[2002] QCA 189

COURT OF APPEAL

McMURDO P
WILLIAMS JA
JONES J

CA No 64 of 2002

THE QUEEN

v.

DAVID BOZZETTO Applicant

TOWNSVILLE

..DATE 27/05/2002

JUDGMENT

WILLIAMS JA: In this matter the applicant pleaded guilty to

the offence of producing the dangerous drug cannabis between 1 January and 5 June 2001. He seeks leave to appeal against the sentence of two and a-half years' imprisonment which was imposed on him following that plea.

Though it was a plea of guilty, it arose in somewhat unusual circumstances. The applicant pleaded not guilty initially to the charge and the matter went to trial. During that trial the applicant gave evidence denying any involvement with the marijuana plants, the subject of the charge.

The jury was unable to agree upon a verdict, they were discharged and a retrial ordered. The retrial commenced a few days later before the same presiding Judge, but of course with a different jury. At that stage the prosecution were apparently in a position to lead some additional evidence linking the applicant with the marijuana plants in question on some two further occasions. Whether or not because of that additional evidence, the applicant changed his plea to that of guilty.

The Crown Prosecutor referred to the fact that the sentencing Judge, having sat through the earlier trial, was cognisant of all relevant facts, and in consequence not a lot of detail was formally placed before the Judge with respect to the facts on which the applicant was to be sentenced.
In the cultivation there were 30 mature female cannabis plants. It was obvious that the plants had been culled over the period of time so that the male plants had been removed;

the female plants had been pruned from time to time. The wet weight, that is weight including root and stalks, was 42.5 kilograms.

Of more significance is the fact that the plants had been placed within a cane crop on a farm in the district in which the applicant lived, but owned by another person. By placing the crop amongst the cane, the applicant gained the benefit of irrigation and fertilisation of the cane crop. He also avoided having any direct link with the crop in the sense that it was not growing on land that he owned. But the corollary of that of course was that he placed the owner of the cane farm at considerable risk. That, in my view, is a relevant factor to take into account when it comes to the issue of sentence.

In the course of placing material before the sentencing Judge, the Crown Prosecutor referred to the fact that police officers had estimated the street value of the plants to be between $60,000 and $80,000. Courts are always reluctant to give significant weight to such unverified assessments of the value of a drug crop, but that statement was in no way challenged, and it was obvious to the Court that in this instance there had been careful production of high quality marijuana and it obviously would have had a significant street value.
It is also of significance to record at this stage that in 1994 the applicant had been convicted of the offence of trafficking in cannabis and had been imprisoned for a period of three years with respect to that offence.

In my view, in determining what inferences should be drawn from the evidence as to the cultivation in question, one is entitled to bear in mind the applicant's previous commercial dealing in that particular drug.

The learned sentencing Judge made this finding in the course of his remarks:

> "Having heard the evidence and the submissions that have been made, whilst I am prepared to accept that there may have been an element of personal use, in my view it is reasonable to conclude that the quantity of cannabis sativa found, that is, the product of your actions had some commercial element. I think it would unrealistic to find otherwise."

Mr Moynihan of counsel who appeared for the applicant, challenged that particular conclusion. He submitted that on the material before the sentencing Judge, one could not conclude on the balance of probabilities that there was a commercial element involved.

In my view, the learned sentencing Judge in this instance was in a better position to draw the inference than this Court would be. He had the advantage of hearing all of the evidence at the aborted trial.

Given the circumstances in which the plea of guilty was entered, this cannot be said to be a situation where any significant discounting was called for in consequence of the plea of guilty. Nevertheless, it is a factor that must be generally taken into account in determining the appropriate sentence. The learned sentencing Judge said that he would:

> "make some allowance for your plea of guilty, although it must, of necessity be somewhat limited for the reasons that I've already given."

Mr Moynihan referred to a number of sentences imposed in other cases in his endeavour to show that the sentence here was outside the accepted range even if one concluded that there was an element of commercial purpose involved. He referred, in particular, to R v Blakers CA 539 of 1996, where a non-custodial sentence was imposed and an appeal by the Attorney-General was unsuccessful. But Blakers can be clearly distinguished; he had no previous convictions and the sentencing Judge held that the cultivation was not for a commercial purpose, though significantly more plants were involved than in the present case.

Mr Moynihan also referred to the recent decision in R v. Reddell 2001 QCA 515, but again, in my view, that case can be distinguished. It was a decision made against the background of a possible question as to whether or not the plea of guilty involved one or two areas of cultivation, and there were other factors which the Court of Appeal regarded as operating in favour of the applicant.

All that one can say is that at the end of the day the Court there decided that the lower sentence of imprisonment imposed, by comparison with this case, was not manifestly excessive.

Here, the applicant is a mature man of 48 years and he does have, as I have already said, the prior conviction for trafficking in cannabis.

In my view, the cultivation in question could be described as sophisticated because of the way in which the female plants had been preferred and the cultivation located amongst the cane crops.

Given all of those circumstances, I am not persuaded that a sentence of two and a-half years' imprisonment is outside the range or is manifestly excessive. In the circumstances, I would refuse leave to appeal.

THE PRESIDENT: The applicant's age, the absence of the benefit of an early plea of guilty, his prior conviction for trafficking and the Judge's finding, which was open on the evidence that the cannabis production involved a commercial element, have the result that the sentence of two and a-half years' imprisonment was not manifestly excessive.

I agree with what has been said by Justice Williams. The application for leave to appeal should be refused.
JONES J: Yes, I agree with the reasons already stated, that the application should be refused.

THE PRESIDENT: That is the order of the Court.
