SUPREME COURT OF QUEENSLAND

CITATION:	*R v Inch* [2011] QCA 353
PARTIES:	**R** **v** **INCH, Ned Ross** (applicant)
FILE NO/S:	CA No 270 of 2011 DC No 223 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Townsville
DELIVERED ON:	9 December 2011
DELIVERED AT:	Brisbane
HEARING DATE:	29 November 2011
JUDGES:	Margaret McMurdo P, Fraser JA and Margaret Wilson AJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The application for leave to appeal against sentence is granted.** **2. The appeal is allowed.** **3. The sentence is varied by:** **(a) Substituting for the sentence of 21 months imprisonment imposed in the District Court on count 1 a sentence of 15 months imprisonment.** **(b) Substituting for the parole release date of 28 February 2012 fixed in the District Court a parole release date of 16 January 2012 for each count.** **4. The sentence imposed in the District Court is otherwise confirmed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant was convicted on his plea of guilty of one count of producing methylamphetamine, one count of possession of methylamphetamine, one count of possession of cannabis and one count of possessing things used in connection with producing a dangerous drug – where the applicant received a head sentence of 21 months imprisonment for the production of methylamphetamine with a parole release date after serving slightly less than one quarter of the sentence –

where the quantity and quality of methylamphetamine produced was not established – where there was no commercial element alleged – where the applicant cooperated fully with police, made admissions, proceeded by way of full hand-up committal and entered an early guilty plea – where the applicant had a drug addiction and a relevant criminal history, including one drug offence committed while on bail for the present offences – where the applicant showed insight into his addiction – whether the sentence imposed was manifestly excessive in all the circumstances

R v Hall [2002] QCA 438, considered
R v Sabine [2007] QCA 220, considered
R v Turner [2007] QCA 70, considered
Veen v The Queen [No 2] (1988) 164 CLR 465; [1988] HCA 14, cited

COUNSEL: F Richards for the applicant
B J Power for the respondent

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

[1] **MARGARET McMURDO P:** I agree with Fraser JA's reasons for granting leave and allowing the appeal against sentence. I also agree with his Honour's proposed orders.

[2] **FRASER JA:** On 30 September 2011, the applicant was convicted on his pleas of guilty of one count of producing methylamphetamine (count 1), one count of possession of methylamphetamine (count 2), one count of possession of cannabis (count 3), and one count of possessing things used in connection with producing a dangerous drug (count 4). The applicant was sentenced on the same day to 21 months imprisonment on count 1, 12 months imprisonment on count 2, and six months imprisonment on each of counts 3 and 4. All sentences were to be served concurrently and the sentencing judge set a parole release date of 28 February 2012 (after serving slightly less than one quarter of the head sentence).

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

Circumstances of the offences

[4] An agreed schedule of facts setting out the circumstances of the offences was tendered before the sentencing judge. On 17 October 2010, police executed a search warrant at the applicant's premises. The applicant was found in a shed at the back of the house with two other men. He was about to inject himself with a substance which he admitted was methylamphetamine (count 2). Police found equipment and chemicals consistent with those used in the production of methylamphetamine (count 4). The applicant admitted that a glass jar connected to the equipment contained methylamphetamine (counts 1 and 2). Police also found a clip-seal plastic bag containing approximately 10 grams of cannabis (count 3).

[5] The quantity and quality of methylamphetamine produced was not established. The prosecution did not allege any commercial element to the production, but noted the "potential to create more". The applicant participated in an interview with police where he made admissions to the offences, and the matter proceeded by way of full hand-up committal. The schedule of facts records that the applicant told police that he had recently discovered how to produce methylamphetamine and "I tried doing it today and that was basically the outcome, you coming through my shed door".

The applicant's personal circumstances

[6] The applicant was 28 years old at the time of the offences and 29 years of age when sentenced. He attended school until year 10, after which he was employed on a stud farm for about five years. The applicant subsequently worked as an opal miner, as a result of which he developed a degenerative back condition requiring treatment by prescription pain medication. He was no longer able to work. At the time of sentence he received a disability pension.

[7] The applicant had been using cannabis as a form of pain relief for many years, but only started using amphetamines in the months before the subject offences as a result of "a number of personal tragedies in his life leading up to that period." Defence counsel particularly referred to the death of the applicant's grandmother, with whom he had been very close, and the death of the applicant's first child, who had only survived for a few hours after birth. The applicant turned to amphetamines as "a means of trying to alleviate the continuing thoughts of depression and distress that he felt." He had tried to self-rehabilitate but had not sought professional treatment for his consequential addiction to the substance. During his interview with police, the applicant acknowledged his addiction and commented that he needed "mental help".

[8] The applicant had a relevant criminal history. In March 2010, he was dealt with in the Townsville Magistrates Court for two counts of possessing dangerous drugs (cannabis and methylamphetamine) and one count of possession of utensils or pipes used in connection with a drug offence. No conviction was recorded and the applicant was released on recognisance of $500, directed to be of good behaviour for a period of six months, and placed on the drug diversion program. In March 2011 the applicant was dealt with in the Ayr Magistrates Court for one count of possession of a dangerous drug. That offence was committed while he was on bail for the subject offences. When police questioned him about the contents of a small brown glass bottle in his pocket, the applicant told the police it was cough medicine, unscrewed the cap, and drank the liquid before the police could stop him. A subsequent test indicated that the substance was amphetamine. For that offence the applicant was fined $350. No conviction was recorded.

The sentence

[9] In sentencing the applicant, the sentencing judge acknowledged the applicant's cooperation with the authorities and his early pleas of guilty. His Honour noted the applicant's drug addiction but considered that it did not excuse him from becoming involved in the production of dangerous drugs. The sentencing judge referred to the applicant's criminal history, and in particular to the drug offence committed whilst on bail for the subject offences. His Honour noted that the laboratory was a "crude setup but, nevertheless, clearly was capable of achieving its purpose", and remarked

that the deterrent aspect of sentencing was particularly important in cases of this kind given the "apparent ease with which crude laboratories … can be set up for the production of these drugs from precursor drugs or stock feed which is readily available for purchase from pharmaceutical outlets." The sentencing judge accepted a submission by the prosecutor that the applicant no longer had "the benefit of youth".

[10] The sentencing judge considered that *R v Day & Gill*[1] put forward by the prosecution as a comparable decision was not relevant as the production in that case involved a commercial aspect. His Honour also considered *R v Hall*[2] to be more serious than the applicant's case. The significant distinguishing factors in the applicant's case from the comparable decisions of *R v Turner*[3] and *R v Drury*[4] put forward by defence counsel were the nature of the production and the applicant's criminal history, particularly the drug offence committed whilst on bail.

[11] In the matrix of circumstances in the applicant's case, the sentencing judge considered that there was "no reasonable alternative" to a sentence involving a period of actual imprisonment. His Honour commented that "drug use and production of drugs is a scourge on our community", and remarked that the sentence which his Honour intended to impose was designed to punish the applicant, to deter him and other persons from committing such offences, and to show the community's denunciation of such conduct.

The parties' submissions

[12] The applicant contends that the sentencing judge erred in considering that there was "no reasonable alternative" to imposing a term of actual imprisonment. The applicant submitted that, in the circumstances of this case, imprisonment with immediate parole or an intensive correction order would have been appropriate. The applicant also contends that the head sentence of 21 months imprisonment with a parole release date after serving five months was manifestly excessive. The applicant argued that the sentencing judge placed too much weight upon the aggravating features and insufficient weight on mitigating factors including the applicant's work history, health, the circumstances in which his drug addiction developed, the lack of a commercial element to the production charge, his cooperation with police, early pleas of guilty, and insight into his addition and need for rehabilitation. The applicant relied upon *R v Turner*, and contended that the appropriate sentence was one of 12 months imprisonment with immediate release on parole.

[13] The respondent argued that it was open to the sentencing judge to consider that the case before him required a period of actual imprisonment, and the fact that some other sentence may also have been within range does not demonstrate that the sentence imposed was manifestly excessive. The respondent relied upon *R v Hall* and *R v Sabine*,[5] and submitted that the sentence imposed adequately reflected the factors favourable to the applicant, while also appropriately recognising the seriousness of the offence, which carried a maximum penalty of 20 years imprisonment.

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1 [2005] QCA 100.
2 [2002] QCA 438.
3 [2007] QCA 70.
4 [2005] QCA 187.
5 [2007] QCA 220.

Consideration

[14] The sentencing judge's remark that there was "no reasonable alternative" to imposing a term of actual imprisonment reflected an exercise of the sentencing discretion in the circumstances of the particular case. The remark did not reveal error.

[15] The sentencing judge was right to emphasise the significance of deterrence in sentencing for this offence, but in my respectful opinion a sentence of 21 months imprisonment for this particular example of the offence was too severe, even taking into account the very early parole release date. The offence of producing this dangerous drug is a serious one, as is reflected in the maximum penalty of 20 years imprisonment. However, the maximum penalty is reserved for a case in the most serious category of the offence.[6] The uncontested facts of this case reveal that the applicant's offence was at the lower end of the scale of offending of this nature. The prosecutor did not challenge the applicant's statements to police, recorded in the schedule of facts, to the effect that this was his first attempt at producing the drug. In the absence of any evidence about the quantity and quality of methylamphetamine, he fell to be sentenced on the footing that he had produced only a minimal amount. There was no contest that the applicant produced the drug only for his personal use. Despite the presence of two other men at the time, it was not suggested that the applicant intended to involve them in the production or use of the methylamphetamine. The applicant's immediate and continuing cooperation with the authorities once he was detected in the offence and the background to his offending were significant factors, as the sentencing judge recognised in ordering parole release after serving less than one quarter of the head sentence. Whilst the applicant did have three drug-related previous offences in his criminal history, those three offences related to one occasion of offending. He had not been previously imprisoned. The offence of possessing dangerous drugs which he committed after the subject offences was relevant, particularly to demonstrate that he had not been rehabilitated, but he is not to be punished twice for that offence.

[16] The applicant's offence was objectively much less serious than the offence in *R v Sabine*, in which the Court dismissed an application for leave to appeal against a sentence of three years imprisonment with parole fixed after serving 16 months. That offender pleaded guilty to one count of producing methylamphetamine over a two month period, whereas the applicant had produced only a minimal amount of drug on one occasion. Although that offender was the owner of the house in which the drug had been produced and it was not alleged that he was the "cook", he had provided a co-offender with accommodation and food in return for the co-offender purchasing precursor drugs. There was no similar aggravating circumstance in the applicant's offence. Although there was also no commercial element in the production of the drug by that offender, it was for the use both of the offender and other occupants of the house. Furthermore, that offender did not cooperate with the authorities, he was older than the applicant, at 40 years of age, and he had a more serious criminal history including a number of convictions for drug offences. Williams JA remarked that while the sentence could be regarded as towards the top of the range, it was not manifestly excessive. *R v Sabine* is not a comparable decision which requires the conclusion that the sentence in this case was within range.

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6 *Veen v The Queen [No 2]* (1988) 164 CLR 465 at 478.

[17] In *R v Hall*, the offender was sentenced on his plea of guilty to two years imprisonment suspended after 12 months for an operational period of three years for one count of producing a dangerous drug. (There was also one count of possessing instructions for producing a dangerous drug which is not relevant for present purposes). The charges arose following a police raid on the offender's premises where they found equipment associated with methylamphetamine production together with a vessel containing pure methylamphetamine. There was 8.16 grams of pure methylamphetamine which, once cut with glucose, would give about 20 grams. The sentencing judge found that the drug had been produced for probable supply to others but without any commercial purpose. The offender was 45 years of age at the time of the offences, and at the time of sentence he was supporting his wife and two children, with another child expected. He had some prior convictions for drug offences dating back to some 30 years before the offences under consideration, the most serious offence being selling heroin for which he was sentenced to six months imprisonment coupled with probation. The Court allowed the appeal against sentence, primarily on the basis that the sentencing judge erred in considering the offender's plea of guilty to be a late plea. Holmes J (as her Honour then was) held (McPherson JA and Cullinane J agreeing) that while the offender had not cooperated with authorities and there had been a committal, the offender was nonetheless entitled to some credit for an early plea. The Court varied the sentence on the production count to two years imprisonment suspended after eight months for an operational period of three years. Although methylamphetamine was then a Schedule 2 drug and it has since become a Schedule 1 drug, the offending in *R v Hall* was more serious, particularly because that offender produced a greater quantity of the drug with the intention of supplying it to others, and because he had a more significant criminal history which included a sentence of imprisonment and probation. In light of the less serious objective facts and more compelling personal circumstances of this case, *R v Hall* does not support the respondent's submission.

[18] In *R v Turner*, the Court refused an application for leave to appeal against a sentence of nine months imprisonment with immediate release on parole for offences identical to the present applicant's. Police found small quantities of methylamphetamine, cannabis, and equipment used to produce methylamphetamine in a room rented by the offender. The sentencing judge considered the offender to be the "major player" in the production, but did not consider the offence to be a "terribly large or consequential production of methylamphetamine", such that the criminality involved did not warrant actual time in custody. The offender's criminal history consisted mostly of traffic offences with one drug offence about 10 years prior to the offences under consideration. The offender had breached his parole by relapsing into offending behaviour. The substance of the offender's complaint was that his sentence ought to have been wholly suspended. In refusing the application, Mackenzie J (with whom the President and Jerrard JA agreed) held that it was clearly open to the sentencing judge to order release on parole instead of suspension. Of significance here is that Mackenzie J accepted as being correct the submission by the prosecutor that a sentence of nine months imprisonment, with immediate release on parole, was within range for offences of that kind and level of seriousness. It must be noted, however, that that offender's previous drug offence had been committed some 10 years earlier. Furthermore, the actual decision was merely that the sentences were not manifestly excessive.

[19] As the sentencing judge rightly observed, in formulating sentences for this offence, it is necessary to take into account the apparent ease with which offenders can set up

crude laboratories for the production of the drug from readily available precursor drugs. The significance of general deterrence in the sentence and the applicant's relevant, albeit relatively minor, criminal history justified the sentencing judge's decision that the applicant should be imprisoned and required to serve a period of actual custody. In my respectful opinion, however, the term of 21 months imposed by the sentencing judge rendered the sentence as a whole manifestly excessive.

[20] In sentencing the applicant afresh, I consider that the appropriate sentence is 15 months imprisonment with a parole release date fixed after less than one third of that term, namely on 16 January 2012.

Proposed orders

[21] In my opinion the appropriate orders are:

1. The application for leave to appeal against sentence is granted.

2. The appeal is allowed.

3. The sentence is varied by:

   (a) Substituting for the sentence of 21 months imprisonment imposed in the District Court on count 1 a sentence of 15 months imprisonment.

   (b) Substituting for the parole release date of 28 February 2012 fixed in the District Court a parole release date of 16 January 2012 for each count.

4. The sentence imposed in the District Court is otherwise confirmed.

[22] **MARGARET WILSON AJA:** I agree with the orders proposed by Fraser JA and with his Honour's reasons for judgment.