SUPREME COURT OF QUEENSLAND

CITATION:	*R v Johnson* [2007] QCA 345
PARTIES:	**R** **v** **JOHNSON, Anthony James** (applicant)
FILE NO/S:	CA No 189 of 2007 SC No 783 of 2006
DIVISION:	Court of Appeal
PROCEEDING:	Application for Extension (Sentence) Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED EX TEMPORE ON:	18 October 2007
DELIVERED AT:	Brisbane
HEARING DATE:	18 October 2007
JUDGES:	McMurdo P, Holmes JA and Douglas J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**Application for leave to appeal dismissed**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – APPEAL BY CONVICTED PERSONS – APPLICATIONS TO REDUCE SENTENCE – WHEN REFUSED – GENERALLY – where the applicant pleaded guilty to production and possession of a dangerous drug, and possession of a document containing instructions for producing a dangerous drug and things used in the production of a dangerous drug – where a conviction was recorded and the applicant was sentenced to 12 months' probation – where the applicant had no prior criminal history and was 62 at the time of the offence – whether or not a conviction should have been recorded *Drugs Misuse Act 1986* (Qld), s 4, s 4A, sch 2A *Penalties and Sentences Act 1992* (Qld), s 12(2) *R v Briese; Ex parte Attorney General* [1998] 1 Qd R 487, considered
COUNSEL:	A J Kimmins for the applicant

M R Byrne for the respondent

SOLICITORS: Ryan & Bosscher for the applicant
Director of Public Prosecutions (Queensland) for the respondent

HOLMES JA: The applicant for leave to appeal against sentence pleaded guilty to production of the dangerous drug, pseudoephedrine; possession of a dangerous drug, methylamphetamine; possession of a document containing instructions for producing a dangerous drug, methylamphetamine; and possession of things used in the production of a dangerous drug, glassware, chemicals, a burner and PH testing strips. Convictions were recorded and he was sentenced to 12 months' probation with a condition that he submit to drug testing. The applicant's real complaint is with the recording of convictions.

The offences came to light when a fire in the kitchen of the applicant's unit in a complex at Surfers Paradise caused some alarm. The complex was evacuated and the Fire Brigade alerted. The fire was successfully extinguished by the applicant and the manager of the complex using a fire extinguisher, but when fire service officers arrived, they noticed equipment suggestive of a clandestine laboratory. They alerted the police who found reaction vessels, glassware, solvents, chemicals containing hydrochloric acid, quantities of powder, Nurofen cold and flu tablets and recipes for the manufacture of dangerous drugs in the kitchen and main bedroom. Items in the bedroom included a burnt saucepan and glassware covered with white powder and

soot. Further documents relating to the manufacture of methylamphetamine were found on the applicant's computer.

13.549 grams of pseudoephedrine were located. A chemist confirmed that the cooking process under way in the unit was consistent with the extraction of pseudoephedrine. The applicant said that he was intending to use the product himself. The Crown did not contest that assertion, accepting that pseudoephedrine could be used as a stimulant. The applicant was also found to be in possession of 7.597 grams of powder, which contained .007 of a gram of methylamphetamine.

In the context of these charges, the applicant's antecedents and personal circumstances were unusual. He was 62 years old at the time of the offences. He had no criminal history. He was qualified as an accountant and had run a series of businesses. He was presently involved in three businesses, each of which involved importation of goods made in China which required him to travel to China. In the past, he had struggled with lethargy and drowsiness resulting from medication for epilepsy. He found those problems assisted by the use of Sudafed with pseudoephedrine as a constituent. When Sudafed in that form became unavailable and replacement medications had unfortunate side effects, he conceived the idea of attempting to extract pseudoephedrine from Nurofen tablets as a substitute.

Ephedrine is a schedule 2A drug. Sudafed is a stereo-isomer of ephedrine, and by virtue of the definition and declaration contained in sections 4 and 4A of the Drugs Misuse Act 1986 (Qld), is to be regarded also as a schedule 2A drug, production of which carries a maximum penalty of five years' imprisonment.

The learned sentencing judge noted the applicant's otherwise good character and absence of previous convictions, as well as the credit to be given for the applicant's pleas of guilty. He accepted that the methylamphetamine discovered was for the applicant's personal use as a stimulant and that the applicant was producing the pseudoephedrine to use in alleviating his lethargy. He observed, however, that the applicant had made no attempt to seek medical advice before resorting to dangerous drugs. Rehabilitation, his Honour said, was important but there was also a need for deterrence, personal and general, in sentencing in respect of pseudoephedrine and methylamphetamine, particularly having regard to the potential for harm of the latter. The appropriate way to mark disapproval of the applicant's conduct while giving an opportunity for supervised rehabilitation was by the imposition of the probation order, with the condition for drug testing which I have already mentioned.

In considering whether convictions should be recorded, the learned sentencing judge made express reference to each of the matters set out in section 12(2) of the Penalties and

Sentences' Act 1992 (Qld). He alluded to the potential for harm of methylamphetamine and the potentially serious consequences of the fire caused by the pseudoephedrine production. The latter was not, he said, a minor offence; nor were the acquisition of information in regard to the production of methylamphetamine or the possession of laboratory equipment for production, trivial offences.

In the applicant's favour were his good character and lack of convictions. His Honour also accepted that the recording of a conviction could cause the applicant economic harm by impeding ability to travel to China. However, he referred to R v Briese, ex parte the Attorney-General [1998] 1 Qd R 487, and to the observation in that case that, in some circumstances, it would not be right to withhold from those with an interest in knowing the truth, the fact that an offender had been convicted. He exercised his discretion to record convictions.

In arguing that convictions should not have been recorded, counsel for the applicant characterised the production offence as one of production of a small amount of a prohibited substance for the applicant's own health reasons and as not serious, given the identified purpose for its production and the fact that it involved no harm to anyone. He reiterated his client's favourable antecedents and the difficulties posed to him by a conviction being recorded. Counsel described the point made in the R v Briese as at the forefront of his Honour's reasons to record a conviction;

but, he argued, there was no force in the notion that some unknown person, at an unidentified time in the future, would have an interest in knowing that the applicant had possessed a small quantity of the prohibited substance in endeavouring to alleviate some physical symptoms. And, he added in his written submissions, the fact of a conviction on these charges would convey a false idea of both the applicant and the offending behaviour.

Counsel for the respondent made these points: the learned sentencing judge had not omitted to take into account any relevant consideration; the detriment complained of was not clearly identified; it was unknown how the recording of the conviction would affect the applicant's prospects of travelling to China; in any case, it was reasonable to suppose that the Chinese Government would have an interest in knowing that a visitor to its country on business had an association with a schedule 2A drug or a schedule 1 drug, for that matter. In any event, it was not mandatory to refrain from recording a conviction simply because business interests were likely to be affected.

The applicant's submission, as it seems to me, oversimplifies the nature of the offending. It ignores the potential for danger in the use of a home laboratory to produce pseudoephedrine, which was illustrated by the fire caused and the attendant inconvenience to other occupiers of the unit complex. It also brushes over the additional

offence of possession of methylamphetamine. Both of these aspects featured significantly in his Honour's decision.

It was clear also that his Honour's reference to the interest of others, knowing of the convictions, was made in the context of the applicant's prospective travel to China. It could not seriously be contended that authorities in that country would not have a proper interest in knowing the previous convictions of those visiting it for business purposes. In any case, it was patently not the only reason for his Honour's recording of convictions. The nature of the offending plainly loomed large in his considerations.

The discretion as to whether to record a conviction conferred by section 12 of the Penalties and Sentences' Act is a broad one. His Honour clearly took into account the matters prescribed under section 12(2), mentioning each. The additional features adverse to the applicant which I have mentioned were also relevant. His Honour properly declined to regard the offences as trivial, notwithstanding his acceptance of the applicant's explanation.

The applicant’s counsel suggested the learned judge had also failed to take into account his client's social wellbeing, a factor referred to in section 12(2). The difficulty with that submission is that there was no particular evidence before his Honour as to any effect in that regard. To the extent that the applicant's age and good character were

relevant in that respect, both were acknowledged by the trial judge in his exercise of discretion.

In essence, the applicant cannot point to any error in his Honour's exercise of discretion but rather complains that it was not exercised favourably to him. No real basis is identifying for interfering with his Honour's exercise of discretion. I would dismiss the application for leave to appeal.

THE PRESIDENT: I agree.
DOUGLAS J: I agree.

THE PRESIDENT: The application for leave to appeal is dismissed

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