SUPREME COURT OF QUEENSLAND

CITATION:	*R v Pearson* [2015] QCA 118
PARTIES:	**R** **v** **PEARSON, Martin Jon** (applicant)
FILE NO/S:	CA No 290 of 2014 DC No 1158 of 2014 DC No 1433 of 2014
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane – Unreported, 8 October 2014
DELIVERED ON:	26 June 2015
DELIVERED AT:	Brisbane
HEARING DATE:	18 June 2015
JUDGE:	Holmes JA and Ann Lyons and Burns JJ Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application for leave to appeal refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant seeks leave to appeal against a sentence imposed in the District Court at Brisbane on 8 October 2014 – where the applicant pleaded guilty to one count of producing a dangerous drug in excess of 500 grams, namely cannabis, two counts of possessing a dangerous drug, one count of possessing a thing for use in connection with producing a dangerous drug, one count of possessing things used in connection with producing a dangerous drug and one summary offence of possession of utensils – where the learned sentencing judge imposed a fine of $1,500 in relation to all offences and recorded convictions – whether the recording of convictions rendered the sentence manifestly excessive – whether the learned sentencing judge erred in the exercise of her discretion to record a conviction *Dixon & Jones v Irvine* [1995] QCA 71, considered *R v Applewaite & Jones* (1996) 90 A Crim R 167; [1996] QCA 533, cited *R v Ball* [1999] QCA 427, cited

R v Blakers & Attorney-General of Queensland [1997] QCA 79, cited
R v Brown [1997] QCA 170, cited
R v Laing (2003) 138 A Crim R 312; [2003] QCA 92, cited
R v Lyle [2013] QCA 293, followed
R v Tarabay [1998] QCA 317, cited

COUNSEL: J Benjamin for the applicant
D L Meredith for the respondent

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

[1] **HOLMES JA:** I have had the advantage of reading the judgment of Ann Lyons J, and agree, for the reasons she has given, that this application for leave to appeal should be refused.

[2] The applicant pointed to sentences from the trial division of this Court[1] in which sentencing judges had not recorded convictions against defendants for the charge of production despite the existence of the circumstance of aggravation that the plants' weight exceeded 500 grams; in one instance by a factor of 11.[2] They served to illustrate only that another judge might have exercised the discretion favourably to the applicant here. It did not follow that her Honour's exercise of the discretion entailed any error or rendered the sentence imposed manifestly excessive.

[3] **ANN LYONS J:** Pursuant to an amended notice of appeal filed on 10 June 2015, the applicant seeks leave to appeal against a sentence imposed in the District Court at Brisbane on 8 October 2014.

[4] On 8 October 2014, the applicant pleaded guilty to one count of producing a dangerous drug in excess of 500 grams, (cannabis); two counts of possessing a dangerous drug; one count of possessing a thing for use in connection with producing a dangerous drug; and one count of possessing things used in connection with producing a dangerous drug. He also pleaded guilty in relation to a summary offence of possession of utensils. The learned sentencing judge imposed a fine of $1,500 in relation to all offences and recorded convictions.

[5] The grounds of appeal are:

1. The recording of convictions rendered the sentence manifestly excessive; and
2. The learned sentencing judge erred in the exercise of her discretion to record a conviction.

The circumstances of the offences

[6] The sentencing hearing was conducted on the basis of an agreed schedule of facts. That schedule indicated that police executed a search warrant at the applicant's home

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1 *R v David John Thomson*, unreported, Martin J, SC No 668 pf 2010, 25 October 2010; *R v Peter Cameron Kelly*, unreported, Applegarth J, SC No 638 of 2010, 6 October 2010; *R v Amanda Sue McAlpine*, unreported, Douglas J, 18 June 2010; *R v Dianne Robb*, unreported, Jones J, SC No 7 of 2009, 10 February 2009; *R v Joshua Michael Quin*, unreported, Mullins J, SC No 789 of 2008, 14 August 2008.

2 *R v Amanda Sue McAlpine*, unreported, Douglas J, 18 June 2010.

at Wooloowin on 18 November 2013. At the commencement of the search, the applicant declared that he had cannabis and directed police to an area outside his home. A search of the property revealed a quantity of loose cannabis sitting on top of a black tub inside a computer room. Inside that tub, police found 12 clipseal bags which contained cannabis seeds and four small glass bottles with further seeds. In a cupboard, police found a quantity of cannabis in a plastic container. The cupboard was equipped with a fan and lights. Fertiliser was also found. A search of the cupboard located empty clipseal bags, a set of scales and loose cannabis.

[7] On the lounge room table, two clipseal bags containing cannabis were found; one had chopped cannabis and the other had whole cannabis buds. There was also a small grey clipseal bag which the applicant told police contained "ice". The gross weight of the contents of that bag was analysed and was found to be 0.09 grams and methylamphetamine was detected in the contents.

[8] In a room in the garage, police found four potted cannabis plants beneath electrical lights connected to a temperature controller. The plants were surrounded on three sides by sheeting and the room was equipped with a fan and air-conditioning. Fertiliser bottles were found in that room.

[9] Three more potted cannabis plants were found in a shed which was equipped in a similar fashion to the garage. Some loose cannabis was also found and another four potted cannabis plants were found beneath a white shade cloth. The plants were of varying maturity. One further plant was found at the side of the house beneath a shade cloth. A metal pipe and grinder were found on a table at the back of the property and a glass smoking pipe was also found.

[10] The applicant admitted to police that he would grow cannabis, harvest it, dry it and smoke it throughout the year. He stated he had put the cannabis in the computer room to dry two days prior, and that the lights were used for growing the cannabis. The Crown Prosecutor at sentence submitted that the applicant's set up was semi-sophisticated.

[11] The Crown Prosecutor submitted that in total 12 cannabis plants were found and they weighed 2.2 kilograms with the roots removed, but that this was a wet weight and the consumable cannabis would have been considerably less. The dried cannabis by itself weighed 408 grams. The Crown did not allege any commercial purpose.

The sentence imposed

[12] There was no doubt that the applicant appeared before the learned sentencing judge without any prior criminal history. He was 47 years of age at the time of the sentence and 45 to 46 at the time of his offending. It is clear that in imposing the sentence, the learned sentencing judge accepted that the applicant was a long-term user of cannabis and that the cannabis found during the search was for his personal use. She noted that the applicant had a good work history as a carpenter, but was, at the time of the sentence, on a disability support pension due to some back and neck injuries. He also had a diagnosis of bipolar disorder. The sentencing judge also referred to the fact that he had a good work history which was confirmed by the references tendered. He had worked for a number of years as a carpenter. He had good support and his mother was present in court. He also had good references and the referees all spoke well of him.

[13] In imposing the sentence, the learned sentencing judge noted that it was a production of cannabis with a circumstance of aggravation. Her Honour noted that a term of

imprisonment such as a suspended sentence would be within range, but that because of the matters personal to him and his lack of prior history, she did not propose to impose a term of imprisonment but rather imposed a fine of $1,500. The sentencing judge then referred to the submissions by Counsel for the applicant that she should exercise her discretion not to record a conviction. She noted the submissions from the applicant's Counsel that, in particular, she should have regard to the nature of the offence, the applicant's antecedents and the impact that recording a conviction would have not only on his social and economic well-being, but his chances of finding employment in the future. Her Honour referred to the fact that Counsel indicated that the applicant would like to travel in the future, however, she noted that there was no evidence that having a conviction recorded would cause him any problems with employment in the future, as his employers had all indicated that they were happy to have the applicant back no matter what happened. Her Honour concluded "having regard to all of those matters I think that the matter is such that a conviction (sic) ought to (sic) be recorded and so they're the orders I make."[3]

Has the learned sentencing judge erred in the exercise of her discretion to record a conviction?

[14] It is argued that the learned sentencing judge's exercise of her discretion to record a conviction was miscarried because she mistakenly was of the opinion that the nature of the offence, being a production of cannabis with a circumstance of aggravation, meant that the offence was one which **must** result in a recording of a conviction. Counsel for the applicant concedes that the sentencing judge does not explicitly say that she felt constrained to record a conviction, but rather it is argued that "the tenor of what Her Honour said reveals that the nature of the offence was such that she felt she had no other option".[4] It is argued that that is gleaned from the learned sentencing judge's discussion with Counsel. The following exchange occurred after Counsel referred to the decision of *R v Blakers & Attorney-General of Queensland*:[5]

> "HER HONOUR: Can I just interrupt you briefly. Where does it say that no conviction was recorded?
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> MR LYNCH: It doesn't say that no conviction was recorded. It doesn't say at all whether a conviction was recorded, but your Honour can see that there were 84 mature plants there weighing 28 kilograms.
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> HER HONOUR: That's not my issue. My issue is that irrespective of what I do today, the cases indicate that a term of imprisonment, suspended, *is certainly what normally appears to be imposed, either partially or wholly suspended, and I can see that there's an argument that a community-based order may be open for somebody where it clearly is just for personal use and they've got no prior convictions, but to then go that one step further, this is not, you know, one plant in the Magistrates Court when looking at the recording of a conviction.*"[6] (emphasis added)

[15] Having considered the sentencing judge's sentence as a whole, I do not consider that her Honour felt in any way constrained in relation to whether to record a conviction or not. In this regard, I note that the sentencing judge stated:

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3 ARB 20, ll 8-9.
4 Outline of Submissions on Behalf of the Applicant dated 28 May 2015, 8.
5 [1997] QCA 79.
6 ARB 13, ll 21-34.

> "Mr Lynch has mentioned that you would like to travel in the future. However, having regard to the nature of the offence and those other matters, there's no evidence that it will cause you any problems with employment in the future. Your previous employers have indicated that they are happy to have you back no matter what happens, and having regard to all of those matters I think that the matter is such that a conviction (sic) ought to (sic) be recorded and so they're the orders I make."[7]

[16] It is clear from those remarks that that her Honour was in fact carefully weighing all up the factors she needed to appropriately take into account. It is also abundantly clear that having weighed all of those factors up, particularly the fact that a conviction would not actually affect the applicant's prospects of employment and given the circumstance of aggravation, her Honour considered that an appropriate sentence was the imposition of a fine together with the recording of convictions. I do not, therefore, consider that the sentencing judge felt constrained in relation to the sentence she could impose, but rather she exercised her discretion after a thorough evaluation of all of the relevant criteria. I do not consider, therefore, that this ground of appeal has been made out.

[17] I now turn to the other ground of appeal, which is that the sentence is manifestly excessive because convictions were recorded.

Was the sentence manifestly excessive?

[18] There is no doubt that imposing a fine of $1,500 for all the offences was appropriate, given that the applicant had no prior criminal history, and that the production and possession was for his own personal use. The question is whether in all of the circumstances imposing convictions in relation to those offences was manifestly excessive.

[19] Three decisions were referred to by the Crown Prosecutor at sentence: *R v Tarabay*,[8] *R v Laing*,[9] and *R v Ball*.[10]

[20] In *R v Tarabay*, the applicant was sentenced in relation to the production of cannabis in excess of 500 grams, where he was growing 36 plants in a hydroponic system and a further 43 in pots. The total weight of cannabis and plant material was in excess of six kilograms. It is clear, therefore, that the quantity of cannabis involved there means that the circumstances in *R v Tarabay* were far more serious than the present circumstances. A sentence of two and a half years imprisonment, suspended after six months, was imposed. Given the different factual circumstances, I do not consider that sentence is of any assistance in relation to determining the question as to whether this sentence is manifestly excessive.

[21] Similarly, the decision in *R v Laing* is not of particular assistance, given that a similar sentence of two and half years was imposed, together with a $5,000 fine for the fraud offence. There was a very sophisticated hydroponic system. Over 1,000 seedlings were found growing and the plant material weighed in excess of two kilograms. Of

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7 ARB 20, ll 4-9.
8 [1998] QCA 317.
9 [2003] QCA 92.
10 [1999] QCA 427.

significance was the fact that the applicant was an electrician and he had installed a device which allowed him to obtain electricity without it being measured. It is clear that over 42,000 kilowatt hours of electricity had been used without being recorded. In that case, the sentences initially imposed were held to be manifestly excessive and were substituted with sentences of 12 months' imprisonment suspended after the eight days the applicant had already served with an operational period of four years. That case is not of assistance given that there was a commercial purpose to the production.

[22] Similarly, in *R v Ball* where a period of imprisonment of 18 months was imposed, suspended after six months, there was in excess of 500 grams of cannabis and the total weight of the plants was six kilograms. The sentencing judge found in that case that there was a commercial element to the production and on appeal a sentence of 12 months' imprisonment, suspended after three months with an operational period of three years was imposed.

[23] At the sentencing hearing, defence Counsel referred to the decision of *R v Blakers & Attorney-General of Queensland*,[11] which was an appeal by the Attorney-General where a production of cannabis charge in excess of 500 grams resulted in a sentence of 240 hours of community service and a period of three years probation. Whilst it was argued that there was no reference in that judgment to the recording of a conviction, it is unclear whether a conviction was in fact recorded and that decision does not really assist given the very different factual scenario. In *R v Blakers & Attorney-General of Queensland*, there was a very sophisticated walk-in-wardrobe, which had been fitted up as a secret underground bunker to grow cannabis. 140 cannabis seedlings were found, together with 84 mature female cannabis plants. The wet weight was more than 28 kilograms. It is clear that the plants were growing in a sophisticated set up which costed more than $8,000 to install and that it consisted of an elaborate drainage and water recycling system, as well as a carbon dioxide boosting system and the diversion of electricity. The Crown submitted that that was a more serious example of production with the number of plants and the elaborate nature of the set up. In my view, an analysis of that decision is of no real assistance with respect to the ultimate question in the present case which is whether the sentence imposed was manifestly excessive.

[24] When the sentencing judge raised the issue of recording convictions with defence Counsel during the sentencing hearing, Counsel responded by referring to the decision of *R v Applewaite & Jones*.[12] It is clear that that decision did not involve a circumstance of aggravation and an amount of only 7.4 grams was involved which had been grown in an outdoor camp. The case was relied on because of the remarks by McPherson JA and Thomas J about sentencing trends for production. It was noted that they had held "Sentencing patterns show that save in the case of repeat offenders a moderate approach is generally made in relation to back-yard production, particularly when the production is for the own use of the grower".[13] Their Honours then indicated that at the lower end of the scale, some production offences can be appropriately dealt with by the imposition of a fine or a community based order, and where it is appropriate that no conviction be recorded.[14]

[25] In *Dixon & Jones v Irvine*,[15] the Court of Appeal overturned the recording of convictions for the production of a dangerous drug and possession of a dangerous drug. In that

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11 [1997] QCA 79.
12 [1996] QCA 533.
13 *R v Applewaite & Jones* [1996] QCA 533, 2.
14 *R v Applewaite & Jones* [1996] QCA 533, 3.
15 [1995] QCA 71.

case, a circumstances of aggravation that the drug exceeded 500 grams was not charged, however, it is clear that the applicant was found to be growing a large number of plants of varying heights. He was 53 with no criminal history and he argued that his future in the computer industry "may be affected by having convictions recorded".[16]

[26] At page 5, their Honours said:

> "A distinct practice of declining to record convictions, where the offender has committed a minor offence or minor offences relating to marijuana, is discernible. That is applied to persons with no significant prior convictions and the case to be now discussed shows that in special circumstances even offenders who have committed prior offences may be considered to merit the advantage of not having a conviction recorded. It is notable that most of the cases of this kind - relatively minor drug offences involving people with no significant criminal record - relate to young offenders. *In Devine v. Fullalove* (unreported, 6 August 1993) the applicant was middle-aged; she was a person with a disability which confined her to a wheelchair, but it was not stated whether the disability was temporary or permanent. She had two convictions for dishonesty, and had been given a bond for possession of small amounts of cannabis and associated items - a set of scales and packaging material; a conviction was recorded below. Macrossan CJ pointed out that the age of the applicant "should not be regarded as disqualifying her from being sentenced without recording a conviction". His Honour referred to the advantage of some consistency in treatment of drug offenders and went on:
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> > "It should be possible to achieve this without too much difficulty in cases simply of possession of marijuana where the quantities are not great and the offender has no previous drug convictions and has a generally good, even if not impeccable, character. In these cases it will often be desirable to record no conviction"."

[27] In that case, the application was granted, the appeal was allowed and it was ordered that no conviction be recorded. It was clear, however, that in that case the applicant's future in the computer industry may well have been affected. The fines imposed were considered not to be light and it was considered unfortunate if the applicant was to suffer further punishment of unpredictable magnitude as a result of convictions being recorded. It was accepted that he was at risk of being damaged in his occupation in future if convictions were held to be recorded. There was also a container with seeds and a pipe. As previously noted, that count of production in *Dixon & Jones v Irvine* did not involve a circumstance of aggravation as was the case here.

[28] Similarly, in *R v Brown*[17] there was no circumstance of aggravation. Police found five cannabis plants, two of which were five feet tall. The others were one and a half to two feet tall. Whilst convictions were recorded at first instance, they were set aside on appeal. In that decision, it was argued that the sentence was manifestly excessive because of the recording of convictions. It would seem that the applicant was self-represented before a magistrate who did not consider the possibility of not recording a conviction which was not raised by the applicant at sentence. On appeal, it was

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16 *Dixon & Jones v Irvine* [1995] QCA 71, 4.
17 [1997] QCA 170.

argued that the cannabis was used for personal and medicinal reasons and the production was likewise directed to that end. The Court of Appeal held that the convictions should be set aside on the basis that such a conclusion was consistent with the Court of Appeal decision in *Dixon & Jones v Irvine*.

[29] In my view, the most relevant comparable decision is *R v Lyle*,[18] which is a recent decision of this Court involving a count of production of cannabis with a circumstance of aggravation. Whilst the quantity involved was greater, namely in the order of almost 15 kilograms, no commercial purpose was alleged by the Crown. Similarly, the applicant there had no criminal history and was aged 35. He was originally sentenced to six months' imprisonment with an immediate parole release date and was resentenced on appeal to a fine of $3,000 with a conviction recorded. In my view, that decision supports a sentence in this case of a fine in the order of $1,500 with a conviction recorded. It could not be argued in this case that the quantity involved was insignificant or minor. Nor could it be argued that the set up here was unsophisticated given the nature of the ducting and cooling system as well as the silver sheeting which had been used.

[30] Furthermore, as Counsel for the respondent notes in his submission, it was not submitted that the recording of a conviction **would** as opposed to **might affect the applicant's ability to travel overseas.** Neither was it argued that recording a conviction would affect the applicant's prospects of employment.

[31] Accordingly, a review of the relevant authorities does not support a submission that the recording of a conviction was manifestly excessive in the circumstances.

[32] I would refuse the application for leave to appeal.

[33] **BURNS J:** For the reasons expressed by Ann Lyons J, as well as the further observations made by Holmes JA with which I concur, I agree that the application for leave to appeal should be refused.

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[18] [2013] QCA 293.