SUPREME COURT OF QUEENSLAND

CITATION:	*R v Short* [2010] QCA 206
PARTIES:	**R** **v** **SHORT, Belinda Jane** (applicant)
FILE NO/S:	CA No 41 of 2010 CA No 70 of 2010 SC No 81 of 2010 SC No 1084 of 2008
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	6 August 2010
DELIVERED AT:	Brisbane
HEARING DATE:	22 July 2010
JUDGES:	Chief Justice and Muir and Fraser JJA Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application refused**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant was convicted on her pleas of guilty of one count of permitting premises to be used for unlawfully producing dangerous drugs and three counts of unlawfully possessing dangerous drugs – where the applicant committed those offences during the four year operational period of a twelve month wholly suspended sentence – where the applicant had already been ordered to serve five days imprisonment for an earlier contravention of the suspended sentence – where the sentencing judge ordered the applicant serve the balance of the suspended sentence – where the applicant was further ordered to serve three years imprisonment for the first count, and lesser concurrent terms for the remaining three counts, cumulatively upon the activated suspended sentence – where the sentencing judge fixed a parole eligibility date after eleven months imprisonment – whether the whole of the suspended sentence should have been activated – whether cumulative sentences should have been imposed – whether the sentence imposed was manifestly excessive

Penalties and Sentences Act 1992 (Qld), s 142(1)(b), s 147(2), s 147(3), s 147(3)(c)

R v Day & Gill [2005] QCA 100, cited
R v Hesketh; ex parte A-G (Qld) [2004] QCA 116, cited
R v Hoad (1989) 42 A Crim R 312, applied
R v Jeffs [2005] QCA 35, cited
R v King, unreported, Mullins J, Supreme Court of Queensland, No. 885 of 2005, 9 November 2006, cited
R v Martin [2002] QCA 513, cited
R v Oldfield [1999] QCA 85, cited
R v Sabine [2007] QCA 220, considered
R v Small, unreported, Ann Lyons J, Supreme Court of Queensland, No. 962 of 2005, 28 November 2006, cited
R v Smith, unreported, Kelly J, Supreme Court of Queensland, No. 245 of 1987, 27 February 1987, cited
R v Spiteri, unreported, Cullinane J, Supreme Court of Queensland, No. 124 of 1995, 2 June 1995, cited
R v Stevens [2006] QCA 361,cited
R v Stewart, unreported, Thomas J, Supreme Court of Queensland, No. 326 of 1996, 22 January 1997, cited

COUNSEL: A J Kimmins, with Y Chekirova, for the applicant
M B Lehane for the respondent

SOLICITORS: Ryan and Bosscher for the applicant
Department of Public Prosecutions (Queensland) for the respondent

[1] **CHIEF JUSTICE:** I have had the advantage of reading the reasons for judgment of Fraser JA. I agree that the application should be refused, for those reasons.

[2] **MUIR JA:** I agree that leave to appeal should be refused for the reasons given by Fraser JA.

[3] **FRASER JA:** On 12 February 2010 the applicant was convicted on her pleas of guilty of four offences she committed on or about 16 September 2008. She was sentenced on 19 February 2010. For permitting premises she occupied to be used for unlawfully producing a dangerous drug she was sentenced to three years imprisonment. On three counts of unlawful possession of dangerous drugs she was sentenced to lesser, concurrent terms of imprisonment. The applicant committed those offences during the four year operational period of a twelve month wholly suspended term of imprisonment imposed on 12 September 2005. The applicant had been ordered to serve five days of the suspended imprisonment when she was dealt with on 15 August 2006 for an earlier contravention of the suspended sentence. The sentencing judge ordered that the applicant serve the balance of the suspended imprisonment of three hundred and sixty days and that the imprisonment on the four count indictment be served cumulatively upon the activated suspended sentence, making a total effective period of imprisonment of just under four years.

[4] The sentencing judge declared that fifty-five days between 16 September 2008 and 11 November 2008, fifty-seven days between 18 November 2008 and 14 January 2009, and seven days between 12 February 2010 and 19 February 2010

spent by the applicant in presentence custody were deemed time already served under the sentence. The sentencing judge fixed 22 September 2010 as the date upon which the applicant is eligible to apply for parole. Taking into account the time which the applicant was deemed already to have served under the sentence, she would serve eleven months in custody before becoming eligible to apply for parole.

[5] The applicant has applied for leave to appeal against the sentence imposed on 19 February 2010 on the ground that it was manifestly excessive because the sentencing judge gave too much weight to the aggravating features and insufficient weight to the mitigating features of the applicant's offending, cumulative sentences should not have been ordered, and the whole of the suspended sentence should not have been activated.

[6] The applicant also filed applications for an extension of time within which to apply for leave, and an application for leave to appeal against the sentence imposed on 12 September 2005, but she abandoned those applications and the Court dismissed them at the hearing.

Circumstances of the offences and the applicant's personal circumstances

[7] The applicant was born on 30 January 1962. She had a troubled childhood, reporting that her mental health status declined when she was severely and persistently molested by her uncle from when she was about 14 years old. After early experimentation with drugs, she was introduced to methamphetamine when she was about 23 years old. She also quickly became a serious heroin addict. Despite attempts to defeat her addictions, she continued to abuse drugs. A psychiatric report tendered at the sentence hearing described her as having had a near twenty year history of opioid and amphetamine addictions, demonstrated by the destruction of all her superficial veins. She is a severe polydrug addict who has lost mental health and cognitive/emotional integrity progressively over many years. Her prognosis is unfortunately not optimistic. The psychiatrist considered that the appropriate treatment would involve drug substitution at high doses but there were practical problems in her undertaking a satisfactory treatment. Consistently with the applicant's personal history, she had a lengthy criminal history largely comprised of drug related offences and offences of dishonesty which spanned sixteen years.

[8] The twelve month suspended sentence was imposed on 12 September 2005 for an offence of possessing methylamphetamine which the applicant committed on 19 August 2003. The total pure weight of the methylamphetamine was .092 grams. The sentencing judge also imposed a twelve month intensive correction order for the offence of possessing a small quantity of heroin on 19 December 2003. The applicant lied to the police about the circumstances of those offences and declined to be interviewed but she did notify her intention to plead guilty at a reasonably early stage. The sentencing judge considered that the possession of drugs was for commercial purposes in a limited way. His Honour took into account that the applicant had served ninety days in custody which could not be declared as time served under the sentence. His Honour explained that the effect of the suspended sentence was that the applicant would for the next four years have the penalty of twelve months imprisonment hanging over her head; if she committed another offence punishable by imprisonment during the period of four years she could be required to serve the whole of that twelve months in addition to any other period of imprisonment imposed for the further offence. His Honour told the applicant that he did not want to see her back in court to be resentenced because there was a high probability that she would be imprisoned in that event.

[9] The applicant subsequently committed two offences of disqualified driving, which breached the suspended sentence, and she performed only a small part of the community service required by her intensive correction order. She was dealt with for those offences in the Magistrates Court by the imposition of a suspended sentence. When the sentencing judge dealt with the applicant for those matters on 15 August 2006 his Honour remarked that with "considerable reluctance" he was prepared to conclude that it was unjust to order the applicant to serve the whole of the suspended imprisonment and instead ordered imprisonment for five days. The sentencing judge explained that the remaining three hundred and sixty days of the suspended sentence would continue for the original operational period of four years from September 2005. The sentencing judge revoked the intensive correction order he had previously imposed and another intensive correction order imposed in the District Court and imposed one intensive correction order for a period of twelve months.

[10] On 5 August 2008 the applicant was sentenced to fifty-two days imprisonment, with the same period of time being declared as time already served under the sentence, for two offences of possessing dangerous drugs and one offence of failing properly to dispose of a syringe or needle, all committed on 26 April 2008. The suspended sentence was not brought to Magistrate's attention.

[11] Evidence of the offences for which the applicant was sentenced on 19 February 2010 was obtained when police executed a search warrant at the applicant's house on 16 September 2008. She then ran out of the back door of her house carrying a brown paper bag and a plastic bag with a small clip seal bag inside it. She failed to comply with an order by police to drop the bags. Instead, in an apparent attempt to dispose of the contents she dispersed the contents of the clip seal bag over her hair and onto the ground. Traces of methylamphetamine were found in the clip seal bag and the paper bag contained pseudoephedrine tablets. Other drugs and drug related paraphernalia were found at the applicant's premises. There were books which included descriptions on how to manufacture methylamphetamine and laboratory equipment upon which there were traces of methylamphetamine. In all, the police found a total quantity of powder and crystals weighing 26 grams amounting to 6.49 grams of pure methylamphetamine (some three times the scheduled amount) and 538 grams of a substance which was predominantly pseudoephedrine. Police also found small amounts of cannabis and heroin and, significantly, $35,000 in cash in a calico bag inside a pot in the kitchen.

[12] The Crown did not allege that the applicant was guilty of producing the drug or selling it herself but she was plainly aware that it was occurring. The applicant denied possessing or owning the drugs and told police that she had run from the house because she feared that they were people who had come to steal from her. There was no challenge to the sentencing judge's findings that this was a lie and that the methylamphetamine was on the premises for commercial purposes.

[13] The applicant pleaded guilty at the committal hearing. The sentencing judge remarked that this entitled the applicant to a significant discounting of her sentence but there was not a lot else he could find which had a similar effect. His Honour referred to the fact that the suspended sentence was imposed for an offence committed over six and a half years earlier, she had served three months which was taken into account at the time of sentencing for that offence, she had remained offence free from the middle of 2006 until early 2008, and though the operational period was current at the time of the offences it had expired about five months before she was sentenced on 19 February 2010.

[14] The prosecutor submitted to the sentencing judge that the appropriate sentence for the applicant's offence of permitting premises she occupied to be used for unlawfully producing a dangerous drug was three to four years imprisonment. Counsel for the applicant submitted that the appropriate period of imprisonment was one to two years.

[15] In imposing the sentence of three years imprisonment, the sentencing judge noted that the applicant had not taken advantage of the chances given to her in the past and concluded that the sentencing requirements of denunciation of the applicant's conduct and the need for deterrence of others required the applicant to be sentenced to imprisonment, which she might use to lay a foundation for getting herself clear of drugs. His Honour took into account the applicant's personal circumstances and the circumstances of the offences which I have summarised. He observed that the type of drug in respect of which the applicant allowed her premises to be used must be a particularly important factor and that the quantity of the drug and the commerciality of the operation must also be relevant. Those three factors were substantially against the applicant. The state of the applicant's health made it clear that her cooperation must be reflected in early release on parole, which the sentencing judge hoped would include strict supervision and arrangements for the intensive psychological and psychiatric treatment envisaged by the psychiatrist.

[16] The sentencing judge rejected the submission that the suspended sentence should not be activated. Section 147(2) of the *Penalties and Sentences Act* 1992 (Qld) provides that the court must make an order under s 147 (1)(b) (ordering the offender to serve the whole of the suspended imprisonment) unless the court is of the opinion that it would be unjust to do so. With reference to the circumstances to which the court must have regard under s 147(3), the applicant's counsel relied only on paragraph (c) ("any special circumstance arising since the original sentence was imposed that makes it unjust to impose the whole of the term of suspended imprisonment"). The sentencing judge found that the circumstances were not sufficiently special to warrant any order other than that the applicant must serve the whole of the suspended imprisonment. The sentencing judge acknowledged that care must be taken to ensure that there was proportionality in the whole period of imprisonment which the applicant must ultimately serve, but his Honour rejected the submission for the applicant that the suspended sentence should be made concurrent with the sentence for the offences on the four count indictment.

Consideration of the arguments in this application

[17] In support of the contention that the sentence was manifestly excessive, the applicant's counsel emphasised the shortness of the period charged in the offence of permitting premises to be used for the production of a dangerous drug ("on or about the sixteenth day of September, 2008"), her disabilities (her severe drug addiction, mental illness and physical deterioration which rendered her barely capable of caring for herself, much less actively participating in the production of drugs), her domestic situation (a commercial drug dealer on quite a large scale took advantage of the applicant's incapacities to use her premises to produce drugs), and that the applicant had no proprietary interest in the significant quantities of drugs found in her premises. The applicant's counsel referred also to the significant delay of two years between the commission of the offences in August and December 2003 and the imposition of a suspended sentence on 12 September 2005, the ninety days which the applicant spent in custody after her arrest on 19 December 2003 and the fact that she had entered early pleas of guilty in relation to the offences.

[18] As the applicant's counsel accepted, however, the sentencing judge took all of those circumstances into account in the applicant's favour. His Honour was also obliged to bear in mind circumstances which pointed to a more severe sentence, particularly the nature and extent of the drug production which the applicant permitted to occur on her premises, she had been unable to take advantage of the repeated chances for her rehabilitation under earlier suspended sentences and intensive correction orders, she committed her offence whilst subject to a suspended sentence, and she had a very extensive criminal record. The sentencing judge was right to characterise the applicant's offence of permitting her premises to be used for producing a dangerous drug as a serious one, notwithstanding that the duration of that conduct was limited. Nor was there any error in the sentencing judge's view that the type of drug for which the applicant allowed her premises to be used was a particularly important factor in determining the appropriate sentence. It is not possible to generalise as to the relative significance of the different factors in all cases, but plainly the sentencing judge was also right to take into account the quantity of the drug and the commerciality of the operation. As his Honour observed, those factors were substantially against the applicant.

[19] The applicant's counsel argued that the sentencing judge erred in disregarding sentencing decisions which counsel cited at the sentence hearing.

[20] In *R v Smith*[1] the offender was sentenced to twelve months imprisonment for an offence of suffering premises to be used for growing more than 4,000 marijuana plants which were said to have a "street" value of $1,000 each. That offender was married, supported a child, had a good work record and had committed only one prior offence. In *R v Spiteri*[2] an offender who permitted a place to be used to grow six hundred cannabis plants was sentenced to twelve months imprisonment suspended for two years. That offender was in poor health and had no prior convictions. In *R v Stewart*[3] an offender who permitted a place to be used to produce hydroponically grown cannabis was given three months imprisonment cumulative upon other drug offences committed in New South Wales. That sentence was imposed on the basis that the Queensland offence was part of an ongoing criminal conduct which involved the New South Wales heroin activities, his convictions for which constituted his only criminal history. The personal circumstances of each of those offenders were more favourable than those of the applicant, those sentences did not concern a schedule 1 drug, and they were imposed more than twenty, fifteen and thirteen years ago respectively. For those reasons they are of no assistance here. *R v Small*[4] in which the sentence was six months imprisonment wholly suspended, is also not a comparable decision, that offender having had no drug history and having committed no serious offence in the previous twenty-seven years.

[21] In *R v Oldfield*[5] a 40 year old mother of two teenage children who was convicted on her pleas of guilty of possessing a dangerous drug and of permitting a place to be

---

1 *R v George Leopold Smith*, unreported, Kelly J, Supreme Court of Queensland, No. 245 of 1987, 27 February 1987.

2 *R v Robert John Spiteri*, unreported, Cullinane J, Supreme Court of Queensland, No. 124 of 1995, 2 June 1995.

3 *R v John Nicholas Stewart*, unreported, Thomas J, Supreme Court of Queensland, No. 326 of 1996, 22 January 1997.

4 *R v Warren Edward Small*, unreported, Ann Lyons J, Supreme Court of Queensland, No. 962 of 2005, 28 November 2006.

5 [1999] QCA 85.

used for the production of .89 grams of methylamphetamine was sentenced to one year and nine months imprisonment with a recommendation for release on parole after nine months. This Court set that sentence aside and resentenced her to twelve months imprisonment suspended after she had served three and a half months before the appeal for an operational period of two years. At that time methylamphetamine was a schedule 2 drug (although there has been no change in the penalty for this offence). Oldfield also had a far less extensive history of drug related offences than this applicant and more compelling personal circumstances. Although she committed her offences whilst on bail, a number of factors operated "strongly in her favour": the extremely small quantity of drugs, the absence of any suggestion that she was actively involved or assisted in the production of drugs, her relationship with the person who allegedly produced the drugs had ceased, there was evidence of violent conduct by that person (although not against the defendant), she had shown remorse and resolved on a change of course once she faced the sobering prospect of a prison sentence, she was of generally good character, and there was the undesirability of interfering with the support which she gave to her mother and children. Again the circumstances are so different as to render that case of no real assistance here.

[22] In *R v King*[6] an offender was sentenced to eighteen months imprisonment wholly suspended for an operational period of two years for an offence of permitting the use of a place for possessing a dangerous drug. Although that defendant appreciated that her partner was using her house to store dangerous drugs and possessed some for a commercial purpose, she was not aware of the nature or quantity of those drugs, namely 26,000 methylenedioxymethamphetamine (MDMA) tablets weighing 7.4 kilograms gross and containing about 2.36 kilograms of pure drug. That offender also had much more compelling personal circumstances than the applicant. She was only 22 years old when she committed the offence, the evidence showed that she had been completely free of illicit substances for some four months before sentence, and, most importantly, the sentencing judge accepted that she had been able to turn her life around.

[23] The prosecutor cited *R v Hesketh; ex parte A-G (Qld)*[7] and *R v Day & Gill.* [8]

[24] In *R v Hesketh; ex parte A-G (Qld)* this Court upheld an Attorney's appeal against a twelve month sentence ordered to be served by way of intensive correction order and substituted a sentence of imprisonment of two and a half years suspended after four months for an operational period of five years. That offender pleaded guilty to a charge of possessing methylamphetamine with a circumstance of aggravation that the quantity exceeded two grams, for which the maximum penalty was twenty years imprisonment. She possessed 57.347 grams of pure methylamphetamine, the purity ranging from 36.5 percent to 61.3 percent, and some cash was also found hidden around her house. She had a criminal record involving property offences, a weapons act offence, and drug offences. The sentencing judge concluded that her activities involved a mix of possession and acquisition of drugs primarily for satisfaction of her own addiction but also to engage in some trade to support that addiction and some sharing with friends. Williams JA, with whose reasons McPherson JA and Holmes J agreed, observed that the broad range of imprisonment

---

6 *R v Amanda Eve King*, unreported, Mullins J, Supreme Court of Queensland, No. 885 of 2005, 9 November 2006.

7 [2004] QCA 116.

8 [2005] QCA 100.

for such an offence was from about two and a half years to about four years imprisonment.

[25] In *R v Day & Gill* this Court found no error in sentences for offences of producing methylamphetamine. Day was not to receive any financial benefit other than a notional payment to an acquaintance in respect of damage to a car for which he was under pressure to pay. That, together with text messages on a mobile phone, sufficiently pointed to a commercial element in the production of the drug. Day was sentenced to three and a half years imprisonment suspended after eighteen months and his female partner Gill was sentenced to three years imprisonment suspended after twelve months. Lesser concurrent terms were imposed for three related drug offences. Gill was 25 years of age and Day was 33 years of age at the time of the offences. Those offenders made admissions to police and entered early pleas of guilty. The offenders jointly had the care of their four months old child and Day also cared for two other children. The lighter sentence given to Gill reflected her age, that she had no prior convictions, and that she was not drug dependent, whereas Day had a long standing amphetamine addiction and a criminal history which included drug offences.

[26] Of course the proper sentence in each case must depend upon an assessment of the offender's criminality in the offence and all of the relevant circumstances, but it is important to note that *R v Day & Gill* concerned a different offence which involved the offender's active participation in the production of drugs; if all other things were more or less equal, that offence might be regarded more seriously than permitting premises to be used for that purpose, as is reflected in the difference in the maximum penalties for those offences. However the applicant's personal circumstances and the circumstances of her offending differed markedly from those considered in each of the decisions I have discussed, including *R v Hesketh; ex parte A-G (Qld)*[9] and *R v Day & Gill*,[10] neither of which involved sentences for the offence of permitting premises to be used for producing a dangerous drug.

[27] The sentencing judge observed, correctly in my respectful opinion, that none of the decisions cited to his Honour was of much assistance in fixing upon the just sentence in this case. I would add that this involved no adverse reflection on counsel at the sentence hearing, who acknowledged their difficulty in finding comparable decisions.

[28] The respondent referred this Court to decisions concerning sentences for production offences: *R v Martin*,[11] *R v Jeffs*,[12] and *R v Sabine*.[13] In *R v Martin* the maximum penalty for that offence was then fifteen years imprisonment. That 52 year old man with no criminal history extracted 95.4 grams of pseudoephedrine from sudafed tablets in a way which might have produced up to 85 grams of pure methylamphetamine. That was much less pseudoephedrine than the 538 grams found at the applicant's premises. Martin was sentenced to four years imprisonment with a recommendation for parole after eighteen months and had comparably favourable personal antecedents. As the Chief Justice subsequently observed in *R v Jeffs*, the helpfulness of *Martin* is reduced by the feature that

---

9 [2004] QCA 116.
10 [2005] QCA 100.
11 [2002] QCA 513.
12 [2005] QCA 35.
13 [2007] QCA 220.

methylamphetamine was then a schedule 2 drug whereas it has since been listed as a schedule 1 drug. In *R v Jeffs*, the offender purchased forty packets of sudafed over a twelve month period knowing that they would be used in the production of methylamphetamine. The maximum penalty for his offence was twenty years, but the potential production in that case was much less than the production carried out on the applicant's premises. Jeffs, who had a lengthy criminal history including an offence of indecent dealing for which he had been sentenced to six months imprisonment, was sentenced to four years imprisonment with a recommendation for release after eighteen months. *R v Martin* and *R v Jeffs* did not concern the subject offence and their different facts render them of limited value here, but the applicant's sentence is not inconsistent with the sentences in those cases.

[29] In *R v Sabine*, an offender who permitted production of methylamphetamine to occur on his premises and who had some involvement in recruiting another man to acquire fewer than twenty boxes of sudafed for that purpose was sentenced to three years imprisonment with parole release after sixteen months. He was a man in his early forties with a criminal history that included drug offences, but he had not previously been imprisoned. Although the objective circumstances of Sabine's offending were more serious than those of the applicant, the production which the applicant permitted to take place on her premises was more substantially commercial and she had the aggravating feature of committing the offence whilst she was subject to a suspended sentence. This decision provides some support for the sentence imposed upon the applicant.

[30] The applicant's sentence was certainly not a light one, but acknowledging that her offending did not involve the generally more serious feature of active production of dangerous drugs and those personal circumstances urged in her favour, the severity of her sentence was justified by the significant extent of the production of a schedule 1 drug which she knowingly permitted, albeit for a short time, to take place on her premises, the fact that when she committed her offence she was the subject of a suspended sentence, and the extent of her criminal record.

[31] The Court was referred to *R v Stevens*[14] in which this Court observed that s 147(3) does not require that the matters identified in that provision be the only matters taken into account in determining whether it would be unjust to order the defendant to serve the whole of the suspended imprisonment. However the applicant did not contend that the sentencing judge failed to take any relevant matter into account in making that determination.

[32] In support of the submission that cumulative sentences should not have been imposed, the Court was referred to *R v Hoad*,[15] in which this Court summarised principles laid down in previous decisions:[16]

> "(a) is there some clear reason why the sentence should be served cumulatively?
>
> (b) is the combined sentence out of proportion to the combined seriousness of the offences?

---

14 [2006] QCA 361 at [22].

15 (1989) 42 A Crim R 312 at 315.

16 See *R v Campbell and Brennan* [1981] Qd R 516 at 524; *Webber*, unreported, Court of Appeal Queensland, No. 187 of 1985; *Henderson*, unreported, Court of Appeal Queensland, No. 85 of 1987.

(c) sentences imposed in respect of offences arising out of one incident or transaction are ordinarily ordered to be served concurrently.

(d) sentences for offences which are separate in character and seriousness are often made to run concurrently."

[33] The last two points had no potential application here. As to the first point, there was a clear justification for cumulative sentences in the circumstance that the applicant committed serious drug offences when she was subject to a suspended sentence of imprisonment imposed for earlier, unrelated drug offences. As to the second point, whilst acknowledging the severity of the sentence it could be not be said that the combined sentence, under which a parole eligibility date was fixed after the applicant had served less than one quarter of the effective four year term, was out of proportion to the combined seriousness of the offences.

Proposed order

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