAN J: I agree.

THE PRESIDENT: The orders are as Justice Dutney has proposed.
