SUPREME COURT OF QUEENSLAND

CITATION:	*R v Beasley* [2013] QCA 322
PARTIES:	**R** **v** **BEASLEY, Paul Matthew**
FILE NO/S:	CA No 174 of 2013 SC No 600 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	29 October 2013
DELIVERED AT:	Brisbane
HEARING DATE:	24 October 2013
JUDGES:	Chief Justice and Fraser JA and McMeekin J 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 found guilty of unlawful possession of methylamphetamine, the quantity of which exceeded two grams (count 1) and possession of things in connection with possessing a dangerous drug (count 2) – where the applicant committed the offences whilst on bail – where the applicant was serving a sentence of three years imprisonment with a parole release date after 12 months at the time of sentence – where the applicant was sentenced on count 1 to two years imprisonment cumulatively on the term currently being served and a concurrent term of seven months imprisonment on count 2 – where the applicant had a significant and relevant criminal history – where the sentencing judge accepted a submission that the applicant's possession should be viewed as having a commercial element – where the applicant argued that he should not have been sentenced on the basis that he knowingly possessed the drug – where the applicant contended the sentence offended the totality principle – whether the sentence was manifestly excessive *Drugs Misuse Act* 1986 (Qld), s 9(b), s 129(1)(c)

Mill v The Queen (1998) 166 CLR 59; [1988] HCA 70, cited
Postiglione v The Queen (1997) 189 CLR 295; [1997] HCA 26, cited
R v Chinmaya [2009] QCA 227, cited
R v Cone [2010] QCA 274, cited
R v Duggan [2004] QCA 442, cited
R v Fabre [2008] QCA 386, cited
R v Lacey [2013] QCA 292, cited
R v Nguyen and Truong [1995] 2 Qd R 285; [1994] QCA 389, cited
R v Todd [1982] 2 NSWLR 517, cited
R v Warren [2011] QCA 89, cited

COUNSEL: P Nolan for the applicant (pro bono)
S J Farnden for the respondent

SOLICITORS: AW Bale and Son for the applicant (pro bono)
Director 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] **FRASER JA:** After a two day trial the applicant was found guilty of unlawful possession of the dangerous drug methylamphetamine, the quantity of which exceeded two grams (count 1) and possession of various paraphernalia in connection with the commission of possessing a dangerous drug (count 2). The applicant was sentenced for those offences on 13 June 2013. At that time he was serving a sentence imposed on 8 October 2012 of three years imprisonment, with a parole release date after 12 months, for offences of producing a dangerous drug and possessing a thing used in the commission of a crime. The applicant was sentenced on count 1 to two years imprisonment cumulatively upon the term currently being served, with a parole eligibility date of 7 May 2014. It was declared that a period of 129 days between 1 June and 8 October 2012 which the applicant had spent in pre-sentence custody was deemed time served under that sentence. He was sentenced on count 2 to a concurrent term of imprisonment of seven months. The overall effect of the sentence was to defer the applicant's previous full time release date from 7 October 2015 until 7 October 2017 and to substitute a parole eligibility date of 7 May 2014 for the pre-existing parole release date of 7 October 2013. Allowing five months for the somewhat shorter period of pre-sentence custody, the parole eligibility date fixed by the sentencing judge extended the minimum custodial period by about twelve months.

[3] The applicant has applied for leave to appeal against sentence on the ground that it is manifestly excessive.

[4] Evidence of the offences was obtained when police executed a search warrant at a residential unit in east Brisbane. The applicant was the sole occupant at the time of the search, although the applicant's girlfriend was the tenant and also lived at the unit. Near a bed on the floor of the second bedroom in the unit police found cash totalling $28,500, a toiletries bag, and a wallet which contained identification belonging to the applicant and a further $310 in cash. The bag contained 19.390 grams of substance in a plastic container and clip seal bags with a calculated

pure weight of methylamphetamine of 10.225 grams (count 1). Police found electronic scales, clip seal bags and other drug paraphernalia (count 2). Police also found a sealed package containing a substance, three laptops, various pairs of glasses, and a smoking pipe. The applicant denied knowledge of the drugs but admitted that the substance was his; he said that he used the substance for arthritic problems but it is also used as a cutting agent for dangerous drugs.

[5] The sentencing judge (who was the trial judge) accepted a submission by the prosecutor, with which defence counsel did not cavil, and found that, given the quantity of methylamphetamine and the amount of cash and other items found by police, the applicant's possession of the drug should be viewed as having a commercial element. The sentencing judge also accepted a submission for the applicant and found that, because the applicant was drug-dependent at the time of the offence in count 1, the maximum penalty for that offence was 20 years imprisonment, rather than 25 years imprisonment: *Drugs Misuse Act* 1986, s 9(b).

[6] Counsel for the applicant argued that it was unclear whether the applicant was sentenced on the basis of the Crown case that he knowingly possessed the drug or on the basis of the alternative Crown case that the applicant failed to rebut the presumption of possession flowing from his occupation of the unit (see s 129(1)(c) of the *Drugs Misuse Act* 1986); because the guilty verdict might have reflected the jury's acceptance only of the alternative case, the applicant should not have been sentenced on the footing that he knowingly possessed the drug. This argument should not be accepted. Since the verdict left open the nature of the applicant's possession of the drug, it fell to the sentencing judge to resolve that question: see *R v Nguyen and Truong* [1995] 2 Qd R 285 and *R v Chinmaya* [2009] QCA 227. The sentencing judge's findings, which were amply supported by the evidence, make it clear that the applicant was sentenced on the footing that he knowingly possessed the drug.

[7] The applicant was 36 when he committed the offences and 37 when he was sentenced. He had a significant criminal history. He had previously been sentenced for drug offending, including 12 months wholly suspended imprisonment imposed in December 1998 for supply and possession of dangerous drugs, 12 months imprisonment to be served by way of an intensive correction order imposed in November 2004 for offences including possession of dangerous drugs, nine months imprisonment imposed in May 2005 for breaching the intensive correction order, three years imprisonment with parole release after more than four months imposed in December 2008 for possessing a dangerous drug and other offences, three months imprisonment imposed in October 2010 for possessing dangerous drugs, importing controlled precursors, and other offences, and three years imprisonment imposed in October 2012 for offences committed by the applicant between June and August 2011. The applicant was on bail for the latter offences when he committed the subject offences.

[8] The applicant argued that manifest excess in the sentence was revealed by the totality of the imprisonment resulting from the order that the two year term imposed on count 1 be served cumulatively upon the existing imprisonment. The applicant accepted that a cumulative sentence was appropriate because he committed his offences whilst on bail, but argued that the appropriate sentence was one year imprisonment to be served cumulatively. That argument invoked the "totality principle" endorsed by the High Court in *Mill v The Queen* (1998) 166 CLR 59 and *Postiglione v The Queen* (1997) 189 CLR 295. That principle requires sentencing

judges to review each component of a sentence to ensure that the overall sentence is "just and appropriate" in all the circumstances, being especially careful in the case of cumulative terms of imprisonment to ensure that the sentence is "not disproportionate to the offender's overall criminality and that it does not stifle prospects of rehabilitation": *R v Lacey* [2013] QCA 292 at [55]-[56] (Wilson J, Douglas J agreeing). The applicant also cited *R v Todd* [1982] 2 NSWLR 517, in which Street CJ, Moffitt P and Nagle CJ at CL agreeing, made similar observations at 519-520. Street CJ referred also to the requirement to give weight to any progress in a prisoner's rehabilitation during the term of an earlier sentence, to the circumstance that such a prisoner has been left in a state of uncertainty about what will happen to the prisoner when sentenced on a subsequent occasion, and to the understanding and flexibility required when sentencing long after the relevant offence has been committed; such circumstances at times might require what otherwise would be an undue degree of leniency being extended to the prisoner.

[9] The sentencing judge applied the totality principle, referring for example to the moderation of a total period of imprisonment to ensure that it was not "crushing" and to the requirement that the total period of imprisonment reflect the criminality involved in all of the offences. Ultimately the sentencing judge rejected the submission made by defence counsel that a concurrent sentence of two years and two months, taking into account the pre-sentence custody, should be imposed together with a parole release date of 7 May 2014. The sentencing judge considered that, in the context of the applicant's offending whilst on bail, his criminal history involving similar offending, and the need to ensure that the sentence adequately reflected the criminality involved, the appropriate sentence was a cumulative term of two years imprisonment with a parole eligibility date on 7 May 2014.

[10] The sentencing judge referred to the submission for the prosecution that *R v Fabre* [2008] QCA 386 indicated that if count 1 stood alone, a sentence for that offence after trial might be in the order of three years imprisonment. The sentence in that case of two and a half years imprisonment, with parole release fixed after eight months in custody, was imposed after a very early plea of guilty and in the context of possession of methylamphetamine with a calculated pure weight of a little under seven grams, less than in this case. Similarly, an application for leave to appeal against a sentence of two and a half years imprisonment suspended after 12 months for an operational period of three years (with a concurrent sentence for possession of Schedule 2 drugs) was refused in *R v Duggan* [2004] QCA 442, in which the total quantity of drug possessed by the offender was substantially less than that possessed by the applicant and the offender pleaded guilty. I would accept the submission for the respondent that the cumulative term of two years imprisonment with the parole eligibility date fixed by the sentencing judge incorporated a discount which sufficiently took into account the totality of the imprisonment in all of the circumstances. The total period of imprisonment for all of the applicant's offences is also consistent with the effective total periods of imprisonment of four and a half years and six years which were found to be appropriate for the totality of the offending in *R v Cone* [2010] QCA 274 and *R v Warren* [2011] QCA 89 respectively. (The parole eligibility dates after one-third of the total periods of imprisonment were fixed in those cases in the context of pleas of guilty.)

[11] The applicant's sentence is not manifestly excessive. I would refuse the application for leave to appeal.

[12] **McMEEKIN J:** I agree with Fraser JA.