SUPREME COURT OF QUEENSLAND

CITATION:	*R v Guzan* [2005] QCA 158
PARTIES:	**R** **v** **GUZAN, Brian Gabriel** (applicant/appellant)
FILE NO/S:	CA No 41 of 2005 SC No 22 of 2005
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	13 May 2005
DELIVERED AT:	Brisbane
HEARING DATE:	12 April 2005
JUDGES:	McPherson and Jerrard JJA and Helman J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Application for leave to appeal against sentence granted** **2. Appeal allowed** **3. Sentence varied to the extent of deleting his Honour's recommendation concerning post-prison community-based release and substituting for it a recommendation that the applicant be eligible for post-prison community-based release after he has served six months imprisonment from the day he was sentenced**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – APPEAL BY CONVICTED PERSONS – APPLICATIONS TO REDUCE SENTENCE – where applicant/appellant convicted of trafficking in cannabis sativa and other drug offences– where applicant/appellant sentenced to two years and nine months imprisonment for count one, one year imprisonment for each of counts two to five and three months imprisonment for count six – where all sentences to be served concurrently – where recommendation for post-prison community-based release after serving twelve months imprisonment – where significant criminal history - whether sentences imposed manifestly excessive

R v Haygarth [1995] QCA 403; CA No 220 of 1995, 28 July 2005, cited
R v McFadden [1994] QCA 288; CA No 132 of 1994, 12 August 1994, considered
R v Seabrook [2004] QCA 210; CA No 21 of 2004, 21 June 2004, considered
R v Whyte [2002] QCA 56, CA No 429 of 2002, 20 February 2003, cited

COUNSEL: M Green for the applicant/appellant
M R Byrne for the respondent

SOLICITORS: Legal Aid Queensland for the applicant/appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **McPHERSON JA:** I agree that this appeal be allowed to the extent proposed in the reasons of Helman J, which I have had the advantage of considering and in which in I concur.

[2] **JERRARD JA:** I have read and respectfully agree with the reasons for judgment and orders proposed by Helman J.

[3] **HELMAN J:** This is an application for leave to appeal against sentences imposed on the applicant on 7 February 2005 in the Supreme Court at Brisbane after he had pleaded guilty to five counts of offences against the Drugs Misuse Act 1986 (counts 1 to 5) and one count of wilful and unlawful destruction of property (count 6). The charges came before the court on an ex officio indictment. Counts 1 to 5 were respectively: unlawfully trafficking in a dangerous drug, unlawfully producing a dangerous drug, unlawfully possessing a dangerous drug, receiving property ($635) obtained from trafficking in a dangerous drug, and possessing things (two mobile telephones and a notebook) he used in connexion with trafficking in a dangerous drug. The dangerous drug in each case was cannabis sativa. The property destroyed was a rubbish bin the property of the Logan City Council. The applicant was party to lighting a fire in it, destroying it. The latter offence was committed in July 2003 and the other offences at the end of 2003. All offences were committed at Logan, with the exception of the production which took place at Petrie.

[4] The applicant had been before the Beenleigh Magistrates Court on 5 November 2002 and was convicted of other offences against the Drugs Misuse Act for which he was sentenced to imprisonment for three months, wholly suspended for an operational period of eighteen months. His Honour ordered that he serve the whole of the three months suspended imprisonment, and for the trafficking sentenced him to imprisonment for two years and nine months. On each of counts 2 to 5 the applicant was sentenced to imprisonment for one year, and on count 6 to three months imprisonment. The sentences for the six offences alleged in the indictment were to be served concurrently with each other, but to begin at the end of the three months suspended sentence. His Honour recommended eligibility for post-prison community-based release after the applicant had served twelve months in prison, and ordered that he pay $200 within twelve months to the Logan City Council by way of compensation for the destruction of the rubbish bin. In default of the

payment of compensation the applicant was ordered to serve imprisonment for two weeks.

[5] The only ground upon which the application is made is that the sentences were manifestly excessive. At the hearing of the application attention focussed on the head sentence, and the recommendation.

[6] The applicant, who was born on 5 June 1981, began using cannabis sativa at the age of twelve, when he ran away from his parents' home. His father was a violent drunkard, and his parents separated. He has worked in restaurants and as a labourer and furniture removalist. He was using cannabis sativa heavily at the time he committed the offences the subject of this application. He has a criminal history of some length which includes a number of drug offences, all involving cannabis sativa. On 5 March 2002 in the Holland Park Magistrates Court he was fined $400 for two offences of unauthorized dealing with shop goods. On 27 March 2002 in the Beenleigh Magistrates Court he was fined $250 for possessing dangerous drugs in December 2001, but no conviction was recorded. On 22 May 2002 in the Beenleigh Magistrates Court he was fined $150 for contravening a direction or requirement of a police officer, and $750 for supplying dangerous drugs and receiving property obtained from trafficking. The drug offences were committed in April 2002. On 7 August 2002 he was again before the Beenleigh Magistrates Court, and this time fined $750 for a number of drug offences: two of possessing dangerous drugs, two of supplying dangerous drugs, and receiving or possessing property obtained from trafficking or supplying, possessing utensils or pipes, etc., and possessing property suspected of having been acquired for the purpose of committing a drug offence – all offences committed in May 2002. As I have related, on 5 November 2002 he was before the Beenleigh Magistrates Court, the drug offences being possessing dangerous drugs and possessing utensils or pipes etc. There was also an offence against the Weapons Act 1990 for which he was fined $500. Those offences were committed in October 2002. On 12 November 2002 in the Beenleigh Magistrates Court he was fined $250 for entering a dwelling without the consent of the owner or person in lawful occupation. On 15 January 2003 in the Beenleigh Magistrates Court he was fined $240 for possession of property suspected of being stolen or unlawfully obtained, another Weapons Act offence, behaving in a disorderly manner, and obstructing a police officer. On 25 March 2003 in the Beenleigh Magistrates Court he was fined $150 for entering a dwelling without the consent of the owner or person in lawful occupation, and $100 for possessing property suspected of having been acquired for the purpose of committing a drug offence. Those offences were committed in February 2003. On 10 September 2003 in the Brisbane Magistrates Court he was fined $100 for using insulting words, and on 2 February 2004 in the Beenleigh Magistrates Court $300 for breaching a bail undertaking. It can be seen then that the applicant's criminal history included thirteen drug offences committed on five occasions beginning in December 2001 and ending in February 2003.

[7] At about 3.00 p.m. on 16 December 2003 the applicant was arrested for breach of a bail undertaking. At the Logan police station he was found to be in possession of twelve clip-seal bags containing cannabis sativa. He co-operated with the investigating police officers by answering questions in an interview in which he revealed that he intended selling the bags, had cultivated cannabis sativa in a forest at Petrie, had supplied it to customers for about one and a half months, and received about 120 telephone calls a day from customers of whom there were about 80 a day.

One telephone had not been enough for his business so he acquired a second. The telephones rang continually while the applicant was in the custody of the investigating police officers, and when the telephones were answered the callers asked for drugs. The applicant had $635 in his wallet, the takings so far that day from the sale of the drug. His Honour was told by counsel for the applicant that he had 'earned' around $200 a day from the trafficking. That figure would indicate that the applicant had 'earned' approximately $9,000 in the one and a half months of trafficking: 45 days at $200 a day; but, as his Honour observed, the figure of $200 a day was hard to accept in the light of admissions he made to the investigating police officers and in the light of the quantity of drugs found in his possession on the day of the interview. His Honour calculated 'well over $10,000' for the 45 days.

[8] In arriving at the sentences he imposed on the applicant, his Honour deducted from the head sentence he would otherwise have imposed (imprisonment for three and a half years) nine months to reflect 287 days the applicant had been in pre-sentence custody. The 287 days could not in law be declared to be time already served, but could be recognised in that way. On the hearing of this application, his Honour's starting point of three and a half years was the subject of argument for both applicant and Crown. The submission for the applicant was that it should have been three years, and for the Crown four or four and a half years. Demonstrating the difficulties of arriving at a determination in matters of this kind, the parties have reversed the positions they adopted before his Honour when a head sentence of imprisonment 'in the order of three years' was suggested on behalf of the Crown and four years on behalf of the applicant.

[9] On behalf of the applicant it was contended that the head sentence that should have been imposed was imprisonment for two years and six months suspended after the applicant had served three months.

[10] A review of comparable cases of pleas of guilty to charges of trafficking in cannabis sativa discussed at the hearing of the application reveals, however, that the head sentence imposed on the applicant was within the accepted range for such cases. The cases discussed were R. v. McFadden [1994] Q.C.A. 288, R. v. Haygarth [1995] Q.C.A. 403, R. v. Whyte [2003] Q.C.A. 56, and R. v. Seabrook [2004] Q.C.A. 210. In each of the first three the sentence was imprisonment for four years. In Seabrook it was imprisonment for three years and six months. The term of actual imprisonment to be served in McFadden was to be 18 months and that in each of the other cases was twelve months. The applicant will be required to serve eighteen months in addition to the three months suspended imprisonment: approximately nine months in pre-sentence custody and another nine months after he has completed the three months suspended imprisonment.

[11] On behalf of the applicant particular reliance was placed upon Seabrook. Seabrook, like the applicant, was in his early twenties at the time of his offending, and he too pleaded guilty to an ex officio indictment charging him with trafficking and less serious drug offences. It was argued strongly that the applicant's offending was less serious than Seabrook's. The applicant had engaged in trafficking for only one and a half months as against Seabrook's approximately twelve months (January to November 2002, and in March and April 2003), and Seabrook resumed trafficking for about one month after he had been released on bail after having been held in custody on a charge of trafficking. But although the applicant trafficked for a

shorter time than Seabrook did, the former's customers were more numerous: eighty a day as opposed to approximately ten a day. Seabrook admitted to a profit of between $500 and $1,000 a week, whereas the applicant's was at least $200 a day. Seabrook's continuing the commission of the offence while at large with bail was a serious matter, but the applicant's committing offences when subject to a suspended sentence matches Seabrook's disobedience to court orders. In addition, Seabrook's criminal history was not as lengthy as the applicant's: Seabrook had previously been convicted only once of a drug offence (in 1999 in the Magistrates Court) and his only other convictions were of two offences of possessing property suspected of being stolen.

[12] Much was made on the applicant's behalf of his full co-operation with the investigating police officers in revealing the extent of his activities. The applicant was clearly entitled to favourable consideration for that co-operation, culminating in his pleas of guilty to an ex officio indictment, although too much cannot be made of it. The twelve clip-seal bags, the continually ringing telephones, and the money in the applicant's possession would no doubt have enlivened the suspicion of the investigating police officers who might well have uncovered the applicant's activities in due course without his assistance. The applicant's revealing his trafficking was no doubt made in part to anticipate a police investigation. This is not one of those cases in which there were no prospects of ever uncovering the offender's crimes. On the contrary, there was sufficient evidence without the applicant's confession to warrant further investigation. Seabrook was entitled to greater favourable consideration than the applicant on this score : he disclosed his trafficking to investigating police officers in March 2003 even though no drugs had been found in his possession on the execution of a search warrant.

[13] A further factor that weighed with the court in Seabrook – and not present in this case – was a substantial effort towards rehabilitation : Seabrook had been released on bail before he was sentenced, on condition that he attend drug rehabilitation courses at Logan House, and he remained at Logan House for three months and satisfactorily completed the courses.

[14] Taking all of those factors into account, and in particular the applicant's prior history of committing drug offences, I conclude that his Honour was correct in visiting upon the applicant a heavier penalty than Seabrook's. Some disparity between the applicant's sentence and Seabrook's was warranted, but the magnitude of the disparity – nine months of actual imprisonment – rendered the applicant's sentence manifestly excessive; on my assessment, by six months.

[15] One final issue should be mentioned. On behalf of the applicant it was submitted that an order for suspension of the applicant's sentence should be substituted for his Honour's recommendation regarding post-prison community-based release. Seabrook's sentence was to be suspended after he had served one year in prison. But the applicant's criminal history and his committing offences in the operational period of the suspended sentence imposed on 5 November 2002 indicate that supervision will be desirable on his release from prison. His history shows that he is not willing or able to comply with the requirements of an order for suspended imprisonment.

[16] For those reasons I should grant the applicant leave to appeal and allow the appeal, but only to the extent of deleting his Honour's recommendation concerning post-

prison community-based release and substituting for it a recommendation that the applicant be eligible for post-prison community-based release after he has served six months in prison from the day his Honour sentenced him.