SUPREME COURT OF QUEENSLAND

CITATION:	*R v Robinson* [2011] QCA 27
PARTIES:	**R** **v** **ROBINSON, John Paul** (applicant)
FILE NO/S:	CA No 142 of 2010 SC No 724 of 2009 SC No 1499 of 2009 SC No 1503 of 2009 SC No 211 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	22 February 2011
DELIVERED AT:	Brisbane
HEARING DATE:	1 February 2011
JUDGES:	Margaret McMurdo P and Fraser and Chesterman JJA Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application for leave to appeal against sentence is refused**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where applicant pleaded guilty to a large number of drug-related charges contained in three indictments – where applicant pleaded guilty to related summary charges – where applicant was sentenced on all counts in the three indictments to six years imprisonment – where applicant was sentenced to six months imprisonment to be served concurrently for related summary charges – where applicant was sentenced on further summary charges not the subject of this application – where applicant argued the sentencing judge failed to take into account his addiction, cooperation with police and related assaults in prison – whether the sentence was manifestly excessive *R v Nagy* [2004] 1 Qd R 63;[2003] QCA 175, cited *R v Stewart* [2004] QCA 320, considered

COUNSEL: The applicant appeared on his own behalf
B G Campbell for the respondent

SOLICITORS: The applicant appeared on his own behalf
Director of Public Prosecutions (Queensland) for the respondent

[1] **MARGARET McMURDO P:** The applicant, John Paul Robinson, pleaded guilty on 12 November 2009 to a large number of drug-related charges contained in three indictments. A four count *ex officio* indictment charged him with offences committed in 2007, namely, producing the dangerous drug amphetamine in a quantity in excess of 2.0 grams (count 1), producing the dangerous drug amphetamine (count 2), possessing instructions about the way to produce amphetamine (count 3) and possessing things used in connection with the crime of producing a dangerous drug (count 4). A six count indictment charged him with offences committed in December 2008, namely, two counts of producing the dangerous drug methylamphetamine (counts 1 and 3); supplying the dangerous drug methylamphetamine (count 2); possessing methylamphetamine (count 4); possessing cannabis (count 5); and possessing things used in connection with the crime of producing a dangerous drug (count 6). A four count indictment charged him with offences committed in 2009, namely, producing the dangerous drug methylamphetamine (count 1); two counts of supplying methylamphetamine (counts 2 and 3); and possessing things for use and used in connection with the crime of producing a dangerous drug (count 4). He also pleaded guilty to some summary offences committed in 2007.

[2] The sentencing proceedings were not concluded on 12 November and were adjourned until the next day. Although the applicant was remanded in custody, he was mistakenly released from the court cells and absconded. He was re-arrested a few days later and charged with newly committed summary drug-related offences and with summary offences against the *Bail Act* 1980 (Qld).

[3] On 13 May 2010 he pleaded guilty in the Supreme Court to these further summary offences. He was sentenced on all counts in the three indictments to six years imprisonment. In respect of the 2009 summary offences, he was sentenced to six months imprisonment concurrent with the six year term of imprisonment; in respect of the 2007 summary offences he was convicted without further punishment. A period of pre-sentence custody of 274 days was declared as time served under the sentence. His eligibility date for parole was set at 10 February 2012, that is, after two and a half years imprisonment. He has applied for leave to appeal against his sentence, contending that it was manifestly excessive.

The applicant's antecedents

[4] The applicant was between 40 and 41 years of age at the time of the offending and 43 at sentence. He had a relevant criminal history. In 1989, he was placed on probation for 18 months for assault occasioning bodily harm. In 2001, he was convicted and fined for minor property offences; obstructing police; failing to properly dispose of a needle and syringe; and breaching bail. In 2002, he pleaded guilty to trafficking in, supplying, and possession of methylamphetamine, possession of cannabis, and other related drug offences. He was sentenced to an

effective term of two and a half years imprisonment wholly suspended for three years. He was not convicted again until November 2007 when he was fined for possessing dangerous drugs and possessing a knife in a public place in October 2007. These offences were committed shortly before the 2007 offences with which this Court is now concerned. In February 2009, he was convicted and fined for possession of suspected stolen property on 1 May 2008.

The facts of the offences

[5] The facts of the applicant's offending were recorded in tendered schedules.[1]

[6] He committed the 2007 offences contained in the four count *ex officio* indictment shortly after he was fined for possessing unlawful drugs and a knife.[2] They occurred in this way. At 9.00 pm on 27 November 2007, police executed a search warrant at a motel in Spring Hill. The applicant was present. Police evacuated the room and requested the assistance of Illicit Laboratory Investigation Team (ILIT). They returned the next day and found a set of electronic scales, and paraphernalia and chemicals able to be used in the production of methylamphetamine (count 4). The applicant told police that he had completed a "cook" about two weeks earlier which produced seven grams of amphetamine. Two other people assisted in the "cook" but he refused to name them. He received about two grams of amphetamine. He kept one gram for personal use and gave the other gram to a friend (count 1). He intended to use the paraphernalia and chemicals in another amphetamine "cook" the following week, but he needed more materials to complete it (count 2). The police found a compact disc containing recipes to make illegal drugs, including instructions on "cooking" amphetamine (count 3). The applicant was also in possession of cannabis and things used in connection with the use of cannabis for which he was charged summarily.

[7] After his arrest on the 2007 counts, the applicant was released on bail. In December 2008, he committed the offences charged in the six count indictment. On 6 December 2008, police executed a search warrant at Bellmere where an associate of the applicant, Michael Cardona, resided. The applicant's Nissan hire car was parked outside. The car contained items belonging to the applicant. On 9 December 2008 at the Caboolture police station, police conducted an electronically recorded interview with him and he subsequently provided them with a sworn statement. He admitted that, at about 10.00 pm on 4 December 2008, he and three others produced methylamphetamine in the garage of Cardona's residence. A person named Andrew; his girlfriend, Mel; and the applicant provided cold and flu tablets and set up a laboratory in Cardona's garage. The "cook" produced about six grams of methylamphetamine. Each of the cooks had a shot of the drug. The applicant received 2.6 grams of methylamphetamine with the remainder going to the other participants (count 1).

[8] Cardona suggested they do a bigger "cook". He exchanged his 2.6 grams of methylamphetamine from their first "cook" with a person called "Slugger" at Boondall in return for other equipment together with 22 boxes of sinus tablets (count 3). The applicant set about producing methylamphetamine in Cardona's kitchen, but he was dissatisfied with the equipment. Cardona offered him $30,000 to produce one kilogram of methylamphetamine. The applicant told Cardona he

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1 Exs 4 to 6.

2 See [4] of these reasons.

was interested in accepting this offer, but he would need better quality equipment and chemicals. Cardona agreed to arrange this. The applicant and Cardona left the house. Shortly afterwards, Cardona rang his daughter who told him that the police were executing a search warrant at his house (count 2).

[9] A small quantity of methylamphetamine (less than 0.001 grams) was found in the applicant's hire car (count 4). Police also found .25 grams of cannabis (count 5) and a quantity of chemicals and equipment capable of being used in producing methylamphetamine (count 6). The applicant was again arrested and again released on bail.

[10] His next series of offending occurred in January 2009 and was charged in the second four count indictment. At 6.10 pm on Friday, 9 January 2009, police executed a search warrant at a house at Caboolture where the applicant was present and was the sole occupant. Police noticed a strong smell of methylated spirits coming from the kitchen. They found a pyrex dish containing brown liquid on a stove top. They evacuated the house and waited for the arrival of ILIT officers. Police then took possession of some paraphernalia and chemicals. An analyst's certificate later detected methylamphetamine and other chemicals used in its production (count 1). In his interview with police, the applicant admitted that he was intending to supply a man with a "point" (one tenth of a gram) in exchange for chemicals (count 2). He was also intending to supply someone called "Deb" with a "shot" in exchange for gas for his cooker (count 3). Police seized items consistent with a clandestine laboratory for the production of methylamphetamine (count 4).

[11] After the applicant was mistakenly released from custody during his sentencing proceeding on 12 November 2009, he committed yet further offences. He was apprehended on 19 November 2009 at Bribie Island where he was found in possession of 3.2 grams of cannabis and associated paraphernalia. He was also charged with offences under the *Bail Act* 1980 (Qld).

Counsel's submissions at sentence

[12] The prosecutor submitted that all the applicant's offending was serious but particularly the 2008 offences. The case was comparable to that of *R v Stewart*.[3] He urged the primary judge to impose a sentence of nine years imprisonment with parole eligibility after four years.

[13] Defence counsel sought to distinguish *Stewart*. He emphasised the applicant's cooperation with the authorities. The 2007 offences were contained in an *ex officio* indictment. The 2008 offences were the subject of a full hand up committal. The applicant admitted his involvement in offences which otherwise would have been difficult or impossible for the prosecution to prove.

[14] Defence counsel tendered a psychologist's report which set out the history of the applicant's employment, family background and relationships. The applicant described his father and mother as alcoholics. He reported that his father was aggressive towards him as a child. He remembered being left alone in the bush because he would not stop crying with colic. He left home at 13 and lived independently. He was married for 10 years but was single at sentence. He had three children aged between 13 and 16 whom he saw regularly. He had participated

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3 [2004] QCA 320.

in counselling, including anger and behaviour management therapy, and had been treated for depression. He had chronic pain from a 2001 back injury for which he had received workers' compensation. As a result, he could no longer do heavy physical work. The psychologist diagnosed a chronic pain disorder combining medical and psychological factors; recurrent depressive episodes since childhood and amphetamine dependence in remission. The applicant would benefit from ongoing counselling and treatment.

[15] A medical report from a general practitioner who had treated the applicant since 1993 confirmed his history of back injury, his need for strong painkillers, and his treatment and medication for long-standing depression, as well as his history of illicit drug use and abuse.

[16] Whilst in custody, in an effort to rehabilitate, the applicant had completed and received certificates for an impressive number of courses. The applicant had prepared an affidavit in which he swore that attacks had been made upon him whilst in prison and that he feared for his safety. He had suffered serious injuries in prison. He also outlined the indignities and inconveniences he had suffered as a protected prisoner. He claimed he had assisted police in other investigations. Other reports provided independent support for the applicant's sworn statements.

[17] Defence counsel emphasised that the applicant had significant periods of solid employment and lengthy periods without offending. He ultimately submitted that comparable authorities supported a global sentence of about five years imprisonment to reflect all of the applicant's offending, including that much of it occurred whilst he was on bail. He urged the judge to suspend the sentence after 18 months or two years, or to at least set a parole eligibility date after two years imprisonment.

[18] In reply, the prosecutor tendered material from police officers to show that, whilst the applicant had given police some assistance, the information was self-serving and of no help in prosecuting others. The prosecutor also emphasised that the applicant and the community needed him to be supervised when he was released into the community; a suspended sentence was therefore inappropriate. Further, the applicant's offending warranted a much lengthier head sentence than five years. He ultimately submitted that a head sentence of no less than seven years should be imposed.

The judge's sentencing observations

[19] In sentencing the applicant, the primary judge made the following observations. The applicant's offending was serious and caused great problems in the community. The applicant was a drug addict and much of his conduct was attributable to his addiction. It was an aggravating feature that he continued to seriously offend whilst on bail.

[20] After detailing the circumstances of the offending, the judge noted the applicant had pleaded guilty to all counts. He had made admissions in respect of offences with which he would not have been charged otherwise, including the most serious of his offences. Some of the offences were contained in an *ex officio* indictment.

[21] He had a troubled upbringing and had been affected by a serious back injury. The judge referred to the psychologist's report and the applicant's criminal history. The

applicant had given assistance to police although this had not proven fruitful. As a result of this assistance, he had been assaulted twice in prison, quite seriously on one occasion. He was subsequently kept in protection in unsatisfactory conditions. He continued to receive threats from prisoners. Whilst there were some similarities to the applicant's case, the circumstances pertaining in *Stewart* made it more serious. The mitigating factors in the applicant's case made special leniency appropriate.

[22] The judge determined that it was appropriate in this case to impose a substantial global sentence to reflect the totality of the applicant's offending, the most serious of which was the planned production of a kilogram of methylamphetamine in January 2008 (count 2). His Honour determined to impose a sentence of six years imprisonment on all counts in the indictments.[4]

The applicant's submissions in this application

[23] The applicant was self-represented in this application for leave to appeal. He did not file any written submissions in support of it. He made the following oral submissions at the hearing. The judge did not sufficiently take into account his addiction; his cooperation with the police in admitting his involvement in offences which would not have been disclosed but for his admissions to police; and that he had been seriously assaulted in prison because of his cooperation with police. He told the Court he suffered from post-traumatic stress disorder following the serious prison assault. Although he had been moved to a new correctional centre, he still feared for his safety and his time spent in prison was more difficult than for other prisoners. He emphasised that he had rehabilitated and learned his lesson and would not re-offend. He submitted that the sentence imposed did not sufficiently recognise the mitigating features and was manifestly excessive.

Conclusion

[24] As the respondent pointed out, the judge's decision to impose six years imprisonment on all counts on all indictments was unusual. Of course, it was well open for the judge to impose a global head sentence in this case to reflect the total criminality of the applicant's offending: see *R v Nagy*.[5] But ordinarily this is done by imposing the global head sentence on the most serious count (here, count 2 in the indictment relating to the 2008 offences) and appropriately lesser concurrent sentences on the remaining counts. I note that none of the sentences imposed exceeded the maximum sentence applicable for that particular offence. There is therefore no reason to grant the application for leave to appeal against sentence unless the applicant's contention, that the effective global six year sentence was manifestly excessive, is made out. I now turn to consider that issue.

[25] The applicant committed these offences as a mature man, although clearly one with a rampant drug addiction. His conviction for drug trafficking in 2002, and his inability to rehabilitate, despite the lenient sentence then imposed, was concerning. He persisted in his offending after serial releases on bail, and even after entering pleas of guilty and the commencement of his sentencing hearing in the Supreme Court in November 2009. None of the decisions to which this Court and the

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4 The sentences imposed on the summary offences are not the subject of this application for leave to appeal against sentence.

5 [2004] 1 Qd R 63; [2003] QCA 175, [21], [39].

sentencing court were referred as comparable are of assistance in determining the sentence here, but nor do they suggest the sentence imposed was excessive.

[26] The applicant persistently involved himself in serious criminal activity and in the actual production of significant quantities of dangerous illegal drugs for his own use and the use of others. His serious and recidivist conduct warranted a significant overall sentence. The most serious aspect of the offending was the applicant's agreement in December 2008 to produce one kilogram of amphetamine in return for $30,000. Had he been successful, ordinarily he could have expected a sentence well in excess of the six years imprisonment imposed here. Further, the judge could have imposed cumulative sentences for each series of offending to effectively amount to an accumulated sentence of more than six years imprisonment. The global sentence of six years imprisonment imposed in this case was appropriately compassionate and was plainly reduced to reflect the many mitigating features, including the applicant's extensive cooperation with the authorities and that his time in prison has been and will be more onerous for him than for other prisoners. Parole eligibility set six months earlier than otherwise gave further recognition to the factors in his favour. An effective global sentence of six years imprisonment with parole eligibility after two and a half years was not manifestly excessive.

[27] It follows that the application for leave to appeal against sentence must be refused.

[28] **FRASER JA:** I agree with the reasons for judgment of the President and the order proposed by her Honour.

[29] **CHESTERMAN JA:** I agree that the application for leave to appeal against sentence should be refused, for the reasons given by the President.