SUPREME COURT OF QUEENSLAND

CITATION:	*R v Alizadeh* [2017] QCA 269
PARTIES:	**R** **v** **ALIZADEH, Shaen Samani** (applicant)
FILE NO/S:	CA No 113 of 2017 SC No 524 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	Application for Extension (Conviction) Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane – Date of Sentence: 19 May 2017 (Boddice J)
DELIVERED ON:	10 November 2017
DELIVERED AT:	Brisbane
HEARING DATE:	22 August 2017
JUDGES:	Sofronoff P and Morrison and McMurdo JJA
ORDERS:	**1. Amend the verdict and judgment record by, for each of the offences:** **(a) deleting the words "under 16 years";** **(b) deleting "6(1)(a) & 6(2)(a)" and substituting "6(1)(b) & 6(2)(aa)".** **2. Extend time to appeal against the conviction on all counts.** **3. Dismiss the appeal against conviction on all counts.** **4. Refuse leave to appeal against sentence.**
CATCHWORDS:	CRIMINAL LAW – SENTENCE – SENTENCING PROCEDURE – FACTUAL BASIS FOR SENTENCE – ROLE OF GUILTY PLEA OR DEPOSITIONS – where the applicant was arraigned upon seven counts of the supply of a schedule 1 dangerous drug to a minor – where the supply was to teenage girls who were under the age of 16 years but the applicant contended that he was under a mistake of fact that they were over 16 years but under 18 years – where the applicant pleaded guilty to the offences on that basis – where the indictment as originally presented referred to s 6(1)(a) and s 6(2)(a) *Drugs Misuse Act* 1986 (Qld) (the DMA), which relate to supply to a minor under 16 years – where the allocutus was administered for a conviction of 'supplying a

dangerous drug with a circumstance of aggravation', without that circumstance of aggravation being specified – where the verdict and judgment recorded a conviction for 'aggravated supply of dangerous drugs under schedule 1 to a minor under 16 years' – where the applicant argued that he was wrongly convicted of seven offences under s 6(1)(a) and s 6(2)(a) of the DMA when he should have been convicted only of offences under s 6(1)(b) and s 6(2)(aa) of the DMA, which relate to supply to a minor over 16 years – where, on sentence, the prosecutor did not refer to which maximum penalty applied – where the sentencing judge appeared to have sentenced the applicant upon the factual premise that the applicant had believed that each of the girls was aged at least 16 years – whether each circumstance of aggravation in s 6 of the DMA creates a distinct offence – whether the applicant was wrongly convicted of an offence under s 6(1)(a) and 6(2)(a) of the DMA – whether the applicant should be resentenced

Criminal Code (Qld), s 1, s 564(2)
Criminal Practice Rules 1999 (Qld), r 15
Drugs Misuse Act 1986 (Qld), s 6, s 129

COUNSEL: B J Power for the applicant
J A Wooldridge for the respondent

SOLICITORS: Fisher Dore for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **SOFRONOFF P:** I agree with the reasons of McMurdo JA and with the orders his Honour proposes.

[2] **MORRISON JA:** I have read the reasons of McMurdo JA and agree with those reasons and the orders his Honour proposes.

[3] **McMURDO JA:** On 15 May 2017, the applicant was arraigned upon seven counts of the supply of a schedule 1 dangerous drug to a minor. He pleaded guilty to each count and the allocutus was administered. On 19 May, he was sentenced to concurrent terms of imprisonment of 18 months with parole release after serving four months.

[4] On 1 June, he filed an application for leave to appeal against that sentence. He was then without legal representation. In a handwritten submission filed in this Court on 26 July, the applicant made a number of complaints about his sentence. However none of them need be considered because the applicant's case has since been recast by his new legal representatives.

[5] The applicant now seeks to appeal against his conviction on each of these counts. In essence, he says that he was convicted of the supply of a drug to a minor under 16 years, when he should have been convicted of the supply to a minor who was 16 years or more. A case in the former category has a maximum penalty of life imprisonment. A case in the latter category has a maximum term of 25 years.

[6] That difference comes from s 6 of the *Drugs Misuse Act* 1986 (Qld) (the DMA) which provides, in part, as follows:

> "**6 Supplying dangerous drugs**
>
> (1) A person who unlawfully supplies a dangerous drug to another, whether or not such other person is in Queensland, is guilty of a crime.
>
> Maximum penalty—
>
> (a) if the dangerous drug is a thing specified in the *Drugs Misuse Regulation 1987*, schedule 1 and the offence is one of aggravated supply under subsection (2)(a)—life imprisonment; or
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> (b) if the dangerous drug is a thing specified in the *Drugs Misuse Regulation 1987*, schedule 1 and the offence is one of aggravated supply under subsection (2)(aa), (b), (c), (d) or (e)—25 years imprisonment; or
>
> (c) if the dangerous drug is a thing specified in the *Drugs Misuse Regulation 1987*, schedule 1 and paragraphs (a) and (b) do not apply—20 years imprisonment; or
>
> (d) if the dangerous drug is a thing specified in the *Drugs Misuse Regulation 1987*, schedule 2 and the offence is one of aggravated supply under subsection (2)(a)—25 years imprisonment; or
>
> (e) if the dangerous drug is a thing specified in the *Drugs Misuse Regulation 1987*, schedule 2 and the offence is one of aggravated supply under subsection (2)(aa), (b), (c), (d) or (e)—20 years imprisonment; or
>
> (f) if the dangerous drug is a thing specified in the *Drugs Misuse Regulation 1987*, schedule 2 and paragraphs (d) and (e) do not apply—15 years imprisonment.
>
> (2) For the purposes of this section, an offence is one of aggravated supply if the offender is an adult and—
>
> (a) the person to whom the thing is supplied is a minor under 16 years; or
>
> (aa) the person to whom the thing is supplied is a minor who is 16 years or more; or
>
> (b) the person to whom the thing is supplied is an intellectually impaired person; or
>
> (c) the person to whom the thing is supplied is within an educational institution; or
>
> (d) the person to whom the thing is supplied is within a correctional facility; or
>
> (e) the person to whom the thing is supplied does not know he or she is being supplied with the thing."

[7] In the indictment, as originally presented, the applicant was charged with these seven counts together with 13 offences of a sexual nature. The complainants under those other counts were teenage girls to whom the applicant supplied drugs according to the charges which are presently relevant. Shortly before the trial was to commence, these other counts were discontinued. The seven drug counts were in relevantly identical terms. It is sufficient to set out count 1 as it appeared on the indictment:

Count 1 Section 6(1)(a)&(2)(a) Drugs Misuse Act 1986 Form 353	that on or about the twenty-first day of June, 2015 at Palm Beach or elsewhere in the State of Queensland, SHAEN SAMANI ALIZADEH, being an adult, unlawfully supplied a dangerous drug to [the name of the girl], a minor.

[8] Rule 15 of the *Criminal Practice Rules* 1999 (Qld) provides that the statement of an offence in an indictment may be in the words of a "schedule form for the offence, with the changes necessary to make the words consistent for the particular circumstances of the alleged offence". The "schedule form" was and is Form 353. The charges on this indictment followed the terms of Form 353, except that the form does not provide for a specification of the statutory source of the charge. As can be seen, the indictment contained, on each count, a specification of s 6(1)(a) and s 6(2)(a) as relevant provisions. On one view, the indictment thereby alleged that the drug had been supplied to a person aged under 16 years.

[9] The arraignment, on each charge, was in the terms of the indictment but with no reference to the relevant part of s 6. The allocutus was administered by the Associate as follows:

> "… you have been convicted on your own pleas of guilty of seven counts of supplying a dangerous drug with a circumstance of aggravation …"

without that circumstance of aggravation being specified.

[10] The administration of the allocutus is the court's acceptance that guilt has been established with the consequence that the defendant is thereby convicted of the offence.[1]

[11] According to the verdict and judgment record, the applicant was convicted in each case of the "aggravated supply of dangerous drugs under schedule 1 to a minor under 16 years." And like the indictment, the record also specifies s 6(1)(a) and s 6(2)(a) as the provisions of the DMA, which were the basis of each conviction.

[12] The ground for the applicant's appeal against conviction is expressed as follows:

> "The appellant was wrongly convicted of seven offences under s 6(1)(a) & (2)(a) of the *Drugs Misuse Act* 1986 when, based on the terms of his pleas of guilty and/or the facts put before the Court on the sentence hearing, he should have been convicted only of an offence under s 6(1)(b) & (2)(aa) of the *Drugs Misuse Act* 1986. The appellant seeks that the Court of Appeal exercise its powers under s 668F(1) of the *Criminal Code* and for each of the seven offences

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1 *R v Verrall* [2013] 1 Qd R 587 at [4] and the cases there cited.

substitute a conviction for an offence under s 6(1)(b) & (2)(aa) of the *Drugs Misuse Act* 1986."

[13] It is argued that the applicant was convicted of offences under s 6(1)(a) and s 6(2)(a), whereas the offences which were charged on the indictment were under s 6(1)(b) and s 6(2)(aa) of the DMA. And it is said that the factual basis upon which the applicant was sentenced was consistent only with the commission of offences under s 6(1)(b) and s 6(2)(aa). Either way, it is argued, there has been a miscarriage of justice, warranting the setting aside of the convictions and the substitution of convictions on what is said to be a different offence, namely the supply of a drug to a minor aged 16 years or more. If that argument were accepted, then the applicant would have to be resentenced.

[14] At the sentencing hearing, the prosecutor tendered, without challenge, a statement of facts which was as follows. Two complainants, one whom I will call H who was aged 14, and another girl whom I will call J, who was aged 15, met the applicant through Facebook. They lied about their ages: H told the applicant that she and J were 16 years old. H agreed to meet with the applicant. J and her sister, whom I will call B and who was aged 13, went with her. After the applicant picked them up in his car, and purchased alcohol and cigarettes for them, he produced a bag of white powder which he said contained "ice". He put some in H's mouth and some in B's mouth. Those acts became the subject of counts 1 and 2. He then had sexual intercourse with H. A few weeks later, the same three, together with another two girls, each aged 13, met with the applicant. The applicant had encouraged H to bring girls with her for a "party". He supplied all of the girls with alcohol before suppling MDMA and cocaine to H and B of which they consumed. He supplied MDMA and cocaine to another two of the girls, who consumed the cocaine but not the MDMA. He supplied the fifth girl with MDMA but she did not consume it. H and B then had sexual intercourse with the applicant, who gave them $50 each.

[15] That was the entirety of the evidence before the sentencing judge as to what were the ages of the girls and what the applicant might have believed in that respect. Section 129 of the DMA provides, in part, as follows:

> "**129 Evidentiary provisions**
>
> (1) In respect of a charge against a person of having committed an offence defined in part 2—
>
> …
>
> (d) the operation of the Criminal Code, section 24 is excluded unless that person shows an honest and reasonable belief in the existence of any state of things material to the charge; and …"

On that statement of facts, the applicant had been told that two of the girls were aged 16. But there was no evidence that he believed that to be the case. Nor was there evidence that he believed that the other girls were at least 16 years old.

[16] In her submissions to the sentencing judge, the prosecutor referred to the different maximum penalties which were prescribed according to whether the child in question was aged under 16. But the prosecutor did not specify which of those maximum penalties applied in this case.

[17] In his submissions, the applicant's then counsel said that it was relevant that the applicant believed that he was supplying to a 16 year old, to which the judge responded by saying, in the course of the argument, that "[i]t might have been that he thought she was 16 rather than 13, but he knew what he was doing. He was supplying to a minor. He's supplying schedule 1 drugs to a minor on two separate occasions and five minors at that."

[18] In his sentencing remarks the judge said this about the ages of the girls:

> "Several of these complainants were 13 years of age. One was 14 and another was 15. I accept that some of the girls, at least, lied to you and indicated that they were 16 years of age. It may well be in those circumstances that you should be sentenced on the basis that since they were friends of these girls, you thought they were all 16 years of age. What is important, however, is even on that basis, you were supplying schedule 1 drugs to five minors because there is no suggestion that you understood them to be more than 18 years of age."

The judge later said:

> "I also have regard to your age. You were born in 1988. You were 26 – 27 at the time and you are now 28. That is a very large disparity even allowing for the fact that you were only 26 or 27. You were a good decade older than what you believed these girls to be."

[19] It thereby appears that the judge was prepared to sentence the applicant upon the factual premise that the applicant had believed that each of the girls was aged at least 16. Nothing had been said in the submissions, or was said by the judge, about whether such a belief would have been a reasonable one, so as to engage s 129 of the DMA. Nor did the judge specifically refer to the maximum penalties for these offences. But it is sufficiently clear that he was sentenced upon the more favourable basis to him, namely that these should be treated as supplies to minors who were 16 years or more. In other words, he was sentenced upon the basis that each count was one of an aggravated supply under s 6(2)(aa), rather than under s 6(2)(a).

[20] But of what offences was the applicant convicted? The applicant's argument is that, in each case, he was convicted, and wrongly convicted, of an offence of the supply of drugs to a minor under the age of 16 years. But the respondent argues that, in each case, he was convicted of an offence of the *aggravated supply* of a dangerous drug. On the respondent's submission, there are no distinct offences of the supply to a minor under 16 years and the supply to a minor 16 years or more. The respondent argues that if drugs are supplied to a minor, the particular age is not an element of the offence, but instead is a factual matter which is relevant only to the sentence.

[21] Section 6(1) creates an offence of the unlawful supply of a dangerous drug to another person. Different penalties are prescribed according to the circumstances of the commission of that offence. But the only words which are in the terms of the creation of an offence are within s 6(1). Section 6(2) is not in terms, for example, that a person who unlawfully supplies a dangerous drug to a minor, or a minor of a certain age, is guilty of a crime. Rather, the circumstance that the drug was supplied to a minor of a certain age is akin to circumstance of aggravation under the

Criminal Code (Qld), which is a circumstance by which the offender is liable to a greater punishment than that to which the defendant would be liable if the same offence were committed without the existence of that circumstance.[2]

[22] A circumstance of aggravation under the *Criminal Code* must be specifically pleaded in the indictment: s 564(2) of the *Code*. But for this offence, created under the DMA, what was required to be pleaded on the indictment was prescribed by Form 353. As already noted, Form 353 does not require a specification of the statutory source of the charge. Instead, it relevantly provides for an allegation that the applicant:

> "Being an adult, unlawfully supplied the dangerous drug … to …, a minor."

The absence of a required specification of the age of the minor could be explained by the fact that Form 353 predates the amendment to s 6 which introduced the distinction between a minor under 16 years and a minor who was 16 or 17 years.[3]

[23] The indictment did identify the relevant provisions as s 6(1)(a) and s 6(2)(a), by the reference to them in the sidenotes. However the terms under which the applicant was arraigned and the allocutus were administered was less clear. In an affidavit tendered in this Court, the applicant says that he understood that he was pleading guilty to the offences with the less serious circumstance that the girls were aged 16. He says that it was only in conferring with his present lawyers that he became aware that he was recorded as being convicted of the offences with the more serious aggravating feature.

[24] In my view, the applicant's understanding is not critical to the outcome here. What matters is that the terms under which he was arraigned and the allocutus was administered were capable of being applied to the less serious case. As counsel for the respondent properly agreed, if there was an ambiguity in this sense, it should be resolved in favour of the prisoner. The applicant was convicted upon the administration of the allocutus. From that point, I would hold, he had been convicted of the supply of drugs to minors, each aged at least 16 years.

[25] Consequently, the verdict and judgment record is the result of an error. It can and should be amended to record the correct details of the convictions.

[26] Counsel for the applicant agreed that if this view was taken of the content of his client's convictions, there was no occasion for the applicant to be resentenced. The argument that he should be resentenced was premised upon a finding that he had been sentenced on the basis of an aggravating circumstance which carried the higher maximum penalty. But as I have set out above, it is clear enough that he was sentenced upon the more favourable factual premise. That accorded with the true content of the convictions.

[27] I would order as follows:

1. Amend the verdict and judgment record by, for each of the offences:

   (a) deleting the words "under 16 years";

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2 *Criminal Code* (Qld) s 1.

3 *Criminal Law and Other Legislation Amendment Act* 2013 (Qld), s 38.

(b) deleting "6(1)(a) & 6(2)(a)" and substituting "6(1)(b) & 6(2)(aa)".

2. Extend time to appeal against the conviction on all counts.

3. Dismiss the appeal against conviction on all counts.

4. Refuse leave to appeal against sentence.