

# SUPREME COURT OF QUEENSLAND

CITATION: *R v Toohey* [2004] QCA 388

PARTIES: **R**  
v  
**TOOHEY, Brendan Peter**  
(applicant)

FILE NO/S: CA No 245 of 2004  
SC No 193 of 2004

DIVISION: Court of Appeal

PROCEEDING: Application for Extension (Sentence)

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED EX TEMPORE ON: 18 October 2004

DELIVERED AT: Brisbane

HEARING DATE: 18 October 2004

JUDGES: McMurdo P, Davies JA and Chesterman J  
Separate reasons for judgment of each member of the Court, each concurring as to the order made

ORDER: **Application for extension of time within which to appeal against sentence refused**

CATCHWORDS: CRIMINAL LAW - JURISDICTION, PRACTICE AND PROCEDURE - JUDGMENT AND PUNISHMENT - SENTENCE - FACTORS TO BE TAKEN INTO ACCOUNT - CIRCUMSTANCES OF OFFENCE - where the applicant pleaded guilty to one count of producing cannabis sativa in excess of the schedule amount and was sentenced to a fine of \$2,500 to be paid within 12 months - where the applicant sought an extension of time within which to appeal against his sentence - where the learned sentencing judge took into account that the growing of the cannabis sativa was for the applicant's own use and not for commercial use - whether the application for extension of time should be granted

COUNSEL: Applicant appeared on his own behalf  
M R Byrne for respondent

SOLICITORS: Applicant appeared on his own behalf  
Director of Public Prosecutions (Queensland) for respondent

THE PRESIDENT: Justice Davies will deliver his reasons first.

DAVIES JA: The applicant pleaded guilty on 28 May 2004 to one of count of producing cannabis sativa in excess of the schedule amount between 29 September 2002 and 1 April 2003. He was sentenced in the Supreme Court to a fine of \$2,500 and allowed 12 months to pay. In default, he was sentenced to three months imprisonment.

The applicant purported to appeal against that sentence on 23 July 2004 by which time the period within which to appeal had expired. He applied for an extension of time on 20 August 2004 and this is the hearing of that application.

The applicant's explanation for the delay is that he mistakenly thought that the period within which he had time to appeal commenced, not from the time sentence was imposed, but from the time that a summary charge was disposed of in June 2004. He became aware of his error only on 2 July 2004. There is no reason not to accept his explanation.

It is unnecessary, in my opinion, to consider whether that explanation is an adequate one to explain the applicant's delay because, in my opinion, if an extension of time were granted an appeal against that sentence would not succeed.

The applicant at the time he committed this offence was 34 years of age. He was a cannabis user and was growing two

cannabis plants on his property for his own use. One of them, when inspected, was 10 feet tall, the other eight feet tall. Together they had a total weight of over 10 kilograms. In addition a total of 98.9 grams of cannabis had been harvested from those plants. It is plainly the case that the weight of the plants included their stems and that the weight of usable cannabis in those plants was substantially less than 10 kilograms. That much would have been obvious to the learned sentencing judge and there is no reason to think that she did not take this into account. Nevertheless, the amount of cannabis involved plainly exceeded the schedule amount.

The applicant had some prior convictions for drug offences, presumably possession of cannabis, but the last of these was about nine years before this. It was inappropriate to give them any significant weight in the sentence to be imposed and the learned sentencing judge did not do so.

Moreover her Honour viewed this case, correctly, as one of growing cannabis for the applicant's own use, not for commercial use. For that reason her Honour imposed what was plainly a moderate sentence. Comparable cases show that this was a sentence well within range for an offence of this seriousness.

In his application for an extension of time the applicant said that he believed the law to be discriminatory as his relationship to the use of cannabis was deeply personal. This was he said, the sort of difference within our culture that a

person should not be attacked for just because others have a different view. In more recent submissions, he adopted a more reasonable and contrite view accepting the law and expressing concern that he had broken it. It is unnecessary to decide whether this reflects a genuine change in view or whether that statement was made primarily for the purpose of obtaining a less severe sentence because in his oral submissions today, he returned to his former theme. Whatever may be the true position in this respect, the sentence imposed was, as I said, moderate and well within range.

Before us the applicant also made some complaints about police suggesting that they were telling lies and that they themselves had not been prosecuted for doing so. But these assertions, even if true, do not affect his plea or the offence to which he pleaded guilty which he accepts.

The Court was told at the time sentence was imposed that the applicant could pay the fine. He now says that he cannot pay it. That is not a matter for consideration on this application.

For the reasons I have given, I would refuse the application for an extension of time.

THE PRESIDENT: I agree. I would only add that it is plain on the material before this Court that if he now has difficulty paying the fine, he can apply for a fine option order.

CHESTERMAN J: I also agree.

THE PRESIDENT: The order is the application for an extension of time is refused.

-----