

SUPREME COURT OF QUEENSLAND

CITATION: *R v Rizk* [2004] QCA 382

PARTIES: **R**
v
RIZK, Keiyed Phillip
(applicant)

FILE NO/S: CA No 224 of 2004
SC No 206 of 2004

DIVISION: Court of Appeal

PROCEEDING: Sentence application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 15 October 2004

DELIVERED AT: Brisbane

HEARING DATE: 29 September 2004

JUDGES: McPherson JA, Jerrard JA and Jones J
Judgment of the Court

ORDER: **1. Application for leave to appeal and appeal allowed;**
2. Sentence imposed in the court below set aside;
3. On count 1, trafficking in a dangerous drug, the applicant is sentenced to six years imprisonment;
4. On count 2, the applicant is sentenced to one year imprisonment, to be served concurrently with the sentence imposed for count 1;
5. It is recommended that the applicant be considered for parole after serving two years of his sentence.

CATCHWORDS: CRIMINAL LAW – DRUG OFFENCES – SENTENCING – whether sentence imposed on applicant for trafficking in ecstasy (a schedule 2 drug) is manifestly excessive

R v Bradforth [2003] QCA 183
R v Raciti [2004] QCA 359

COUNSEL: A J Glynn SC for the applicant
S G Bain for the respondent

SOLICITORS: Terry Fisher & Co for the applicant
DPP (Qld) for the respondent

- [1] **THE COURT:** The applicant on 17 June 2004 pleaded guilty in the Supreme Court at Brisbane to one count of trafficking in a dangerous drug and one count of possessing a dangerous drug, with the circumstance of aggravation that the quantity of the drug was in excess of 2 grams. The drug in each count was MDMA, or ecstasy, which is a Schedule 2 drug. The consequence of this is that the maximum penalty for both of the counts the applicant pleaded guilty to was therefore 20 years imprisonment, as opposed to a maximum of 25 years imprisonment in the case of Schedule 1 drugs. The applicant was sentenced to a term of 8 years imprisonment, with a recommendation that he be considered for parole after 3 years. This is an application for leave to appeal against that sentence, on the ground it is manifestly excessive.
- [2] An investigation by the Australian Crime Commission uncovered evidence of a major wholesale drug operation of which the applicant was part. The applicant worked under his co-offender Raciti, and was involved in obtaining large quantities of ecstasy from numerous suppliers at Raciti's direction and in distributing ecstasy to others below them in the chain of distribution. The applicant pleaded guilty to trafficking in ecstasy between the dates of 5 June 2002 to 26 August 2002, which is a period of between two and a half and three months. The evidence against the applicant consisted of telephone intercepts and surveillance by the police, and drugs found in his possession when the police apprehended him immediately before the end of the investigation. The first telephone conversation involving the applicant was on 6 June 2002, when the applicant contacted Raciti to discuss purchasing from him 1000 ecstasy pills at a price of \$22 per tablet.
- [3] Raciti was first arrested and found in possession of a large quantity of drugs including ecstasy and methylamphetamine on 7 June 2002. He was given bail, but after his release continued to carry on the business of trafficking in drugs, this time taking greater precautions to avoid being detected by the police. One such precaution was that he began to use the applicant to do the "hands on work" of the business on his behalf. The applicant would, on behalf of Raciti, purchase significant quantities of ecstasy from numerous suppliers. Counsel for the applicant, at the hearing of this appeal, characterised his involvement as being no more than that of an employee of Raciti. There is some evidence, however, that the applicant was keen to increase his level of participation in the business.
- [4] The applicant was found in possession of a large quantity of ecstasy when carrying out a purchase for Raciti on 24 August 2002. Before then, from 10 August 2002, there are telephone records of numerous conversations between the applicant and Raciti on matters such as when a deal was to take place, how much cash they had, how much ecstasy would be sold to them and at what price. On one occasion Raciti asked the applicant to let the rest of the crew (meaning the people to whom they sold drugs) know that the deal was to take place, so that they would not buy drugs from other suppliers in the meantime, which he agreed to do. On the day of the final transaction, the applicant phoned Raciti, who told him that there would be 5 people, which is apparently code for 5,000 ecstasy pills. The applicant told him that he could get together 50, by which he meant \$50,000. Raciti then phoned Van Rijn to confirm that the transaction would take place, although from then on it was the applicant who carried out the transaction. The applicant rang Van Rijn and asked for a pie, by which he meant that they were to meet at the Yatala Pie Shop. Van Rijn told him, in code, that the price would be \$87,500. Surveillance videos show both the applicant and Van Rijn arriving in their cars at the car park of the

Yatala Pie Shop at 4.15 pm. Van Rijn then got out of his car and took a Sportsgirl bag over to the applicant's vehicle. They later left in their separate vehicles.

[5] The applicant was intercepted shortly after the transaction driving on a motorway at Underwood. The police found the Sportsgirl bag in a cardboard box in the back of his car after the applicant had first attempted to show them that there was nothing in the cardboard box apart from some linen. In that bag, the police found 5,063 ecstasy tablets in smaller clip-sealed plastic bags. The tablets, when analysed, were found to be of 31.7% purity and to contain a total of 445.188 grams of pure ecstasy. The applicant had paid Van Rijn \$87,500 for the tablets. The applicant informed the police, once the tablets were found, that "I'm just the driver. That's all mate". The applicant was taken into custody but refused to be interviewed by the police. He pleaded guilty to the two counts alleged against him, after the Crown on the day of the hearing, amended the indictment so that the count of trafficking did not include trafficking in methylamphetamine and cocaine.

[6] Raciti was sentenced by the same judge and on the same occasion as the applicant now before us and his sentence appeal was heard by this Court in conjunction with the appeal by the present applicant. Based on this Court's decision in *R v Bradforth* [2003] QCA 183, we declined to alter the sentence of 11 years imposed on Raciti for trafficking in Schedule 1 and Schedule 2 drugs. See *R v Raciti* [2004] QCA 359. We took the view that the appropriate sentencing range for large scale trafficking in such drugs was 10 to 12 years and that Raciti's offending was at the upper end of that range.

[7] There are several important points of difference between the course and quality of Raciti's offending and that of the applicant here. In the case of Raciti the trafficking involved Schedule 1 drugs, whereas here it was confined to Schedule 2 drugs, for which we would ordinarily assume a range of 8 to 10 years imprisonment. The period of trafficking in Raciti's case extended over 4 months compared with 2½ months in the case of the applicant. Furthermore, when Raciti was first arrested on 7 June, he was released on bail and immediately returned to his business of trafficking. The interruption caused by his arrest was used by Raciti only to take steps to conceal his activities. It was then he began to employ the applicant Rizk. In addition to being on bail, Raciti was also on probation arising out of his conviction in 2000 for earlier drug offences. He had some other criminal offences in his past. At 39 or 40 years of age he was at the time of offending an older man than the applicant, who was 25, and who had no prior criminal history of any kind. Raciti used the applicant as his agent or go-between to arrange transactions for obtaining the supply of drugs and their distribution. It appears to have been in that role that the applicant was acting in the transactions at Yatala shortly before he was arrested.

[8] The applicant was born on 9 June 1977. He was 25 during the period of his drug trafficking and 27 at sentencing. He has a supportive family and has had a good upbringing. He has worked consistently in a variety of occupations since leaving school. His most recent job was working in a supermarket 6 to 7 days per week, to assist his cousin who became ill with Crohn's disease, and he had, we are told, been promised a share of that business, as a partner, before he was imprisoned for the offences now before the Court. The applicant was addicted to ecstasy. He was first introduced to the drug when, at the age of 21, he began take part in the "party scene", and at a time when his family were experiencing financial difficulties. It can however be inferred from the quantity of drugs involved that,

notwithstanding his addiction, the motivation for his offending was commercial gain.

[9] We consider that, when all these factors are brought into account, the starting point head sentence of 8 years in the case of the applicant was too high and that it should be reduced to 6 years. In the light of the applicant's previous good record, his pleas of guilty, and the other personal factors referred to, we consider that the applicant should be recommended for parole after serving 2 years of his sentence.

[10] It follows from what has been said, that the application for leave to appeal and the appeal should be allowed. The sentence imposed in the court below should be set aside. On count 1, trafficking in dangerous drugs, the applicant should be sentenced to six years imprisonment, and on count 2, possession of a dangerous drug, the applicant should be sentenced to one year of imprisonment, to be served concurrently with the sentence on count 1. It should be recommended that the applicant be considered for parole after serving two years of that sentence.