SUPREME COURT OF QUEENSLAND

CITATION:	*R v Lindsay* [2004] QCA 444
PARTIES:	**R** **v** **LINDSAY, Howard Kerry** (applicant)
FILE NO/S:	CA No 327 of 2004 SC No 255 of 2003 SC No 602 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	19 November 2004
DELIVERED AT:	Brisbane
HEARING DATE:	19 November 2004
JUDGES:	Jerrard JA and Mackenzie and Philippides JJ 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 – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AGAINST SENTENCE – APPEAL BY CONVICTED PERSONS – APPLICATIONS TO REDUCE SENTENCE – WHEN REFUSED – GENERALLY – where applicant had prior convictions – where substantially different from the present offence – where committed 10 years previously – where only dealt with five years before commission of present offence – whether penalty disproportionate to the gravity of the offence under consideration – whether learned sentencing judge improperly inflated the sentence because of convictions CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AGAINST SENTENCE – APPEAL BY CONVICTED PERSONS – APPLICATIONS TO REDUCE SENTENCE – WHEN REFUSED – GENERALLY – where war service following conscription – where no specific reference by learned sentencing judge to war service – where "other circumstances" mentioned – where learned sentencing judge placed emphasis on general deterrence – whether the

applicant's war service was sufficiently recognised

COUNSEL:	A J Kimmins for the applicant R Pointing for the respondent
SOLICITORS:	A W Bale & Son for the applicant Director of Public Prosecutions (Queensland) for the respondent

MACKENZIE J: The applicant pleaded guilty to producing cannabis sativa in excess of 100 plants and associated summary charges of possession of irrigation equipment and a Cryovac machine as well as two summary charges of failing to securely store weapons.

He was sentenced to five years imprisonment, suspended after 20 months with an operational period of five years for the indictable offence. He was convicted but not further punished in respect of the summary offences. He seeks leave to argue that the sentence imposed upon him is manifestly excessive.

The main focus of submissions before us today was on the period of suspension rather than the sentence of five years although a submission was maintained that a sentence of four years may have been a more appropriate head sentence with a correspondingly lower period of suspension.

The facts of the matter were that when police executed search warrants of two properties near Gympie, part owned by the applicant, they found two large plots of cannabis containing about 5000 plants on the first at Tandur Road, and 11 plots containing about 7000 plants at the other at Burridge Road. All of the crops were irrigated.

The plants at Tandur Road ranged from 20 to 120 centimetres in height. There was also a quantity of cannabis head spread over about two square metres on the floor of the shed. A .375 rifle was found in the house. The plants at Burridge Road were 10 to 120 centimetres in height. There was a Cryovac machine for vacuum packing the drugs and scales, scissors and secateurs.

There were three sealed bags of cannabis. A .22 rifle was found in the house. The total weight of the drying cannabis and the packaged cannabis at the two locations was 9.83 kilograms. Needless to say it is not disputed that there was a commercial purpose. However, there was no evidence of remains of other crops or old crop sites.

The applicant said that the crops were six to seven weeks old. The reason he gave for engaging in the enterprise was that his grazing business was under financial stress because of the drought then prevailing in the area which was compounded by his degenerative back. Other members of his family also suffered from health problems.

There were numerous references from family, friends and acquaintances, the thrust of which is that he was a good family man and active in the affairs of the community in which he lived. He had served in Vietnam as a National Serviceman and was wounded by shrapnel from a grenade.

He had been convicted on four previous occasions for offences of dishonesty. The first three occasions apparently involve relatively minor offences. The only offences treated as being of any consequence were related charges of possession of a motor vehicle with intent to deprive the owner of it and false pretences committed in 1992, but not finalised until 1997. He was sentenced to a fully suspended six months term of imprisonment for those offences.

In the present proceedings the learned sentencing Judge dealt with the applicant on the basis that the crop was for commercial exploitation. He said that financial difficulties, not uncommon among people on the land, were no excuse for growing the crop. He referred to the fact that the applicant was well regarded and to the offences for which he was given the suspended sentence.

He also referred to the disadvantages to the applicant and his family arising from health and other circumstances if he was imprisoned but observed that the applicant must have known that detection would inevitably lead to imprisonment.

The learned sentencing Judge took into account the plea of guilty, but said that he could not allow personal and family problems and other circumstances which had been the subject of submissions by counsel to overwhelm the need for personal deterrence.

The argument that the sentence of five years imprisonment,

suspended after 20 months, was manifestly excessive, was founded on two propositions. The first was that the prior convictions were virtually of no relevance because of their substantially different character from the present offence and that they had been committed ten years previously, although only dealt with five years before the commission of the present offence.

This argument was linked to the proposition that a prior criminal history is a factor that may be taken into account in sentencing but not to be given such weight as to lead to imposition of a penalty disproportionate to the gravity of the offence under consideration.

The authorities relied on by the applicant's counsel in that regard are unlike the present case in that the concern was that a persistent offender’s sentence may have reflected an impermissible component designed to protect society from the risk of recidivism. (*Veen v The Queen (No 2)* (1988) 164 CLR 465; *R v. Aston* (No 2)[1991] 1 Qd R 375)

I note in passing that a quote attributed to Ottewell in the outline is not, in fact, from Ottewell but is a passage from *Veen v The Queen (No 2)* which, in passing, cites Ottewell. Nevertheless it may be accepted that principle is a well accepted general proposition. However for my part I can see nothing in what the learned trial Judge said that suggests that he impermissibly had regard to the relatively recent conviction for dishonesty as part of the total background of

the applicant for sentencing purposes. In saying that it was a relatively recent conviction, I do not overlook that the offences had actually occurred some years before. It is the relative recency of the conviction that seems to me to be something that should have brought home to the applicant the need to avoid further dishonest behaviour. There is nothing to suggest, in my view, that the learned sentencing Judge improperly inflated the sentence because of the conviction.

The second point was that the applicant's war service in Vietnam had been insufficiently recognised. The proposition essentially was that service following conscription, without an attempt to avoid that obligation, was a factor entitling the applicant to special consideration when it came to sentence. Counsel was also prepared to extend the principle to servicemen who had volunteered.

The particular aspect of the complaint is that the learned sentencing Judge made no specific reference to war service in his sentencing remarks. However, he did refer compendiously to, the “other circumstances which have been the subject of submissions" by his counsel. There was nothing to suggest the learned sentencing Judge was excluding war service from that category. However the thrust of the remarks was that matters of that kind, when weighed against the need for deterrence of this kind of offence, had not as much force as may be the case in other circumstances.

I do not doubt that service of the category undertaken by the applicant is meritorious and forms part of the information as to his background which must be taken into account in a sentencing context. However, it illustrates the learned sentencing Judge's approach to the matter to refer to a couple of passages from the transcript at pages 13 and 14.

A submission was being made by counsel below in the following terms:-

"… whilst there would be full credit given to the plea of guilty by a reduction from say, six years to four years, for argument sake, if it was to be a third, there are still the mitigating factors such as good character."

His Honour then said,

"Character. Yes it's balanced by a prior sentence of imprisonment for dishonesty, and personal and family circumstances in the case of serious drug offences cannot be allowed to overwhelm the significance of general deterrence."

Counsel responded, "Certainly. I don't ask your Honour to be overwhelmed by those matters." And his Honour said,

> "Well, they can't count for much, because in the case of serious drug offences, these are business enterprises and those who perpetrate these offences know from day-to-day as they are doing them, that if they are caught, they

> must expect to go to prison with all the consequences that that would involve for themselves and their family. They are thinking about these things or ought to be as the crime is committed from day-to-day."

That was the general approach that his Honour took to the matters by way of personal background and in my view the emphasis on deterrents of this kind of offence was not misplaced.

While it is difficult to discern the complete uniformity from the schedule of sentences for commercial production of cannabis relied on by the respondent, it suggests that sentence of five years imprisonment falls comfortably within the pattern of sentences imposed for roughly comparable offences. There is, in my view, no basis for concluding that it was manifestly excessive to impose such a head sentence.

I am also not persuaded that the allowance made for matters in the applicant's favour is inadequate in all of the circumstances. For the reasons given I am satisfied that the sentence is not manifestly excessive and that the application for leave to appeal should be refused.

JERRARD JA: I agree with the reasons expressed by Justice Mackenzie and add that to succeed in this Court the applicant had to show that the sentence the learned Judge imposed was obviously excessive and that accordingly there had been some error of principle when imposing that sentence. Or else the

applicant had to demonstrate that the sentence was imposed on the basis of some significant error of fact or other demonstrated error of principle. None of this has been shown by the matters recorded in the record or in argument or the ones referred to in the judgment of Justice Mackenzie. I too agree that the application should be dismissed.

PHILIPPIDES J: I agree.

JERRARD JA: The order of the Court is that the application is dismissed.
