SUPREME COURT OF QUEENSLAND

CITATION:	*R v McVea* [2004] QCA 380
PARTIES:	**R** **v** **McVEA, Peter Andrew** (applicant)
FILE NO/S:	CA No 145 of 2004 SC No 337 of 2003 SC No 542 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	15 October 2004
DELIVERED AT:	Brisbane
HEARING DATE:	19 August 2004
JUDGES:	McMurdo P and Helman and Dutney JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Application for leave to appeal against sentence is granted.** **2. Appeal allowed to the extent of setting aside the sentence imposed on count 1 and instead substituting a sentence of imprisonment for one year suspended after six months with an operational period of two years.**
CATCHWORDS:	CRIMINAL LAW – JUDGMENT AND PUNISHMENT – SENTENCE – FACTORS TO BE TAKEN INTO ACCOUNT – CIRCUMSTANCES OF OFFENDER – where the applicant convicted on pleas of guilty of three drug offences and two summary matters – whether head sentence of imprisonment for four years suspended after twelve months with an operational period of four years excessive *Drugs Misuse Act* 1986 (Qld), s 10 *R v Hall* [2002] QCA 438; CA No 253 of 2002, 17 October 2002, distinguished *R v Clapham* [2003] QCA 418; CA No 208 of 2003, 23 September 2003, distinguished
COUNSEL:	A W Moynihan for the applicant

M R Byrne for the respondent

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

[1] **McMURDO P:** I agree with Helman J that, for the reasons he gives, the application for leave to appeal should be granted and the appeal allowed to the extent of setting aside the sentence imposed on count 1 (an offence against s 10(1)(a) *Drugs Misuse Act* 1986 (Qld)) and instead substituting a sentence of imprisonment for one year suspended after six months with an operational period of two years.

[2] **HELMAN J:** On 14 May 2004 the applicant pleaded guilty in the Supreme Court at Brisbane to three charges of offences under the *Drugs Misuse Act* 1986 committed at Brisbane on 29 March 2002: having in his possession things (numerous items of glassware, chemicals, a portable stove, filter paper and stands, mobile phones, scales, and a quantity of Sudafed) for use in connexion with the commission of the crime of producing the dangerous drug methylamphetamine, unlawfully possessing the dangerous drug cannabis sativa, and unlawfully possessing the dangerous drug methylamphetamine. The first charge was brought under s 10(1)(a) of the *Drugs Misuse Act* and the other two charges under s 9 of that Act. Those charges appeared on an indictment that had been presented on 26 August 2003 and in which two other people, Danielle Charleton and George Postic, had been charged with offences under the *Drugs Misuse Act*. In addition to the three charges on the indictment there were two further charges, of summary offences allegedly committed on 29 March 2002 at Brisbane. The applicant also pleaded guilty to those charges: unlawfully having in his possession a thing (a water pipe) for use in connexion with the smoking of a dangerous drug, and possessing a weapon (a category R butterfly knife) when he was not authorized to possess the weapon under a licence or permit to acquire, and without other lawful authority, justification, or excuse. The first of those charges was brought under s 10(2)(a) of the *Drugs Misuse Act* and the second under s 50(a) of the *Weapons Act* 1990.

[3] For the offence under s 10(1) of the *Drugs Misuse Act* the learned judge sentenced the applicant to imprisonment for four years to be suspended after he had served twelve months, with an operational period of four years. Short concurrent terms of imprisonment were imposed for the other offences alleged on the indictment: imprisonment for one month for unlawfully possessing the cannabis sativa, and imprisonment for three months for unlawfully possessing the methylamphetamine. The applicant had been in custody for 'a couple of weeks' in connexion with these and other charges not proceeded with before he was sentenced. That time in custody could not be treated as having been served under these sentences because it, in part, related to those other charges, but it may properly be considered when assessing the overall effect of the penalties imposed on the applicant. For the summary offences he was fined and allowed six months to pay in each case: $500 for possessing the pipe and $700 for possessing the knife. Orders were made forfeiting the glassware etc., and the knife to the State of Queensland.

[4] The applicant applies to this court for leave to appeal against his sentences on the ground that they are manifestly excessive. No argument was advanced in relation to the short periods of imprisonment, which have now been served. The principal

argument for the applicant was directed to the sentence of imprisonment for four years, and some brief argument was advanced concerning the fines.

[5] On 14 May 2004 Danielle Charleton was also before the learned sentencing judge. She pleaded guilty to a charge of unlawfully possessing methylamphetamine on 29 March 2002 at Brisbane. That charge was on the indictment on which the applicant was charged. In addition, she was charged on another indictment with two further offences under the *Drugs Misuse Act*: unlawfully supplying methylamphetamine on 30 January 2002 at Redland Bay and unlawfully possessing the dangerous drug cannabis sativa on 12 April 2002 at Brisbane. She pleaded guilty to those two offences as well. For each of the offences concerning methylamphetamine she was sentenced to imprisonment for two years, but in each case the term of imprisonment was wholly suspended for an operational period of three years. On the charge of possessing cannabis sativa she was fined $1,000 and allowed ten months to pay.

[6] The applicant was thirty-one years old at the time of the commission of the five offences. He had a criminal history which began on 2 June 1998 and included a number of offences against the *Drugs Misuse Act*. At the time of the commission of the offences for which he was sentenced on 14 May 2004 he was on bail on charges of unlawfully producing methylamphetamine and of another offence against s 10(1) of the *Drugs Misuse Act*, both committed on 24 October 2001. He was fined $1,800 for those offences in the Cleveland Magistrates Court on 15 April 2002. On 25 July 2002 in the Brisbane Magistrates Court he was fined a further $500 for possessing dangerous drugs on 4 July 2002.

[7] As the events of 29 March 2002 were related to his Honour, the applicant was driving a station wagon in Brunswick Street, Fortitude Valley when it was intercepted by a squad of police detectives. Postic was in the front passenger seat and Charleton in the back. A search of the vehicle revealed a back pack belonging to the applicant and the glassware etc., described by the Crown prosecutor as a 'laboratory', i.e., the equipment and material necessary to produce methylamphetamine. The applicant, a mechanic, had performed some mechanical work for Postic, and Postic had supplied him with drugs on a few occasions as payment for that work. Postic, who did not have a driver's licence, had asked the applicant, who did, to drive him around looking for a place to stay. When they were intercepted they had been driving for some hours. The question of the extent of the applicant's knowledge of Postic's involvement with the production of drugs was discussed before his Honour. Counsel for the applicant agreed that the applicant knew that Postic was a producer and seller of drugs, but, elaborating the extent of the applicant's knowledge of Postic's affairs, he told his Honour that it became apparent to the applicant that Postic was 'involved to some degree in production' - whether supplying equipment for production or as a producer himself would 'still be unknown to him.' The applicant denied through his counsel that he was involved in any way in Postic's production of drugs or received any benefit from it. On the hearing of the application, Mr Byrne, for the Crown, conceded that there was nothing before the court that indicated that the applicant knew Postic supplied drugs to anyone other than the applicant himself. In the applicant's back pack there were drugs for his personal use: a small clip-seal bag of cannabis weighing 1.7 grams, and a small quantity of methylamphetamine, 0.35 of a gram of powder which contained .003 of a gram of pure methylamphetamine.

[8] In advancing the argument for the applicant Mr Moynihan relied on two recent decisions of the Court of Appeal in cases in which offenders with criminal histories had pleaded guilty to producing methylamphetamine and to possession charges and applied for leave to appeal against sentences imposed on them. (It should be noted that in each of those cases the methylamphetamine was at the time a schedule 2 drug whereas at the time when the applicant committed the offences concerning methylamphetamine it was a schedule 1 drug, the change having been made on 21 September 2001.) In *R v Clapham* [2003] QCA 418, decided on 23 September 2003, the applicant, an addict, was sentenced for production of methylamphetamine and possessing things used in connexion with its production. He and his co-accused had hoped to produce between 2 and 4 grams for personal use: they set up a laboratory in a motel room and had produced 2.71 grams of pure methylamphetamine when interrupted by police officers. For the two offences Clapham was initially required to perform community service for 120 hours, but was later resentenced to imprisonment for twelve months after he had failed to perform any community service. The appeal was allowed and the sentence varied by suspending it after four months, with an operational period of three years to reflect the applicant's co-operation with the investigating and prosecuting authorities and his early plea of guilty. In that case reference was made to *R v Hall* [2002] QCA 438, decided on 17 October 2002, in which the applicant who was charged with unlawfully producing methylamphetamine and unlawfully possessing instructions for producing a dangerous drug had set up a laboratory in a rented apartment and produced 8.16 grams of pure methylamphetamine. For producing the methylamphetamine Hall was sentenced to imprisonment for two years to be suspended after he had served twelve months, with an operational period of three years. The sentence was varied to be suspended after eight months. Consistently with the variation in the head sentence, the concurrent sentence imposed for possessing instructions was reduced from imprisonment for nine months to imprisonment for eight months. As each of those offenders had set up a laboratory and produced the methylamphetamine in the laboratory it was argued that theirs were more serious cases than this applicant's. In my view, so they are.

[9] Mr Moynihan argued further that there was a relevant disparity between the head sentence imposed upon the applicant and the sentences imposed upon Charleton. She had supplied methylamphetamine to an undercover police officer, possessed a substantial quantity of methylamphetamine (5.737 grams, 1.497 grams pure), and possessed cannabis (8 grams). She was nineteen years old at the time of the commission of the offences with a criminal history that included offences of dishonesty and drug offences, had previously breached probation orders and a suspended sentence, and had been imprisoned. She assisted Postic in his trade in drugs.

[10] Also relied on on behalf of the applicant was the result of Postic's application for leave to appeal to this court against sentences imposed on him. Postic's application was decided on the day the applicant's case was heard, 19 August 2004. On 10 May 2004 Postic pleaded guilty to a number of offences against the *Drugs Misuse Act* charged on three indictments, including the one containing the charges against this applicant. The principal charges were trafficking in methylamphetamine and unlawfully producing amphetamine. There were other charges related to those principal charges. Among the charges related to the production charge was a charge under s 10(1)(b) of the *Drugs Misuse Act* of unlawfully possessing things of the kind the subject of the principal charge against this applicant. Postic's application

and appeal were successful, with the result that he is now serving a term of imprisonment for six and a half years for trafficking and a cumulative sentence of imprisonment for three and a half years for production. There were shorter, concurrent terms of imprisonment for the related offences. Included in the latter was a sentence of imprisonment for eighteen months for possessing the things to which I have referred. It was recommended that he be considered for post-prison community-based release on 10 December 2005, when, as he served 639 days in pre-sentence custody, he will have served about one-third of the head sentence.

[11] Giving due weight to the gravity of the offence that had led to the imposition of the head sentence on this applicant, the fact that it was committed while the applicant was at large on bail on charges concerning other offences against the *Drugs Misuse Act* and the fact that by the time he committed the offence methylamphetamine was a schedule 1 drug, I nonetheless conclude that there is such a disparity between the head sentence imposed upon the applicant and those imposed on Clapham, Hall, and Charleton (even allowing for her youth) to warrant the intervention of this court. Postic himself, with whose enterprise this applicant's association was only peripheral, is now subject to a sentence of imprisonment for three and a half years for unlawfully producing amphetamine and was sentenced to imprisonment for eighteen months for the offence under s 10(1). The penalty imposed on the applicant on 15 April 2002 tends to add weight to the argument advanced on his behalf. The head sentence was, I think, manifestly excessive and should be varied by substituting a sentence of imprisonment for one year suspended after six months, with an operational period of two years.

[12] It was asserted on behalf of the applicant that the imposition of fines on one who is also sentenced to imprisonment is unusual, as perhaps it is because prisoners are not usually able to pay fines, but the fines were discussed with counsel for the applicant by his Honour and there was no suggestion that the applicant was unable to pay them. It cannot be said I think that the fines were manifestly excessive or that there was any error in principle in imposing fines with adequate provision for time to pay in a case like this. I should then refuse the application so far as it relates to the fines.

[13] In the result in my view the applicant should be given leave to appeal against the head sentence, his appeal should be allowed, and the sentence varied as I have indicated.

[14] **DUTNEY J:** I have read the reasons for judgment of Helman J. I agree with the orders he proposes for the reason he has set out.