SUPREME COURT OF QUEENSLAND

CITATION:	*R v Raciti* [2004] QCA 359
PARTIES:	**R** **v** **RACITI, Giuseppe Antonio** (applicant)
FILE NO/S:	CA No 229 of 2004 SC No 154 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Sentence application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED EX TEMPORE ON:	29 September 2004
DELIVERED AT:	Brisbane
HEARING DATE:	29 September 2004
JUDGES:	McPherson JA, Jerrard JA and Jones J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Application for leave to appeal and appeal allowed** **2. Sentence imposed in the court below set aside** **3. On count 1 the applicant is sentenced to eleven years imprisonment** **4. On each of counts 3, 4, 5 and 6 the applicant is sentenced to one year imprisonment** **5. All sentences to be served concurrently** **6. Declare that the offence the subject of count 1 is a serious violent offence**
CATCHWORDS:	CRIMINAL LAW – DRUG OFFENCES – SENTENCING – where applicant pleaded guilty to trafficking in methyl-enedioxyoethylamphetamine (MDMA or ecstasy) (Count 1), methylamphetamine and cocaine during a four month period, three counts of possession in each case of more than two grams of drugs and one count of possessing $9,750 obtained by trafficking – where learned sentencing judge imposed a sentence of 11 years imprisonment on count 1 but imposed no specific sentences in respect of the other four charges – whether sentence imposed on applicant for trafficking in ecstasy (a schedule 2 drug) is manifestly excessive *R v Bradforth* [2003] QCA 183; CA No 423 of 2002, 9 May

	2003, cited *R v Crofts* [1999] 1 Qd R 386, cited *R v Crossley* (1999) 106 A Crim R 80, cited *R v Nagy* [2003] QCA 175; [2004] 1 Qd R 63, cited
COUNSEL:	K Fleming QC, with B W Farr, for the applicant S G Bain for the respondent
SOLICITORS:	Terry Fisher & Co for the applicant Director of Public Prosecutions (Queensland) for the respondent

McPHERSON JA: In the case of Rizk, the Court will reserve its decision. In the case of Raciti, I will give my reasons now. The applicant Giuseppe Raciti pleaded guilty in the Supreme Court to trafficking in methylenedioxymethylamphetamine or MDMA, methylamphetamine and cocaine, during a four month period between 15 May and 26 August 2002 (count 1).

He also pleaded guilty to three counts of possession on 7 June 2002 in each case of more than two grams of drugs, as regards count 3 on amphetamine, count 4 of methylamphetamine and count 5 of MDMA. In addition, he pleaded to a count of possessing $9,750 obtained by trafficking (count 6). Cocaine and methylamphetamine, which is widely known as speed, are now schedule 1 drugs carrying a maximum term of imprisonment of 25 years. MDMA or ecstasy is a schedule 2 drug, as to which the maximum penalty is 20 years imprisonment.

The learned sentencing judge imposed a sentence of 11 years imprisonment on count 1 – (trafficking), but imposed no specific sentences in respect of the other four charges. This was an error. A judge is bound to impose a sentence of some

kind in respect of each separate charge for which a person is indicted and pleads guilty: see *R v Crofts* [1999] 1 Qd R 386,387; *R v Nagy* [2004] 1 Qd R 63. That remains so, even if as commonly happens, a sentencing judge selects an offence in one of a series of counts as reflecting the overall criminality of the offending behaviour, he or she must then impose lessor sentences on the other charges which are ordinarily made concurrent. Technically, therefore, the judge in the present case erred in what she did or omitted to do and we are therefore entitled or perhaps bound to re-sentence Mr Raciti.

That could be done here simply by reimposing the 11 year sentence for count 1 and imposing lessor, more or less nominal sentences for one year in respect of each of counts 3, 4, 5 and 6, all to be served concurrently. The applicant, however, challenges the 11 year sentence as excessive and argues that it should be reduced to nine years while retaining an express declaration that embodies a conviction for a serious violent offence.

Such a declaration would be and is imported automatically by s 161A and section 1612B of the *Penalties and Sentence Act*, in this instances, once the penalty reaches the level of imprisonment for 10 years. In making that concession to the need for severity in this case, the applicant nevertheless submits that the sentence of 11 years is too high.

The question of the appropriate sentence for large scale trafficking in schedule 1 drugs has come before this Court on a number of occasions in recent times, of which *R v Bradforth* [2003] QCA 183 is to my mind the most relevant decision. There the applicant was sentenced at first instance to 12 years imprisonment with a declaration under s 161B for one count of trafficking, mainly in speed, at a time when it was still a schedule 2 drug; but also in cocaine and in speed after it became a schedule 1 drug, and in ecstasy. He was also sentenced for one count of possession of various articles used in connection with the trafficking and one count of possession of a variety of drugs which included all of those already mentioned.

Again, the sentencing judge in that case omitted to impose separate sentences for each of the lessor charges. This Court allowed the appeal and reduced the sentence on count 1 from 12 to 10 years, with the accompanying declaration under s 161B, together with concurrent sentences of one year for the second, and nine years for the third of the charges. In reducing the sentence on count 1 from 12 to 10 years, Muir J with whom Williams and Jerrard JJA agreed, said that a purpose of doing so was to give appropriate recognition to the early plea of guilty and to the fact that the application had been on remand for nine months before being sentenced.

Earlier in his reasons in that case, Muir J had said,

> "Major determinants of penalty in trafficking cases include the type of drugs supplied, the quantity of the drugs, their value, the nature of the venture or undertaking, and whether the activities are commercial or engaged in to feed a habit. In all cases, however, regard must be had to the maximum penalties imposed by statute and the recognition by the Legislature and the courts that the purveying of drugs of the nature of those under consideration, however motivated, has the potential to cause much individual suffering as well as social harm and decay."

In my view, the effect of the decision in *Bradforth* is to suggest a sentencing range of between 10 and 12 years in trafficking cases of its kind. The question on this application for leave to appeal therefore is how far the present can, if at all, be distinguished from *Bradforth*, or whether it can be taken out of the range suggested by that case?

This involves a consideration or comparison of the matters referred to by Muir J and of the criminality of the applicant here with that of *Bradforth* in the case referred to. The first point of similarity to be noticed is that the range of drugs being trafficked in was approximately the same. Both involving schedule 1 drugs of cocaine and speed, together with the schedule 2 drug ecstasy.

The period of trafficking in *Bradforth* was longer, being roughly 12 months, as compared with four months here, but in both cases it may be noticed that it continued until the police decided to intervene and close it down.

Bradforth, however, was only 26 years of age and had no prior drug convictions, whereas the applicant here was 39 to 40 when offending and 42 years old at sentencing, and had drug convictions in 1983 and in 2000. On the latter occasion a sentence of 30 months' probation was imposed. While on bail, each offender in that case and this had engaged in further drug offences as exemplified in the case of this applicant in counts 3, 4, 5 and 6. In addition, as has been said, the applicant committed all of these offences while he was on probation resulting from the conviction in the year 2000.

There is therefore little between the two offenders that is favourable to the applicant. Indeed, as can be seen, the contrary is quite clearly the case. The applicant here was found to have a substantial sum of money in his possession and, unlike *R v Bradforth*, there is also evidence from telephone intercepts and otherwise, of very large quantities of drugs and money changing hands between the applicant and those with whom he dealt.

The police had the applicant under surveillance and were intercepting his telephone calls. When they first intervened in early June 2002, the applicant had just engaged in purchasing 6,000 ecstasy tablets for $117,000. Despite being

given bail, he continued to offend in the same way. In late August when he was arrested for a second time and his drug business was finally shut down, he was engaged in a transaction involving some 5,000 tablets and some $50,000 at the same time as his co-offender Rizk was also arranging for the same supplier to provide $87,500 worth of drugs.

Taking all these matters into account, it seems to me that the applicant Raciti's offending was substantially more serious than that of Bradforth, and that, even allowing for the pleas of guilty in the present case, the appropriate sentence here fell at the high end of the range considered in *Bradforth*. A sentence of 11 years on count 1 was and is therefore justified. What remains to be considered is the applicant's efforts to rehabilitate himself after he was taken into custody in August of the year 2002.

He has, it appears by fairly clear evidence, become a model member of the drug treatment centre or detoxification centre in which he was since that time. This is a matter that can weigh in his favour. However, the notion that he has completely turned over a new leaf and was about to start a new life free of drugs would have been much more impressive if it had not been for the fact that he had been given a chance previously in early June, and that had, as soon as he was then released on bail, gone back to the business of trafficking in schedule 1 and schedule 2 drugs.

The other factor that weighs with me is that there is no indication at all that the applicant has volunteered to cooperate with the police in the way of identifying his sources and the persons to whom he supplied. A lengthy period of surveillance by the police through telephone and other methods has disclosed all that is available that tells in the way of explaining who he was dealing with. He has not volunteered any further information about his many contacts than has been obtained from the telephone intercepts and police surveillance.

In my view, therefore, although it is a matter to be considered in this case, his efforts at rehabilitation, personally effective though they may have been, are not such as to require a serious reduction in the penalty that ought to be imposed in this case.

The applicant has a further complaint, which is that there is a lack of parity between his sentence and that of his co-offender Rizk. That complaint is, in my view, not supportable when regard is had, not only to the differences in their levels of participation in drug dealing, their different ages and previous criminal history, but to the fact that Raciti is subject to a declaration under s 161B. Such a declaration is a factor that does not fall to be taken into account when considering the question of disparity between co-offenders. See *R v Crossley* (1999) 106 A Crim R 80.

It becomes necessary now to formally set aside the single sentence imposed and to sentence the applicant on each of counts 1, 3, 4, 5 and 6 in the indictment. As to that I would order that sentences be imposed as follows.

Count 1 imprisonment for 11 years; count 3 imprisonment for one year; and the same sentence in respect of each of counts 4, 5 and 6. All those sentences are, of course, to be served concurrently.

The declaration relating to count 1 of the serious violent offence in this instance flows, I think, from the terms of the Act itself but, to avoid any doubt about it, there will also be an express declaration to the effect that the offence, the subject of count 1 of which the applicant has been convicted, is a serious violent offence.

JERRARD JA: I agree with the reasons for judgment of McPherson JA and with the orders he proposes.

JONES J: I agree.

McPHERSON JA: The order will be as I have stated it.
