SUPREME COURT OF QUEENSLAND

CITATION:	*R v Mrsic; ex parte A-G (Qld)* [2005] QCA 349
PARTIES:	**R** **v** **MRSIC, Ivan** (respondent) **EX PARTE ATTORNEY-GENERAL OF QUEENSLAND** (appellant)
FILE NO/S:	CA No 185 of 2005 SC No 10 of 2005
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Appeal by A-G (Qld)
ORIGINATING COURT:	Supreme Court at Cairns
DELIVERED ON:	23 September 2005
DELIVERED AT:	Brisbane
HEARING DATE:	19 September 2005
JUDGES:	Jerrard and Keane JJA and Cullinane J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Appeal allowed** **2. The respondent's existing sentence is set aside and, instead, the respondent is sentenced to seven years imprisonment to be served concurrently with his present sentence with a recommendation that he be eligible for post-prison community based release on 13 May 2007**
CATCHWORDS:	CRIMINAL LAW - APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION - APPEAL AND NEW TRIAL - APPEAL AGAINST SENTENCE - APPEAL BY ATTORNEY-GENERAL OR OTHER CROWN LAW OFFICER - APPLICATIONS TO INCREASE SENTENCE - OTHER OFFENCES - where the respondent had pleaded guilty to unlawfully producing more than 500 grams of cannabis sativa - where the respondent had been sentenced to imprisonment for seven years with a recommendation that he be considered for post-prison community based release on 13 May 2006 - where the respondent was already serving a sentence of imprisonment for other offences - where effect of recommendation was that the respondent would not serve any

additional time in gaol for the unlawful production offence - where the respondent was 64 years of age and had a history of heart disease - whether, in all the circumstances, the sentence imposed at first instance was manifestly inadequate

R v Guthrie [2002] QCA 509; (2002) 135 A Crim R 292, cited
R v Irlam; ex parte A-G [2002] QCA 235; CA No 157 and CA No 173 of 2002, 28 June 2002, applied
R v Morcus [2003] QCA 279; CA No 113 of 2003, 8 July 2003, cited
R v Panichelli & Petrosanec [1995] QCA 348; CA No 146 and CA No 148 of 1995, 5 June 1995, cited

COUNSEL: M R Byrne for the appellant
B G Devereaux for the respondent

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

[1] **JERRARD JA**: In this appeal I have read the reasons for judgment of Keane JA and the orders proposed by His Honour, and agree with those. The effect of the recommendation for parole made by the learned sentencing judge is that, if followed, the respondent would be released on post-prison community based release on the same date – 13 May 2006 – as that on which he would be released after completing the 10 year sentence imposed for manslaughter on 18 June 1997. The offence of unlawful production of cannabis sativa, for which he was sentenced on 18 May 2005, and which was committed between 1 March 2004 and 13 October 2004, was committed when he was on parole for that offence of manslaughter. He was paroled on 18 December 2002, and returned to custody on 12 October 2004. He had also been sentenced on 18 June 1997 to five years imprisonment for an offence of producing cannabis sativa between 1 May 1995 and 15 November 1995.

[2] That 1995 offence of production was committed when he was on parole from a three year sentence imposed on 18 February 1994, for producing cannabis sativa. That production had been carried on between 1 April 1991 and 8 May 1991, and involved in excess of 100 plants. The learned sentencing judge imposing sentence on 18 February 1994, in respect of that 1991 cultivation, remarked that Mr Mrsic has no convictions for offences which the judge would regard as of any real significance since 1976. That learned judge also remarked that taking into consideration time spent in custody between 18 May 1991 and 16 August 1991, and 15 August 1993 until 18 February 1994, and declared as time served, Mr Mrsic would be eligible for parole in approximately nine months.

[3] Two things can be noticed about that sentence. The first is that Mr Mrsic *did* have a relevant conviction which the learned sentencing judge would have been entitled to take into account, although incurred after 1991. That was a conviction in the Supreme Court in Darwin on 22 February 1993 for the possession of a commercial quantity of cannabis, for which Mr Mrsic was sentenced to two years imprisonment with a non-parole period of twelve months. Taking the dates into account, it seems very likely that that offence was actually committed when Mr Mrsic was on bail for

the 1991 offence of cultivation. The second point is that Mr Mrsic must have commenced the offence of producing cannabis for which he was ultimately sentenced on 18 June 1997, when also sentenced for manslaughter, very soon after being released on parole from that sentence imposed in February 1994.

[4] That said, Mr Mrsic gave evidence in June 2005 in a contested sentence, and the learned judge who imposed the seven year term accompanied by a recommendation for consideration for community based release on 13 May 2006 has considerable experience. That sentencing judge had the opportunity to form opinions relevant to the appropriate sentence, after hearing Mr Mrsic in the witness box, and I respectfully consider that an un-stated premise of the sentence must have been that judge's view that Mr Mrsic, now aged 64 and with a significant heart disease, and with a daughter prepared to have him live with her, has reached the stage of his life at which he is unlikely to re-offend after release.

[5] His conduct in producing a cannabis sativa crop in which he expected to harvest between 165 to 170 kg of (presumably saleable) cannabis produced from some 1,800 plants, when on parole for manslaughter, does require that there be some actual time in custody to be served after the expiration of the sentence for manslaughter. (There being no realistic prospect of Mr Mrsic being released again on parole again during the 10 year sentence.) In the circumstances I consider he should serve an extra period of 12 months, and accordingly agree that Mr Mrsic should be recommended eligible for post-prison community based release on 13 May 2007. That recommendation appropriately reflects his plea of guilty and his personal circumstances in mitigation of the penalty.

[6] **KEANE JA:** On 18 May 2005, the respondent pleaded guilty to unlawfully producing a quantity of the dangerous drug cannabis sativa in excess of 500 grams. The offence was committed between 1 March 2004 and 13 October 2004 at Kirrima near Kennedy in far north Queensland. On 20 June 2005, the respondent was sentenced to imprisonment for seven years with a recommendation that he be considered for post-prison community based release ("PPCBR") on 13 May 2006.

[7] The Honourable Attorney-General appeals against the sentence on the ground that it fails adequately to reflect the gravity of the offence and the need for general deterrence, and on the ground that the learned sentencing judge gave too much weight to factors going to mitigation.

Circumstances of the offence

[8] On 12 October 2004, police located the respondent at a cleared area of bushland about 100 metres by 30 metres at Kirrima. On the site, there were about 1,800 cannabis plants in varying stages of maturity. Police also located another cleared, but empty, area and a smaller plot which seems to have been used for propagating cannabis seeds. At the main site were gardening tools, a stock of food and some irrigation piping.

[9] The respondent admitted to police that he had been involved in cultivating cannabis at the site since March 2004. He told police that an earlier crop had failed and that he expected a harvest of 165 to 170 kg. When apprehended by the police, the respondent lamented that he would now "die in prison".

[10] There was a dispute as to the value of the respondent's interest in the crop. The prosecution contended that the respondent stood to recover a sum in the order of

$800,000 from the crop, whereas the respondent claimed that his share was worth only $15,000. That was largely on the basis that another person was involved in the enterprise as its "principal". The learned sentencing judge was not prepared to treat attempts at mathematical calculation of the value of the crop as any better than "an informed guess". His Honour found that it "was a considerable exercise, persisted in after the loss of the first crop, and was likely to be of significant financial benefit". His Honour found that some other person or persons were also involved in the enterprise. The respondent did not identify that person or persons.

The respondent's circumstances

[11] The respondent was born in Croatia on 6 March 1941. According to the respondent, he fled Croatia when he was 16 years of age and joined the French Foreign Legion for three years. He came to Australia in 1960 and worked as a mechanic principally in mining communities.

[12] The respondent had an unhappy personal life, but his daughter is supportive of him. She and her partner are willing to take him into her home to care for him upon his release from prison.

[13] The respondent has a history of heart disease. In this regard, he had a heart attack on 4 November 1999 from which he made an uneventful recovery. In March 2000, he was diagnosed as suffering from coronary disease.

[14] As to the respondent's heart condition, his Honour held that "it cannot be said that [his] ill health will lead to additional burdens in the way in which might [sic] be taken into account to lessen [his] sentence. In other words it is not … established that [he has] a condition which would lead to additional hardship over those experienced by others without [his] disabilities in [his] position".

[15] The respondent had an extensive criminal history. It consisted principally of drink driving and property related offences until 1993 when the respondent was convicted of possession of a commercial quantity of cannabis in the Northern Territory. In 1994 he was imprisoned for three years for drug offences including unlawful production of cannabis. In 1997 he was convicted of a further offence of unlawful production of cannabis and of manslaughter which occurred as a result of a falling out with others engaged in that enterprise. These offences were committed while the respondent was on parole. He was sentenced to five years imprisonment for the drug offence and 10 years for the manslaughter.

[16] The offence of present concern was committed while the respondent was on parole for the offences of which he was convicted in 1997. He was returned to custody on 12 October 2004. The learned sentencing judge was informed that the balance of the respondent's term for these offences involved an anticipated release date of 13 May 2006. This was on the basis that the respondent would then have served the full term of his sentence of 10 years for manslaughter. It is this circumstance which founds the submission on behalf of the Attorney-General that, if the recommendation by the learned sentencing judge is given effect, the respondent may not actually be punished by a term of imprisonment for the offence of present concern.

The sentence

[17] The effect of the recommendation, if acted upon, would mean that the respondent may not serve any term of actual imprisonment for what is a serious offence, made

more serious because it was committed in determined defiance of the law while the respondent was on parole for similarly serious offences. The learned sentencing judge made his recommendation for PPCBR on the basis of the respondent's "age … [his] state of health and [his] daughter's preparedness to take [him] in".

[18] In my respectful opinion, these considerations are not apt to sustain the recommendation for PPCBR which was made in this case.

[19] As to the respondent's age, the respondent is currently 64 years of age. He is not especially elderly. More importantly, he has spent the last 20 years of his life, at least when he was not in gaol, as an active and unrepentant producer of commercial quantities of illegal drugs. This is not a case where an elderly person comes to be sentenced many years after he or she has committed a crime and has since lived a blameless life. In such a situation, considerations of deterrence and protection of the community are of little moment because of the good character the offender has demonstrated during the time between the commission of the offences and the date of sentence.[1] In contrast, the respondent to this appeal has demonstrated an undeniable and continuing commitment to a form of illegal commerce which causes great harm to the community. By his own admission, he clearly understood the risk of the trade in which he engaged was that, if apprehended, he would spend a substantial part of the time left to him in gaol.

[20] The respondent's ill-health, as the learned sentencing judge observed, is not such as to expose him to undue hardship in prison. It is, therefore, difficult to see how consideration of the respondent's health could warrant the recommendation which his Honour made. As this Court said in *R v Irlam; ex parte A-G*:[2]

> "While an offender's ill health is a mitigating factor in circumstances where imprisonment will lead to additional burdens beyond those experienced by others, that feature must not be allowed to overwhelm appropriate reflection of the grave nature of offences like these."

[21] The offence for which the respondent was being sentenced was committed in 2004. The respondent's cardiac problems had started years beforehand. As Mullins J, with whom de Jersey CJ and Williams JA agreed, said in *R v Guthrie*:[3]

> "It must be relevant to the weight to be given to the ill-health of the offender that the offending was committed by the offender while suffering from the same conditions for which he seeks sympathetic treatment on the sentencing…"

[22] As to the willingness of the respondent's daughter to take him in, this circumstance of itself affords little reason to think, and significantly his Honour did not find, that the respondent's daughter is likely to be able to control the respondent so as to ensure that he mends his ways. There is no suggestion that there is any real likelihood of rehabilitation being forced on the respondent either by illness or by being with his daughter. Further, and perhaps more importantly in this case, this circumstance does not remove from consideration the strong claim of deterrence as a factor bearing upon the appropriate sentence.

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1 See, eg, *R v CC* [2004] QCA 187; CA No 51 of 2004, 31 May 2004.

2 [2002] QCA 235; CA No 157 and CA No 173 of 2002, 28 June 2002 at [76].

3 [2002] QCA 509 at [45]; (2002) 135 A Crim R 292 at 300.

[23] The decisions of this Court in *R v Panichelli & Petrosanec*[4] and *R v Morcus*[5] indicate that, in a case of serious persistent offending of this kind, a sentence of the order of seven years imprisonment is appropriate at least where considerations of age and ill-health are not material. In my respectful opinion, the learned sentencing judge erred in attaching a recommendation for early eligibility for PPCBR to the sentence of imprisonment because there were no relevant circumstances which warranted that degree of leniency in the face of the respondent's persistent criminality and the evident need for a deterrent sentence.

[24] Had the excessive leniency involved in the recommendation not been extended to the respondent, he would have been eligible for PPCBR in the ordinary course on or about 16 February 2009 after having served approximately half of the seven year term of imprisonment imposed upon him.[6] At that time, he would be a few weeks short of his 68th birthday.

[25] In my respectful opinion, making allowance for the respondent's plea of guilty (even though the case against him was overwhelming), and the harshness involved in denying the respondent the possibility of PPCBR until he attains 68 years of age, but having regard to the incorrigible criminality of the respondent's conduct and the need for the respondent to serve a period of actual imprisonment, I would vary the sentence imposed by deleting the recommendation made by the learned sentencing judge and substituting instead a recommendation that he be eligible for PPCBR on 13 May 2007.

Conclusion and orders

[26] This sentence would mean that the respondent would serve, albeit concurrently with the sentence for his other offences, a little over two and a half years actual imprisonment for his latest offence if the recommendation is acted upon. It would also reflect the moderate approach appropriate to a resentencing by this Court in appeals against sentence by the Attorney-General.[7]

[27] The appeal should be allowed, the sentence set aside and the respondent should be sentenced to seven years imprisonment to be served concurrently with his present sentence with a recommendation that he be eligible for PPCBR on 13 May 2007.

[28] **CULLINANE J:** I have read the reasons for judgment of Keane JA in this matter and agree with those reasons and the orders he proposes.

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4 [1995] QCA 348; CA No 146 and CA No 148 of 1995, 5 June 1995.

5 [2003] QCA 279; CA No 113 of 2003, 8 July 2003.

6 *Corrective Services Act* 2000 (Qld), s 135(2)(e).

7 Cf *Griffiths v The Queen* (1977) 137 CLR 293 at 310, 327, 329 - 330; *Everett v The Queen* (1994) 181 CLR 295 at 299 - 300; *R v Melano; ex parte Attorney-General* [1995] 2 Qd R 186 at 189 - 190; *R v Alibasic and Salajdjiza; ex parte Cth DPP* [2005] QCA 108; CA No 401 and CA No 402 of 2004, 15 April 2005 at [21].