SUPREME COURT OF QUEENSLAND

CITATION:	*R v Raine* [2017] QCA 204
PARTIES:	**R** **v** **RAINE, Morgan Daniel** (applicant)
FILE NO/S:	CA No 263 of 2016 SC No 110 of 2014 SC No 846 of 2015
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane – Date of Sentence: 12 September 2016 (Ann Lyons J)
DELIVERED ON:	15 September 2017
DELIVERED AT:	Brisbane
HEARING DATE:	11 July 2017
JUDGES:	Sofronoff P and Morrison JA and Atkinson J
ORDER:	**Application for leave to appeal refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – OTHER MATTERS – where the applicant was sentenced to a head sentence of five years and three months' imprisonment on one count of trafficking in heroin and methylamphetamine – where the sentencing judge accepted that s 5(2) of the *Drugs Misuse Act* 1986 applied to the head sentence so that the applicant was required to serve not less than 80 per cent of the sentence before being eligible for parole – where defence counsel at sentence accepted the proposed range for the head sentence and that the 80 per cent rule applied – where the applicant submitted that the sentencing judge erred by failing to consider if the effect of s 5(2) could be mitigated by reducing the head sentence – whether the head sentence should be reduced to mitigate the effect of s 5(2) – whether, if the applicant fell to be re-sentenced, he would be sentenced under the legislation as it is now or under the legislation which applied at the time he committed the offence *Corrective Services Act* 2006 (Qld), s 182A *Criminal Code* 1899 (Qld), s 668E *Drugs Misuse Act* 1986 (Qld), s 5 *Drugs Misuse Act Amendment Act* 1989 (Qld), s 5

Drugs Misuse Act Amendment Act 1990 (Qld), s 5(1)(a), s 5(1)(b)
Justice and Other Legislation Amendment Act 2013 (Qld), s 490D
Penalties and Sentences Act 1992 (Qld), s 160A, s 160C, s 160E, s 161Q, s 180
Safe Night Out Legislation Amendment Act 2014 (Qld)
Serious and Organised Crime Legislation Amendment Act 2016 (Qld)

R v Clark [2016] QCA 173, cited
R v Cornale [1993] 2 Qd R 294; [1993] QCA 145, cited
R v Hughes [2017] QCA 178, cited
R v Maniadis [1997] 1 Qd R 593; [1996] QCA 242, cited
R v Neilson [2014] QCA 221, cited
R v Pascoe [1997] QCA 284, cited
R v Trimble [2004] QCA 464, cited
R v Watson [2017] QCA 82, cited

COUNSEL: J Briggs for the applicant
M Whitbread for the respondent

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

[1] **SOFRONOFF P:** I agree with the reasons of Atkinson J and with the order her Honour proposes.

[2] **MORRISON JA:** I have read the reasons of Atkinson J and agree with those reasons and the order her Honour proposes.

[3] **ATKINSON J:** On 12 September 2016, the applicant, Morgan Daniel Raine, was sentenced in the Supreme Court after pleading guilty to a number of drug offences.

[4] On indictment 110 of 2014, he was sentenced to five years' imprisonment on one count of trafficking in the dangerous drugs methylamphetamine and cannabis between 12 January 2013 and 14 February 2013; two years' imprisonment on one count of possessing the dangerous drug methylamphetamine in excess of 2.0 grams; one year imprisonment on each of one count of possessing a thing used in connection with trafficking in a dangerous drug and one count of possession the dangerous drug heroin; and six months' imprisonment on one count of possession of a category R weapon, namely an electrical antipersonnel device.

[5] On indictment 846 of 2015, he was sentenced to five years and 10 months' imprisonment on one count of trafficking in dangerous drugs, namely heroin and methylamphetamine between 20 September 2013 and 30 January 2014. All of the sentences were to be served concurrently. A parole eligibility date was fixed at 11 May 2021.

[6] Shortly after the sentences were imposed, it became apparent that there was an arithmetical error in the sentence imposed for the trafficking count in indictment 846 of 2015. That error was corrected on 16 September 2016 when the sentence was re-opened and the head sentence was reduced to five years and three months'

imprisonment. The applicant's parole eligibility date was amended to 24 November 2020.

[7] The applicant lodged an application for leave to appeal against sentence on the ground that the sentence imposed was manifestly excessive. On the hearing of the appeal, the applicant was given leave to amend the ground of appeal so that it was instead that "the learned sentencing Judge erred, by failing to consider if she could mitigate the effect of s 5(2) *Drugs Misuse Act* 1986 by reducing the head sentence for the offence on Indictment 846 of 2015."

The offences

[8] The charges contained in indictment 110 of 2014 related to events between 12 January and 13 February 2013. On 13 February 2013, police searched the applicant's apartments, motor vehicle and mobile telephones and found evidence that he had been trafficking in methylamphetamine and cannabis between 12 January and 13 February 2013. Items indicating his culpability for the less serious offences were also found. He was charged with some offences and released on bail. He was later issued with a notice to appear on other offences.

[9] The trafficking charge contained in indictment 846 of 2015 related to much more serious offending and occurred whilst he was on bail. The applicant participated in a highly organised enterprise involving a large number of persons and very substantial amounts of drugs. Police identified that PT was a significant offender. PT had 150 customers and supplied dangerous drugs up to 100 times per day. The applicant was convicted on the basis that he aided PT's trafficking. Between July 2013 and February 2014, the turnover from PT's trafficking was between $4 million and $5 million and his profit from $227,500 to $333,500. The applicant and PT were in frequent and close contact during a period of slightly over four months from 20 September 2013 to 30 January 2014. The applicant sourced drugs, supplied drugs, collected drug debts, drove PT, delivered drugs to PT, organised accommodation, assisted him in avoiding the police and liaised with his associates.

[10] The applicant was sentenced on the basis that he was an addict who received drugs for his offending but minimal or no profit. He was 37 and 38 years of age at the time of offending and 40 when sentenced. He had a four page criminal history detailing serious offending, including a sentence of six years' imprisonment in 2001 for grievous bodily harm with intent. The applicant received good reports while in custody and completed rehabilitation programs and obtained other qualifications.

[11] At the time of sentence, the applicant had served 789 days of pre-sentence custody. However, that period of custody could not be declared. At sentence, the prosecution submitted that a sentence of eight years' imprisonment should be imposed, but that should be reduced to six years to account for the period of pre-sentence custody. The prosecution submitted that the "80% rule" ought to apply to the main charge of trafficking.

[12] The defence accepted that a starting point of eight years was established by the authorities.[1] The defence submitted that the head sentence should be reduced to five years 10 months' imprisonment to account for the period of pre-sentence custody. The defence also accepted that the parole eligibility date would have to be set at the 80 per cent mark.

Applicant's submissions

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1 *R v Neilson* [2014] QCA 221; *R v Trimble* [2004] QCA 464; *R v Pascoe* [1997] QCA 284.

[13] A number of the applicant's co-offenders had been sentenced by the time of the applicant's sentence. PT initially received a sentence of 10 years' imprisonment with a serious violent offence declaration. PT rendered significant assistance to the police and appealed the sentence, instead receiving nine years' imprisonment and no declaration.

[14] Nikita Lavender was another co-offender who, the applicant submitted, is the most comparable. After making timely pleas of guilty, Lavender was sentenced on one count of trafficking and one count of possession. Lavender was an addict but also profited from the trafficking. She cooperated significantly with police and provided a helpful statement to them. Lavender had only previously been convicted of minor drug offences. She was sentenced to eight years' imprisonment and her parole eligibility date was set two years from the date of sentence. Lavender's trafficking charge was not affected by the "80% rule".

[15] The trafficking charge on indictment 846 of 2015 was subject to s 5 of the *Drugs Misuse Act* 1986, which came into effect on 29 August 2013 (after the first period of trafficking). Section 5(2) provided that if a person was sentenced to a term of imprisonment for unlawfully trafficking in a dangerous drug, then the court was required to order that the person spend not less than 80 per cent of the sentence in prison before being eligible for parole.

[16] The applicant submitted that at sentence neither the parties nor the sentencing judge "considered whether it was appropriate or even possible to reduce Mr Raine's head sentence to moderate the effect of s 5(2)" of the *Drugs Misuse Act*. The prosecution submitted that there could not be any mitigation of the head sentence "because of the sentencing regime". Defence counsel submitted that:

> "So, curiously, because – although Lavender trafficked for a much longer period than my client, because she started prior to the change in legislation she had to serve two years of an eight year sentence. My client will end up having to serve more time than her, although involved for a shorter period of time, because of the operation of the 80 per cent. And that's unfortunate, but it is what it is. So my submission is a starting point of eight years would be reduced to five years and ten months to take into account the two years and two months".

[17] After submissions, the sentencing judge asked the applicant whether he wished to say anything. The applicant asked whether there was a way of "working out a bigger top and a lower bottom". Her Honour replied:

> "…The difficulty is that there were amendments to the *Penalties and Sentences Act* which means that there is nowhere to move in terms of the 80 per cent. And Mr Edwards has made all the submissions that he can on your behalf. And, unfortunately, that's the legislation."

[18] The applicant submitted that *R v Clark*[2] establishes that it is permissible to reduce a head sentence to soften the impact of s 5(2) of the *Drugs Misuse Act*. In that case, Morrison JA noted:[3]

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2 [2016] QCA 173.
3 At [69].

> "The application of the policy behind s 5(2) has evident difficulties. Consider an offender who receives a sentence of a term of imprisonment, and is to serve 80 per cent under s 5(2). If that offender shows demonstrable rehabilitation whilst in prison, that will have no effect on the period of actual custody served, no matter how worthy the conduct and no matter how strong the rehabilitation. One would be forgiven for thinking that cannot be in the community's best interests."

[19] The applicant submitted that the sentencing judge expressly recognised that the applicant was an addict, had done a number of courses in custody, had received good reports while in custody, had completed rehabilitation programs and had returned clear drug tests while in custody. It was submitted that this clear evidence of rehabilitation allowed the sentencing judge to consider reducing the head sentence to soften the impact of s 5(2). It was submitted by the applicant that the sentencing judge erred in failing to consider this possibility and that this error enlivened this court's power to intervene and to resentence the applicant.

[20] The applicant proposed that this court resentence the applicant on the basis of the current provisions of the *Drugs Misuse Act*. In doing so, the applicant submitted that the court should accept a starting point of eight years' imprisonment, reduced to five years 10 months' to account for the applicant's pre-sentence custody. It was submitted that an immediate parole eligibility should be set to account for the applicant's rehabilitation.

Respondent's submissions

[21] In relation to the basis on which the applicant was sentenced, the respondent submitted that at sentence the applicant's counsel did not address the specific point contended by the applicant, that he was "sentenced on the basis that he was an addict who received drugs for his offending but no profit". The respondent submitted that the correct submission was that the applicant was sentenced on the basis that the benefit to the applicant was not able to be quantified but that there was some benefit. The prosecutor submitted that it was unknown whether the applicant did or did not receive money but that he "certainly got drugs". The respondent submitted that this was the basis upon which the applicant was sentenced.

[22] In relation to the sentencing judge's consideration of the requirement that the applicant serve 80 per cent of the sentence, the respondent submitted that *R v Clark* (relied upon by the applicant) is authority for the principle that when considering the sentencing requirements of s 5(2) of the *Drugs Misuse Act* a sentencing judge may impose a head sentence towards the lower end of the applicable range. *R v Clark* is also authority for the established proposition that "a sentencing judge is accorded as much flexibility as is consonant with the statutory sentencing regime in determining the appropriate sentence".[4]

[23] The respondent submitted that the sentencing judge did in fact take into account the evidence of the applicant's participating in some drug rehabilitation programs and the clear drug test results. The respondent further submitted that it is "an impossible hurdle" for the applicant that, at sentence, the applicant's counsel agreed with the

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4 At [68].

head sentence that was in fact imposed. It was not suggested by the applicant that the agreed head sentence was inappropriate.

[24] It was submitted that no sentencing error was demonstrated and the application must fail. It was clear how the sentence was reached, the effect of s 5 of the *Drugs Misuse Act* was the primary concern of all parties at the time of sentence, and the sentence was in fact re-opened to reduce the head sentence specifically to mitigate or moderate the effect of that provision.

[25] It was submitted that in *R v Watson*[5] this court recently made it clear that to obtain leave to appeal against sentence it is necessary to demonstrate an arguable error of law or fact in the exercise of the sentencing discretion.

[26] Finally, it was submitted that if the application were allowed, the applicant should be re-sentenced to a head sentence of six years and 10 months' imprisonment with a parole eligibility date of 16 July 2017.

Consideration

[27] The applicant did not ask for a lower head sentence to be imposed if he were to be successful on appeal. Indeed he submitted that a higher head sentence of five years and 10 months' imprisonment should now be imposed by this court. The reason why no decrease in the head sentence was sought was no doubt because the sentence imposed was at the lower end of the permissible range for offences of this type.

[28] Imposing a sentence at the lower end of the range in this case showed that the learned sentencing judge took into account the fact that the applicant was required to serve 80 per cent of his sentence before being eligible for parole. Her Honour explicitly observed that she was unable to do anything about requiring him to serve 80 per cent of the sentence but there seems little doubt that her Honour took that into account in the head sentence imposed on the second count of trafficking, that is on indictment No. 846 of 2015. The requirement for him to serve 80 per cent of his sentence was explicitly taken into account when the sentence was reopened to reduce the sentence that he was otherwise required to serve. It appears that the learned sentencing judge was very cognisant of the need to ameliorate the head sentence to take account of the fact that the applicant would be required to spend 80 per cent of that sentence in actual custody. Accordingly, I can find no error of the type alleged in the amended ground of appeal.

[29] Since it was fully covered in the submissions on this application. I should go on to consider whether, if there had been such an error and the applicant fell to be re-sentenced by this court, he would be re-sentenced under the legislation as it is now or under the legislation which applied at the time he committed the offence in indictment 846 of 2015, that is between 20 September 2013 and 13 January 2014. This requires a consideration of the various iterations of the *Drugs Misuse Act* and accompanying legislation.

The applicable law

[30] The *Drugs Misuse Act* was first enacted in 1986. Section 5 made trafficking in dangerous drugs a crime. It provided:

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5 [2017] QCA 82 at [41].

> "**5 Trafficking in dangerous drugs.**
>
> A person who carries on the business of unlawfully trafficking in a dangerous drug is guilty of a crime.
>
> Penalty:
>
> (a) If the dangerous drug is a thing specified in the First Schedule, imprisonment with hard labour for life which cannot be mitigated or varied by a court.
>
> (b) If the dangerous drug is a thing specified in the Second Schedule, imprisonment with hard labour for life."

[31] This section has seen a number of amendments. In 1989 a new subsection was added by s 5 of the *Drugs Misuse Act Amendment Act* 1989 (the 1989 Amendment Act). The new subsection 2 provided:

> "Where a person is charged with the commission of a crime defined in this section no further step in the proceedings shall be taken in relation to that crime (other than remanding the person in custody or on bail) until the consent of the Crown Law Officer has been obtained."

[32] That section was further amended on 25 May 1990 by the *Drugs Misuse Act Amendment Act* 1990 (the 1990 Amendment Act). That amendment deleted the words from s 5(1)(a) of the *Drugs Misuse Act* "life which cannot be mitigated or varied by a court" and inserted the words "twenty-five years". It deleted the word "life" from s 5(1)(b) and inserted the words "twenty years". Section 15 of the 1990 Amendment Act inserted a new s 61 into the *Drugs Misuse Act* which enabled people who had been sentenced to imprisonment for life to apply to the Supreme Court to be resentenced. When the person was resentenced the court was to sentence under the *Drugs Misuse Act* as amended by the 1990 Amendment Act. Any new sentence was to be treated as if it had commenced on the date upon which the person was originally convicted.

[33] Various amendments were made to the section but the next major relevant amendment was made in 2013.

[34] In 2013, the *Drugs Misuse Act* was amended by *Justice and Other Legislation Amendment Act* 2013 (the 2013 Amendment Act) which received assent on 13 August 2013. Section 5 then provided:

> "(1) A person who carries on the business of unlawfully trafficking in a dangerous drug is guilty of a crime.
>
> Maximum penalty—
>
> (a) If the dangerous drug is a thing specified in the *Drugs Misuse Regulation 1987*, schedule 1 — 25 years imprisonment; or
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> (b) If the dangerous drug is a thing specified in the Drugs Misuse Regulation 1987, schedule 2 — 20 years imprisonment.

(2) If a court sentences a person to a term of imprisonment for an offence against subsection (1), the court must make an order that the person must not be released from imprisonment **until the person has served a minimum of 80% of the prisoner's term of imprisonment for the offence**.

(3) Subsection (2) does not apply if the court sentences the person to a term of imprisonment and makes either of the following orders under the *Penalties and Sentences Act 1992* for the person –

(a) an intensive correction order;

(b) an order that the whole or a part of the term of imprisonment be suspended." (emphasis added)

[35] This amendment required amendments to the *Penalties and Sentences Act* 1992 ("PSA") ss 160A, 160C, 160E and Schedule 1. Schedule 1 listed "serious violent offences" and included s 5 of the *Drugs Misuse Act* "if the act or omission constituting the offence wholly or partly occurred before 13 August 2013". Section 232 is the transitional provision found in the PSA. It provides that:

> "Schedule 1, as amended by the *Justice and Other Legislation Amendment Act 2013*, is taken to have had effect on and from 13 August 2013."

[36] The 2013 Amendment Act also introduced s 182A into the *Corrective Services Act* 2006 (CSA). The section applied to a prisoner who was serving a term of imprisonment for a drug trafficking offence. Subsection 182A(2) provided that "the prisoner's parole eligibility date is the day after the day on which the prisoner has served 80% of the prisoner's term of imprisonment for the drug trafficking offence." The 2013 Amendment Act also introduced s 490C which provided that "Section 182A applies only to a prisoner who is serving a term of imprisonment for a drug trafficking offence committed after the commencement of that section." Drug trafficking offence was defined to mean:

"(a) an offence against the *Drugs Misuse Act 1986*, section 5; or

(b) an offence of counselling or procuring the commission of, or attempting or conspiring to commit, an offence mentioned in paragraph (a)."

[37] Section 182A of the CSA was further amended by the *Safe Night Out Legislation Amendment Act* 2014 (the 2014 Amendment Act). It relevantly provided that the section applied to a prisoner who was serving a term of imprisonment for a drug trafficking offence. Subsection 3 provided that the prisoner's parole eligibility date was the day after the day on which the prisoner has served 80 per cent of the term. That section was found in Part 3 of the 2014 Amendment Act which commenced on assent. It was assented to on 5 September 2014.

[38] Section 490D was also introduced by the 2014 Amendment Act and provides that s 182A of the CSA "applies to a prisoner who is serving a term of imprisonment for a drug trafficking offence only if the act or omission constituting the offence occurred wholly on or after 13 August 2013."

[39] In 2016, the *Drugs Misuse Act* was amended by the *Serious and Organised Crime Legislation Amendment Act* 2016 (the 2016 Amendment Act). It came into effect on the date of assent, 9 December 2016. By s 164 of the 2016 Amendment Act, it omitted subsections 2 and 3 of s 5 of the *Drugs Misuse Act* and replaced them with the following:

> "(2) The *Penalties and Sentences Act 1992*, section 161Q states a circumstance of aggravation for an offence against this section.
>
> (3) An indictment charging an offence against this section with the circumstance of aggravation stated in the *Penalties and Sentences Act 1992*, section 161Q may not be presented without the consent of a Crown Law Officer."

[40] As a result of the 2016 Amendment Act, s 161Q of the PSA provides:

> "**161Q Meaning of *serious organised crime circumstance of aggravation***
>
> (1) It is a circumstance of aggravation (a ***serious organised crime circumstance of aggravation***) for a prescribed offence of which an offender is convicted that, at the time the offence was committed, or at any time during the course of the commission of the offence, the offender—
>
> (a) was a participant in a criminal organisation; and
>
> (b) knew, or ought reasonably to have known, the offence was being committed—
>
> (i) at the direction or a criminal organisation or a participant in a criminal organisation; or
>
> (ii) in association with 1 or more persons who were, at the time the offence was committed, or at any time during the course of the commission of the offence, participants in a criminal organisation; or
>
> (iii) for the benefit of a criminal organisation.
>
> (2) For subsection (1)(b), an offence is committed for the benefit of a criminal organisation if the organisation obtains a benefit, directly or indirectly, from the commission of the offence.
>
> (3) To remove any doubt, it is declared that a criminal organisation mentioned in subsection (1)(b) need not be the criminal organisation in which the offender was a participant."

[41] Also as a result of amendments made by the 2016 Amendment Act, under s 251 of the PSA, if an offender is convicted of an offence, *inter alia*, against s 5 of the *Drugs Misuse Act* and the offence is committed partly, but not wholly, after the commencement date, then s 161Q applies in relation to the offence only if, at a time after the commencement, the offender was a participant in a criminal organisation and knew, or ought reasonably to have known, a matter mentioned in s 161Q(1)(b).

[42] Section 21 of the 2016 Amendment Act also amended s 182A of the CSA. It provides relevantly:

> "(1) This section applies to a prisoner who—
>
> (a) is serving a term of imprisonment for a drug trafficking offence; and
>
> (b) was sentenced for the offence under the *Drugs Misuse Act 1986*, section 5(2) as in force before the commencement of the *Serious and Organised Crime Legislation Amendment Act 2016*, section 164."

Subsection (3)(a) provides:

> "The prisoner's parole eligibility date is the day after the day on which the prisoner has served — if the prisoner is serving a term of imprisonment for a drug trafficking offence — 80% of the term."

[43] This section applies to the applicant who was so sentenced. Section 182A(3)(a) of the CSA expressly provides that his parole eligibility date does not arrive until after he has served 80 per cent of his sentence. In this case there is no ability for the court to depart from the provision of s 668E(3) of the *Criminal Code* 1899 which provides that if on appeal this court is of the opinion that some other sentence should have been imposed at first instance then it should quash the sentence which was imposed and pass the sentence that should have been imposed.[6] This is consistent with the decision in *R v Hughes*,[7] which was heard before this matter was heard and where the decision was handed down after the hearing of this matter. The specific provision found in s 182A(3)(a) of the CSA prevails over the more general provision found in s 180(2) of the PSA, which has an analogue in s 4F(2) of the *Crimes Act* 1914 (Cth), which provides that if a provision of an Act reduces the sentence for an offence, or the maximum or minimum sentence then the reduction extends to offences committed before the commencement of the provision but does not affect any sentence imposed before the commencement.

[44] If this court were to re-sentence the applicant, it would be required to sentence him according to the sentencing regime that applied at the time when he committed the offence. At that time, a person convicted of an offence under s 5 of the *Drugs Misuse Act* was required to serve 80 per cent of the sentence in prison before being eligible for parole unless subsection 5(3) applied. Accordingly this court would be bound to apply the same sentencing regime which bound the learned sentencing judge.

[45] Accordingly, I would refuse the application for leave to appeal.

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6 See *R v Cornale* [1993] 2 Qd R 294 at 297; [1993] QCA 145; *R v Maniadis* [1997] 1 Qd R 593 at 597; [1996 QCA 242.

7 [2017] QCA 178.