SUPREME COURT OF QUEENSLAND

CITATION:	*R v Fraser* [2007] QCA 346
PARTIES:	**R** **v** **FRASER, Robert** (applicant)
FILE NO/S:	CA No 139 of 2007 SC No 5 of 2007
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Cairns
DELIVERED EX TEMPORE ON:	18 October 2007
DELIVERED AT:	Brisbane
HEARING DATE:	18 October 2007
JUDGES:	McMurdo P, Holmes JA and Douglas J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**Application for leave to appeal 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 the applicant was convicted at trial of producing a dangerous drug, cannabis sativa, in excess of 500 grams – where the applicant was sentenced to two and a half years imprisonment with a parole release date fixed after 12 months – whether the sentence imposed was manifestly excessive *R v Applewaite* (1996) 90 A Crim R 167, considered *R v Laing* [2003] QCA 92; (2003) 138 A Crim R 312, considered *R v McKay* [1997] QCA 97; CA No 574 of 1996, 17 April 1997, considered *R v Rodgers & Dowling* [2003] QCA 99; CA Nos 179 & 200 of 2002, 14 March 2003, considered *R v Roulstone* [1998] QCA 324; CA No 254 of 1998, 18 September 1998, considered *R v Vincent; Ex parte Attorney-General of Queensland*

[2000] QCA 250; (2000) 112 A Crim R 433, considered

COUNSEL:	A J Kimmins for the applicant M R Byrne for the respondent
SOLICITORS:	Wettenhall Silva Solicitors for the applicant Director of Public Prosecutions (Queensland) for the respondent

THE PRESIDENT: The applicant, Robert Fraser, was convicted after a one day trial of producing a dangerous drug, cannabis sativa, in excess of 500 grams. He was sentenced to two and a half years' imprisonment with a parole release date fixed at 29 May 2008, that is, after 12 months.

He now applies only for leave to appeal against his sentence, contending that it was manifestly excessive. His counsel, Mr Kimmins, submits that the appropriate range was a sentence of about 21 months' imprisonment with suspension or suspended after four to six months.

The following facts were admitted at the trial so that the contentious issue was narrowed to whether Mr Fraser or some other unknown intruder was responsible for the production of the cannabis.

On 15 February 2006, police executed a search warrant of Mr Fraser's premises near Millaa Millaa in far north Queensland where he then lived with his wife. In the south-east corner of the property was a dam with an irrigation pipe leading to a cleared area within a thicket of lantana.

Police located seven areas within the thicket with a total of 234 cannabis sativa plants growing. The area was fenced with three-strand barbed wire. The irrigation pipe was replaced in places both within the thicket and close to the dam with grey gaffer tape and super glue. Also located near the cannabis sativa plants were a red shotgun cartridge, fertiliser and two pieces of Styrofoam.

Police found in Mr Fraser's Datsun vehicle red shotgun cartridges and two partially used rolls of grey gaffer tape which were similar to items found at the thicket. Police found in Mr Fraser's shed, Styrofoam planter boxes, used and unused tubes of super glue, partially used and unused rolls of gaffer tape and fertiliser consistent with like items found at the thicket. Police found in Mr Fraser's home receipts for items consistent with items found at the thicket. The plants were growing appropriately 300 metres in a straight line from Mr Fraser's home and 130 metres in a straight line from a shed on the property. Vehicular access was possible from both the house and the shed to the thicket. The total weight of the cannabis was admitted to exceed 15 kilograms.

At sentence, the prosecutor made the following submissions. The total weight of the plants would appear closer to 87 kilograms. The plants were relatively poor quality and spindly because they were competing with lantana. It was, nevertheless, a significant production of cannabis sativa and by implication, a commercial quantity. Mr Fraser's

criminal history commenced in 1992 and included convictions and fines for weapons' offences, dangerous driving and street offences. In 2000, he was sentenced to three months' wholly suspended imprisonment for the offences of doing indecent acts and indecent treatment of a child under 16. During the 12 month period of that suspended sentence, he was convicted and fined for possession of property suspected of being tainted. He was found to have breached the suspended sentence and its operational period was extended for a further 12 months. A sentence of two and a half to three years' imprisonment was appropriate for the present offences. Although he had not pleaded guilty, his method of conducting the trial had narrowed the issues. This was some demonstrated cooperation with the criminal justice system and should be reflected in the sentence, impliedly by an early release date.

Defence counsel, at sentence, emphasised the following. Mr Fraser was 59 at the time of the offence and 61 at sentence. He lost his right eye when he was 17 years old. He had back problems, chronic heart disease and high cholesterol. There was no information placed before the Court that he would be worse off in prison than in the general community, nor did defence counsel gainsay the prosecutor's submission as to the total weight of the plants.

Defence counsel emphasised that Mr Fraser has had an excellent work history as a manual labourer in various parts of Australia until 1990. Since then, he has been in receipt

of a disability pension and unable to work because of a degenerative condition of the spine which affects his mobility and requires him to use crutches. Although he had some criminal history, he had no like convictions. Defence counsel did not cavil with the prosecutor's suggested sentence of two and a half to three years' imprisonment but urged the Judge to take into account Mr Fraser's health problems and "give some dispensation in view of his age and medication condition."

In passing sentence, the learned Judge made the following observations. The plantation was plainly a commercial operation and there was no suggestion that Mr Fraser was himself a drug user. The prosecution case against him was overwhelming. The cultivation was not particularly sophisticated but was a result of quite a lot of hard work and planning. Although he had no prior drug history, he had been sentenced to a wholly suspended term of imprisonment in the past. He had cooperated with the system to some extent in admitting uncontested facts in the prosecution case. He also had health problems and was 61 years old.

Mr Kimmins now contends on Mr Fraser's behalf that the prosecutor at sentence erred in setting the range at between two and a half to three years' imprisonment rather than at between 18 months to two years' imprisonment. In support of that contention, he relies on the following cases, *R v Le Blowitz* (1996) 90 A Crim R 232, *R v Applewaite and Jones* (1996) 90 A Crim R 167, *R v Vincent* (2000) 112 A Crim R 433,

R v Shepherd and Kyriakou [2001] QCA 181, *R v Laing* [2003] QCA 92 and *R v Rodgers and Dowling* [2003] QCA 99.

By contrast, Mr M R Byrne, who now appears for the respondent, contends that the sentence imposed is supported by *R v Roulstone* [1998] QCA 324 and *R v McKay* [1997] QCA 97.

The maximum penalty for the offence is 20 years' imprisonment. In *Applewaite and Jones*, this Court reviewed a number of cases involving the production of cannabis and listed those factors which tend to influence the appropriate penalty. The sentence will, in each case, necessarily depend on where on the scale of seriousness the particular production of cannabis sativa falls. The present case was more serious than *Applewaite and Jones*, *Vincent* and *Laing* in that it did not concern mere cannabis seedlings, but rather 234 mature plants.

Mr Kimmins submits that the number of plants is more important than the weight of cannabis produced because of the potential commerciality. The legislature, however, seems to me to place more emphasis on the actual weight of the dangerous drug produced.

Many of the cases referred to by Mr Kimmins concerned quite different factual scenarios to the present. Many of them demonstrate only that this Court's decision in refusing the application for leave to appeal meant that the sentence imposed in those cases at first instance was not manifestly

excessive. They are not especially helpful in determining the appropriate range in the present case.

Here, as the learned sentencing Judge found, Mr Fraser took part in a relatively unsophisticated cultivation but nevertheless was the result of some hard work and planning. The weight of the mature though spindly plant was somewhere in excess of 15 kilograms and more like 87 kilograms, although including stalks or “trunks”.

On the evidence, there was no suggestion that Mr Fraser was a cannabis user or that he was anything other than the principal offender in a commercial operation and therefore the sole beneficiary of the profits hoped to be reaped from the crime.

The facts of the present case seem more akin to *Rodgers and Dowling*. The 62 year old Rodgers was sentenced to three years' imprisonment with no early release date, despite his wife's significant health problems. Rodgers had an extensive criminal history between 1962 and 1972 but nothing since that time. He was convicted after a 23 day trial involving three accused. Mr Fraser's more extensive cooperation with the criminal justice system and his own health problems, which I note are not suggested to be exacerbated by his time in custody, (compare *Smith* (1987) 78 A Crim R 315 at 317, *R v LS* [2006] QCA 354 and *R v Van Boxtel* [2005] VSCA 175 at 33) make his sentence of two and a

half years' imprisonment with a release date after 12 months entirely comparable.

The sentence imposed here is also supported by this Court's decisions in *Roulstone* and *McKay*. The latter was a somewhat comparable case to the present one but, unlike Mr Fraser, McKay pleaded guilty at committal and to production of lesser weight of cannabis. McKay was sentenced to two and a half years' imprisonment with a non-parole period of nine months. Mr Fraser's fixed release date on parole after 12 months is consistent with his more limited cooperation.

Mr Fraser has not demonstrated that the sentence imposed on him was manifestly excessive. The application for leave to appeal should be refused.

HOLMES JA: I agree.

DOUGLAS J: I agree.

THE PRESIDENT: The application is refused.

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