SUPREME COURT OF QUEENSLAND

CITATION:	*R v Elizalde* [2006] QCA 330
PARTIES:	**R** **v** **ELIZALDE, Christos** (applicant)
FILE NO/S:	CA No 158 of 2006 SC No 439 of 2006
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	1 September 2006
DELIVERED AT:	Brisbane
HEARING DATE:	15 August 2006
JUDGES:	McPherson JA, Dutney and Mullins JJ Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application dismissed**
CATCHWORDS:	CRIMINAL LAW - APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION - APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – APPEAL BY CONVICTED PERSONS – APPLICATION TO REDUCE SENTENCE - WHEN REFUSED – GENERALLY – where applicant pleaded guilty to one count of trafficking MDMA, methylamphetamine and cocaine and one count of possession of cocaine with a circumstance of aggravation – where summary of intercepted telephone calls involving the applicant put before the sentencing judge without objection by the applicant – whether sentencing judge entitled to make the findings against the applicant based on those telephone calls – where sentencing judge imposed a sentence of nine years imprisonment with no serious violent offender declaration for the trafficking offence and a concurrent term of three years imprisonment for possession – whether sentence was manifestly excessive *Evidence Act* 1977 (Qld) s 132C(2), s 132C(3), s 132C(4) *R v Bradforth* [2003] QCA 183; CA No 423 of 2002, 9 May 2003, considered

R v Raciti [2004] QCA 359; CA No 229 of 2004, 29 September 2004, considered
R v Rizk [2004] QCA 382; CA No 224 of 2004, 15 October 2004, considered

COUNSEL: A M West for the applicant
M J Copley for the respondent

SOLICITORS: Dale & Fallu for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **McPHERSON JA**: I have read and agree with the reasons of Mullins J for refusing this application for leave to appeal. As her Honour observes, the question in this Court is whether, on the evidence at the sentence hearing, it was open to the primary judge to make the findings that he did about the level of the appellant's drug trafficking. The issue is essentially one of fact, having regard to the evidence, and it was and is one in which the onus of proof resting on the Crown fell to be discharged on the balance of probabilities taking account of the seriousness of the consequences for the appellant of making an adverse finding: *Evidence Act* 1977 (Qld), s 132C(4).

[2] By force of s 132C(2) of the Act the judge was entitled to act on the statements made by the applicant in the numerous intercepted telephone calls that were either admitted or not challenged at the hearing. The statements by the applicant constituted both admissions by him and original evidence in the form of the *res gestae* of the trafficking charged against him. In my view, his Honour was justified in acting on those statements at their face value, and there is therefore no basis for interfering with the sentence.

[3] It follows that the application for leave to appeal against sentence must be dismissed.

[4] **DUTNEY J:** I agree that the application for leave to appeal should be refused for the reasons given by Justice Mullins.

[5] **MULLINS J:** The applicant pleaded guilty to trafficking in the dangerous drugs 3, 4-methylenedioxymethamphetamine ("MDMA"), methylamphetamine and cocaine between 13 June 2002 and 29 October 2002 and possession of the dangerous drug cocaine on 5 October 2002 where the quantity of the dangerous drug cocaine exceeded 2.0 grams. MDMA is a schedule 2 drug, but the other two drugs are found in schedule 1. The applicant was sentenced to concurrent terms of imprisonment of nine years for the trafficking and three years for the possession. He applies for leave to appeal against the sentence for trafficking on the basis that it was manifestly excessive.

[6] The applicant was about 25 years old at the time of the offending and was 28 years old when sentenced. Although the offences were committed in 2002, the applicant was not arrested and charged until 29 January 2004 at the completion of a covert police operation. There was a full hand up committal and a guilty plea was indicated at an early stage of the proceedings.

[7] The issue that had to be resolved at the sentence was the scale of the applicant's trafficking. The prosecutor had submitted that the applicant was involved at "the large wholesale end of the market" and was "appropriately described as a large scale trafficker of schedule 1 and schedule 2 drugs". The applicant's counsel submitted otherwise and sought a conclusion from the learned sentencing judge that the level of the applicant's dealing fell far short of the level relied on by the prosecutor and that, although there was a great deal of discussion in intercepted telephone calls about significant quantities of drugs, these deals did not come to fruition and the applicant was not dealing in significant quantities of the drugs.

[8] The sentencing judge concluded that the applicant was a large scale drug dealer and stated:

> "It is apparent that you were prepared to sell very large amounts of MDMA, up to 5,000 tablets at a time, for a total turnover of about $100,000. There were instances when you proposed to supply smaller amounts for a smaller price but it is clear that you were close to suppliers or manufacturers of MDMA and that you were prepared to, and were looking to, sell large amounts of drug for large amounts of money."

The sentencing judge acknowledged that it was not clear precisely what transactions the applicant completed, what profits were made by him or what sums of money passed through his hands, but accepted that on a number of occasions the applicant did supply cocaine, MDMA and methylamphetamine for substantial amounts of money. The sentencing judge stated that it was appropriate to deal with the applicant on the basis that he deliberately dealt in drugs for his own profit in a substantial way as a wholesaler.

[9] The applicant's involvement in trafficking came to light because police were intercepting the telephones of others including one Betham, one Nardone and one Nabhan. A summary of the intercepted telephone calls involving the applicant was before the sentencing judge. The sentencing judge relied on that summary to make his findings about the level of the applicant's trafficking. On this application, the applicant submits that the conclusion that the applicant was a large scale dealer overstates the evidence. It is conceded that the applicant talked in terms of large scale deals, but it is submitted that his actual achievements were much more modest and that it was a matter of speculation whether he was actually close to suppliers and manufacturers, as at best the evidence showed that he talked as if he was close to such people.

[10] The issue on this application is, therefore, whether it was open to the sentencing judge to make the findings which he did about the level of the applicant's trafficking, having regard to the requirements of s 132C(3) and (4) of the *Evidence Act* 1977 (Qld).

[11] The summary that was relied on by the prosecution at sentence revealed:

(a) on 12 July 2002 the applicant offered to sell to Betham a kilogram of methylamphetamine for $70,000 or an ounce for $4,000 and offered to show Betham a sample;

(b) on 17 July 2002 the applicant advised Betham that there was only an ounce available of methylamphetamine and supplied the sample of methylamphetamine to Betham on that day, but when he wanted payment

for the sample because he had provided too large a sample, Betham cancelled the deal, so that no transaction foreshadowed by the applicant's offer on 12 July 2002 took place;

(c) on 17 July 2002 the applicant offered to supply ecstasy tablets to Betham that came vacuum packed the same as previous ecstasy tablets had come packaged at a price of $18 per ecstasy tablet on a quantity of 10,000 and the applicant arranged to meet Betham to give him a sample;

(d) on 18 July 2002 the applicant advised Betham that he could now only obtain 1,000 ecstasy tablets and Betham advised that he no longer wanted them;

(e) on 31 July 2002 Nabhan asked the applicant if he had any ecstasy tablets available and the applicant advised Nabhan later that day that he did not have an answer about the ecstasy tablets;

(f) on 31 July 2002 Nabhan asked the applicant about the availability of cocaine, the applicant reported to Nabhan later that day that the cocaine was coming in 2 days' time and kilograms of cocaine were available, and Nabhan said he would take a kilogram of cocaine if the applicant were able to get it;

(g) in the same conversation Nabhan asked the applicant if there were any cocaine available straight away as he only wanted an ounce, but a half or a quarter of an ounce would do him and the applicant undertook to find out what was available, but it was not known if this supply were made;

(h) on 8 August 2002 in response to an inquiry made by Nardone, the applicant advised that he could get 2,000 ecstasy tablets (but his supplier would only sell 1,000 ecstasy tablets at a time) at $18.50 per tablet;

(i) the applicant obtained a sample of the ecstasy tablet from his supplier and provided it to Nardone who had it tested and complained that it contained ketamine and not MDMA;

(j) on 9 August 2002 the applicant obtained another sample ecstasy tablet which he supplied to Nardone who rejected the quality of the tablet and did not proceed with the deal;

(k) during the course of a telephone conversation between the applicant and Nardone on 9 August 2002, the applicant referred to the return of his supplier to Sydney and when the applicant demanded money for the sample ecstasy tablets, Nardone complained that the applicant had never paid for sample ecstasy tablets that Nardone had supplied the applicant in the past;

(l) on 10 August 2002 the applicant told Nabhan that he had a sample of cocaine that was available at $6,000 an ounce which was 80% pure and they both agreed that it was too expensive, but the applicant said that it was the only stuff his supplier could get;

(m) on 11 August 2002 Nardone and the applicant have conversations about a further supply of ecstasy tablets from the applicant who supplied Nardone with one sample tablet, but the supply did not take place;

(n) on 13 August 2002 the applicant told Nardone that he was going to Sydney to meet the manufacturers of the ecstasy tablets;

(o) on 14 August 2002 the applicant flew from the Gold Coast to Sydney on a commercial flight and returned by train on 15 August 2002;

(p) on 16 August 2002 the applicant offered Nardone ecstasy tablets at $20 per ecstasy tablet;

(q) on 20 August 2002 Nardone asked the applicant if he had been able to obtain any ecstasy tablets at $19 per tablet, but no deal eventuated;

(r) on 29 August 2002 Nardone told the applicant that he had 24 ounces of cocaine available in Sydney at $4,500 an ounce and the applicant said he believed he could sell that and mentioned that he had to get 2 ounces of cocaine from Nabhan to give to another person;

(s) on 29 August 2002 Nardone inquired whether the applicant had any ecstasy tablets, but the applicant was unsuccessful in finding any;

(t) on 31 August 2002 Nardone asked the applicant if he could supply 3,000 ecstasy tablets, but the applicant was unable to do so;

(u) on 3 September 2002 the applicant advised Nabhan that his mate was getting some cocaine of good quality which was 90% purity and the applicant would get an ounce of this cocaine for Nabhan when it arrived;

(v) on 6 September 2002 the applicant asked Nabhan for 10 ounces of crystal methylamphetamine which he could sell that day, but later that day Nabhan told the applicant that the deal in relation to the crystal methylamphetamine had fallen through, but the applicant requested Nabhan to get a sample of crystal methylamphetamine which Nabhan provided to the applicant the next day;

(w) on 7 September 2002 the applicant asked Nabhan for 10 ounces of crystal methylamphetamine and this was followed by a series of calls about a pending sale by the applicant to a woman he referred to as "Liz", but by 13 September 2002 the sale had not taken place;

(x) on 8 September 2002 the applicant told Nardone that he was running around in relation to ecstasy tablets, because he needed 20 ecstasy tablets "here" and 50 ecstasy tablets "there";

(y) on 17 September 2002 Nabhan asked the applicant what had happened to the 8 ball (3.5 grams) of crystal methylamphetamine that Nabhan had given him and the applicant explained that he had given it to some males and had not received payment for it;

(z) on 19 September 2002 the applicant asked Nabhan to bring him a gram of crystal methylamphetamine as he wanted a sample to show a customer who wanted to buy an ounce, but Nabhan refused because the applicant still owed him for the last lot of crystal methylamphetamine that he had given the applicant;

(aa) on 19 September 2002 the applicant had ecstasy tablets that he sought Nabhan's help in selling and Nabhan arranged for one Bush to obtain 5,000 ecstasy tablets from the applicant, but no deal resulted;

(bb) on 22 September 2002 the applicant asked Nabhan if he wanted any cocaine that the applicant described as "nice";

(cc) on 24 September 2002 Nabhan suggested to the applicant that he ascertain if his ecstasy supplier would be interested in swapping a kilogram lot of crystal methylamphetamine for 5,000 ecstasy tablets, but no transaction took place;

(dd) on 26 September 2002 the applicant inquired of Nabhan about the availability of crystal methylamphetamine in order to supply Liz;

(ee) on 26 September 2002 the applicant told Nabhan that he only had about 1 gram left of the crystal methylamphetamine that Nabhan had supplied him and Nabhan said that he would give the applicant another 8 ball of crystal methylamphetamine the next day;

(ff) Nabhan then supplied the applicant with 8 balls of crystal methylamphetamine which the applicant then on sold;

(gg) on 2 October 2002 Nabhan asked the applicant if he could obtain 10,000 ecstasy tablets for Nabhan, but as those the applicant could source were not of the quality that Nabhan was seeking, there was no transaction;

(hh) on 4 October 2002 Nabhan inquired of the applicant as to how many ecstasy tablets he had and the applicant responded that the female supplier was coming to see him that night and that only 1,000 ecstasy tablets were obtained;

(ii) on 4 October 2002 Nabhan had promised a customer that he would travel to Sydney to obtain 2 ounces of cocaine for the customer, but Nabhan arranged for the applicant to travel from the Gold Coast to Sydney on a commercial flight on 5 October 2002 and when the applicant returned on a flight from Sydney to Brisbane, the airline staff located the cocaine in the applicant's bag and the applicant was detained by police at the airport after he had collected the bag and denied knowledge of the cocaine;

(jj) on 16 October 2002 Nabhan asked the applicant if he could obtain some cocaine, as Nabhan wanted at least half an ounce and the applicant reported later that day to Nabhan that he had not obtained any cocaine, but he was able to get 5,000 ecstasy tablets;

(kk) on 18 October 2002 the applicant supplied Nabhan with cocaine;

(ll) on 22 October 2002 Nabhan informed the applicant that he could supply him ecstasy tablets made of ketamine at $10 per tablet, but the applicant stated that he could get them at $8 per tablet and that they were being sold at $14 each;

(mm) on 23 October 2002 the applicant and Nabhan had a number of telephone conversations in relation to cocaine that the applicant was sourcing for

Nabhan and the applicant informed Nabhan that the supplier wanted the money before he would supply cocaine and that the supplier only had 8 balls of cocaine for Nabhan;

(nn) on 24 October 2002 Nabhan inquired of the applicant what had happened to the 8 ball of crystal methylamphetamine that Nabhan had given him and the applicant stated that he was in the process of selling it and that his customer still wanted it;

(oo) on 25 October 2002 Nabhan asked the applicant if he could obtain 5,000 ecstasy tablets for him but when the applicant later that day told Nabhan that he had 500 ecstasy tablets that another person did not buy, Nabhan did not want those;

(pp) on 27 October 2002 the applicant told Nabhan that he needed to get some crystal methylamphetamine from him;

(qq) on 27 October 2002 the applicant informed Nabhan that he had got the same quality cocaine at the same price.

[12] The summary revealed, therefore, that the applicant was a person who was contacted by others when they were looking for sizeable quantities of MDMA (usually 1,000 tablets or more) or cocaine and who himself contacted others when he was able to source cocaine and MDMA tablets. The summary revealed actual transactions at a relatively modest level involving crystal methylamphetamine which was both purchased and onsold by the applicant, references to past transactions involving MDMA tablets, an actual supply of cocaine to Nardone and the provision of samples of these drugs to and from the applicant. The trip to Sydney by the applicant on 5 October 2002 that resulted in his carrying back to Brisbane 52.779 grams of powder that contained 12.688 grams of cocaine showed that what was revealed by the telephone intercepts was not merely “talk”. It was the possession of this cocaine that was the subject of the possession charge.

[13] The applicant did not object to the summary prepared by the prosecution being put before the sentencing judge. It was open to the sentencing judge to draw the inferences from this summary which he did about the nature and level of the applicant’s involvement in trafficking in MDMA, cocaine and methylamphetamine.

[14] Even on the basis that these findings of the sentencing judge are not disturbed, the applicant submits that the sentence of nine years for trafficking was manifestly excessive.

[15] The applicant had one prior entry in his criminal history for minor drug offences committed in 1995. After his arrest in 2004, the applicant worked to overcome his substantial addiction to methylamphetamine and obtained and held regular employment. The applicant relied at the sentencing on a number of favourable personal and employment references.

[16] The sentencing judge referred to *R v Bradforth* [2003] QCA 183 and *R v Raciti* [2004] QCA 359 for selecting the appropriate range of penalty for the applicant's trafficking as between 10 and 12 years imprisonment. But for the matters in the applicant's favour, the sentencing judge would have sentenced the applicant to a term of imprisonment of 11 years which would have carried with it a declaration

that the applicant was convicted of a serious violent offence. Taking into account the applicant's rehabilitation since his arrest, his future prospects and his early indication of a guilty plea, the sentencing judge reduced the sentence to one of nine years imprisonment without a declaration as to the commission of a serious violent offence.

[17] In *Bradforth* the offender pleaded guilty to trafficking in cocaine, MDMA and methylamphetamine over a period of 12 months. He was 26 years old when sentenced. He was found in possession of 1,386 tablets containing 62 grams of MDMA, 63.4 grams of cocaine and 7.38 grams of methylamphetamine which were packaged in 82 clip seal plastic bags. He was also in possession of records of sums owing to him by customers for drugs and five mobile phones. It was conceded that his drug selling activities were "a large business". Whilst on bail he was stopped by police and found in possession of 85.17 grams of gamma hydroxybutyric acid, 0.45 grams of cocaine and 22.6 grams of MDMA and a set of scales. He was charged with possession of dangerous drugs and it was inferred that he was in possession of those drugs for a commercial purpose. Bradforth was on remand for nine months, but no declaration could be made as to time served for the sentence of trafficking. On appeal the sentence of 12 years for trafficking was reduced to 10 years which was effectively a sentence of 11 years when the period spent on remand was considered.

[18] In *Raciti* the offender pleaded guilty to trafficking in MDMA, methylamphetamine and cocaine during a period of four months. Raciti was about 40 years old when he offended. He was under surveillance and his telephone calls were being intercepted. He was first arrested after he had purchased 6,000 MDMA tablets for $117,000. Despite being given bail, about two and one-half months later he was engaged in a transaction involving some 5,000 MDMA tablets for a purchase price of $50,000. Raciti's offending was described as "substantially more serious" than that of Bradforth and that the appropriate sentence should be at the high end of the range considered in *Bradforth* which was noted to be between 10 and 12 years. Raciti had undertaken efforts at rehabilitation after his arrest on the second occasion. He was sentenced to 11 years for trafficking.

[19] The applicant submits that his offending was not as serious as that in *Bradforth* or *Raciti* and his sentence should have fallen somewhere between that imposed in *Raciti* and that imposed in *R v Rizk* [2004] QCA 382.

[20] The offender in *Rizk* was a co-offender of Raciti. Rizk pleaded guilty to trafficking in MDMA over a period of two and one-half months. On appeal his sentence of eight years imprisonment with a recommendation for parole after serving three years was reduced to imprisonment of six years with a recommendation for parole after serving two years. Rizk would purchase significant quantities of MDMA for Raciti. Rizk acted on behalf of Raciti in purchasing 5,063 MDMA tablets containing 445 grams of MDMA for which Rizk had paid $87,500. Rizk was 25 years old when he offended and was addicted to MDMA.

[21] The circumstances of the offending in *Rizk* were clearly less serious than those applying to the applicant. The applicant showed persistence in offending, even after he became aware that he had attracted police attention when he was found in possession of a significant amount of cocaine. On the basis of the findings made by the sentencing judge as to the nature and level of the applicant's trafficking, the

sentence of nine years imprisonment is not outside the range of sentence appropriate for that offending after taking into account the applicant's personal circumstances.

[22] The application for leave to appeal against sentence should be refused.