

SUPREME COURT OF QUEENSLAND

CITATION: *R v Lawson* [2012] QCA 229

PARTIES: **R**
v
LAWSON, Kevin David
(applicant/appellant)

FILE NO/S: CA No 60 of 2012
SC No 153 of 2009
SC No 705 of 2011
SC No 101 of 2012

DIVISION: Court of Appeal

PROCEEDING: Sentence Application

ORIGINATING COURT: Supreme Court of Queensland

DELIVERED ON: 28 August 2012

DELIVERED AT: Brisbane

HEARING DATE: 2 August 2012

JUDGES: Muir and White JJA and Douglas J
Separate reasons for judgment of each member of the Court,
each concurring as to the orders made

ORDERS: **1. Application for leave to appeal against sentence granted.**
2. Appeal allowed.
3. Sentences below are set aside.
4. It is ordered in lieu thereof:
(a) In respect of counts 1 and 2 that the applicant be sentenced to imprisonment for a period of three years to be suspended after the applicant serves nine months imprisonment; and that he not commit another offence punishable by imprisonment within a period of four years to avoid being dealt with for the suspended term of imprisonment.
(b) In respect of counts 3 and 4, that the applicant be sentenced to imprisonment for a period of three years to be suspended after the applicant serves nine months imprisonment; and that he not commit another offence punishable by imprisonment within a period of four years to avoid being dealt with for the suspended term of imprisonment.

- (c) **In respect of count 5, that the applicant be sentenced to imprisonment for a period of 12 months suspended after the applicant serves six months imprisonment; and that he not commit another offence punishable by imprisonment within a period of 18 months to avoid being dealt with for the suspended term of imprisonment.**
- (d) **In respect of the breach of probation, that the applicant be re-sentenced on the original offences and that he be imprisoned for a period of 12 months suspended after the applicant serves six months imprisonment; and that he not commit another offence punishable by imprisonment within a period of 18 months to avoid being dealt with for the suspended term of imprisonment.**

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where applicant pleaded guilty to two counts of production of the dangerous drug methylamphetamine, one count of unlawful possession of pseudo-ephedrine, one count of unlawful possession of methylamphetamine, and one count of possession of things used in connection with the production of a dangerous drug – where applicant sentenced to imprisonment for five years suspended after 20 months for an operational period of five years on the production charges – where applicant sentenced to imprisonment for three years suspended after 20 months for an operational period of five years on the possession of dangerous drugs charges – where applicant sentenced to 12 months imprisonment on the possession of things used in connection with the production of a dangerous drug charge – where breach of probation also found to be proved and a sentence of 12 months imposed – whether the sentences were manifestly excessive because the learned sentencing judge failed to give sufficient weight to the level of cooperation exhibited by the applicant, including his admissions, the addiction suffered by him, the fact that the drugs possessed and produced were for his personal use, and the extent of his rehabilitation

R v Adamovics [\[2006\] QCA 77](#), referred

R v Boyd [\[2001\] QCA 421](#), cited

R v Drury [\[2005\] QCA 187](#), referred

R v Griffiths [\[2009\] QCA 13](#), cited

R v Hesketh; ex parte A-G (Qld) [\[2004\] QCA 116](#), cited

R v Robinson [\[2011\] QCA 27](#), cited

R v Zeremes and Zeremes [\[2003\] QCA 255](#), cited

COUNSEL: D C Shepherd for the applicant/appellant
B J Merrin for the respondent

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

- [1] **MUIR JA:** I agree with the reasons of Douglas J and with the orders he proposes.
- [2] **WHITE JA:** I have read the reasons for judgment of Douglas J and agree with those reasons and the orders which he proposes.
- [3] **DOUGLAS J:** The applicant pleaded guilty to two counts of production of the dangerous drug methylamphetamine, one count of unlawful possession of pseudoephedrine, another count of unlawful possession of methylamphetamine and a count of possession of things used in connection with the production of a dangerous drug. He was also dealt with for a breach of probation.
- [4] On the production charges he was sentenced to imprisonment for five years suspended after 20 months for an operational period of five years. On the charges of possession of dangerous drugs, he was imprisoned for three years suspended after 20 months for an operational period of five years and was sentenced to 12 months imprisonment on the fifth count of possession of things used in connection with the production of a dangerous drug.
- [5] The breach of probation was found to be proved and a sentence of 12 months imprisonment imposed. That sentence was imposed in respect of each of three offences contained in the indictment relevant to the breach of probation: production and possession of cannabis and of possession of things used in the production of that drug.
- [6] The appeal primarily concerned the sentences imposed for the production charges and that part of the sentences imposed on the possession of dangerous drug charges requiring the applicant to serve a period of 20 months before release.
- [7] The grounds of appeal were, essentially, that the five year sentences for counts 1 and 2 reflected an excessive level of punishment not warranted when the overall circumstances were taken into account. The applicant argued that the sentences were manifestly excessive because the learned sentencing judge failed to give sufficient weight to the level of cooperation exhibited by the applicant, including his admissions, the addiction suffered by him, the fact that the drugs possessed and produced were for his personal use and the extent of his rehabilitation.
- [8] The submission was also made that her Honour failed to set parole release dates for the sentence imposed on the fifth count of possession of things used in connection with the production of a dangerous drug and in relation to the sentences imposed consequent upon the breach of probation. Mr Shepherd for the applicant conceded, however, that in the circumstances of this case it appeared to be a technical requirement which had no practical impact.

Background

- [9] The appellant was 34 years of age at the time of the offences and 35 when sentenced. He had been convicted in 1996 of minor offences, including one of possession of a pipe used in connection with smoking a dangerous drug. He was

then convicted in 2009 of the three cannabis offences which led to him being placed on probation for two years from 8 April 2009.

- [10] About 20 months into that period of probation, on 21 December 2010, police executed a search warrant at his residence where he lived with his family and discovered buried canisters containing 1,945.18 grams of pseudo-ephedrine and 77.097 grams of pure methylamphetamine contained in substances weighing a total of 140.493 grams. Police also found items commonly associated with the production of methylamphetamine and consistent with their having been a part of a dismantled clandestine laboratory that had been used in the production of that drug.
- [11] The appellant had lived at the property for three months and admitted having produced methylamphetamine on two occasions while he lived there. It is fair to conclude that the evidence police found led to the inference that the appellant was producing methylamphetamine about the time of the search but the only evidence of an earlier production by him came from his own admission and his admissions also facilitated the proof of the case generally, something that her Honour said she took into account.
- [12] He contended that the methylamphetamine was for his personal use, an assertion that the prosecution refused to accept because of the quantity of the drug, the hiding of the canisters by their burial, the purity of the drug and the presence of the equipment and precursor chemicals. The prosecution case, therefore, was that the appellant was involved in commercial production. He had denied that to police. He later told his psychologist that he needed only to produce enough to last him a year.
- [13] The learned sentencing judge was not satisfied that the commerciality of the production had been established because of evidence that he had, until very recently before his arrest, suffered a very significant addiction involving the consumption of quite large quantities of the drug. Her Honour also relied on the absence of other indicia of commerciality such as messages on his mobile phone. Nor was there any evidence that he had acquired unexplained wealth.
- [14] The appellant had cooperated with the administration of justice by his admissions and participation in a record of interview, a full hand-up committal hearing, and by entering early pleas of guilty. He had subsequently sought treatment for his drug addiction through the 19 week Q-Merit drug diversion program and by attending psychological counselling voluntarily. The evidence was that he had abstained from the use of methylamphetamine for a period commencing two days before his arrest until the sentence hearing. That evidence was buttressed by negative results from 13 random drug screening tests.
- [15] His progress through the Q-Merit program was described as excellent and the psychologist who treated him privately also described his progress during therapy as excellent. She concluded that he had no immediate need for further psychological treatment after half the number of sessions to which he was entitled through Medicare. She described his symptoms as a complicated bereavement secondary to the premature death of his father when the applicant was 12 or 13 years old. She said that he also suffered from anxiety disorder and amphetamine dependence in remission with medical diagnoses of osteoarthritis, chronic pain disorder and sleep apnoea. He has addressed the latter problem since his arrest by losing a significant amount of weight. He has also reduced his intake of caffeine which had been

excessive. His use of cannabis began when he was about 13 and of amphetamines when he was 23. It became a habit which he rationalised as assisting in pain relief.

- [16] He has been in a steady relationship since he was 19 and has two children with his partner. She was opposed to his drug use and the effect of his arrest was to give him a “wake-up call” encouraging him to focus once again on his family. He has had a consistent work history and was regarded as reliable by his employer.

The sentence below

- [17] Before her Honour the prosecution relied on a number of comparable decisions where there had been commercial production of the drug and which were submitted supported a sentence of between five and six years.¹ In spite of her conclusion that the prosecution had not established the commerciality of the production, her Honour sentenced the appellant in that range by imposing sentences of five years for the two production charges. Counsel for the appellant below had submitted that the many mitigating factors to which I have referred justified the imposition of a sentence in the vicinity of four years suspended after one year.
- [18] Her Honour’s conclusion was affected, also, by the fact that the offences were committed while the appellant was on probation, something she described as “a matter of particular gravity.” She had not been provided, however, with any authorities dealing with cases of production for personal use. Some comparable decisions were provided to us by Mr Shepherd, counsel for the appellant on this appeal, who was not the counsel below.
- [19] Those decisions, in my view, show that an appropriate head sentence for an offence of production where the drug is for personal use, even where the offence is committed in breach of probation, may be significantly less than the five years imposed by her Honour.
- [20] For example, in *R v Drury*,² the applicant pleaded guilty to a number of charges which included four counts of production of methylamphetamine. The primary judge sentenced him to three years imprisonment suspended after 15 months for an operational period of four years on the fourth count. The Court of Appeal described the offences as involving persistent production as an addict for his own use over four distinct periods. He appears to have been on bail after the first of the four groups of offences.
- [21] His offending occurred after traumas within his family. The production was also solely for his personal use where he was severely addicted. By the time of sentence he had rehabilitated himself. He had also been extremely cooperative with the administration of justice and had a good work history. His criminal history was relatively minor and not drug related.
- [22] He had spent almost seven months in pre-sentence custody which could not be the subject of a declaration. The quantity of drug produced appears to have been small, at least compared to the total in this case, but the Court reduced the three year penalty imposed below to two years imprisonment suspended after six months with an operational period of three years. Taking into account the seven months spent in

¹ *R v Robinson* [2011] QCA 27, *R v Boyd* [2001] QCA 421 and *R v Zeremes and Zeremes* [2003] QCA 255.

² [2005] QCA 187.

pre-sentence custody it can be seen as an effective sentence of about two years and seven months. Although he was not on probation on drug related offences as this applicant was, he had offended persistently while on bail in respect of the earlier charges.

- [23] Mr Shepherd also referred us to a number of decisions where the sentences for possession of significant quantities of the drug for personal use, in his submission, supported the penalty of three years imprisonment imposed by her Honour in respect of the possession counts charged against this applicant.³ He submitted that, here, the production and possession were really features of the one criminal activity. He then argued that a sentence of three years imprisonment for the production adequately reflected the overall criminality of the applicant's behaviour and that the imposition of two more years by her Honour's imposition of the five year sentences for the two production charges showed that those sentences were manifestly excessive even taking into account the fact that the production occurred while the applicant was on probation.
- [24] Mr Shepherd characterised the breach of probation as more likely to be an indication of the applicant's addiction not having the element of blatant disregard for authority seen in cases such as *R v Drury*⁴ and *R v Adamovics*.⁵ He pointed out that the applicant here had otherwise complied with his probation order to the extent that a court report suggested he remained a suitable candidate for further community based orders. He also submitted that the offending behaviour here did not involve other people and could not be said to advance, encourage, or facilitate the movement of drugs in the wider community. The applicant told his psychologist that one reason for his production of the drug was so that he would not have to mix with the people usually involved in that sort of activity.
- [25] Mr Shepherd also submitted that a period of 20 months actual custody did not sufficiently recognise the mitigating features to which I have referred earlier, namely his level of co-operation, including his admissions, his addiction, the fact that the production was for personal use and the extent of his rehabilitation. In those circumstances he argued that the point of eligibility for release justified something less than the usual one-third mark.
- [26] Ms Merrin for the prosecution submitted, with some justification, that it is not necessarily appropriate to compare sentences for possession of methylamphetamine with those of production because of the dangers involved in its production and the fact that production commonly requires the intentional collection of significant quantities of pseudo-ephedrine, a legal drug, but one whose purchase is monitored. To those concerns might be added the risk that the drug, when produced, may become available to others through theft or otherwise, even if the production was not commercial. In this case, however, the applicant had buried what he produced.
- [27] Here, where her Honour accepted that the production was for the personal use of an addict who had taken significant and apparently successful steps to rehabilitate himself and who had cooperated with the authorities, it seems to me that the sentence imposed for the production charges was manifestly excessive. When one bears in mind the explanation that the quantity produced, although relatively large, was intended for personal use over a significant period, the comparison between the

³ See *R v Hesketh; ex parte A-G (Qld)* [2004] QCA 116 and *R v Griffiths* [2009] QCA 13.

⁴ [2005] QCA 187.

⁵ [2006] QCA 77.

comparable sentences for the possession of significant quantities of the drug and the degree of criminality involved in the production charge is not dissimilar. The decision in *R v Drury*⁶ also supports the view that the sentence on the production charge was too high.

[28] Mr Shepherd submitted that, instead, an appropriate sentence for the offences of production in counts 1 and 2 was one of imprisonment for three years to be suspended after nine months with an operational period of between three and five years. He also submitted that, in relation to counts 3 and 4, the possession charges, the term of imprisonment should remain as three years but that it should be suspended after nine months, again, with an operational period of between three and five years. In relation to count 5 and the sentences imposed consequent on the breach of probation, he submitted that the head sentence of 12 months could stand but that those sentences should also be suspended after nine months for an operational period of 18 months. It seems to me that, in the case of a 12 month sentence, a suspension after six months would be more appropriate.

[29] That range of sentences does seem to me to be more appropriate to this type of offending and to respond to the applicant's determined efforts to rehabilitate himself. Accordingly, I grant leave to appeal against sentence and would allow the appeal and set aside the sentences below and in lieu thereof order:

- (a) In respect of counts 1 and 2 that the applicant be sentenced to imprisonment for a period of three years to be suspended after the applicant serves nine months imprisonment; and that he not commit another offence punishable by imprisonment within a period of four years to avoid being dealt with for the suspended term of imprisonment.
- (b) In respect of counts 3 and 4, that the applicant be sentenced to imprisonment for a period of three years to be suspended after the applicant serves nine months imprisonment; and that he not commit another offence punishable by imprisonment within a period of four years to avoid being dealt with for the suspended term of imprisonment.
- (c) In respect of count 5, that the applicant be sentenced to imprisonment for a period of 12 months suspended after the applicant serves six months imprisonment; and that he not commit another offence punishable by imprisonment within a period of 18 months to avoid being dealt with for the suspended term of imprisonment.
- (d) In respect of the breach of probation, that the applicant be re-sentenced on the original offences and that he be imprisoned for a period of 12 months suspended after the applicant serves six months imprisonment; and that he not commit another offence punishable by imprisonment within a period of 18 months to avoid being dealt with for the suspended term of imprisonment.

⁶ [2005] QCA 187.