SUPREME COURT OF QUEENSLAND

CITATION:	*R v Gardner* [2015] QCA 70
PARTIES:	**R** **v** **GARDNER, Kristen** (applicant)
FILE NO/S:	CA No 260 of 2014 SC No 304 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	1 May 2015
DELIVERED AT:	Brisbane
HEARING DATE:	15 April 2015
JUDGES:	Margaret McMurdo P and Holmes JA and Applegarth J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**The application for leave to appeal against sentence is refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant pleaded guilty to two counts of producing a dangerous drug, cannabis, in excess of 500 grams – where the applicant was sentenced to three years imprisonment on count 1 and five years imprisonment on count 2, with parole eligibility set after 15 months – where the applicant and his family were involved in large scale cannabis production on a cattle property owned by the applicant's father – where the applicant assisted in cannabis production at the family property over two distinct periods – where the applicant taught the children present at the property how to maintain, weed and distinguish the sex of the cannabis plants – where the applicant also photographed the activities and assisted in weeding, maintenance and the installation of a water system – where following a police raid, the police found eight different cannabis fields and various sheds containing drying cannabis plants, with a total value of almost $70m – where following the present offences in Queensland, the applicant committed further offences in New South Wales – where the applicant pleaded guilty in the

Lismore District Court and was sentenced to four and a half years imprisonment for cultivating and supplying cannabis in a large commercial quantity – where the applicant rehabilitated after his release from prison in New South Wales – where the applicant's offending occurred between six and nine years before his sentence – whether this long delay should have been taken into account during sentencing – whether the sentence was manifestly excessive

Penalties and Sentences Act 1992 (Qld), s 13A

Mill v The Queen (1988) 166 CLR 59; [1988] HCA 70, cited
R v L; ex parte Attorney-General (Qld) [1996] 2 Qd R 63; (1995) 84 A Crim R 142; [1995] QCA 444, cited
R v Le Blowitz [1998] 1 Qd R 303; [1996] QCA 451, distinguished

COUNSEL: S G Bain for the applicant
D R Meredith for the respondent

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

[1] **MARGARET McMURDO P:** The applicant, Kristen Gardner pleaded guilty to two counts of producing a dangerous drug, cannabis, in excess of 500 grams. He was sentenced to three years imprisonment on count 1 and five years imprisonment on count 2, with parole eligibility set after 15 months on 23 November 2015. He has applied for leave to appeal against that sentence on the basis it was manifestly excessive, given the delay between commission of the offending and sentence and his subsequent rehabilitation.

The applicant's antecedents and subsequent offending

[2] The applicant was aged between 28 and 32 at the time of the offences which occurred between 1 January 2005 and 30 June 2008. He was 38 years old when sentenced. The delay between commission of the offences and his sentencing is central to this application.

[3] He had a minor prior criminal history. On 5 October 1996 in the Brisbane Magistrates Court he was fined, without conviction, for the possession of cannabis.

[4] He had a highly relevant subsequent conviction. On 23 June 2010 in the Lismore District Court he pleaded guilty to cultivating a prohibited plant, cannabis, and supplying a prohibited drug, cannabis, in a large commercial quantity and was sentenced to four and a half years imprisonment with a non-parole period of two years and three months. These offences were committed on 25 April 2009, after the commission of the present offences.

[5] They concerned the commercial supply of 132 kilograms of cannabis, for which the maximum penalty was 20 years imprisonment. An offence of cultivating 900 cannabis plants with a maximum penalty of 15 years imprisonment was also taken into account. The applicant had harvested a very large cannabis plantation and prepared it for market. He had set up camp in a remote area with water and drying systems.

He claimed to be cultivating the cannabis to fund lawyers for his family's legal representation for the Queensland charges, arising out of the police raid on 30 June 2008. The sentencing judge did not consider this was a mitigating feature. The 2009 offences were committed for financial gain. The applicant had no noteworthy convictions but had embarked in a major criminal enterprise. He believed he had been or would be charged in relation to his family's activities in Queensland but the sentencing judge could not take that into account. It was true, however, that the applicant was not intending to profit from the cultivation to fund his own lifestyle.

[6] The sentencing judge noted the applicant's excellent references. He was in maximum security because of the offences alleged against him in Queensland and would have to serve his sentence outside the Lismore area. This would impact on family accessibility. Since his imprisonment in New South Wales he had assisted the Corrective Services authorities by carrying out electrical work. He was trying to improve himself and his many talents could be developed in a productive and useful way in the future. It seemed he had excellent prospects of rehabilitation. His imprisonment meant that he had been unable to be part of his young child's life and this was a source of deep regret. His timely plea warranted a full discount of 25 per cent. The charges, however, were serious and socially unacceptable. The appropriate penalty was six years imprisonment but the judge reduced that to four and a half years to commence on 25 April 2009 when he was first incarcerated. The judge found special circumstances warranting a non-parole period to expire on 24 July 2011 so that the applicant served two years and three months in custody prior to his release on parole.

The facts of the present offending

[7] The applicant, his father, Michael Gardner Snr, and his father's family were involved in large scale cannabis production. Michael Gardner Snr and his then wife, Ms Kelly Millard, purchased a property for that purpose located in an isolated area between Stanthorpe, Texas and Inglewood. It appeared to be a legitimate cattle property. Michael Gardner Snr was the primary offender. Ms Millard, her children, aged between 11 and 13, the applicant's brother, Michael Gardner Jr, and many other family members were involved. The applicant's relationship with his father was volatile and characterised by serious conflict. Michael Gardner Snr was sentenced to 13 years imprisonment on 13 June 2012 for trafficking in cannabis between 1 June 2004 and 17 December 2008. He will serve 10.4 years before becoming eligible for parole.

[8] The applicant assisted in cannabis production at the family property over two distinct periods. He was at most an occasional user of cannabis and was not an addict. His involvement in count 1 between January and September 2005 was to assist and set up the property for large scale production. He attended the property about eight times. He taught the children present to maintain the cannabis plants, to distinguish their sex, to discard unwanted male plants and to weed. At the end of the period charged as count 1 he left to travel overseas where he lived and worked until his father persuaded him to return. He then continued to assist in cannabis cultivation from September 2007 until 30 June 2008 when police executed a search warrant. During the second period, he documented and photographed the activities of others for a documentary film he hoped to produce. He built a second base camp closer to a new area of cannabis cultivation and assisted with the installation of a water system, weeding and maintenance. He was experienced in cannabis cultivation and had published articles in overseas publications on that topic and concerning his abusive father. Michael Gardner Snr was the primary offender. He controlled all

aspects of the cultivation including the distribution of the profits of the illicit business. He often reneged on agreements with family members for distributing profit. He sold the cannabis for $2,400 per dry pound.

[9] An SKS rifle and a Browning pistol belonging to the applicant and other guns belonging to Michael Gardner Snr were kept at the property. The applicant used his firearms to shoot pigs and wild animals but his father used his guns, together with verbal abuse, to threaten Ms Millard and her children and to control the applicant, his siblings and their partners.

[10] When police raided the property they found eight different cannabis fields and various sheds containing drying cannabis. The total weight of useable cannabis on the property was 3.59 tonnes valued at almost $70m. They also found $10,000 cash in a locked shipping container and weapons including leg shackles, handcuffs, extendable batons, concealable pen guns, night-vision goggles, long-range rifle scopes, hand gun carry cases and over 10,000 rounds of live ammunition.

[11] The applicant left the property after falling out with his father some weeks prior to the police raid. The applicant's emphasis on taking photographs and video footage was a major point of friction with his father who felt he should be doing more physical work. The applicant aspired to have a career in photography and film rather than cannabis cultivation.

Defence submissions at sentence

[12] Defence counsel at sentence tendered a report from psychologist, Dr Luke Hatzipetrou, who interviewed the applicant on 2 and 7 July 2014. The report included the following information. The applicant was the eldest of five children. His father initially operated a banana farm in northern New South Wales. He was a violent man and the applicant's mother left him in 1984. For 18 months the children lived with their mother but it seems she had mental health problems and they returned to live with their father who had four more children to different partners. Once the applicant completed Year 10, his father removed him from school to work on the farm. The applicant was resentful that his father had put him in a situation where he was unqualified and reliant on unskilled labour for income. He worked on the farm seven days a week including before and after school. The farm had no official electricity supply until 1994.

[13] He left home at about 20 years of age and obtained positions in Brisbane and Sydney. He later travelled to Canada where he worked as a freelance photographer, obtaining contract work and making small films including for a magazine associated with the cannabis counter-culture. He completed his Year 12 equivalent whilst in prison in New South Wales. After his release from custody in New South Wales he was employed in a photographic shop and had his own part-time business teaching photography.

[14] His father was controlling, through physical abuse when the applicant was young, and later by ensuring he was financially dependent. When his father told him to return home from Canada to work on the farm he felt obliged to comply. He now better understood his father's manipulative behaviour and they had no current contact. He felt all his siblings had been damaged by their father's violence and

manipulation and had various degrees of related psychological and drug issues so that his relationship with them was also dysfunctional.

[15] The applicant was now married with two young children. His wife suffered from chronic fatigue. He was concerned about his family's welfare if he were to be returned to prison. He was motivated to create a functional family unit.

[16] Dr Hatzipetrou considered that the applicant, on his release from prison in New South Wales, was engaged in meaningful employment and was a productive and well-liked member of his local community. He presented as a positive and supportive partner and father. His history of psychological trauma has integrated into his personality structure; he appeared to have adjustment disorder in partial remission. He was anxious and irritable because of his legal predicament. There were no current indications of polysubstance dependence disorder, anti-social personality disorder or adult psychopathy. He had demonstrated emotional resilience and maturity and was engaging in pro-social behaviours. He had insight into the seriousness of his actions. His continued employment would be a protective factor against future re-offending and mental health problems. Dr Hatzipetrou recommended a comprehensive psychiatric review by a forensic psychiatrist or psychologist for the purposes of treatment. The applicant's considerable intellectual capacity suggested he would benefit from recommended treatment strategies and he was strongly motivated to address his offending behaviour.

[17] Defence counsel also tendered references from citizens in the Lismore area attesting to the applicant's impressive reputation in the community, including his strong work ethic and his dedication to his wife and children, since his release on parole in mid-2011 on the 2009 offending.

[18] The applicant, defence counsel emphasised, had indicated since the committal hearing that he would plead guilty on the basis reflected in the committal depositions. He pleaded guilty as soon as the prosecution accepted his guilty plea to the present counts on the basis that he made no financial gain. For most of the period during which count 2 occurred he focussed on making a documentary. His involvement in both counts was minimal and incidental and arose from his dysfunctional upbringing. His prospects of rehabilitation were excellent in light of his demonstrated rehabilitation since his release from custody in July 2011. He had full time employment, was actively engaged with his local community and had established a family whom he supported. It was more than three years since his release from prison and he had led a commendable life during this time. The present charges occurred more than six years ago.

[19] Whilst there was no strict parity issue between the applicant and his co-offenders, the sentences imposed on Michael Gardner Jr, Rosemary Gardner and Benjamin Sutherland were helpful. The applicant should be sentenced to a significant head sentence to reflect the objective seriousness of the offences but the sentence should be fully suspended.

The sentences of the co-offenders emphasised by the applicant

[20] Michael Gardner Jr pleaded guilty to producing a dangerous drug in excess of 500 grams, negligent acts causing harm, unlawful possession of a weapon, and related summary offences. He did so on the basis that he assisted in producing cannabis at the property over two periods, the first from about early 2006 to early

2007 and the second from about October 2007 to July 2008. He received $25,000 plus living expenses for his role and was promised but did not receive five per cent of sales. He was a principal worker on the property during the period of his offending. He had rehabilitated in the 18 months prior to sentence. He co-operated with the authorities so that s 13A *Penalties and Sentences Act* 1992 (Qld) was relevant. But for his co-operation, he would have been sentenced to eight years imprisonment with no order as to early release on parole. In light of his co-operation he was sentenced to five years imprisonment suspended after 12 months with an operational period of five years.

[21] The applicant's sister, Rosemary Gardner, pleaded guilty to producing cannabis in excess of 500 grams between 1 June 2004 and 17 December 2008. She assisted over two time periods, initially on weekends, when she manicured harvested cannabis for $100 per pound and later in 2007 by organising a family group to plant a large number of plants when she was heavily pregnant and supervising the children. After the police raid on 30 June 2008, she recovered money from debtors to fund a family legal defence fund. She had the sole care of four children and was well-regarded in her community. A psychologist report recorded her severely dysfunctional upbringing. She was also sentenced under s 13A *Penalties and Sentences Act*. But for that co-operation, she would have received a sentence of four years imprisonment with release after 15 months but, in light of her co-operation, her four year sentence was wholly suspended for an operational period of five years.

[22] The applicant's brother-in-law, Benjamin Sutherland, pleaded guilty to producing cannabis in excess of 500 grams on the basis that he worked on the family property, initially planting cannabis in November 2007 and then harvesting and packing it in 2008. There was no evidence that he was directly paid for his efforts. He returned with his partner many times in early 2008 and assisted in the harvest of about 600 pounds of cannabis at the end of April 2008. After Michael Gardner Snr's arrest this was sold and the proceeds used to fund legal fees, including Mr Sutherland's. He was not aware the legal fees were being funded in this way. He had no criminal history. He was sentenced to 18 months imprisonment wholly suspended for an operational period of three years.

Conclusion

[23] The sentencing of this applicant involved a delicate weighing of competing considerations. His persistent involvement over many years in the large scale commercial production of cannabis is recognised by the law in both Queensland and in New South Wales as serious criminal conduct warranting stern penalties to ensure personal and general deterrence. The maximum penalty for each of the present offences was 20 years imprisonment and each was a moderately serious example of the offence. The applicant played a not insignificant role during two periods, each of about nine months, in a huge cannabis cultivation business. The offending occurred, however, between six and nine years before his sentence. This delay was because, after the commission of those offences and knowing that he was likely to be charged with them, he committed like offences in New South Wales to fund his family's legal costs. This subsequent offending placed him in a much more serious category of offender than all his co-offenders, if he were sentenced for all his offending together, other than his father. Nor did he have the benefit, as did some of his co-offenders, of s 13A *Penalties and Sentences Act*. The sentences

imposed on his co-offenders are of limited assistance in determining the appropriate sentence for the applicant.

[24] This case raised a number of important sentencing principles. One was the need to ensure that the overall sentence imposed for all his offending, including the New South Wales offending, was not crushing: *Mill v The Queen*.[1] Another was whether the extraordinary delay before sentence on the Queensland offences warranted mitigation because, first, the applicant had a resulting lengthy period of uncertainty and stress and, second, because he rehabilitated during the period of delay: *R v L; ex parte Attorney-General (Qld)*.[2] The applicant's dysfunctional relationship with his violent and manipulative father and the applicant's plea of guilty were also important considerations.

[25] The principal factor in so far as the totality principle is concerned is whether, had the applicant been sentenced for all his offending in both Queensland and New South Wales, the effective, total sentence (nine and a half years imprisonment with parole eligibility after three and a half years) would be unjust and crushing. The applicant's counsel understandably did not embrace that contention. The applicant, during three quite separate periods, involved himself in producing large quantities of cannabis for commercial gain. As the sentencing judge for the present offences recognised, having escaped the clutches of his manipulative father and found satisfying work in Canada, he voluntarily returned, aged in his early-thirties, to again assist in his father's large scale cannabis business. Then, as a mature man, knowing he was to be charged with those offences, he involved himself in another large scale commercial cannabis production to pay for lawyers for his family's legal defence on criminal charges. According to the law of Queensland and New South Wales, such conduct warranted a firm deterrent sentence. An effective, total sentence of nine and half years imprisonment with release on parole after three and half years imprisonment to reflect his plea of guilty, his limited role, and the insidious influence of his father, was neither crushing nor excessive.

[26] Counsel for the applicant quite rightly emphasised that the applicant had completed his sentence and parole period for the New South Wales offences, had been living and working in the community since his release in July 2011, had established a loving, functional family, was in full time employment and was well-respected in his community. It may be doubtful that anyone will be well-served by returning the applicant to prison for at least 15 months, given his rehabilitation. Further time in prison is unlikely to assist him, his family nor the local community in which he is held in high regard. But the primary judge, after taking into account all the mitigating features, considered that the applicant's involvement in these serious offences was such that principles of personal and general deterrence required him to serve this further period of actual detention. The applicant's counsel was unable to refer this Court to any case involving two such large scale commercial productions of cannabis over such extended periods, even with extremely mitigating circumstances other than s 13A, where an offender had not served a period of actual detention.

[27] Counsel was given leave to provide, after the hearing, any cases supporting her contentions. She referred this Court to *R v Cook, Coleman, Kake, Innes and Le Blowitz*.[3]

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1 (1998) 166 CLR 59.
2 [1996] 2 Qd R 63.
3 [1998] 1 Qd R 303.

Le Blowitz and Cook appealed against their convictions and Cook, Coleman, Innes and Kake applied for leave to appeal against sentence. Although Cook, Kake and Innes had some modest success in obtaining slightly earlier recommendations for parole, their offending was nowhere near as grave as the present applicant's. The case is not helpful.

[28] I have considerable sympathy for the applicant who, to his credit, appears to have made an honest, lawful life for himself and his dependant wife and young children since his release on parole. This is commendable given his very significant disadvantages in life. A more lenient sentence was open. But he has not demonstrated that this sentence, effectively five years imprisonment with parole eligibility after serving 25 per cent, was manifestly excessive.

[29] The applicant has sought the certainty of a suspended sentence rather than the uncertainty of the present parole recommendation. But the judge has not erred in preferring to give a parole eligibility date. The applicant's troubled background and Dr Hatzipetrou's report suggests he will benefit from the guidance and support of a thoughtfully constructed parole order. Whether he is granted parole in November this year will be a matter for the parole board. But his efforts since his release on parole in New South Wales in July 2011 are, on the material before this Court, impressive. He presents, on that material, as an excellent parole candidate. Gaining early parole would appear to be, not only in his interests, but in the interests of his family and the community.

[30] As the applicant has demonstrated no error on the part of the primary judge, I would order that the application for leave to appeal against sentence is refused.

[31] **HOLMES JA:** I agree with the reasons of Margaret McMurdo P and the order she proposes.

[32] **APPLEGARTH J:** I agree with the reasons of the President for refusing the application for leave to appeal against sentence.