SUPREME COURT OF QUEENSLAND

CITATION:	*R v McCloud* [2003] QCA 542
PARTIES:	**R** **v** **McCLOUD, Richard** (applicant)
FILE NO/S:	CA No 317 of 2003 SC No 78 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Cairns
DELIVERED EX TEMPORE ON:	4 December 2003
DELIVERED AT:	Brisbane
HEARING DATE:	4 December 2003
JUDGES:	McPherson and Williams JJA and McMurdo J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application for leave to appeal against sentence refused**
CATCHWORDS:	CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT – SENTENCE – FACTORS TO BE TAKEN INTO ACCOUNT – MISCELLANEOUS MATTERS – OFFENCE COMMITTED WHILE ON BAIL OR PROBATION AND EFFECT OF BREACH OF PROBATION – where applicant convicted of producing cannabis sativa with circumstance of aggravation – where offence committed while applicant on parole – where sentenced to three years imprisonment to be served at expiration of current prison term – where applicant had significant criminal history involving similar offences – where applicant only involved in production of drug for about three days – whether cumulative sentence manifestly excessive
COUNSEL:	N V Weston for the applicant B G Campbell for the respondent
SOLICITORS:	Legal Aid Queensland for the applicant Director of Public Prosecutions (Queensland) for the respondent

McPHERSON JA: I will ask Mr Justice Williams to give the first judgment in this matter.

WILLIAMS JA: The applicant pleaded guilty to a charge that between 5th and 8th January 2002 he produced a dangerous drug, cannabis sativa, with a circumstance of aggravation. He was sentenced to three years' imprisonment, to be served at the expiration of the current prison term that he was bound to serve. There was a recommendation that he be eligible for parole on the 14th of June 2008.

Though he pleaded guilty, the applicant put in issue the degree of his involvement in the production in question. In consequence, evidence was taken, including evidence from the applicant, and findings were made by the sentencing Judge as to the degree of involvement. It was on the basis of those findings that he was sentenced. There was no challenge to the findings of fact so made.

In order to appreciate the significance of the sentence imposed, it is necessary to refer to the applicant's criminal history. Relevantly, on 13 September 1996, he pleaded guilty to possession of cannabis sativa, four counts of supplying cannabis sativa and production of cannabis sativa.

He was then found with about 650 grams of loose product and 22 plants between 10 and 40 centimetres high. The offences were committed between 1 March and 25 May 1996.

At that time, he did not have a significant criminal history, and the prosecution did not press for a custodial sentence.

He was ordered to perform 240 hours community service, and convictions were recorded.

Then, on 15 December 1999, he pleaded guilty to two counts of producing a dangerous drug, two counts of possession of a dangerous drug, and associated offences. The first count of production related to the police finding some 1,596 cannabis plants at Calligans Creek on 25 May 1998.

The second production offence related to the finding of some 1,950 plants of cannabis in the Bloomfield area on 12 October 1999. The latter offence was committed whilst he was on bail with respect to the first count of production.

On the first count of production, he was sentenced to three years' imprisonment, and on the second, to four years' imprisonment, the latter being made cumulative on the earlier sentence.

The applicant was also breached in relation to the 1996 community service order, and ordered to serve six months' imprisonment, concurrently.

The applicant therefore received an effective sentence of seven years' imprisonment, with a recommendation that he be considered for parole on or about 30 November 2001.

The applicant was, in fact, released from custody with respect to those matters on 7 December 2001, and placed on parole. He

was found at the crop site of the present charges on 8 January 2002.

The police discovered a large cannabis crop on Bonnie Doon station near Mount Carbine on 8 January 2002. The applicant and three other men were observed at the site and were detained. When approached by police, the applicant ran off, but was caught.

Some 2,064 plants and 1,190 seedlings were found growing. There was an irrigation system set up with a pump and a generator. There was a large tent with four beds inside, as well as a large quantity of tinned food, a gas-run refrigerator, and a calendar containing a work roster.

Police also located 400 kilograms of bagged fertiliser, and 200 litres of liquid fertiliser. A large amount of other equipment was also found.

The applicant was sentenced on the basis that he had been at the site for three to four days, that he had transported provisions to the site to sustain the workers, that he had cooked for those involved, that he had taken one of the workers to the site, and had assisted in the preparation of the ground.

Two of the applicant's youthful co-offenders had been sentenced in relation to the matter and received short terms

of imprisonment. Those persons had insignificant criminal histories.

The position of the co-offenders so dealt with was substantially different from that of the applicant. The applicant was aged 56, and had, as previously indicated, a significant criminal history. The applicant assisted in the production of a large quantity of cannabis, knowing that he was breaching parole. It was only about a month after he had been released from prison on parole.

The learned sentencing Judge did point out that the evidence did not establish what financial benefit the applicant would have received from his participation in the production. The learned sentencing Judge noted that the automatic effect of the conviction and imprisonment was the cancellation of parole, and he observed no injustice was thereby occasioned.

The learned sentencing Judge imposed a sentence of three years' imprisonment to commence at the completion of the sentence the applicant was required to serve because of the breach of parole.

Making that sentence cumulative involved an exercise of the learned sentencing Judge's discretion. The learned sentencing Judge noted that in his view, the sentence of three years was a moderate sentence, given the criminal history.

Largely because of the plea of guilty, the learned sentencing Judge recommended eligibility for post-prison community based release on 14 June 2008, a date half-way through the three year term, as would ordinarily apply based on the commencement of that term on 14 December 2006.

The contention of the applicant is that the sentence is manifestly excessive when regard is had to the plea of guilty, the limited role he played, the lack of evidence as to the benefit he would have received, and the totality of the effect of the cumulative sentence.

In my view, the head sentence of three years' imprisonment was moderate. Given the previous terms of imprisonment imposed on the applicant for similar offences, a sentence of four years or more was readily justifiable. Though the applicant's involvement was only for a few days prior to arrest, it was not insignificant. It appears he had gone virtually from prison to the plantation, and were he not apprehended by the police, obviously he would have remained there, actively promoting the production.

In the circumstances of this case, the degree of criminality is not measured by the three days or so he was actually on the plantation.

In the circumstances, it has not been demonstrated that the sentence imposed was manifestly excessive, and the application for leave to appeal against sentence should be refused.

McPHERSON JA: I agree.

McMURDO J: I agree.

McPHERSON JA: The application for leave to appeal is dismissed.
