SUPREME COURT OF QUEENSLAND

CITATION:	*R v Stewart* [2004] QCA 320
PARTIES:	**R** **v** **STEWART, Peter Brian** (applicant)
FILE NO/S:	CA No 148 of 2004 SC No 11 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED EX TEMPORE ON:	2 September 2004
DELIVERED AT:	Brisbane
HEARING DATE:	2 September 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
ORDER:	1. **Application for leave to appeal granted and appeal allowed;** 2. **Alter the sentences imposed below as follows:** **Count 2 – three and a half years imprisonment;** **Count 3 – six months imprisonment to be served concurrent with the sentence for count 2;** **Count 5 – three and a half years imprisonment, to be served cumulative on the sentences imposed on counts 2 and 3;** **Count 4 – two years imprisonment to be served concurrent with the sentence on count 5;** **Count 7 and 8 – two years imprisonment for each, to be served concurrently with each other, but cumulative on the remaining sentences.** 3. **The recommendation for parole (post prison community based release) after three years and nine months is not disturbed.**
CATCHWORDS:	CRIMINAL LAW – JUDGMENT AND PUNISHMENT – SENTENCE – FACTORS TO BE TAKEN INTO ACCOUNT – TOTALITY – where the applicant pleaded guilty to six offences including possession and production of methylamphetamine – where the applicant was sentenced to

	an effective sentence of 11 years, made up of a number of cumulative sentences, with an order for post prison community release after 3 years and 9 months – where applicant's 520 days spent in pre-sentence custody could not be declared pursuant to s 161 of the *Penalties and Sentences Act* – where the applicant was unlikely to receive the benefit of post prison community based release – whether the totality principle had been adequately recognised – whether the total effect of the combined sentences is appropriate when balanced against the Applicant's criminality
COUNSEL:	A J Donaldson with J Griffiths for the applicant R G Martin for the respondent
SOLICITORS:	The applicant appeared on his own behalf Director of Public Prosecutions (Queensland) for the respondent

McPHERSON JA: I'll ask Justice Holmes to deliver the first set of reasons.

HOLMES J: The applicant seeks leave to appeal against an effective sentence of 11 years, made up of a number of cumulative sentences imposed upon six counts. The background to those counts was as follows: In November 2001 the police found at his residence various quantities of methylamphetamine totalling 24 grams of powder, 5.7 grams of pure. He had an exercise book with amounts and dates written in it. The sentence proceeded on the basis that the possession of methylamphetamine was for a commercial purpose.

There were some syringes containing methylamphetamine found, suggesting an element of personal use. 37 grams of cannabis were also found. The applicant was sentenced to four years and eight months imprisonment in respect of the possession of amphetamines and six months concurrent for the possession of cannabis. In May 2002 another residence occupied by the applicant was searched. About 1.7 grams of powder containing

methylamphetamine was found; the percentage unknown. More importantly, the police found precursor chemicals including large quantities of tablets containing pseudoephedrine, some buried in the yard, and equipment: a cooker, funnel, jug and so on.

There were some security devices on the premises in the form of video cameras and a scanner to pick up police radio. On the basis of those findings the applicant pleaded guilty to charges of possession of methylamphetamine and production of methylamphetamine, the latter on the basis that the possession of chemicals and equipment were steps preparatory to the production of methylamphetamine. He was sentenced on the possession count to two years' imprisonment and on the production count to three years and 10 months' imprisonment concurrent with each other, but cumulative on the sentences on the first two counts.

In December 2002 the applicant's residence was again raided. On this occasion the police found a CD with instructions for the manufacture of methylamphetamine, and again some equipment and precursor chemicals, but on this occasion the charge was possession of equipment and chemicals used in connection with production rather than a deemed production. On each of those counts the applicant was sentenced to two years and six months concurrent with each other but cumulative on the other sentences. A recommendation was made for post-prison community-based release after three years and nine months.

The applicant had a criminal history which had a number of drug-related entries. Most of them were for the possession of cannabis and were dealt with in the Magistrates Court, but there were two more significant entries. On the 7th of June 1991 he was sentenced to 21 months' imprisonment on charges including one count of supplying a small quantity of LSD for $400 and three counts of supplying cannabis.

On 17th of May 1995 he was sentenced on one charge of possession of cannabis sativa, one count of possession of methylamphetamine, 35 grams in total, 4.6 grams pure, and a count of possession of $10,000 obtained from the commission of an offence. He was sentenced to six years' imprisonment with a recommendation for parole after two years, but did not, according to his counsel, get the benefit of parole and served a full six years.

The first of these offences must, the learned sentencing Judge observed, have been commenced only a few months after the end of the parole period for the 1995 offences. In fact, allowing for time already served in the 1995 sentence it seems the parole period probably would have ended in April 2001, about seven months prior. The last four offences, of course, were committed on bail.

His Honour said that had he been sentencing on the charges individually he would have considered the first of the possession charges to warrant a sentence of six years, the deemed production five years and the possession of

instructions and possession of chemicals and equipment charges three years' imprisonment. Those sentences would have added up to 14 years if imposed cumulatively. He therefore reduced the respective period so as to produce a total of 11 years' imprisonment.

The applicant had, however, spent 520 days in custody which were not solely in respect of the offences before the Court - it seems there were summary charges pending - but which were, the Crown accepted, the real reason for his remaining in custody. The Crown accepted that that period ought to be taken into account. There was, it seems, some other period that he had spent in custody in between the dates of the offences but the length of that period could not be established; it is really unknown whether it was a matter of days, weeks or months.

At the suggestion of the applicant's counsel, his Honour took the 520 day period into account by making the parole recommendation. He also, in making that recommendation, acknowledged that the applicant was entitled to some credit for his guilty plea, but he declined to regard it as an early plea.

It seems that although the Crown and defence had been negotiating for some 12 months in respect of the indictment, which originally included a trafficking count, it was not until about a week before the matters were to go to trial that the applicant indicated he would plead guilty to the counts on

which he was sentenced. The Crown dropped two counts, including the trafficking count, and the matter proceeded to sentence.

For the applicant it was said before his Honour that he had had an unstable and difficult childhood and had been using drugs since the age of 15, and it was accepted that he was an addict. He had been undertaking a number of courses while in gaol and had been an active member of Narcotics Anonymous. The basis of the application for leave was, in essence, that the totality principle had not been adequately recognised. The applicant had already served almost two years. Effectively he was no liable to serve a period approaching 13 years in total and his prospects of parole were poor.

I think that submission has merit. The real problem, it seems to me, in the sentence here is that the recommendation for parole 21 months earlier than he would otherwise have been eligible was a most uncertain means of allowing for the time in custody. There was every reason to think the applicant would not achieve it.

I should say that the approach his Honour took in relation to the 520 days was induced by defence counsel, whose submission seems to me to have been most ill thought-out. In my view the effect of the aggregate sentence, when one takes into account the time already served, was crushing.

I consider that the sentence appropriate if the applicant was to receive a real recognition of the time spent in custody, and in order to make the sentence proportionate to his criminality, was one of nine years' imprisonment. That could be achieved by imposing three and a half years' imprisonment on count 2, with a concurrent sentence of six months' imprisonment on count 3; three and a half years' imprisonment on count 5, cumulative on the sentences imposed on counts 2 and 3; two years' imprisonment on count 4 concurrent with the sentence on count 5; and two years' imprisonment on each of counts 7 and 8, those sentences concurrent with each other but cumulative on the remaining sentences.

I would leave the recommendation for parole at three years and nine months as affording some recognition of a plea which, though not early, was of some significance in saving the community the cost of a trial. Those are the orders I would make.

McPHERSON JA: I agree.

WILLIAMS JA: I agree.

McPHERSON JA: The order will be in accordance with what Justice Holmes has proposed. We will adjourn now.
