SUPREME COURT OF QUEENSLAND

CITATION:	*R v Armstrong* [2005] QCA 116
PARTIES:	**R** **v** **ARMSTRONG, Neil Anthony** (applicant)
FILE NO/S:	CA No 83 of 2005 SC No 482 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED EX TEMPORE ON:	15 April 2005
DELIVERED AT:	Brisbane
HEARING DATE:	15 April 2005
JUDGES:	McMurdo P and Keane JA and Philippides J 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 granted;** **2. Appeal allowed by setting aside the sentence and in lieu thereof order that the applicant be imprisoned for 18 months and that the sentence be suspended forthwith for an operational period of 2 years.**
CATCHWORDS:	CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT – SENTENCE – where applicant sentenced to 2½ years imprisonment suspended after 12 months for an operational period of 3 years for unlawful possession of methylamphetamine in excess of 2 grams – where applicant had served 8 months in pre-sentence custody which was taken into account – where applicant made rehabilitation efforts and drug-free for some time – whether sentence imposed manifestly excessive *R v Brooker* [2002] QCA 101; CA No 35 of 2002; 20 March 2002 *R v Christie* [2000] QCA 165; CA No 430 of 1999; 8 May 2000, considered *R v Hesketh; ex parte A-G(Qld)* [2004] QCA 116; CA No

411 of 2003; 23 April 2004, considered
R v Kennedy [2000] QCA 140; CA No 23 of 2000; 14 April 2000, considered
R v Tabe [2004] QCA 17; CA No 376 of 2003; 10 February 2004, distinguished
R v Woods [2004] QCA 204; CA No 99 of 2004; 18 June 2004, considered

COUNSEL:	BW Farr for the applicant M Copley for the respondent
SOLICITORS:	The applicant appeared on his own behalf Director of Public Prosecutions (Queensland) for the respondent

PHILIPPIDES J: Neil Anthony Armstrong was convicted on 28 February 2005 on his plea to a charge of unlawfully possessing the dangerous drug methylamphetamine in a quantity exceeding 2 grams. He was sentenced on 3 March 2005 to two and a half years' imprisonment suspended after 12 months for an operational period of three years. A declaration was made in respect of pre-sentence custody of 237 days from 21 January 2004 to 14 September 2004. The applicant seeks leave to appeal against that sentence on the basis that it was manifestly excessive.

The applicant, who was born on 20 September 1969 was 34 years of age at the time of the offence and 35 at sentence.

The offence came to light when police executed a search warrant at the applicant's home at Loganholme on 22 January 2004. During the search they located a large clipseal bag which in turn contained three other clipseal bags.

One clipseal bag contained 14.044 grams of moist brown substance which was analysed to be 5.9 per cent pure methylamphetamine yielding 0.828 grams of pure methylamphetamine. A second bag contained 8.546 grams of moist pale yellow substance which was analysed to be 17.8 per cent pure methylamphetamine yielding 1.521 grams of methylamphetamine. The third bag also contained a similar substance of 1.443 grams with a purity of 25.3 per cent methylamphetamine yielding 0.362 grams of pure methylamphetamine. The total weight of the gross powder was therefore 24.023 grams with the total weight of methylamphetamine being 2.711 grams.

The applicant told police that he had bought the drugs for his own personal use and that was not challenged by the Crown at sentence.

In imposing the sentence his Honour referred to what he described as the applicant's appalling record of offences connected with the applicant's drug addiction and the fact that the applicant had previously been given the benefit of attending and completing an intensive drug rehabilitation course.

His Honour made specific mention of the fact that the applicant had been dealt with on 10 December 2003 in the Magistrates Court on two counts of possessing powder, apparently amphetamine or methylamphetamine and had been dealt with leniently by being ordered to serve six months'

imprisonment by way of an intensive correction order but had nevertheless offended within six weeks.

His Honour appears to have taken the plea into account in the head sentence imposed and appears to have taken additional matters of mitigation into account in suspending the head sentence after 12 months' imprisonment.

The matters which his Honour referred to in this regard were the applicant's plea, the fact that the eight month period had been served in pre-sentence custody, and the shock which that had been for the applicant, the fact that the applicant had a stable relationship and obtained part time employment and had taken steps towards rehabilitation by ridding himself of his drug addiction, a course which was to be encouraged.

On behalf of the applicant it was contended that the sentence imposed was manifestly excessive, bearing in mind that the amount of methylamphetamine found was only .711 grams more than the schedule amount, that some eight months had already been served by way of pre-sentence custody at the date of sentence, that the drugs were personal use only, the applicant's plea and the evidence of continuing rehabilitation.

It was submitted that the sentence which should have been imposed was one of 18 months' imprisonment suspended after the time served for an operational period of three years. Additional matters relied upon on behalf of the applicant were

that the applicant had relapsed into drug use after a relationship break up, had completed two rehabilitation courses and other studies whilst on remand, had been drug-free since January 2004 and was in a relationship with a woman who was a non-drug user. The applicant also had the responsibility of caring for up to six children. It was said that he had been on bail since September 2004, thus providing the Court with a lengthy period of time to assess his continuing rehabilitation.

Before the learned sentencing judge it had been submitted on behalf of the prosecution that the appropriate sentencing range was one of two to two and a half years' imprisonment coupled with an order suspending the sentence or recommending eligibility for release after a period earlier than the halfway mark.

In support of those submissions counsel had referred to *R v Hesketh; ex parte A-G (Qld)* [2004] QCA 116, *R v Tabe* [2004] QCA 17, schedule 1 comparatives, and *R v Kennedy* [2000] QCA 140, and *R v Christie* [2000] QCA 165 as schedule 2 cases.

Tabe was a case where the offender was sentenced after trial to two years' imprisonment on a count of possession of almost 14 grams of methylamphetamine. His application for an extension of time in which to appeal was refused on the basis that it would almost certainly be unsuccessful. Given the nature of the application there before the Court of Appeal it is of no real assistance.

It was perhaps misleading to have referred the learned sentencing judge to *Hesketh* as a comparative and no reliance was placed on it before this Court. In seeking to uphold the sentence imposed counsel for the prosecution conceded that no authority could be found that was sufficiently comparable with the present case and which had resulted in a sentence of similar duration.

As mentioned, *Hesketh* concerned an offence committed after the reclassification of the drug as a schedule 1 drug and while it is not a comparative because of the circumstances of that case, it and other cases demonstrate that the sentence imposed in the present case was outside the appropriate sentencing discretion.

Hesketh was an Attorney's appeal against a sentence of 12 months' imprisonment to be served by way of an intensive correction order imposed on a plea to one count of possession of methylamphetamine in excess of 2 grams. A quantity of 57.347 grams of pure methylamphetamine was involved and the sentence was imposed on the basis that there was a commercial element. On appeal the Court stated that the broad range of imprisonment for an offence such as that before the Court there was one of two and a half to four years' imprisonment. Given the offender's criminal history and the very large quantity involved it was held that a custodial sentence was required but that mitigating circumstances such as the efforts at rehabilitation and that the offender was the carer of a

five-year old child and an ailing mother warranted it being kept to a minimum. The Court imposed a sentence in effect of two and a half years' imprisonment and suspended the sentence after nine months for an operational period of five years.

That case indicates that the present case was beyond the appropriate sentencing range, given the quantity of the drug involved here, the fact that no commercial element was suggested, and the period that the applicant had already served in custody at sentence. That conclusion is supported by the sentence imposed in *R v Woods* [2004] QCA 204 which also concerned a sentence imposed after the reclassification of the drug as a schedule 1 drug.

In *Woods* a sentence of 12 months' imprisonment was imposed at first instance in respect of the possession of methylamphetamine in excess of 2 grams. The quantity involved was 12 grams of powder containing 3.85 grams of pure methylamphetamine. It was accepted that it was for personal use only. The possession in that case thus concerned a little more than the quantity of pure methylamphetamine involved in the present case. The 24-year old offender in that case had a criminal history and had breached bail conditions.

On appeal it was held that the sentencing discretion had miscarried but for reasons other than that the sentence imposed was excessive. The discretion was therefore exercised afresh by the Court of Appeal by suspending the sentence after four months and imposing an operational period of three years.

Kennedy and *Christie* were cases where sentences were imposed on young offenders with criminal histories who also had the care of young children. In both cases sentences of 18 months' imprisonment with no other ameliorating orders were held not to be manifestly excessive. Although *Kennedy* and *Christie* concerned schedule 2 cases, they also point to the sentence in the present case being excessive even though the offence in the present case was committed after the reclassification of the drug.

Whilst methylamphetamine is now a schedule 1 drug it should be noted that prior to the reclassification the maximum term was 20 years' imprisonment and that after the reclassification the maximum term where the person convicted is drug-dependent remains 20 years, and 25 years' imprisonment applies in other cases.

In the case of *Kennedy*, the quantity of methylamphetamine involved was 7.147 grams, more than three times the schedule amount. Furthermore, the offender there was sentenced on the basis of a late plea only notifying the Crown of the intention to plead the day before the trial. The present case involves a considerably smaller quantity of the drug and the present applicant ought to be afforded greater credit for his plea than was given to the offender in *Kennedy*.

While in the case of *Christie* the possession was of a quantity of 2.8 grams of methylamphetamine and therefore in a similar

category to the present case, the drug in Christie was of a very high grade such that it could require cutting up to five times before use. In addition, *Christie* was also a case where a late plea was made. Christie changed his plea during the first day of the trial after an adverse ruling of law. His plea was therefore not reflective of remorse or cooperation nor had he demonstrated any efforts towards rehabilitation as the present applicant has.

Reference was made by the Court of Appeal in *Woods* to the decision of *R v Brooker* [2002] QCA 101 which concerned a 32 year old offender with a not inconsiderable criminal record who was sentenced to six months' imprisonment in respect of his possession of 4 grams of methylamphetamine. It was stated in *Woods* that, given the reclassification of the drug, a sentence of six months' imprisonment may now be considered to be below the relevant range.

The authorities thus indicate that the appropriate head sentence in the present case, given the quantity of the drug involved, the early plea and lack of commerciality, was one of between 12 to 18 months' imprisonment.

If, as it appears, the learned sentencing judge took into account the applicant's plea of guilty and his cooperation with the administration of justice in fixing the head sentence, he gave insufficient weight to the applicant's plea. In addition, in moderating the sentence imposed by suspending it only three months earlier than the time by which the

applicant would have been entitled to apply for post-prison community-based release, the learned sentencing judge gave insufficient weight to the other matters of mitigation to which his Honour referred. In those circumstances, I am of the view that the sentencing discretion miscarried. The sentencing discretion must therefore be exercised afresh.

It is the case that the applicant has an extensive criminal history both in South Australia and Queensland. In South Australia, the criminal history included a conviction and fine for possessing cannabis in May 1990, a conviction for breaking into a building and committing a felony for which he received six months' imprisonment in June 1990 and a conviction and fine for possessing cannabis in June 1990.

The applicant's offending in Queensland included offences of dishonesty in 1996, 1997 and 1998. Of more relevance is the fact that the applicant was, on 18 June 2001, placed on an intensive drug rehabilitation order for dishonesty offences committed between October 2000 and February 2001. He successfully complied with that order and, on 2 May 2002, he was put on 12 months' probation. However, he breached that order on 28 February 2003 and was given a wholly suspended term of three months' imprisonment. On 10 December 2003, as the learned sentencing Judge mentioned, the applicant was sentenced to a six months intensive correction order for two counts of possessing dangerous drugs and one count of possessing tainted property. The drugs were either amphetamines or methylamphetamine.

The applicant's criminal history means that he should receive a heavier sentence than the offender in *Woods*. In addition, the applicant is older than Woods was when sentenced and was in breach not only of bail but also of an intensive correction order.

Nevertheless, there are significant mitigating circumstances in the applicant's favour other than his plea. Of particular significance is that the applicant had made real efforts towards rehabilitation; he had been drug free since January 2004, a significant achievement for an individual with the applicant's drug addiction history. He was subjected to urine testing while in custody and continued with his efforts upon his release in September 2004 to the time of his sentencing in March 2005. The applicant therefore has, as his Honour accepted, real prospects of rehabilitation which are to be encouraged. In addition, he has now spent some 9½ months in custody, in circumstances where it would also have been within the sentencing discretion for a sentence to have been imposed which required him to serve a lesser period of actual imprisonment.

In my view, the appropriate sentence in the present case is one of 18 months' imprisonment suspended forthwith for an operational period of two years. Such a sentence adequately addresses issues of deterrence, bearing in mind the custodial period already served and the heavy consequences which attend the applicant should he further offend during the remainder

operational period. It also accommodates matters of mitigation and promotes the applicant's promising prospects of rehabilitation.

I would therefore grant leave to appeal, allow the appeal by setting aside the sentence and, in lieu thereof, order that the applicant be imprisoned for 18 months and that the sentence be suspended forthwith for an operational period of two years.

THE PRESIDENT: I agree.

KEANE JA: I agree.

THE PRESIDENT: The orders are as proposed by Justice Philippides.
