SUPREME COURT OF QUEENSLAND

CITATION:	*R v Ross; R v Turnbull* [2004] QCA 357
PARTIES:	**R** **v** **ROSS, Anthony James** (applicant) **R** **v** **TURNBULL, Gregor Derek** (applicant)
FILE NO/S:	CA No 291 of 2004 CA No 292 of 2004 SC No 330 of 2004 SC No 331 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	1 October 2004
DELIVERED AT:	Brisbane
HEARING DATE:	21 September 2004
JUDGES:	McPherson JA, Cullinane and Jones JJ Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Applications for leave to appeal against sentence dismissed**
CATCHWORDS:	CRIMINAL LAW — PRACTICE AND PROCEDURE — SENTENCING — whether sentence is manifestly excessive — whether trial judge erred in concluding drug production was for commercial use — where applicants' claim drugs were for personal use *Brown v Dunn* (1893) 6 R. 67, cited *R v Neale* [2004] QCA 128; CA No 70 of 2004, 23 April 2004, cited *R v Ball* [1999] QCA 427; CA No 250 of 1999, 8 October 1999, cited
COUNSEL:	A J Kimmins for the appellants S G Bain for the respondent

SOLICITORS: McMillan Lawyers for the appellants
Director of Public Prosecutions (Queensland) for the respondent

[1] **McPHERSON JA:** I have read and agree with the reasons of Cullinane J for dismissing the applications. I agree that it was open to the learned sentencing judge to infer that production of the offending plants had a commercial purpose. His Honour plainly did not accept the evidence to the contrary of either of the applicants given at the sentence hearing. He was in my opinion correct in reaching the conclusion that he did. Given that predicate, the sentences imposed were not in themselves outside the limits of a proper sentencing discretion as suggested by other decisions in similar circumstances.

[2] The applications for leave to appeal against the sentences imposed should be dismissed.

[3] **CULLINANE J:** The two applicants who were sentenced together seek leave to appeal against sentences imposed on each of them in the Supreme Court on 5 August 2004.

[4] The applicant Ross pleaded guilty to one count of production of cannabis, and one of possessing various items of equipment for use in connection with the production of cannabis. The sentence, the subject of the application for leave, is that imposed on the count of production namely 18 months imprisonment suspended after six months with an operational period of two years.

[5] Turnbull pleaded guilty to a count of production of cannabis, a count of possessing items used in the commission of that offence and a count of possession of cannabis. He received the same sentence as Ross received in respect of the production count and seeks leave to appeal against this.

[6] In each case the items the subject of the counts of possession of things used in connection with the production count were the components of hydroponic systems used in each case for the production of the cannabis.

[7] The facts which were outlined to the court by the prosecutor were not the subject of any real dispute but there was a substantial dispute raised as to the purpose of the production in each case.

[8] Ross was the owner of three premises. In one of these premises which was at the time unfurnished and unoccupied police found a hydroponic system in place with cannabis plants in pots on a tray supported by a frame. There was a lighting and shade system and the plants were watered through an irrigation system. Electrical equipment such as timers was found nearby. Windows were sealed with a double-sided fabric which did not permit the entry of any light and also prevented anyone seeing in to the dwelling. Some 20 plants weighing 5,287 grams were found.

[9] Another house owned by Ross was let by Turnbull. In that house the police found a similar hydroponic system set up within the house and another system in a shed at the rear of the house. There were some nine plants weighing 9,190 grams. In addition an amount of $600.00 in cash was located. According to the police Turnbull explained that he had obtained this cash from working the week before but he declined to give details about the nature of his employment.

[10] The applicant Ross was born on 21 November 1965. He was 36 at the time of the offences. He has no previous convictions. Turnbull was born on 8 June 1967 and was aged 35 at the time of the offences. He too had no previous convictions.

[11] After the facts that I have just summarised were outlined (in somewhat greater detail) to the court the prosecutor made clear that he contended that the proper inference to be drawn from those facts was that there was a commercial purpose to the production in each case. Following some brief argument the learned sentencing judge indicated an inclination to accept that this was the case in the absence of anything before him to the contrary. Following this each of the applicants were called to give evidence.

[12] Each gave evidence that he had established the hydroponic system for the purposes of producing cannabis for personal use and each gave evidence of the details of such personal use.

[13] The learned sentencing judge did not accept the evidence of either. He said that he found the evidence of Ross unconvincing, and in the case of Turnbull said that he frankly disbelieved his evidence.

[14] The reason given by the learned sentencing judge for concluding that the purpose of the production was commercial included in each case the hydroponic system which was described as sophisticated and elaborate. In the case of Ross the learned sentencing judge referred to the fact that the property which was an investment property was not rented, but was used for the production of cannabis. There were no signs of personal consumption of the drug. His Honour also referred to the fact that Turnbull had in his possession $600.00 in cash in fifty dollar notes for which he gave the police no satisfactory explanation.

[15] The applicants in each case challenged the findings that the cannabis was not for personal use but had a commercial purpose. One particular area of challenge in Ross' case was that there was, so the argument went, a failure to challenge certain evidence of the applicant Ross. This evidence involved an explanation by him that he had hid the cannabis that he used so that his son would not see it. This, it was said would provide an explanation for the absence of any signs of personal use and that his Honour in placing some reliance upon the absence of such signs acted in the face of uncontradicted evidence to the contrary. It was said that the rule in *Brown v Dunn* required the prosecutor to directly challenge the applicant Ross about this.

[16] As I have said the prosecution had outlined the facts as they had presented themselves to the police and there was no dispute about these. It was obviously the case that the prosecution contended that the production was one for commercial purposes and that the absence of any signs of personal use and of any explanation as to having possession for this effect to the police was significant. In these circumstances it does not seem to me to be a matter of critical importance that the prosecutor did not formally challenge the evidence which Ross had given on this subject. Nor does it seem to me that the principle in *Brown v Dunn* was in any way offended given that the nature of what was alleged was apparent and indeed the evidence which was called by Ross was intended to rebut the inference which the prosecution had asked the learned sentencing judge to draw from the facts outlined by him.

[17] The findings challenged are of course findings of fact. It was plainly open to the judge to reach the conclusions that he did about the credibility of each applicant. It was also in my view open to the learned sentencing judge to infer in the circumstances that I have outlined that the production in each case was for a commercial purpose.

[18] It was argued in the alternative that even if the production was for commercial use the sentences of imprisonment of 18 months suspended after six months were manifestly excessive. Emphasis was placed upon the lack of criminal history in either case, the limited size of the production and the pleas of guilty.

[19] We were referred to a number of cases by counsel on either side. Points of distinction were made by each counsel about the cases cited by the other. However in my view a consideration of the cases as a whole leads to the conclusion that the sentences imposed were within the permissible range. Cases such as *R v Neale* CA 70 of 2004 and *R v Ball* CA 250 of 1999 provides support for the imposition of terms of imprisonment of the kind imposed here.

[20] The applicants have failed to show that the sentences imposed were manifestly excessive. The applications should be refused.

[21] **JONES J:** I have read the reasons prepared by Cullinane J in this matter. I agree with those reasons and the orders proposed.