SUPREME COURT OF QUEENSLAND

CITATION:	*R v Neale* [2004] QCA 128
PARTIES:	**R** v **NEALE, Jason Adam** (applicant)
FILE NO/S:	CA No 70 of 2004 SC No 6 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Toowoomba
DELIVERED EX TEMPORE ON:	23 April 2004
DELIVERED AT:	Brisbane
HEARING DATE:	23 April 2004
JUDGES:	Davies, Williams and Jerrard JJA 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 dismissed**
CATCHWORDS:	CRIMINAL LAW - JURISDICTION, PRACTICE AND PROCEDURE - JUDGMENT AND PUNISHMENT - SENTENCE - CIRCUMSTANCES OF OFFENCE - where applicant was convicted on his own plea of guilty for production of a dangerous drug with a circumstance of aggravation and one count of possession of a dangerous drug - where dangerous drug was cannabis sativa and large quantities of the drug were found growing in applicant's house - where applicant was sentenced to 15 months imprisonment, suspended after five months - whether the sentence imposed was manifestly excessive in all the circumstances *R v Ball* [1999] QCA 427; CA No 250 of 1999, 8 October 1999, distinguished
COUNSEL:	Applicant appeared on his own behalf M J Copley for respondent
SOLICITORS:	Applicant appeared on his own behalf Director of Public Prosecutions (Queensland) for respondent

DAVIES JA: The applicant was convicted on his own plea of guilty on 30 March 2004 on one count of production of a dangerous drug, cannabis sativa, between 15 October 2002 and 3 July 2003, with the circumstance of aggravation that the quantity exceeded 500 grams; and one count of possession of cannabis sativa on 2 July, 2003. He was sentenced on the same day to 15 months imprisonment suspended after five months for an operational period of two years on the first of those counts and three months imprisonment to be served concurrently on the second. He seeks leave to appeal against those sentences which means, in effect, the first of them.

On 3 July 2003 the police raided a house which the applicant rented at Drayton. Behind a false wall in the garage area they found a hydroponic growing system set up. Thirteen mature cannabis plants were growing there. They weighed 22 kilograms with roots removed. The growing system was sophisticated in that it was ventilated by air conditioning and electric meters had been bypassed.

There was some debate on the sentence hearing as to whether this had been to avoid detection or to save expense. But his Honour inferred, and was plainly entitled to, that at least one reason for this was to avoid detection. His Honour had been told, as is commonly said in these cases, that a common way of detecting marijuana growing plantations of this kind is by apparently excessive usage of electricity.

In addition to the plants there was 378 grams of cannabis drying in a number of places in the garage of the house.

The total amount of cannabis was therefore substantial. The applicant declined to speak to police and his counsel on the sentence hearing put forward no explanation for the applicant having grown this substantial amount. In those circumstances, in my opinion, the learned sentencing judge was entitled to infer, as he plainly did, that there was a degree of commerciality in the applicant's operation in the sense that some part at least of the produce of the plants he was growing were to be sold.

The applicant is a 32 year old man with no prior criminal history. He pleaded guilty at an early stage to an ex officio indictment. All of this his Honour plainly took into account in the sentence which he imposed.

The applicant was also the sole carer of his daughter aged six whose mother has cervical cancer. However it was said on the applicant's behalf that she will be able to look after the child though that would not be ideal. Mr Neale, on his application today, has told us that she has since been obliged to give up the care of the child who is now in the care of a friend.

It was submitted by the applicant that his Honour failed to take all of this into account and should have done so. In my opinion this was a minor consideration only in determining the

sentence which was appropriate, having regard to the facts which I have set out. Moreover the fact that his Honour did not specifically mention this matter does not mean that he did not take it into account. I do not think there is any substance in this point.

On the sentence hearing the applicant's counsel contended for a sentence of 12 months suspended after four. The prosecutor contended for a sentence greater than 12 months, submitting that the decision of this Court in *Ball* CA No 250 of 1999 supported that contention.

Of the cases cited to the learned sentencing judge and in this Court, *Ball* is, in my opinion, the most closely comparable. Ball was sentenced by this Court to 12 months imprisonment to be suspended after a period of three months for production of cannabis sativa of a weight less than a third of the weight in this case. As in this case the Court inferred that the production had, at least in part, a commercial purpose. Like the applicant here, Ball had no prior criminal history. He also had a good work record and family background as it appears the applicant has here. Like the applicant, he gave early notice of an intention to plead guilty.

It seems to me therefore that the only substantial difference between that case and this is the very much higher quantity of cannabis sativa being grown by the applicant. It may also be that the applicant's production system was more sophisticated than that of Ball's because it was said in the latter's case

that the operation was not in any sense sophisticated, nor capable of producing a large quantity of the drugs.

Although he did not say so specifically, the learned sentencing judge, plainly for the above reason, thought that this case was a more serious one than *Ball*. I agree and I cannot be satisfied, in the circumstances, that the sentence which his Honour imposed was manifestly excessive. I would therefore dismiss the application.

WILLIAMS JA: I agree.

JERRARD JA: I agree.

DAVIES JA: The application is dismissed.