SUPREME COURT OF QUEENSLAND

CITATION:	*R v Klumper* [2004] QCA 375
PARTIES:	**R** **v** **KLUMPER, Mary Rose** (applicant)
FILE NO/S:	CA No 323 of 2004 DC No 22 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Toowoomba
DELIVERED EX TEMPORE ON:	8 October 2004
DELIVERED AT:	Brisbane
HEARING DATE:	8 October 2004
JUDGES:	McMurdo P and Jones and Chesterman JJ Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application for leave to appeal against sentence refused**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – APPEAL BY CONVICTED PERSONS – APPLICATIONS TO REDUCE SENTENCE – WHEN REFUSED – GENERALLY – where applicant convicted on guilty plea of producing and possessing cannabis in excess of 500 grams and of possessing things used in connection with producing a dangerous drug – where sentenced to 12 months imprisonment suspended after four months with an operation period of 18 months – where applicant was 65 years old at time of sentence and had no prior criminal history – whether sentence was manifestly excessive *R v Laing* [2003] QCA 92; CA No 411 of 2002, 6 March 2003, considered
COUNSEL:	A J Rafter SC for the applicant R G Martin for the respondent
SOLICITORS:	Gilshenan & Luton for the applicant Director of Public Prosecutions (Queensland) for the respondent

THE PRESIDENT: The applicant was convicted on 7 September this year of one count of producing a dangerous drug, cannabis, in excess of 500 grams (count 1); one count of possessing a dangerous drug, cannabis, in excess of 500 grams (count 2); and one count of possession of things used in connection with producing a dangerous drug (count 3). She was sentenced to 12 months imprisonment suspended after four months with an operational period of 18 months in respect of each offence. The applicant contends the sentence was manifestly excessive and that a fully suspended sentence should have been imposed.

The maximum penalty for counts 1 and 2 is 20 years imprisonment.

The applicant had no criminal history, pleaded guilty by ex officio indictment and was 65 years old at sentence. She was born in Amsterdam in 1939 and migrated to Australia when she was 11 years old. She had a solid work history until she was diagnosed with depression about 10 years ago and had been on a disability pension for some years prior to sentence. No material was tendered at sentence and no further details given about her condition of depression.

The facts of her offending were as follows. Mrs Klumper was present at her home at Thornville near Crows Nest with the co-offender, Dennis Land, when police executed a search warrant. They found a large container holding 16 cannabis plants

ranging in height from .5 to .9 of a metre. The container was partially covered with bales of sugar cane mulch and insulating material. An air-conditioning unit was installed through a hole cut into the wall of the container. A timed-light source and mirror were set up to direct light onto the plants. Police also found a generator, chemicals and equipment used for cultivating the plants.

A further 21 plants ranging in height from five to 15 centimetres were growing in a room next to the bathroom inside Mrs Klumper's home. The windows of the room had been covered with plastic and blankets and an alternative UV light source was suspended over the plants.

Mr Land assisted the police in locating another 23 plants growing in the garden of the 16 hectare property. Some of the plants were protected by wire. The stalks of another six plants were found along a nearby creek bed. Police found 40 grams of cannabis drying on a large table on the veranda. Inside a locked cupboard police found Mrs Klumper's handbag and a large garbage bag containing cannabis and other smaller plastic bags, including some one-ounce bags of cannabis. More cannabis was found in the garage. Police also found two sets of electronic scales, packets of snap-lock bags, a vacuum bag sealer, lights and a large quantity of ventilation ducting. The total quantity of cut dried cannabis was 851.7 grams.

The total quantity of growing cannabis with the roots removed was 652.1 grams.

The prosecution at sentence submitted that there was a clear commercial purpose involved in the production and contended that despite the mitigating factors a custodial sentence would ordinarily be called for, but conceded that because of the applicant's prior history and age a fully-suspended sentence was open.

Mrs Klumper's counsel at sentence emphasised that her co-offender, Mr Land, was, at the time of sentence, in custody in relation to other offences. Mrs Klumper came to know him through her friend, Mr Land's sister. Mr Land was in trouble, suggested this criminal activity and she foolishly became involved. Her counsel emphasised that there was no real sophistication to her criminal activity, even though he conceded it was plainly commercial. He urged the learned sentencing Judge to fully suspend the sentence in the light of her age and previous good character. To her credit she did not put forward any spurious claims that the cannabis was only for her own use or was not for a commercial purpose.

His Honour considered that the gravity of the offences required a penalty involving actual custody to deter others from engaging in such activity. Although the conduct was not sophisticated, it was elaborate and engaged in determinedly over a substantial period with a plain commercial purpose. His Honour gave recognition to the mitigating factors of Mrs Klumper's previous good character and plea of guilty by way of

ex officio indictment by an early suspension of the term of imprisonment.

As the Prosecutor at sentence recognised, a fully suspended sentence could have been imposed in this case: see, for example *R v Laing* [2003] QCA 92; CA No 411 of 2002, 6 March 2003, where effectively a fully suspended sentence was imposed in circumstances which could be said to have some comparison to those here. Laing was addicted to cannabis and the level of commerciality there, (he claimed to be selling only to friends), was considered low. Because of the very large quantity of cannabis involved here, no such finding was or could have been made in this case. Nevertheless, the single judge decisions referred to in *Laing* at pp 9 and 10 do support the sentencing prosecutor's concession that a non custodial sentence was open. See *R v Hellmuth* (unreported, Cullinane J, Supreme Court, 6 September 1995); *R v Fioretti* (unreported, Helman J, Supreme Court, 5 April 2001) and *R v Gandini* (unreported, Thomas J, Supreme Court, 29 April 1996).

Despite that concession, it is impossible to say that the sentence which was imposed here was outside the exercise of a sound sentencing discretion. Compare *R v Ball* [1999] QCA 427; CA No 250 of 1999, 8 October 1999 and *R v Ross and Turnbull* [2004] QCA 357 of 2004; CA No 292 of 2004, 10 October 2004.

There is no reason to conclude that the sentencing Judge gave insufficient weight to the principle that a sentence of imprisonment should only be imposed as a last resort. His

Honour clearly concluded that this case required a deterrent sentence of actual imprisonment; that conclusion was open on the facts, especially as the applicant was a mature woman.

I would refuse the application for leave to appeal against sentence.

JONES J: For the reasons given by the learned President, I too would refuse the appeal and the orders proposed.

CHESTERMAN J: I agree.

THE PRESIDENT: That is the order of the Court.
