SUPREME COURT OF QUEENSLAND

CITATION:	*R v Cone* [2010] QCA 274
PARTIES:	**R** **v** **CONE, Mark Lindsay** (applicant)
FILE NO/S:	CA No 155 of 2010 SC No 4 of 2010 SC No 398 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court in Brisbane
DELIVERED ON:	12 October 2010
DELIVERED AT:	Brisbane
HEARING DATE:	1 October 2010
JUDGE:	McMurdo P, Chesterman JA and Cullinane J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**a. Application for leave to appeal against sentence is granted.** **b. Allow the appeal:** **i. Set aside the sentences imposed in respect of the count of supplying a dangerous drug on or about 23 October 2007 of four and a half years imprisonment and the sentence imposed on the count of possessing a dangerous drug with a circumstance of aggravation on 24 October 2007 of four and a half years imprisonment and substitute for each of those terms, terms of imprisonment of three and a half years.** **ii. Set aside the term of imprisonment of fifteen months imprisonment in respect of the count of possession of a dangerous drug with a circumstance of aggravation on 30 September 2008 and substitute therefore a term of imprisonment of nine months imprisonment.** **The sentences otherwise stand. The 11 September 2010 is fixed as the applicant's eligibility for release on parole date.**

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE – where the applicant pleaded guilty to four indictable offences and four summary offences – where the applicant has an extensive criminal history – where the applicant was on parole when the first group of offences were committed – where the applicant was on bail for the first group of offences when the second group of offences were committed – whether the learned sentencing judge placed sufficient reliance on the applicant's plea of guilty – whether the applicant held real prospects of rehabilitation – whether the sentences imposed were manifestly excessive or inadequate

Drugs Misuse Act 1986 (Qld)
Weapons Act 1990 (Qld)

AB v The Queen (1999) 198 CLR 111; [1999] HCA 46, considered
R v Daley(2004) 147 A Crim R 440; [2004] QCA 385, considered
R v Michalas [2007] QCA 38, considered
R v Stewart [2004] QCA 320, considered
R v Swan [2000] QCA 430, considered

COUNSEL: B Mumford for the applicant
M Lehane for the respondent

SOLICITORS: Fisher Dore for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **McMURDO P:** I agree with Cullinane J.

[2] **CHESTERMAN JA:** I agree with the orders proposed by Cullinane J for the reasons given by his honour.

[3] **CULLINANE J:** The applicant seeks leave to appeal against sentences imposed in the Supreme Court at Brisbane on 11 June 2010.

[4] On that day the applicant pleaded guilty to four indictable offences and four summary offences. The indictable offences were:

(a) supplying methylamphetamine
(b) possessing methylamphetamine and heroin with a circumstance of aggravation
(c) possessing property obtained from the supply of a dangerous drug
(d) possessing methylamphetamine and cannabis sativa with a circumstance of aggravation.

[5] The summary offences were two offences under the *Drugs Misuse Act* 1986 (Qld) relating to the possession of utensils and the failure to dispose of a syringe, an offence under the *Weapons Act* 1990 (Qld) and breach of bail.

[6] The first three of these did not attract any punishment.

[7] On each of (a) and (b) of the indictable offences, the applicant was sentenced to four and a half years imprisonment and on (c) the count of possessing property obtained from the supply of a dangerous drug, he was sentenced to two years imprisonment. These three terms were ordered to be served concurrently.

[8] On (d) that is the count of possession of a dangerous drug with a circumstance of aggravation committed on 30 September 2008, the applicant was sentenced to 15 months imprisonment to be served cumulatively upon the two terms of four and a half years. On the breach of bail, he was ordered to serve three months imprisonment which was to be served cumulatively upon the other terms of imprisonment. The applicant was thus sentenced to an effective term of imprisonment of six years. The parole eligibility date was fixed at 10 March 2011. As the applicant had already served some 458 days of pre-sentence custody in respect of which declarations were made, effect was that his eligibility for parole was fixed at the one-third point of the total imprisonment imposed.

[9] The applicant was born on 2 January 1978.

[10] The indictable offences (a) (b) and (c) were committed in October 2007 as were the first two summary offences. The other indictable offence was committed in September 2008 and the breach of bail occurred in July 2008.

[11] The applicant had a very extensive criminal history including a substantial number of offences of dishonesty and drug offences.

[12] An agreed statement of facts was tendered (Exhibit 5).

[13] On 24 October 2007 police went to the room of a hotel where the applicant was staying. A number of people were present, including the applicant who was seen to be holding a large amount of cash in his hand when the police arrived. He ran towards an exit and dropped a large clip seal bag onto the floor of the room as he did so. Police attempted to detain him as he was in the process of putting the money down the front of his shorts.

[14] When he was detained, it was found that the bag that he had dropped contained a quantity of brown substance which proved to be methylamphetamine. Whilst he was being searched his phone was continually ringing. A set of scales was found on a bed in the room. He denied any knowledge of these. In a waste bin there was found an uncapped syringe. The total sum of money seized was some $7,320. The gross weight of the substance seized was 19.169 grams of which 5.398 grams was pure methylamphetamine. The applicant admitted to police that some $800 - $1,100 of the money was from his work and the remainder came from selling drugs. He admitted to police that the bags contained amphetamines but said heroin which was found was for his own personal use. He acknowledged that he sold amphetamine and said that the drugs that were found would have either been used or sold. He volunteered to police that the previous evening he sold amphetamine in a transaction at a service station and for which he received $6,000. He

acknowledged at this time that the scales were used for the purposes of weighing drugs and that the phone which was seized was used both for the sale of drugs and for personal use.

[15] Almost a year later on 30 September 2008, police executed a search warrant at the applicant's residence. The applicant had failed to answer his bail in respect of the earlier matters of 24 September 2007. Although the police were told the applicant was not present when they arrived he was found to be hiding beneath a mattress and was arrested. Some five clip seal bags of what proved to be methylamphetamine were found during a search of the premises. The gross weight of the material was 14.641 grams of which 2.333 grams was pure methylamphetamine. A small quantity of cannabis was found with a bong. A cross bow was located by police in the premises. The applicant admitted to possessing the cannabis, the cross bow and the bong but refused to answer questions in relation to the other drugs. The applicant was sentenced upon the basis that the offences of October 2007 involved commercial dealings in drugs, whilst the offences of September 2008 were not of that character.

[16] The applicant was on parole in respect of the attempted arson offence when the first group of offences was committed. His parole was suspended but subsequently he was released on parole and this was the position when the October offence was committed.

[17] At the time of the second lot of offences he was on bail in respect of the first group of offences.

[18] The applicant plainly has serious problems with drugs as the learned sentencing Judge acknowledged. He has a long criminal history and has had many opportunities afforded to him but has not taken advantage of these.

[19] Though counsel for the applicant in his outline of argument contended that errors of principle in the learned sentencing Judge's approach could be identified, it is clear that his substantive submission was that the sentence overall was manifestly excessive.

[20] The first of the areas contended for relates to the volunteering by the applicant of the information that he had, supplied a quantity of methylamphetamine for some $6,000, the day prior to being questioned by the police on 24 October.

[21] This was something which called for a substantial allowance in accordance with what was said by the High Court in *AB v The Queen* (1999) 198 CLR 111 calls.

[22] Whilst it is acknowledged that the learned sentencing Judge referred to the fact that the count of supply was one which the authorities were unaware of and might not have otherwise discovered, it was said that the learned sentencing Judge must not have made any or any sufficient allowance for this and reliance was placed upon his Honour's remarks[1] that the biggest mitigating factor in the case was the applicant's pleas of guilty.

[23] In my view there is nothing to support the suggestion that the learned sentencing Judge overlooked this matter. It must of course be borne in mind that it is not alone

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1 r 49 line 55.

the volunteering of information about an unknown offence which calls for the relevant discount but that fact followed by the applicant's plea of guilty to that offence. His Honour plainly took both these matters into account. It must also be borne in mind that this consideration is relevant only to the supply count.

[24] The second matter related to the rehabilitation programme that the applicant intended to undertake. His Honour expressed the view that it would be optimistic of him to sentence the applicant on the basis that he would succeed in his attempts at rehabilitation. His Honour expressed the hope that this would occur but in expressing his reservations he was doing no more than echoing the remarks of the psychologist, the author of the report which had been placed before His Honour.

[25] His Honour recognised that in imposing cumulative sentences, the total term of imprisonment had to reflect the criminality involved and satisfy the totality principle.

[26] He said:

> *"The biggest mitigating fact is, I think, your plea of guilty and also I think I must take into account the fact that the total period of imprisonment must seem fair in the circumstances of the case as well as the individual sentences for individual brackets of offending."*

[27] We were referred to a number of cases by each counsel. Counsel for the respondent, whilst acknowledging that there was no truly comparable authority, placed particular emphasis upon the matter of *R v Swan* [2000] QCA 430.

[28] That case certainly bears a significant degree of factual similarity with the present case. The applicant was charged with possession of methyl amphetamine, heroin and cannabis sativa. After being released on bail he was found in possession of methyl amphetamine. He has a substantial criminal history and was on parole at the time that the offences were committed. He was on bail in respect of the earlier offences when charged with the later one. With the unexpired portion of the sentence still to be served, the effect of the sentence imposed is a term of eight years ten and a half months which was reduced by two years by this Court on appeal. However the significant difference between the two cases is that Swan pleaded not guilty and was convicted after trial.

[29] The matter of *R v Stewart* [2004] QCA 320 involves in my view considerably more serious offending than the present case.

[30] Counsel for the applicant amongst other cases placed reliance upon *R v Michalas* [2007] QCA 38 and *R v Daly* [2004] QCA 385.

[31] In *Michalas'* case the applicant was convicted of possession and supply of methylamphetamine as well as certain property and other offences. He was issued with notices to appear in respect of those matters and some 23 days later whilst subject to such notices, was found at a hotel in possession of methylamphetamine and numerous clipseal bags as well as a substantial sum of cash. He had a criminal history which included a number of offences of dishonesty but did not include any drug offences. He was sentenced to two and a half years imprisonment with parole after ten months. An application for leave to appeal was refused. Daly, who had

a substantial criminal history involving drug offences received a term of imprisonment for three years for possession and supply counts with a suspension after twelve months in respect to one of the cases and a parole eligibility date after twelve months in respect of the other.

[32] On appeal the sentence was varied to one which resulted in the suspension taking place forthwith. He had served about a year in pre-sentence custody.

[33] A consideration of these and the other cases to which we have referred leaves me with the clear impression that the sentence of four and a half years in respect of counts (a) and (b) would be difficult to justify if they stood alone. They make up the substantial component of a total of some six years imprisonment constituted by three cumulative terms. The sentence overall must meet the totality principle.

[34] I think that the total term of six years can be regarded as excessive.

[35] I would grant the application and set aside the terms of four years and six months imposed in respect of counts (a) and (b) and substitute therefore a term of three and a half years on each of those counts. I would also set aside the term of fifteen months imprisonment imposed in respect of count (d) and substitute therefore a term of nine months. I would leave undisturbed the three months cumulative imprisonment imposed in respect of the breach of bail.

[36] The total imprisonment then would be four and a half years imprisonment and I would fix the eligibility for parole date at 11 September 2010, that is at one-third of the total imprisonment after taking into account the pre-sentence custody. This means that the applicant is now eligible for parole.

[37] The formal orders therefore would be:

a. Application for leave to appeal against sentence is granted.

b. I allow the appeal:

i. Set aside the sentences imposed in respect of the count of supplying a dangerous drug on or about 23 October 2007 of four and a half years imprisonment and the sentence imposed on the count of possessing a dangerous drug with a circumstance of aggravation on 24 October 2007 of four and a half years imprisonment and substitute for each of those terms, terms of imprisonment of three and a half years.

ii. Set aside the term of imprisonment of fifteen months imprisonment in respect of the count of possession of a dangerous drug with a circumstance of aggravation on 30 September 2008 and substitute therefore a term of imprisonment of nine months imprisonment.

The sentences otherwise stand. The 11 September 2010 is fixed as the applicant's eligibility for release on parole date.