SUPREME COURT OF QUEENSLAND

CITATION:	*R v Vincent; ex parte A-G* [2000] QCA 250
PARTIES:	**R** **v** **VINCENT, Barry Colin** (respondent) **EX PARTE ATTORNEY-GENERAL OF QUEENSLAND** (appellant)
FILE NO/S:	CA No 85 of 2000 SC No 21 of 2000
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Appeal by Attorney-General (Qld)
ORIGINATING COURT:	Supreme Court at Toowoomba
DELIVERED ON:	23 June 2000
DELIVERED AT:	Brisbane
HEARING DATE:	19 June 2000
JUDGES:	Pincus, Davies and Thomas JJA Judgment of the Court
ORDER:	**Appeal dismissed**
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 – APPLICATION TO INCREASE SENTENCE – OTHER OFFENCES - whether failure to impose an actual term of imprisonment manifestly inadequate in the circumstances – inconsistent submissions by Crown at first instance and on appeal CRIMINAL LAW – JUDGMENT AND PUNISHMENT – RECOGNIZANCES, PROBATION AND OTHER NON-CUSTODIAL ORDERS – PROBATION ORDERS AND SUSPENSION OF SENTENCE – GENERALLY – whether suspended sentence may be imposed in conjunction with community service order – reasoning in *Hughes* does not extend to prevent the imposition of a suspended sentence in conjunction with a community service order – no prohibition implicit in *Penalties and Sentences Act*

Penalties and Sentences Act 1991 s 92, s 103(2)(b)

R v Applewaite and Jones (1996) 90 A Crim R 167, considered
R v Arana [2000] QCA 184, CA No 441 of 1999, 16 May 2000, considered
R v Craig David Hughes [2000] QCA 16, CA No 306 of 1999, 11 February 2000, considered
R v Hughes [1999] 1 Qd R 389, considered
R v M ex parte Attorney-General [1999] QCA 442, CA No 251 of 1999, 2 November 1999, considered

COUNSEL: N Weston for the appellant
C Chowdhury for the respondent

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

[1] **THE COURT:** This is an appeal by the Attorney-General against sentences imposed for offences of production and possession of cannabis with a circumstance of aggravation. On the production count the respondent was sentenced to three months imprisonment wholly suspended for 12 months. On the possession count he was ordered to perform 80 hours community service, and a conviction was recorded.

[2] The respondent is a 53 year old disability pensioner who lives in Stanthorpe with his wife. He has a long working history of work as a steel worker, roof plumber and panel beater. In more recent years he performed seasonal farm work but this diminished when his health started to deteriorate.

[3] The circumstances of the offences are that police executed a warrant on his residence on 25 November 1999 and found 596 cannabis plants ranging from seedlings to plants said to be one metre tall. However, the numerous photographic exhibits fail to show any plants of more than half that size. The analyst's certificate reports the weight of "plants with roots removed and green plant material" as a mere 46.9 grams. There may well be a discrepancy between the amount of material that was seized and that taken to the forensic services branch for analysis and weighing. In the result the court does not have any reliable figure as to the total weight of the plants. The best evidence of bulk would seem to be what can be inferred from photographs. Inside the respondent's house the police found cuttings and plant parts weighing a total of 538.4 grams. These were described as early pluckings not of good quality and would probably have been burnt. The learned sentencing judge noted that the quantity was just sufficient to permit a circumstance of aggravation to be alleged in the second count.

[4] The respondent was entirely co-operative with the police. His straightforward admissions against interest in the context of these cases portray a refreshing degree of candour or even naivety. He told the police he was growing the plants to make a profit but that he had not yet sold any of them because they were too small. He

grew the plants from seeds which had been given to him by some "bike fellas" whom he permitted to do some racing around his place. He had watered the plants and given them two treatments of fertiliser, but the operation was fairly described as unsophisticated. The respondent did not know the difference between female and male plants, had no harvesting or drying technique or equipment and no existing means of disposal.

[5] The respondent has no prior convictions on drug matters although he had convictions for stealing and like offences during his youth and two further convictions of that kind in 1983 and 1991. None of these had required a custodial sentence.

[6] Relevant factors affecting the sentence included the respondent's co-operation with police, his early plea of guilty, the relative lack of sophistication in the venture, his good work history and his community involvement. References showed him to be a contributor to his community. The learned sentencing judge went on to note the public shame that he will endure, and, significantly, his extremely poor health. He has a number of chronic conditions including a serious diabetic condition. The medical evidence also describes him as suffering from hypercholesterolaemia, hypertension, gastric reflux and generalised arthritis. He has suffered a CVA (stroke) and heart attack. His arthritic condition particularly affects his lower back. He also requires surgery on his achilles tendon. The poor health of an offender is a factor that needs always to be weighed with some circumspection. The present case presents a genuine spectrum of symptoms which would render prison a greater hardship than it would be for others.

[7] In the present case, the respondent has already served the 80 hours community service which was ordered on the second count. The report from the community service centre includes the following: "Despite all his ailments Mr Vincent completed his hours without complaint, went regularly to the project and did full eight hour days. Was said to be an excellent worker by on-site supervisor. This fellow's performance certainly puts some of the fit and healthy young slackers who won't do eight hour community service days to shame".

[8] The position taken by the Crown during sentencing fairly recognised the mitigating factors of the case. The learned Crown prosecutor noted that "his apparent frankness stands out". The learned Crown prosecutor went on to indicate the reasonable possibility of a non-custodial order. He suggested that the "normal penalty would be imprisonment of, say, 12 months with an early release, say, at three months", but having said that, continued "There is a number of factors here, of course – the co-operation and the like – and it may be that your Honour would accede to a request for a suspended sentence, or, alternatively, an intensive correction order, and the Crown would respectfully submit that it is a matter to weigh up the strength of mitigation".

[9] Those submissions are somewhat at odds with the bringing of the present appeal which is based on the premise that nothing other than a custodial penalty was appropriate. The unfairness of inconsistent approaches by the Crown at sentence

and on appeal is obvious. The restraint exercised by the court in acceding to appeals in such circumstances has been identified on many occasions[1].

[10] The relevant criteria to assist in determining the point at which a custodial sentence may be necessary were discussed in *R v Applewaite and Jones*[2]. In the absence of countervailing circumstances, the cultivation of over 500 plants with a view to profit would normally be expected to produce the result that a period of actual custody was necessary. Indeed that was the principal submission of counsel for the Attorney-General. However those factors are in the present case tempered by the countervailing circumstances which have already been mentioned. These circumstances identify the case as one where a suspended sentence was possible, even if a custodial one might have been thought more likely.

[11] The learned sentencing judge observed that the respondent was probably fortunate that the police intervened at the early stage they did. Of course, a need for deterrence against such activity is just as strong in relation to pensioners as it is to any other sector of society and this aspect must be borne in mind. At the same time, the level of activity was such that it fell within an arguable area concerning whether a custodial sentence is necessary. The concessions of the Crown prosecutor below in our view were not unreasonable. There is little doubt that the learned sentencing judge was assisted by those submissions to frame the sentence that she did. When all matters are considered we do not think it would serve the interests of justice to impose a custodial sentence at this stage.

Was this combination of orders legally available?

[12] Counsel for the respondent submitted, in reliance upon *Craig David Hughes*[3] and *Arana*[4], that it was not open for suspended imprisonment to be imposed in conjunction with a community service order, and "conceded" that this court ought to re-sentence, submitting that if it did so it would impose fully suspended sentences on both counts. However we are not satisfied that the concession is correct. Neither *Craig David Hughes* nor *Arana* expressly holds such a combination of orders to be unlawful. Neither do the cases of *R v Hughes*[5] or *R v M ex parte Attorney-General*[6]. All the above cases are based upon the inappropriateness of concurrent orders of probation and imprisonment, having regard to the terms of the *Penalties and Sentences Act* 1991. The only way in which such sentences can be combined, according to these authorities, is under s 92 of the Act whereunder a maximum of six months imprisonment may be imposed along with a probation order. As intensive correction orders are regarded by the Act as "imprisonment" it has been held that such orders are likewise prohibited from being made concurrently with a probation order[7]. Although *Arana* involved a combination of a probation order, a community service order and a suspended

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1 *R v Tricklebank* [1994] 1 Qd R 330; *R v Boult ex parte Attorney-General* CA 458 of 1993,17 March 1994; *R v Melano* [1995] 2 Qd R 186; *R v Conquest ex parte Attorney-General* CA 394 of 1995, 19 December 1995; *R v Craddock ex parte Attorney-General* CA 269 of 1998, 23 October 1998.

2 (1996) 90 A Crim R 167.

3 [2000] QCA 16, CA No 306 of 1999, 11 February 2000.

4 [2000] QCA 184, CA 441 of 1999, 16 May 2000.

5 [1999] 1 Qd R 389.

6 [1999] QCA 442, CA No 251 of 1999, 2 November 1999.

7 *R v M ex parte Attorney-General* above.

sentence of imprisonment, the basis of invalidity of such combined orders was a perceived inconsistency between the probation order and the suspended sentence, with express reference to *R v Craig David Hughes*[8].

[13] Does the *Penalties and Sentences Act* implicitly prohibit the present combination? The present combination will be invalid only if the imposition of a community service order is inconsistent with concurrent imposition of a suspended imprisonment order. In our view there is no inconsistency between such orders. If, prior to completing the community service, the offender committed another offence and was required by the court to serve the suspended term or part of it, there is no reason why the balance of the community service could not be performed after the offender's release. Section 103(2)(b) requires that the necessary number of hours must be performed "within one year of the making of the order *or another time allowed by the court*" (our emphasis). This gives the court jurisdiction to extend the time for performance of the community service order to such time as might be thought reasonable having regard to the interruption brought about by the activation of the suspended sentence. We see no necessary inconsistency or conflict of the kind identified in *R v M ex parte Attorney-General*[9]. It is neither necessary nor desirable to extend the restrictive effect of *R v Hughes*[10] into the present sentencing options.[11]

[14] We are therefore of the view that the sentences of the learned judge were not contrary to the requirements of the *Penalties and Sentences Act.* It is not necessary, as was submitted, for the sentences to be set aside and for this court to sentence afresh.

[15] For the above reasons the appeal should be dismissed.

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8 above.

9 [1999] QCA 442, CA No 251 of 1999, 2 November 1999 per McPherson JA at para 3, and by Jones J at paras 40-41.

10 [1999] 1 Qd R 389.

11 Cf *R v A and S; ex parte Attorney-General* [1999] QCA 503, CA No 292 & 293 of 1999, 3 December 1999.