SUPREME COURT OF QUEENSLAND

CITATION:	*R v Jeffs* [2005] QCA 35
PARTIES:	**R** **v** **JEFFS, Kevin John Patrick** (applicant)
FILE NO/S:	CA No 422 of 2004 SC No 40 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Toowoomba
DELIVERED ON:	25 February 2005
DELIVERED AT:	Brisbane
HEARING DATE:	15 February 2005
JUDGES:	de Jersey CJ, Jerrard JA and Mackenzie J Separate reasons for judgment of each member of the Court, Jerrard JA and Mackenzie J concurring as to the orders made, de Jersey CJ dissenting
ORDERS:	**1. Application for leave to appeal against sentence granted** **2. Appeal allowed** **3. Vary sentence by recommending that the applicant be considered for post-prison community-based release after serving 18 months of his sentence**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AGAINST SENTENCE – APPEAL BY CONVICTED PERSONS – APPLICATION TO REDUCE SENTENCE – where applicant pleaded guilty to unlawful production of methylamphetamine and possession of materials in connection with production of such drug – where applicant was sentenced to four years imprisonment with no recommendation for early release – where the applicant was not actually producing the drug and cooperated with authorities – whether the sentence was manifestly excessive *Penalties and Sentences Act* 1992 (Qld), s 103(1)(a) *Drugs Misuse Regulation* 1987 (Qld), sch 1 *R v Boyd* [2001] QCA 421; CA No 134 of 2001, 3 October 2001, distinguished

R v Campbell [2002] QCA 109; CA No 315 of 2001, 21 March 2001, considered
R v Martin [2002] QCA 513, CA No 269 of 2002, 21 November 2002, considered

COUNSEL: T Moynihan for the applicant
M J Copley for the respondent

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

[1] **de JERSEY CJ:** I have had the advantage of reading the reasons for judgment of Jerrard JA.

[2] The helpfulness of *R v Boyd* [2001] QCA 421, *R v Campbell* [2002] QCA 109 and *R v Martin* [2002] QCA 513 is reduced by the feature that the offending involved in those cases occurred when methylamphetamine was a sch 2 drug, whereas when the present applicant committed his offence, it was in sch 1. On the other hand, this applicant did not actually manufacture the drug, which was the case with those other offenders. But this applicant did a substantial amount of work obtaining the Sudafed tablets over a lengthy period, knowing the unlawful purpose for which they were to be utilized, and when it comes to the determination of penalty, the margin between his activity and that of the actual manufacturer should not in my view assume too great a significance. Additionally, his objective was some personal financial profit.

[3] Particularly aggravating features of this case are that only four months before the applicant was arrested in respect of these offences, he received the warning constituted by the police discovery of the chemicals at his property in October 2003; and further that for 12 months of the 13 months period of offending, he was subject to a community service order, imposed on 11 March 2003 in respect of the offence of entering premises, committing an indictable offence and breaking out. The seriousness of that crime is otherwise illustrated by the amount of restitution ordered, $3,050. To carry out this offending throughout the period of a community service order, when the applicant would have been under the regular supervision of the authorities, and following the police raid, reflected a brazenness suggesting a particular need for special deterrence. Again, too much should not be made of the applicant's limited intellect, to which the learned sentencing Judge was referred.

[4] In these circumstances, after allowing for the pleas of guilty, the sentence of four years was not inappropriate, and making further allowance for the applicant's substantial past criminal record, it was not necessary that a recommendation be made as to early consideration of parole: the absence of such a recommendation did not in my view render the penalty which was imposed, manifestly excessive.

[5] I would refuse the application for leave to appeal against sentence.

[6] **JERRARD JA:** On 26 November 2004 Kevin Jeffs pleaded guilty to one count of unlawfully producing the dangerous drug methylamphetamine, and one count of having in his possession one motor vehicle and a quantity of chemicals and glassware for use in connection with the crime of producing that dangerous drug.

He was sentenced to four years imprisonment, and has applied for leave to appeal against the severity of that sentence.

[7] The period during which he admitted by his plea that he had unlawfully produced methylamphetamine was between 20 February 2003 and 2 March 2004, at Millmerran. The conduct on which the prosecution relied was Mr Jeffs' purchase of 40 packets of Sudafed during that time on different dates. The first was 21 February 2003 and the last 16 February 2004. Sometimes one packet was bought in one day, sometimes as many as four or five. When more than one packet was purchased in any one day, Mr Jeffs went to different pharmacists. Sudafed contains a substance which can be used as a significant precursor for the production of methylamphetamine, and the amount of Sudafed Mr Jeffs bought would make a maximum of 51 grams of methylamphetamine.

[8] On 22 October 2003 police executed a search warrant on Mr Jeffs' property, and found bottles of chemicals which could be used in the production of amphetamine or methylamphetamine. Those included acetone and caustic soda. The police also saw glassware with traces of white powder. No charges were laid as a result of that visit, but it put Mr Jeffs on notice that his unlawful activities had come to police attention.

[9] On 1 March 2004 police again executed a search warrant on those premises, and once again located precursor chemicals, including acetone, caustic soda, hydrochloric acid, hypophosphorous acid; and laboratory equipment including a reaction vessel, a home made condenser, and tongs. A number of empty Sudafed blister packs were also found. It was clear that Mr Jeffs had bought more Sudafed after the October 2003 search.

[10] His counsel submitted that Mr Jeffs was a person of very low intellect, who could not read or write. He was employed at Hall's Poultry on the southern side of Millmerran, and also worked part time as a wood cutter and fencer. He had a very good employment record, and his counsel told the court that Mr Jeffs had purchased the boxes of Sudafed at the request of a person with whom Mr Jeffs was living, being paid between $30 and $40 profit per box by that person for supplying it. All up Mr Jeffs made in the order of $750 out of the purchase and supply of that Sudafed. He had bought the Sudafed because he was separated from his female partner and was the parent responsible for caring for their three children aged 13, 12, and 9. He had been finding it hard to support those children from his lawful employment. His counsel's submission was that it was the other person who was to make all the profits from the sale of whatever methylamphetamine was produced.

[11] Those submissions by Mr Jeffs' counsel did not admit any actual physical involvement by Mr Jeffs in producing amphetamine. The facts on which he was sentenced reflected both those submissions in mitigation and the information placed before the learned sentencing judge by the Crown, namely that those facts were limited to his having repeatedly purchased that Sudafed, for a small profit on each occasion, and for the purpose of enabling another person to produce amphetamine at their jointly occupied premises.

[12] While Mr Jeffs was sentenced on the basis that he played a lesser role in the production of amphetamine than his being its actual manufacturer, and while that role required no knowledge of how to manufacture methylamphetamine, his

obtaining the Sudafed was still an important role. Further, Mr Jeffs has prior convictions for criminal offences dating back to 1985, including for wilful and unlawful damage to property, false pretences, stealing, unlawful use of a motor vehicle, assault, aggravated assault on a female, entering premises with intent, possessing tainted property, and for indecent dealing with a girl under the age of 14. He was sentenced to 6 months imprisonment, for that last offence, that being his only prior imprisonment. He is a regular enough offender.

[13] The prosecution conceded to the learned sentencing judge that Mr Jeffs had co-operated with the investigating police and had entered a timely plea. As against that, the point was also made that Mr Jeffs had been sentenced on 11 March 2003 in the Millmerran Magistrates Court, for an offence of entering premises and committing an indictable offence therein on 22 September 2002, to an order that he perform 200 hours of community service, and pay restitution of $3,050. As Mr M Copley submitted for the respondent on this application, that community service order would have contained a requirement that Mr Jeffs not commit another offence during the period of the order.[1] Whatever that period was, it would have commenced to run one month after Mr Jeffs had made his first purchase of Sudafed, and the information before the learned judge shows that he made his next purchase (of two packets of tablets, and therefore from two different chemists), on 12 March 2003, the day after being placed on community service. He made other purchases on 14 March 2003, 31 March 2003, 7 April 2003, 16 April 2003, and thereafter during the undoubted period of that community service order. Mr Jeffs significantly failed to respond to leniency extended to him.

[14] This Court was referred to three of its quite recent decisions involving sentences for the production of methylamphetamine. In *R v Boyd* [2001] QCA 421, this Court ordered that a sentence of five years imprisonment be imposed on a 58 year old appellant who had succeeded in having one count quashed on appeal, and a circumstance of aggravation quashed in another. Regarding the production count, police had raided premises near El Arish where there was a pig farm, and there had located various items used for the production of methylamphetamine. Chemical analysis revealed traces of it in the equipment, and 23.656 grams of a precursor drug were located, sufficient to produce 21.2 grams of methylamphetamine. Count 4 related to the possession of hypophosphorous acid and another precursor.

[15] That appellant had a significant criminal history which began in 1962, and which showed regular convictions for a variety of offences between then and the year 2000, including convictions for possession of a prohibited plant in 1984, possession of a dangerous drug in 1994, and for being knowingly concerned in importing cannabis from Papua New Guinea in 1996, and for possession of a prohibited import. That sentence was imposed after a trial and a partly successful appeal against conviction. That appellant was the person actually producing the drug. That fact, his serious prior criminal history, and the lack of any mitigating factor derived from a plea of guilty, make his case one in which a heavier sentence more was appropriate than the sentence for Mr Jeffs. This is so even though at the time Mr Boyd was producing methylamphetamine, it was not listed in sch 1 to the *Drugs Misuse Regulation* 1987 (Qld). It became a sch 1 drug on 21 September 2001, and accordingly the maximum penalty Mr Jeffs faced on a conviction for producing it

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[1] See s 103(1)(a) of the *Penalties and Sentences Act* 1992 (Qld)

without a circumstance of aggravation was 20 years, compared to 15 for Mr Boyd on the like charge.

[16] In *R v Campbell* [2002] QCA 109 this Court reduced a sentence of five years imprisonment (with community-based release recommended after two years) to a sentence of four years imprisonment, with post-prison community-based release recommended after 18 months. That appellant had pleaded guilty to one count of production of methylamphetamine in excess of two grams (it then being a sch 2 drug), that offence having occurred in circumstances in which the appellant had allowed his residence to be used for the production of that drug by another or others, and had also produced a quantity of it himself. He had agreed to accept the offer of an overseas trip in payment for his participation in a commercial operation of production of the drug. When police searched his premises they located 120 grams of methylamphetamine, and sufficient chemicals to enable production of a further quantity estimated at between 160 and 190 grams.

[17] That appellant had a minor criminal history. He had actually produced some of the drug himself, and more than twice as much was found at his premises as the amount which could have been produced by Mr Jeffs' principal from the total quantity of Sudafed Mr Jeffs bought. Because Mr Campbell pleaded guilty to producing a quantity exceeding two grams of methylamphetamine, he faced the same maximum penalty of 20 years which Mr Jeffs faced. Comparing their comparative criminality, the maximum term to be imposed on Mr Jeffs should not be higher than that imposed on Mr Campbell; and Mr Campbell achieved a recommendation. He was not, however, under an order to perform community service when he was offending.

[18] In *R v Martin* [2002] QCA 513 this Court upheld a sentence of four years imprisonment with post-prison community-based release recommended after 14 months, imposed on a 52 year old person with no prior convictions, and who had a prior good work history and character. Mr Martin had pleaded guilty at an early stage to an offence of producing methylamphetamine. Police located 95.4 grams of pseudoephedrine at his house, and iodine crystals, pyrex dishes, scales containing traces of methylamphetamine, razor blades, scraping knives, caustic soda, and other precursors for the production of methylamphetamine; and evidence of its past manufacture. The pseudoephedrine located could have produced 85 grams of pure methylamphetamine. Mr Martin was an actual producer of the drug, whose offending behaviour occurred before it became a sch 1 drug, but who admitted past production of it by his plea, and who was in a position to produce more of it. Although the maximum term he faced would have been one of 15 years, since his plea did not admit past production in excess of two grams, his general conduct was more serious than that of Mr Jeffs, altogether his prior history was much better. Mr Jeffs' head sentence should be of the same order as Mr Martin's.

[19] The learned sentencing judge explained when imposing the sentence that no recommendation for consideration for early release was being made because the head sentence had been reduced from a notional four and a half, or five years, to take into account Mr Jeffs' co-operation and his early plea. I respectfully consider that the fact that Mr Jeffs was not himself actually producing the drug, and the fact that his financial benefit from supplying Sudafed was very moderate, together with the extent of his co-operation with the administration of justice, means that it was appropriate both to reduce the head sentence as described by the learned sentencing judge, and to recommend consideration for early release. The sentence imposed

without that recommendation results in it being manifestly excessive, even when taking into account the aggravating circumstance that he was already required, by order, not to violate the law. Treating that circumstance as balancing his more minor role in production, a sentence of four years with no recommendation would be unexpectedly severe if Mr Jeffs had been the actual producer of 52 grams, who had pleaded guilty. That much is demonstrated by those other sentences. I would grant leave to appeal, allow the appeal, and vary the sentence imposed by recommending that Mr Jeffs be considered for post-prison community-based release after he has served 18 months of his sentence. .

[20] **MACKENZIE J:** This is an application for leave to appeal against a sentence of four years imprisonment, without any recommendation for early release, for producing methylamphetamine and one year's imprisonment for possession of chemicals and glassware and a motor vehicle for use in connection with the production of methylamphetamine. The sentence for the latter is by no means excessive; the focus is on the former.

[21] The facts relied on by the Crown were that on 20 occasions over a period of about 12 months, the applicant purchased a total of 40 packets of Sudafed tablets, sometimes a single packet and sometimes several on the one day, from different pharmacies. He supplied these tablets to another person who paid him $30 to $40 profit. His counsel estimated that he had got about $750 for his efforts (although that assertion does not correspond mathematically with the product of the number of packets and the admitted profit level).

[22] The quantity of Sudafed purchased had the potential to produce 51 grams of methylamphetamine, a not insignificant quantity. The inference that the applicant knew the purpose for which he was purchasing it is strong, since not only were equipment and chemicals to produce methylamphetamine found at the premises on 1 March 2004 when the applicant was arrested but there had also been a visit by police to the premises on 22 October 2003 when glassware with residue characteristic of drug production and chemicals characteristically used to produce methylamphetamine had been found. It appears that, for reasons that are not explained, he was not charged with respect to the occasion in October 2003. However, it was as the Crown Prosecutor said, a "wake up call in relation to what he was doing, but he persisted".

[23] Another issue, arising from the applicant's criminal history, which did not appear to be focussed on at sentence was that on 11 March 2003, less than one month after his offending began, he pleaded guilty to a housebreaking offence and was placed on a community service order for 200 hours. A substantial period of his offending would have therefore occurred while he was subject to the community service order. Otherwise, although he has several convictions for offences of dishonesty, assault and one of indecent dealing, he has no previous convictions for drug offences. The record shows that he admits being a cannabis user but not a user of amphetamines. His offending was motivated by the desire to supplement his income by the profit he made from purchasing the Sudafed under the arrangement with the person to whom he on-sold it.

[24] It was accepted that there was a timely plea of guilty in circumstances demonstrating an intention to cooperate with the administration of justice. The applicant had custody of three children aged 9 to 13. He had a good work history.

The learned sentencing judge was told that the applicant was of very low intellect, as his illiteracy demonstrated. However, the store placed on this as a mitigating factor by counsel in this application on the basis that the applicant was likely, because of his intellect, to be feckless is somewhat inconsistent with the reliability attested to in references from his employers, in particular. Whether the persistence of his actions notwithstanding the warnings he had was irresponsible foolhardiness or brazenness is open to question on the material in the record.

[25] The comparable sentence particularly focussed on by the learned sentencing judge was *R v Campbell* [2002] QCA 109. As the learned sentencing judge observed, the offence preceded the amendment to the *Drugs Misuse Act* which placed methylamphetamine in the first schedule with the consequent increase in the applicable maximum penalty. Campbell had been sentenced to five years imprisonment with a recommendation after two years, which was reduced to four years imprisonment with a recommendation after 18 months on appeal. Without down-playing the role of people who are prepared to facilitate production of methylamphetamine by acquiring and on-selling precursors of the drug for profit, Campbell was a direct participant in its production, having accepted tutelege from the principal offender and cooking the drug in his absence. He was an actual participant in the production; he profited at least to the extent of receiving an overseas trip for his services. An actual quantity of 120 grams had been produced at the time of the raid. Chemicals with an additional potential yield of up to 190 grams were found. In my view *R v Campbell* is significantly more serious on its facts than the present case but the increased maximum penalty to which the applicant is subject is a balancing factor.

[26] When the learned sentencing judge pronounced sentence without making a specific recommendation for the applicant's early release, his counsel addressed the learned sentencing judge further. The learned sentencing judge indicated that the four year sentence reflected a reduction from a notional head sentence of four and a half to five years and that the early plea of guilty and cooperation had been taken into account in reducing the head sentence. On the particular facts of the case, I have come to the conclusion that a reduction from a head sentence in the range of four and a half to five years to four years to allow for factors in the applicant's favour renders the sentence as a whole manifestly excessive. In my view, a sentence of four years with a recommendation for early release is appropriate. The case is one where rather than an order for suspension after a period, a period of supervision following release is appropriate.

[27] I would therefore grant the application for leave to appeal. I would allow the appeal in relation to count 1 to the extent that the sentence should be varied only to the extent that there be a recommendation that the prisoner be eligible to apply for post-prison community-based release after serving 18 months.