SUPREME COURT OF QUEENSLAND

CITATION:	*R v Thomson* [2011] QCA 191
PARTIES:	**R** **v** **THOMSON, Brett Alan** (applicant)
FILE NO/S:	CA No 120 of 2011 SC No 60 of 2011 SC No 132 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Cairns
DELIVERED EX TEMPORE ON:	10 August 2011
DELIVERED AT:	Brisbane
HEARING DATE:	10 August 2011
JUDGES:	Margaret McMurdo P, Muir JA and Boddice J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**Delivered ex tempore on 10 August 2011:** 1. **The application be granted.** 2. **The appeal be allowed.** 3. **The sentence for count 1 be varied by directing that the applicant be released on parole immediately on the conditions mentioned in s 200(1) of the *Corrective Services Act* 2006 (Qld) ("the Act").** 4. **The applicant must report to a probation and parole officer as required by the Act between 9.00 am and 5.00 pm today or on the next business day and obtain a copy of the parole order.** 5. **The applicant is hereby informed that if he fails to comply with the latter requirement he will be unlawfully at large for the purposes of the Act.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant was sentenced to 18 months probation after pleading guilty to offences of possessing approximately three grams of cannabis and 3.559 grams of pure MDMA – where the applicant was convicted of breaching the probation order by dealing with

shop goods in an unauthorised manner – where the applicant breached the probation order again by committing drunk and disorderly and public nuisance offences and by testing positive on two occasions for cannabis – where the applicant was re-sentenced to a term of imprisonment of nine months for possession of the MDMA and to a concurrent term of imprisonment of one month for possession of the cannabis – where the applicant submitted that the sentencing judge gave insufficient weight to the applicant's youth, his lack of relevant criminal history, his prospects of rehabilitation and to the nature of the possession offences – where the breaches of the probation order occurred approximately 16 and a half months into the 18 month term of the order and were less serious in nature than the original offending – whether the sentence of nine months imprisonment was manifestly excessive

Corrective Services Act 2006 (Qld), s 200(1)
Drugs Misuse Act 1986 (Qld), s 129(1)(c)
Penalties and Sentences Act 1992 (Qld), s 126(6)(b)

R v Chinmaya [2009] QCA 227, considered
R v Holmes [2008] QCA 259, considered
R v Sartori [2006] QCA 284, considered

COUNSEL: C Morgan for the applicant
M B Lehane for the respondent

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

MUIR JA: The applicant was 22 years of age when sentenced in the Supreme Court on 3 April 2009 to 18 months probation after pleading guilty to offences of possessing approximately three grams of cannabis (count 2) and 62 ecstasy pills containing 3.559 grams of pure MDMA (count 1). A conviction was not recorded.

On 19 April 2010, the applicant was convicted of breaching the probation order by the commission of the offence of "unauthorised dealing with shop goods" by consuming them. The probation order was left in place.

On 20 April 2011, the applicant was found to have breached the probation order by committing "drunk and disorderly" and "public nuisance" offences and by the use of cannabis. In the latter regard, the applicant had tested positive for cannabis in July and

September 2010. He was re-sentenced to a term of imprisonment of nine months for possession of the MDMA and to a concurrent term of imprisonment of one month for possession of the cannabis.

It was directed that the applicant be released on parole after serving five months of the nine month term of imprisonment. The release date was thus 19 September 2011.

Counsel for the applicant submitted that the longer sentence was manifestly excessive in requiring the applicant to serve an actual term of imprisonment and in providing for a parole release date beyond the halfway point of the sentence. It was submitted that the sentencing judge gave insufficient weight to: the applicant's youth; the applicant's lack of relevant criminal history; the applicant's prospects of rehabilitation, including an offer of an apprenticeship and the nature of the possession offences. In the latter regard, counsel for the applicant referred to the absence of commerciality in the possession of the drugs, which were for the personal use of a 21-year-old who made admissions and pleaded guilty. Reliance was placed on the fact that the breaches of the probation order occurred approximately 16 and a half months into the 18 month term of the probation order and were less serious in nature than the original offending. It was submitted also that, although the applicant's compliance with the probation order had not been perfect, it had been generally satisfactory.

Counsel for the applicant relied on *R v Chinmaya* [2009] QCA 277; *R v Sartori* [2006] QCA 284 and *R v Holmes* [2008] QCA 259. The 28-year-old offender in *Chinmaya*, who had no prior criminal history and a good work record, was sentenced to concurrent terms of imprisonment of 12 months with a parole release date after serving three months. He pleaded guilty to possession of the dangerous drug methylamphetamine (contained in five clip seal bags of powder and 25 tablets) and to possession of MDMA with a circumstance of aggravation that the quantity of that dangerous drug exceeded two grams.

The offender admitted that the 25 ecstasy tablets which contained 1.672 grams of MDMA and the five clip seal bags containing powder which had within it 0.111 grams of methylamphetamine were for his personal use. By operation of s 129(1)(c) of the *Drugs Misuse Act* 1986 (Qld) he was deemed to be in possession of 88 tablets containing 6.027 grams of MDMA. However, it was accepted by the sentencing judge that the offender did not have knowledge of the presence of the 88 ecstasy tablets and that the methylamphetamine powder found in his room was owned by another person. The offender, who had been granted bail after serving two days of his sentence, was ordered by the Court on 17 July 2009 to be released on parole immediately. Justice Fraser, with whose reasons the others members of the Court agreed, concluded that the requirement for a deterrent sentence was sufficiently met by recording a conviction and imposing a head sentence of 12 months imprisonment.

In the course of his reasons in *Chinmaya*, Justice Fraser referred to *Sartori* in which, as he observed, the Court concluded that a sentence of 18 months imprisonment suspended after five months imposed for possession of 104 ecstasy tablets containing 10.679 grams of pure MDMA was not manifestly excessive in circumstances in which there was a commercial element to the offender's conduct. It was remarked also that the offender had a significant criminal record involving repeated drug offences.

The offender in *Holmes* was a 19-year-old apprentice electrician with a good employment history and no prior criminal history. He succeeded on appeal in having sentences of 12 months imprisonment to be served by way of an intensive correction order for one offence of possession of MDMA and three offences of supplying MDMA set aside and replaced by a two year probation order. The offender had purchased seven ecstasy tablets for $210. He admitted having sold one of the tablets to each of his two friends on the night he was apprehended and to having sold another two to a friend the week before. The offender did not profit from the sales. It was accepted that he had suffered emotional trauma as a result of his mother's diagnosis with cancer, the death of a close neighbour, the

death of a close school friend and the failure of the business in which he worked as an apprentice. He also stood to be sentenced on the basis that his convictions for the supply offences resulted from his own admissions.

Counsel for the respondent submitted that the sentences imposed were consistent with that imposed in *Chinmaya* and that they appropriately provided for deterrence. It was pointed out that the applicant continued to ingest illegal drugs during the probation period and had breached the order on three separate occasions. Reference was also made to a conviction for a public nuisance offence a very short period after the expiration of the probation period. Despite having been dealt with by a Supreme Court judge on one of the occasions on which the probation order had been breached and despite an earlier written warning from Corrective Services, it was pointed out that the applicant had re-offended.

In my view, the matters referred to by counsel to the respondent justified the imposition of a custodial sentence. As counsel pointed out, the applicant had not been deterred from re-offending or from breaching his probation conditions by the warnings given to him on his original sentencing and subsequently. However, in my respectful opinion, the sentence insufficiently took into account the nature of the breaches which led to his re-sentencing and the fact that he had already undergone the greater bulk of his probation. Under s 126(6)(b) of the *Penalties and Sentences Act* 1992 (Qld), the Court was required to have regard to the making of the probation order and "anything done to comply with [its] requirements". The applicant's compliance with the probation order was less than satisfactory but he failed to report on only four occasions and his prospects of rehabilitation appeared reasonable: he has the offer of an apprenticeship and he is quite young. Counsel for the applicant made the valid point that the applicant's breaches were far less serious in nature than his original offending.

For these reasons, I would order that:

1. The application be granted;
2. The appeal be allowed;

3. The sentence for count 1 be varied by directing that the applicant be released on parole immediately on the conditions mentioned in s 200(1) of the *Corrective Services Act* 2006 (Qld) ("the Act");
4. The applicant must report to a probation and parole officer as required by the Act between 9 am and 5 pm today or on the next business day and obtain a copy of the parole order;
5. The applicant is hereby informed that if he fails to comply with the latter requirement he will be unlawfully at large for the purposes of the Act.

I note the undertaking of the applicant's legal representative to inform the applicant of his obligations to report under s 160G(5) of the *Penalties and Sentences Act* 1992 (Qld).

THE PRESIDENT: I agree.

BODDICE J: I agree.

THE PRESIDENT: The orders are as set out by Justice Muir.