SUPREME COURT OF QUEENSLAND

CITATION:	*R v Gardner (Senior)* [2012] QCA 290
PARTIES:	**R** **v** **GARDNER (Senior), Michael Bennett** (applicant)
FILE NO/S:	CA No 172 of 2012 SC No 126 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	26 October 2012
DELIVERED AT:	Brisbane
HEARING DATE:	22 October 2012
JUDGES:	Holmes and White JJA and Daubney J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where applicant sentenced to 13 years imprisonment for unlawful trafficking in cannabis sativa – where applicant contends that sentence was inadequate and ought to have been 20 years imprisonment – where respondent seeks to hold the sentence imposed below – whether applicant demonstrated relevant basis for challenging the appropriateness of his sentence *Criminal Code* 1899 (Qld), s 668D, s 668E(3) *Drugs Misuse Act* 1986 (Qld), s 5(b) *Penalties and Sentences Act* 1992 (Qld), s 9, s 13, s 19(1)(a) *Neal v The Queen* (1982) 149 CLR 305; [1982] HCA 55, considered *R v Grkovic*, unreported, Court of Criminal Appeal, Qld, CA No 323 of 1988, 2 March 1989, cited *R v Kerma* [2006] QCA 127, cited *R v Lowe* [2004] QCA 398, cited *R v Salter* [2010] QCA 284, cited *R v Tindel* [1997] QCA 293, cited *R v Wittwer* [1995] QCA 452, cited

Veen v The Queen [No 2] (1988) 164 CLR 464; [1988] HCA 14, cited

COUNSEL: The applicant appeared on his own behalf
S J Farnden for the respondent

SOLICITORS: The applicant appeared on his own behalf
Director of Public Prosecutions (Queensland) for the respondent

[1] **HOLMES JA:** I agree with the reasons of White JA and the order she proposes.

[2] **WHITE JA:** The applicant seeks leave to appeal against the sentence of 13 years imprisonment imposed on him in the Trial Division on 13 June 2012 for unlawful trafficking in cannabis sativa on the ground that it is, in all the circumstances, manifestly inadequate. He pleaded guilty on 22 March 2012 on the third day of his trial.

[3] The applicant has filed an outline of submissions in which he contends that the sentence which ought to have been imposed was one of 20 years – the maximum for the offence in respect of which he had pleaded guilty.[1]

[4] At his sentence hearing the applicant was represented by counsel and solicitor. The primary judge did, however, give the applicant an opportunity to address the court after his counsel had made submissions on sentence. Her Honour had foreshadowed her intention to do so after the allocutus was administered on 22 March.

[5] The sentence proceeded on an agreed statement of facts. The applicant intervened after the primary judge commenced her sentencing remarks to identify perceived inaccuracies in the facts. Her Honour adjourned the proceedings until after the luncheon adjournment so that facts disputed by the applicant could be resolved. Thereafter there were no interventions by the applicant.

Circumstances of offending

[6] The statement of facts[2] recites:

> "Over more than a four and a half year period between mid 2004 to December 2008 the defendant was the central figure of a large scale trafficking operation involving the production, packaging and distribution of cannabis on a[n] heroic scale.
>
> The defendant's unlawful activities yielded profits in the hundreds of thousands of dollars. He was not a heavy user of cannabis. The operation was a sophisticated and elaborate commercial venture. Large sums of money were invested by the defendant in the infrastructure required to undertake the production of the crops …
>
> In the first two years of the production, members of the defendant's young family also worked on the crops and received payment from the defendant. They were aged between 11 and 14 years of age when they commenced their duties.

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1 *Drugs Misuse Act* 1986, s 5(b).
2 AR 83-87.

> The defendant continued to traffic in large quantities of the drug even after his incarceration in June 2008."[3]

[7] The production of the cannabis took place on a property which had been purchased by the applicant in 2004 for that purpose located in an isolated area between Stanthorpe, Texas and Inglewood. On 30 June 2008 police executed a search warrant on the property. They found eight different cannabis fields. All but one of the sites had been harvested, although one crop, which was approximately 50 metres by 100 metres, had about half of its plants remaining - approximately 22,000 plants. A representative sample of 100 plants was weighed with the roots removed and totalled 51.9 kilograms. There were various sheds on the property containing drying cannabis. The total weight of useable cannabis in the drying sheds was 3.59 tonnes. The statement of facts recites that the approximate black market value of the cannabis located on the property was $68.95 million, comprising $50 million value in respect of the crop and $18.95 million in value for the drying material.

[8] The statement of facts recites:

> "$10,000 in cash was found in a locked shipping container. The police also located a quantity of weapons at the camp sites consisting of 2 leg shackles, 7 pairs of hand cuffs, two extendable batons, concealable pen guns, military night vision goggles, long range rifle scopes, hand gun carry cases and in excess of 10,000 rounds of live ammunition."[4]

[9] Five family members gave statements implicating the applicant. The matter proceeded by way of "a very lengthy committal hearing" in 2009 and, after some delays, to trial in the Supreme Court. The applicant sought a preliminary ruling that he had a defence of "Extraordinary Emergency" based on his motive for growing and selling cannabis – to fund a campaign to stop abortion. After that ruling the applicant pleaded guilty.

Submissions on sentence

[10] The prosecutor submitted that there were a number of features which placed the offence close to the worst category of case[5] in that the operation was extremely sophisticated; extended over many years; involved very large amounts of cannabis; the applicant was the central figure; it had the aggravating feature that children, including young children, were involved; there was persistence even after apprehension; and a late plea. The prosecutor noted an absence of a significant criminal history,[6] and no actual violence; and he was not convicted after a trial. The range was submitted to be between 13 and 15 years imprisonment. Counsel referred to *R v Grkovic*[7], *R v Tindel*[8], and *R v Salter*.[9]

[11] Defence counsel submitted for a head sentence of 10 to 12 years imprisonment and referred to the additional cases of *R v Wittwer*[10], *R v Lowe*[11], and *R v Kerma*.[12]

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3 AR 83.
4 AR 84.
5 AR 19.
6 His criminal history was quite minor.
7 Unreported, Court of Criminal Appeal, Qld, CA No 323 of 1988, 2 March 1989.
8 [1997] QCA 293.
9 [2010] QCA 284.
10 [1995] QCA 452.
11 [2004] QCA 398.
12 [2006] QCA 127.

[12] The applicant then addressed the primary judge on the evils of abortion. He claimed that he had engaged in the production and sale of cannabis to finance a campaign against abortion in Australia. There was no evidence in the material that he had utilised the not inconsiderable sums generated by his criminal enterprise to this end at the time of sentence. The applicant told the primary judge, expressly, that he had no regrets about his conduct. In his written outline and orally on this application, he emphasised again that he did not plead guilty to assist in the administration of justice.

[13] The applicant submitted below that if the primary judge accepted his explanation for his criminal conduct she would make an order releasing him absolutely pursuant to s 19(1)(a) of the *Penalties and Sentences Act* 1992. He also informed the court that he had intended "to grow a lot more" cannabis and to make "a lot more money out of it". In the circumstances, he submitted, his was a "top level" enterprise and ought to attract a high penalty.

[14] In the course of submissions the primary judge was referred to the sentences imposed on family members involved for their participation in the enterprise.[13] No issues of parity arise on this application.

Sentence

[15] In her lengthy and careful reasons the primary judge set out the facts and circumstances of the offending, made reference to the sentences imposed on others involved in the applicant's trafficking enterprise, and to the comparative cases to which she had been referred. Her Honour said that she would not take into account the applicant's "implied plea to have a higher sentence than that requested by the prosecution".[14] Her Honour analysed the comparable cases and arrived at her sentence. She made a declaration of 1,423 days spent in pre-sentence custody.

Submissions on application

[16] The applicant made the following points in his written outline of submissions:

1. He did not plead guilty to "expedite convenience for The State, so as to therefore seek a mitigation of sentence, however small".
2. He had had insufficient opportunity to develop submissions on sentence about the importance of a police DVD showing the extent and ultimate destruction of the cannabis crop. The applicant contends that since the police were not wearing any protection during the burn off that demonstrated that the State did not regard cannabis as dangerous. Had he had an opportunity to examine this DVD, he submitted, it would have provided him with further evidence to develop his defence of "Extraordinary Emergency".
3. The evils of cannabis and abortion are compared. The applicant would favour permitting the lesser evil of cannabis to eliminate the greater evil of abortion.
4. The natural production of cannabis is less harmful than hydroponically grown cannabis.

[17] The applicant wished to elaborate orally on his written submissions. None of his submissions were relevant to a sentence application either on the basis of manifest excess or manifest inadequacy and no error was identified. The court declined to allow him to do so.

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13 Those sentences were mentioned in the statement of facts.

14 AR 66.

Jurisdiction to increase sentence

[18] Section 668E(3) of the *Criminal Code* provides:

> "On an appeal against a sentence, the Court, if it is of opinion that some other sentence, whether more or less severe, is warranted in law and should have been passed, shall quash the sentence and pass such other sentence in substitution therefor, and in any other case shall dismiss the appeal."

A person requires the leave of the court to appeal against the sentence passed on the person's conviction.[15]

[19] In *Neal v The Queen*[16] the High Court held that where a defendant seeks leave to appeal against the severity of the sentence and the appeal court proposes to act upon its powers in s 668E(3) and increase the sentence, it should first grant the defendant leave to appeal so as to have an opportunity to abandon his appeal. That is not this case, but it does affirm that in an appropriate case if the appeal court is of the view that a more severe sentence "is warranted" it may pass such other sentence.

Discussion

[20] The applicant has demonstrated no error in the approach of the primary judge. The respondent to this application does not seek to do other than hold the sentence below. The only relevant submission made by the applicant is that the extent of his trafficking was so great that it fell within that class of cases described as "the worst category" for which the maximum is reserved.[17] The prosecutor below correctly identified that this was not such a case. The plea of guilty, no matter what the applicant's motivation in making it, did have the effect of shortening the proceedings considerably and is required to be taken into account by a sentencing judge.[18] The applicant's conduct in carrying out his criminal enterprise, so far as the evidence revealed, did not involve violence.

[21] The court below was referred to relevant comparable decisions and took them into account. It is not fruitful to analyse those cases save to comment that the applicant has not distinguished those cases further than done by counsel below (or at all) nor has he identified some other decisions which would suggest that some more severe sentence ought to have been imposed. The primary judge gave effect, so far as relevant, to the guiding principles in s 9 of the *Penalties and Sentences Act* 1992.

[22] The applicant has demonstrated no relevant basis for challenging the appropriateness of the sentence imposed below. I would refuse the application for leave to appeal.

[23] **DAUBNEY J:** For the reasons given by White JA, with which I respectfully agree, I would also refuse the application for leave to appeal.

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15 Section 668D.

16 (1982) 149 CLR 305.

17 *Veen v The Queen [No 2]* (1988) 164 CLR 465 at 478.

18 *Penalties and Sentences Act* 1992, s 13.