SUPREME COURT OF QUEENSLAND

CITATION:	*R v Barnes* [2004] QCA 459
PARTIES:	**R** **v** **BARNES, Terence** (applicant)
FILE NO/S:	CA No 352 of 2004 SC No 597 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED EX TEMPORE ON:	25 November 2004
DELIVERED AT:	Brisbane
HEARING DATE:	25 November 2004
JUDGES:	McPherson and Jerrard JJA and Philippides 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 allowed** **2. Allow the appeal** **3. Set aside the sentence imposed in respect of count one on the indictment and order that the applicant be sentenced on that count to imprisonment for four months to be served concurrently with the other sentences**
CATCHWORDS:	CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT – SENTENCE – where applicant sentenced for aggravated production of a dangerous drug, possession of a dangerous drug, possession of things and possession of instructions to 2 and a half years imprisonment, suspended after 9 months for an operational period of 4 years – where possession for personal use – where applicant had a prior drug conviction – whether sentence manifestly excessive *R v Adams* [2003] QCA 22; CA No 340 of 2002, 5 February 2003, considered *R v Applewaite & Jones* (1996) 90 A Crim R 167, distinguished *R v Bozzetto* [2002] QCA 189 ; CA No 64 of 2002, 27 May 2002, distinguished

	R v Laing [2003] QCA 92; CA No 411 of 2002, 6 March 2003, considered *R v Neale* [2004] QCA 128; CA No 70 of 2004, 23 April 2004, distinguished *R v Roulstone* [1998] QCA 324; CA No 254 of 1998, 18 September 1998, distinguished *R v Tarabay* [1998] QCA 317; CA No 107 of 1998, 29 May 1998, distinguished
COUNSEL:	A J Kimmins for the applicant D Meredith for the respondent
SOLICITORS:	Price & Roobottom for the applicant Director of Public Prosecutions (Queensland) for the respondent

McPHERSON JA: I ask Justice Philippides to deliver the first judgment.

PHILIPPIDES J: This is an application leave to appeal against sentence. On 17 September 2004, the applicant, who is 34 years of age and an electrician by trade, was sentenced on his plea to one count of production of the dangerous drug cannabis sativa with a circumstance of aggravation. A sentence of two and a half years imprisonment suspended after nine months for an operational of four years was imposed.

The applicant also pleaded to one count of possession of cannabis sativa for which he was sentenced to one month imprisonment; one count of possession of things, namely a quantity of hydroponic equipment and chemicals used in connection with the production of a dangerous drug for which he was sentenced to three months imprisonment; and one count of possession of a document containing instructions regarding

the production of cannabis sativa in respect of which he received three months imprisonment.

The offences were discovered when police found documentation at the property of the applicant's brother which led them to search a property at Blackstone Creek. When the police arrived, they found the applicant present. In the course of the search, the police located a room containing 52 cannabis plants grown by means of a hydroponic system. Twelve of the plants were mature female plants between 1 and 1.5 metres in height. The remaining 40 plants appeared to be cuttings or seedlings from these mature plants. Also located were containers of chemicals and fertilisers and magazines with instructions for growing of cannabis hydroponically. There was also a small quantity of dried cannabis and four water pipes. The total quantity of the plants was 8.1039 kilograms. The applicant apparently had hoped to obtain one-fifth of the product as dried product. The applicant admitted that all the cannabis and equipment was his and claimed to be a casual smoker for relaxation purposes. He declined to be interviewed formally.

At sentence, the respondent submitted that the appropriate range for the head sentence was one of 12 months imprisonment and one of 18 months to two and a half years if a commercial purpose was found. However, the Crown case at its highest was only that a commercial element was suggested.

In imposing sentence, the learned sentencing Judge had regard to the fact that the total quantity of plant material involved was in excess of eight kilograms; that the production was considered to be a relatively sophisticated one involving the deception of electricity authorities and that the applicant was a relatively sophisticated and successful producer of the drug. His Honour stated that although the application was a user, it was not said that the quantity produced was necessary simply to serve his own habit. However, his Honour noted that no finding was sought that the production was for a commercial purpose and was ultimately not prepared to make such a finding.

His Honour had regard to the applicant's criminal history and considered it a significant element that it included a prior conviction for an offence of knowingly taking part in the production and manufacturing of a prohibited plant for which he was sentenced to 12 months' periodic detention. While his Honour accepted that the applicant's role in that offence was relatively minor, his Honour considered it a significant feature of the case. His Honour also took into account, by way of mitigation, the fact that the applicant had entered a timely plea and that the applicant had, since being charged, undertaken significant business and financial commitments by purchasing a bakery business. His Honour accepted that a custodial sentence would, in those circumstances, have consequences for the applicant's partner and family. However, given the applicant's criminal history and in particular the previous conviction for a similar matter, the quantity of the

production and its sophisticated nature, his Honour considered that those matters of mitigation could not result in the imposition of a wholly suspended sentence. His Honour, however, considered those matters of mitigation by suspending the sentence as he did.

On the applicant's behalf, it was submitted that the sentence imposed for the production offence was manifestly excessive. The applicant has presently served just over two months of the sentence imposed. It was submitted that the appropriate sentence in the present case is one of six months imprisonment wholly suspended after the period of time already served in custody by the applicant.

In support of these submissions, counsel for the applicant contended firstly that the learned sentencing Judge erred in the emphasis placed on the sophisticated nature of the production and the amount of material involved. It was contended that these matters ceased to be of significance once it was accepted by the learned sentencing Judge that the cannabis was not produced for a commercial purpose. I am unable to accept that submission. The quantity of the drug involved is clearly a relevant matter going to the circumstance of aggravation and the severity of the sentence to be imposed.

Secondly, it was submitted on behalf of the applicant, that the learned sentencing Judge placed too much emphasis on the applicant's previous conviction for a similar offence and gave

insufficient weight to the fact that the prior offence had occurred some eight and a half years before the present offending. In support of these submissions, counsel referred to the fact that although the previous drug offence had occurred in February 1996, the applicant was not sentenced until August 2000 and the fact that the sentence imposed was only one of periodic detention, in the nature of weekend detention, the presence of a similar offence is clearly a matter of importance in a sentence to be imposed. The applicant's criminal record in fact refers to two offences, one of production and one of manufacture. These, however, do appear to relate to the one episode. The actual nature of the applicant's involvement appears to have been that of using his expertise as an electrician to set up lighting for the production of the drugs involved.

The third matter raised was that the sentence imposed was manifestly excessive having regard to comparable cases.

On behalf of the respondent, it was contended that the sentence was not manifestly excessive, although it was conceded that it was at the upper end of the appropriate range which was said to be between 18 months and three years' imprisonment.

In support of that submission the respondent referred to *R v Roulstone* [1998] QCA 324, *R v Bozzetto* [2002] QCA 189, *R v Applewaite and Jones* (1996) 90 A Crim R 167, *R v Tarabay* [1998] QCA 317 and *R v Neale* [2004] QCA 128. *Roulstone* was a

case in which a sentence of three years' imprisonment was imposed in respect of the production of 80 mature plants and 63 seedlings. Not only were considerably more plants involved in that case but the offender had a significant criminal history with a number of drug related offences. There was also a commercial purpose and no plea.

In *Bozzetto*, a sentence of two and a half years imprisonment was imposed on a 47 year old offender who pleaded to the production of a crop of cannabis which included 30 mature female plants. The total weight of the cannabis plants involved was 42.5 kilograms and had an estimated street value of between 60,000 to $80,000. There was also a commercial element in the production and the offender's criminal history included a conviction for trafficking in cannabis. That case is considerably more serious than the present.

In *Applewaite*, a sentence of 18 months' imprisonment was imposed on a 30 year old offender with a minor criminal history. 504 cannabis seedlings were involved in the production. However, the offender went to trial and, therefore, did not have the benefit of a plea, cooperation or remorse. That case, therefore, is not of great assistance.

Tarabay involved the production of 79 plants of over eight kilograms in weight on a non-commercial basis using a hydroponic system. A sentence of two and a half years' imprisonment, suspended after six months, imposed on the 24 year old offender who pleaded and had a minor criminal

history, was set aside on appeal and one of two years' imprisonment suspended forthwith was imposed. That case had an unusual feature, in that the sentencing judge refused to act on the basis of the concessions made by the Crown that the production was for personal use and as to the appropriate sentencing range, without giving the parties notice of his intention to do so. On appeal, the sentence imposed was that conceded as appropriate by the prosecution before the sentencing judge.

In *Neale*, a sentence of 15 months imprisonment suspended after five months for an operational period of two years was imposed in respect of cannabis production using a hydroponic system. Whilst the offender had no prior conviction, there was a commercial aspect to the production and the production involved a considerably larger quantity than in the present case, that is 22 kilograms of plant material.

Of the cases relied upon by the applicant, *R v Laing* [2003] CA 92 and *R v Adams* [2003] QCA 22 have particular relevance. In *Laing*, a sentence of two and a half years' imprisonment suspended after three months for five years imposed on a 46 year old offender was set aside and a sentence of 12 months' imprisonment suspended after eight days for four years was imposed. The offender had prior convictions, mainly for driving offences, but also one minor prior conviction for a drug offence. There were 117 seedlings and three large plants involved, using a hydroponic system, which was said to be sophisticated and which involved the unlawful use of

electricity by deception. A previous crop was also involved. The two crops were of about 230 plants in extent. A $5,000 fine was also imposed for the fraudulent appropriation of power. The offender had a drug addiction problem, but the sentence was imposed on the basis of there also being a limited commercial purpose of selling to friends which is not a feature present in this case.

In *Adams*, a sentence of 12 months' imprisonment suspended after four months for an operational period of five years was set aside and a sentence of four months' imprisonment substituted. That case concerned cannabis production using a hydroponic system. It involved nine large plants weighing 15.25 kilograms from which 1.52 kilograms of dried cannabis leaf was expected to be produced. There was also possession of 22 small plants relating to a possession count.

The 50 year old offender had only one prior conviction, that being for a drug offence which had occurred eight years previously and for which he received a fully suspended sentence. He was sentenced on the basis that the cannabis was for his own personal use and for that of three friends and that there was no commercial intent. On appeal, the Court observed that an examination of sentences imposed by this Court revealed that on a number of occasions this Court has either itself imposed or not interfered with entirely non-custodial sentences for the production of cannabis. It was said, that commonly found in those cases, is a plea of guilty together with either the feature of production for the

personal use of the grower or the feature of the grower having no relevant prior convictions or both those features. In *Adams*, the offender was not producing cannabis solely for his own use and did have a prior relevant conviction.

In the present case, more plants are involved than in *Adams*, although the total weight of the plants involved is less. As in *Adams*, there is a prior relevant conviction but unlike that case, that is not the full extent of the applicant's prior criminal history. In addition, the present case involves the feature that the sophisticated nature of the production included the applicant using his expertise as an electrician to divert electricity. However, unlike *Adams* the cannabis was for the applicant’s own use.

Having reviewed the cases put forward by the respondent I do not consider that this case fell within the range contended for by the respondent. In my view, those cases and the cases of *Laing* and *Adams* demonstrate that the sentence imposed was manifestly excessive and I would grant leave to appeal. Given that there was no finding of a commercial element, that the only relevant offending occurred over eight years ago and was of a minor nature and taking into account the plea and the other matters of mitigation, the applicant was entitled to some leniency in the sentence to be imposed, notwithstanding that a large quantity was involved in the production and its sophisticated nature.

In my view, a sentence of four months imprisonment was called for. I would allow the appeal by substituting a sentence of four months' imprisonment with a sentence of two and a half years imprisonment suspended after nine months for an operational period of four years.

McPHERSON JA: I agree.

JERRARD JA: I also agree. I add that the applicant claimed to the investigating police that the cannabis was being grown for his personal use. Notwithstanding that the sentences upon which the prosecution relied in this Court had the feature of a finding or concession that the cannabis involved in each of those was either partly or entirely being produced for a commercial purpose.

Once it was clear that the Crown could not sustain the allegation that in this matter the cannabis was being produced for a commercial or non-personal use purpose the learned sentencing judge may have been more assisted by reference to sentences in this Court where no such purpose was admitted or inferred.

McPHERSON JA: The order of the Court is, the application to appeal is allowed. Set aside the sentence imposed in respect of count one on the indictment. Instead, order that the applicant be sentenced on that count to imprisonment for four months to be served concurrently with the other sentences.
