SUPREME COURT OF QUEENSLAND

CITATION:	*R v Robinson* [2008] QCA 365
PARTIES:	**R** **v** **ROBINSON, Shane Matthew** (applicant)
FILE NO/S:	CA No 189 of 2008 SC No 43 of 2008
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Cairns
DELIVERED ON:	21 November 2008
DELIVERED AT:	Brisbane
HEARING DATE:	24 October 2008
JUDGES:	McMurdo P, Fraser JA and McMeekin J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**Application dismissed**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – application for leave to appeal against sentence – convictions for offences under the *Drugs Misuse Act* 1986 (Qld) – whether the sentence imposed was excessive *Criminal Code* 1899 (Qld), s 688D *Penalties and Sentences Act* 1992 (Qld), s 13(3), s 161 *R v Daly* (2004) 147 A Crim R 440; [2004] QCA 385, considered *R v Drury* [2005] QCA 187, considered *R v King*, unreported, Supreme Court, Qld, SC No 16 of 2008, 15 July 2008, considered *R v Kunst* [2003] 2 Qd R 98; [2002] QCA 400, considered
COUNSEL:	The applicant appeared on his own behalf G Cummings for the Respondent
SOLICITORS:	The applicant appeared on his own behalf Director of Public Prosecutions (Queensland) for the respondent

[1] **McMURDO P:** The application for leave to appeal against sentence should be refused for the reasons given by McMeekin J.

[2] **FRASER JA:** I agree with the order proposed by McMeekin J and with his Honour's reasons for the order.

[3] **McMEEKIN J:** This is an application pursuant to s 668D of the *Criminal Code* for leave to appeal against sentence passed on 21 June 2008.

[4] The applicant, Shane Matthew Robinson, pleaded guilty at the Supreme Court in Cairns to 16 offences against the provisions of the *Drugs Misuse Act* 1986 (Qld) and was sentenced to imprisonment as follows:

(a) two counts of supplying methylamphetamine to another (count 9 - 3 years and count 10 - 4 years);

(b) four counts of possession of methylamphetamine (counts 1, 6, 11, and 14 – 2 years);

(c) one count of possessing amphetamine (count 4 – 2 years);

(d) one count of possessing 3,4-methylenedioxymethamphetamine (count 3 – 1 year);

(e) three counts of possession of cannabis sativa (counts 2, 5 and 7 - 1 year);

(f) three counts of possessing things for use in connection with the commission of the crime of supplying dangerous drugs (counts 8, 13 and 15 – 1 year); and

(g) two counts of possession of property knowingly obtained from supplying a dangerous drug (counts 12 and 16 – 1 year).

[5] In relation to count 10 (the second count of supplying methylamphetamine to another) the applicant was sentenced to imprisonment for four years with a parole eligibility date set for 21 December 2008, that is after serving one year and 70 days, bringing into account 255 days of pre-sentence custody. Effectively his Honour sought that the applicant serve a further six months imprisonment from the date of sentence. The remaining sentences were ordered to be served concurrently.

[6] The Notice of Application for Leave to Appeal does not set out any grounds. The applicant is unrepresented. It would appear from his submission that he contends that the sentence imposed was manifestly excessive.

[7] The offending conduct occurred in five distinct episodes between 16 January 2007 and 26 August 2007. The applicant was born on 21 September 1968 and so was aged 38 and 39 at the time of commission of the offences and 39 when sentenced. The applicant has a long criminal history going back to 1985 when he was aged 17. Between 1985 and 1993 the applicant was convicted of 11 offences including two drug offences. Significantly, as the primary judge observed, there was no offending between 1993 and 2006.

[8] On 11 September 2006 the applicant was convicted and fined in the Cairns Magistrates Court for possession of dangerous drugs and related offences. On 18 January 2007 the applicant was again convicted in the Cairns Magistrates Court in

connection with drug offences. He was then given probation for two years. The day before being placed on probation the applicant committed the offences mentioned in counts 1, 2 and 3 – possession of methylamphetamine, possession of cannabis sativa and possession of MDMA. All of the subsequent offending conduct occurred whilst the applicant was on bail granted following his arrest on counts 1, 2, and 3 and whilst he was the subject of the probation order imposed in the Cairns Magistrates Court on 18 January 2007.

[9] On 16 March 2007 the applicant was charged in the Cairns Magistrates Court with failing to appear in accordance with his undertaking and breaching a bail condition. He was convicted on each charge and sentenced to 14 days imprisonment which sentence was wholly suspended for a period of 12 months. Counts 6 to 16 were committed during that operational period.

[10] The applicant was taken into custody on 25 August 2007 after being arrested on counts 14, 15, and 16. He remained in custody until the date of the sentence. A period of 255 days was declared as pre-sentence custody under s 161 of the *Penalties and Sentences Act* 1992 (Qld).

[11] From this summary it can be seen that the bulk of the offending occurred whilst the applicant was on bail, and on probation, and committed during the operational period of the suspended term of imprisonment. This aspect of the case demonstrates the applicant's disregard for the law, disregard for the leniency shown to him and adds significantly to the seriousness of his offending.

[12] The circumstances of the offences may be briefly described. As mentioned there are essentially five episodes:

(a) Counts 1, 2 and 3 concern the interception of the applicant's vehicle on 17 January 2007. Police located a clip seal bag containing a small quantity of methylamphetamine powder, a cigarette packet with a single ecstasy table within it, several clip seal bags containing small quantities of methylamphetamine and a plastic container with less than one gram of cannabis;

(b) Police were called to the motel room of the applicant on 6 February 2007 following a disturbance. They located clip seal bags containing two grams amphetamine powder and a small quantity of cannabis. The possession of these drugs is the subject of counts 3 and 4;

(c) On 2 April 2007 police attended at the applicant's residence. In his bedroom they found powder containing methylamphetamine, some cannabis, clip seal bags, spoons, a syringe, a mobile phone with a drug deal inquiry amongst the messages, tick sheets and two hand written notes consistent with third parties seeking supply of methylamphetamine from the applicant. The evidence resulted in the charges contained in counts 6, 7, and 8 and the first count of supply set out in count 9;

(d) On 5 June 2007 in the course of a search of his person police found on the applicant $1,465 in cash, a clip seal bag containing methylamphetamine, a set of scales, and a mobile phone. Messages on the phone confirmed that the applicant was involved in the sale of

drugs to others. This evidence resulted in the second charge of supply in count 10 and the charges set out in counts 11, 12, and 13;

(e) On 25 August 2007 police executed a search warrant at a motel room in Cairns and found the applicant there. He was in possession of several clip seal bags of powder containing methylamphetamine, a set of scales with residue on them, clip seal bags, a cutting knife and $1,500 in cash. As a result he was charged with counts 14, 15, and 16.

[13] The learned trial judge accepted a submission that the applicant was a street dealer, was addicted to drugs and that he engaged in the crime of supplying others with drugs in order to feed his own habit.

[14] The prosecutor at sentence urged the learned primary judge to impose a sentence in the order of four to five years (AR 14/50). After receiving that submission and reviewing the overall criminality of the applicant's conduct His Honour commented that, treated globally, the criminal conduct would "certainly warrant a penalty of five years." (AR 15/25).

[15] As to the plaintiff's personal circumstances the learned primary judge accepted that he was subject to some personal stressors including the recent death of his father, a breakdown in his marriage, and a need to care for a young daughter aged 12 years. The child had been in her father's care and was at the time of sentence being cared for by her grandmother.

[16] References tendered to the primary judge indicate that the applicant had skills in the construction industry and was well regarded.

[17] The learned primary judge took some comfort from the 13 year gap in the criminal history between 1993 and 2006 as indicating that the applicant had the capacity "to lead a good life". He accepted that the recommencement of the criminal conduct in 2006 was associated with the death of the applicant's father and the stressors in relation to the breakdown of his marriage. He accepted that his vulnerability to these stressors led to the drug offences and the addiction to drugs.

[18] Further His Honour accepted that the applicant had voluntarily sought out help with his drug addiction for the time when he might be released from jail.

[19] The matters emphasised by the applicant's counsel at sentence, in addition to the matters already mentioned, were that the applicant had conducted a successful business which had its peak in 2005 and 2006 and employed up to seven staff and had a turnover in excess of $150,000 annually, but that this life unravelled when he formed a relationship with a drug addicted female. He pointed out that as a result of the consequent addiction to drugs the applicant had lost his business and motor vehicle and given up custody of his daughter to his mother so that she could be better cared for.

[20] The applicant's counsel submitted to the learned primary judge that he should consider a head sentence of three years with a release on parole after 12 months.

[21] Against this background I turn to the central issue on the appeal – whether the imposition of a sentence of four years imprisonment with parole eligibility after

serving one year and 70 days fell outside the limits of a sound exercise of the sentencing discretion.

[22] It should first be noted that the applicant was sentenced on his plea of guilty. The record shows that the prosecutor accepted that this was an early plea (AR 4-50). It would appear that there had been a hand up committal and the plea taken on the first occasion of the listing of the matter before the Supreme Court. In accordance with s 13(3) of the *Penalties and Sentences Act* 1992 his Honour recorded that he took into account the plea of guilty. The context suggests that it affected the parole eligibility date that he had fixed (AR 28-50) and, given his earlier remark concerning the suitability of a five year term of imprisonment, perhaps also the head sentence.

[23] Secondly, it is necessary to bear in mind the overall conduct of the applicant.

[24] The offending conduct occurred over a period of some seven months. It could not in any sense be considered to be an isolated event or connected series of events. The offending conduct included two counts of supplying methylamphetamine, supply being a most serious charge. Methylamphetamine is a schedule one drug. The supply of it carries a maximum sentence of 20 years imprisonment (s 6(1)(b) of the *Drugs Misuse Act* 1986). His Honour properly recognised the significance of the offence when he remarked:

> "I have to have regard to the impact of your conduct in (sic) this occasion and …. the great harm it does in the community. It destroys lives and as the supplier of drugs you are part of that pattern of destruction." (AR 25/30-40)

[25] Thirdly it was quite proper for the sentence to reflect the applicant's complete disregard for the law in his continuing to offend despite his apprehension and despite being placed on bail.

[26] We have been referred to a number of decisions of this Court. As is often the case none precisely meets the facts here.

[27] *R v Drury* [2005] QCA 187 was a case like this one where there were multiple counts all related to drug offences. There however the significant counts related to the production of methylamphetamine. This Court set aside a sentence of three years imprisonment suspended after serving 15 months with an operational period of four years in relation to the most significant count of producing methylamphetamine and in its place substituted a sentence of two years imprisonment suspended after six months with an operational period of three years. The one significant matter that is akin to the facts here is that the appellant there persistently offended whilst on bail which the court accepted perhaps reflected the "insidious and desperate nature of his addiction." However there are a number of differences between the facts here and *Drury*. The offender there had spent some seven months in custody which could not be declared. He pleaded guilty to an ex officio indictment and without drug analysis certificates demonstrating considerable co-operation with the administration of justice. He had no prior convictions for drug related offences. The quantities of methylamphetamine that were found to have been produced were small and were for his own use, there being an absence of any commercial element.

[28] That may be contrasted with the facts here where the applicant did have prior convictions for drug offences and his offences were of supplying and had a considerable commercial element.

[29] We were referred to *R v Daly* [2004] QCA 385. Mr Daley faced seven counts including one of possessing methylamphetamine in a quantity exceeding two grams (the total calculated of 2.26 grams of methylamphetamine), one of supplying methylamphetamine, and two of supplying marijuana. The head sentences of three years imprisonment imposed in respect of the counts of aggravated possession and supplying of methylamphetamine were not interfered with, the focus of attention being on other matters. Effectively Mr Daly was required to serve a little more than 12 months of the sentence before its suspension.

[30] Whilst there are some similarities - principally that one count involved supply of a schedule 1 drug, and that Mr Daly had a criminal record which included a number of drug offences, one of which was supplying dangerous drugs for which he had been imprisoned – there are significant differences to the present case.

[31] Mr Daly's offending conduct was of a much shorter duration than the applicant's, there was only one charge of supplying a schedule 1 drug, he did not repeat that offence whilst on bail, he was younger (23 years of age) and his earlier life was described as "very unfortunate" – his parents separated when he was nine, he was placed in a foster home at 11, he lived on the streets from age 13 to age 17, by the time he reconnected with his mother when aged 18 she was supporting herself by prostitution and was herself addicted to drugs to which she introduced him and shortly before the offending conduct occurred Mr Daly's mother had been murdered which had understandably distressed him and resulted in "excessive abuse of dangerous drugs" and then to the offences charged.

[32] We were referred to *R v Kunst* [2003] 2 Qd R 98. Mr Kunst was sentenced to imprisonment for three years with a recommendation for release after 12 months following his plea of guilty to charges of supplying methylamphetamine on four occasions and cannabis sativa on one occasion to an undercover police officer. Whilst there were more charges of supplying than in the present case the four occasions relied on occurred over a period of about five weeks. Here the offending conduct, taken globally, occurred over seven months.

[33] A further important point of distinction is that the subsequent occasions of supplying methylamphetamine did not occur whilst the prisoner was on bail, although it is evident that Mr Kunst was active criminally when on bail on the subject charges. Further, it is important to note what was in issue in that case. Two arguments were advanced. One was that the learned primary judge had failed to appropriately declare pre-sentence custody. The other was that instead of a recommendation for release after 12 months, the sentence should have been suspended after 12 months. No argument was addressed to the issue of whether the sentence of three years imprisonment to serve 12 months (at least) was appropriate.

[34] Finally we were referred to a decision by a single judge in the matter of *R v King* (unreported) Jones J – 16/08-15 July 2008. Mr King pleaded guilty to one count of possession of methylamphetamine in a quantity exceeding two grams and five counts of supplying methylamphetamine. On the latter counts he was sentenced to two and a half years imprisonment all to be served concurrently. The offending

conduct occurred over a period of about two months and the latter four offences after being admitted to bail on the first two offences. There seem to be two relevant distinctions – the offending conduct occurred over a shorter period and there was no mention by the sentencing judge of any prior convictions.

[35] It appears that a sentence of three years imprisonment has been accepted as appropriate where the offence is the supply of a schedule 1 drug particularly where there are other drug offences. *Daly* and *Kunst* are consistent with that. The sentence of three years imprisonment that his Honour imposed on count 9, the first count of supplying methylamphetamine, reflects that approach. Here the nature of the offending conduct, the fact that it occurred over a period of about seven months, the fact that the applicant was of mature age, and the fact that the serious offences of supplying a schedule 1 drug were not only repeated but occurred whilst the applicant was on bail, probation and under a suspended sentence, together with his previous criminal history involving drug offences, places this case into a more serious category than those to which we were referred. A longer sentence for the second count of supply cannot in these circumstances be criticised.

[36] One thing that does emerge from this review of cases is that it is common enough for the sentencing court, where it is appropriate to bring into account an early plea of guilty, to require that a period of about 12 months be served – about one-third of the head sentence. Here the period before eligibility for parole is a little over 14 months and well under that one–third level reflecting the view that his Honour plainly took that there were reasonably grounds for optimism that the applicant could be successfully rehabilitated.

[37] I might observe, with respect, that his Honour had good grounds for that optimism. The 13 years of productive life in the community between 1993 and 2006, and the fact that the cause of the offending conduct seems plainly to have been the life stressors that the applicant came under and the "insidious and desperate nature of his addiction" (per McMurdo P in *Drury*) all justify that optimism and the early eligibility date .

[38] It has not been demonstrated that His Honour overlooked any significant matter, or brought into account any irrelevant matter. In my view the sentence was not manifestly excessive.

[39] The application should be dismissed.