SUPREME COURT OF QUEENSLAND

CITATION:	*R v Rodd; ex parte A-G (Qld)* [2008] QCA 341
PARTIES:	**R** **v** **RODD, Daniel James** (respondent) **EX PARTE ATTORNEY-GENERAL OF QUEENSLAND** (appellant)
FILE NO/S:	CA No 193 of 2008 SC No 325 of 2007 SC No 586 of 2008 SC No 632 of 2008 SC No 633 of 2008
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Sentence by A-G (Qld)
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	31 October 2008
DELIVERED AT:	Brisbane
HEARING DATE:	27 October 2008
JUDGES:	de Jersey CJ, White AJA and McMeekin J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. That the appeal be allowed in respect of count one;** **2. That in respect of count one, the sentence of nine years imprisonment, with a parole eligibility date fixed at 8 October 2010, be set aside;** **3. That on count one, the respondent be imprisoned for 10 years;** **4. That in respect of count one, there be a declaration that the respondent's conviction is of a serious violent offence;** **5. That the other sentences imposed, and other orders made, on 27 June 2008, be confirmed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – APPEAL BY ATTORNEY-GENERAL OR OTHER CROWN LAW OFFICER – APPLICATION TO INCREASE SENTENCE – trafficking in and production of methylamphetamine – large

scale operations, with respondent a principal – large financial returns – substantial commercial motivation – respondent used violence to intimidate minions – offending continued after grants of bail – respondent's own drug dependency of diminished significance because of commercial motivation – whether sentencing Judge erred in not making a serious violent offender declaration because of the respondent's addiction – latish plea of guilty – whether sentence of 9 years imprisonment manifestly inadequate

Corrective Services Act 2006 (Qld), s 182(2)
Drugs Misuse Act 1986 (Qld), s 5
Penalties and Sentences Act 1992 (Qld), s 161A(a)(ii), s 161B(3)

R v D [1996] 1 Qd R 363; [1995] QCA 329, considered
R v Christensen [2002] QCA 113, considered
R v Kashton [2005] QCA 70, applied
R v Raciti [2004] QCA 359, applied
R v Tilley; ex parte A-G (Qld) [1999] QCA 424, considered

COUNSEL: D L Meredith for the appellant
S J Hamlyn-Harris for the respondent

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

[1] **de JERSEY CJ:** The Honourable the Attorney-General appeals against sentences imposed on the respondent on 27 June 2008. The respondent had pleaded guilty to the offences on 24 April 2008.

[2] The most serious was carrying on the business of unlawfully trafficking in methylamphetamine, between 1 January 2002 and 7 March 2004, for which the respondent was sentenced to nine years imprisonment, with parole eligibility fixed after six years. Allowing for pre-sentence custody of 1,498 days, the date set was 8 October 2010.

[3] The respondent pleaded guilty to producing methylamphetamine over the same period, which attracted a seven year term. There were two other counts of the production of methylamphetamine (seven years imprisonment), two of possession of methylamphetamine (one year and two years respectively), one of the possession of MDMA (two years), one of the possession of instructions for production (five years), one for the possession of glassware used in production (five years), and two of the unlawful possession of motor vehicles (three years).

[4] The respondent was convicted on his pleas of related summary charges, including weapons offences, for which no further penalty was imposed.

[5] The respondent also pleaded guilty to two summary Commonwealth offences (disclosure of the existence of a summons), and an indictable Commonwealth offence (giving false evidence before an examiner). The last attracted a six month term of imprisonment, to be served cumulatively upon the nine year term imposed for the trafficking. All of the other terms, State and Commonwealth, are to be served concurrently.

[6] At the time of the commission of these offences, the respondent was aged between 29 and 30 years, and he was 34 years old when sentenced. His prior criminal history – which was of no particular significance in the sentencing – included convictions for assault occasioning bodily harm (1996), for the possession of cannabis (1997 and 1998), for the dangerous operation of a motor vehicle (2003), and for breach of bail (2004).

[7] The respondent was sentenced as a principal (with one Dimich) in the trafficking business. Police officers uncovered the case against him in the course of multiple raids on a number of properties. As narrated by the sentencing Judge:

> "Rodd was responsible for the manufacture and sale of large amounts of methylamphetamine. He used the services of a number of others who were allocated tasks, such as sourcing pseudoephedrine tablets, acting as lookouts, cleaning equipment before and after cooks, purchasing items of equipment for the business and items for Rodd's personal use.
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> The cooks were in the order of pounds. One of the cooks which took place at 'the Ranch' is the subject of count two…after several raids at those premises, operations were moved to Dollarbird Drive. Counts four and five were instances of production at that address. Production occurred also at Jimboomba, although Rodd has not been charged with any specific production there.
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> Rodd coordinated the cooks. He bought various chemicals, while others, such as Dimich and Garfath were responsible for technical aspects.
>
> I have referred to Rodd's using others to source the precursor pseudoephedrine. He had more than one person working in that role at a time. One witness has provided evidence of sourcing tablets in Brisbane and in Melbourne. He had said that over 18 months to two years, leading up to Christmas 2003, he went on a run once a month. Each run lasted three weeks. On each trip he visited between 300 and 350 chemists. Generally he took someone with him. One of them would target chemists on the way down to Melbourne and the other on the way up to Brisbane. He said he was given $100,000 to purchase tablets and he made a profit out of the run of $30,000.
>
> Rodd lived a very extravagant lifestyle. He was in possession of large amounts of money in cash that could not be explained by his employment as a concreter. Financial analyses have been done of his unexplained income over the period of the trafficking. That done by

> an analyst appointed by his own lawyers came up with a figure of approximately $101,000 while that done by an analyst engaged by the prosecution came up with a figure of $236,000.
>
> Whatever the correct figure, it presents far from a complete picture of his profits. He used cash to purchase expensive items, leaving no document trail. He had associates purchase things for him in other names.
>
> Rodd sold one pound quantities of methylamphetamine for $45,000. He sold one ounce quantities for $3,000 cash or $3,200 on credit. There is evidence of amounts between $1,000 and $50,000 being exchanged for drugs. On one occasion he gave Garfath a bag containing $130,000 to bury.
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> Rodd used violence and threats of violence to control and manipulate his minions. During the trafficking he used violence to make others confess to crimes they had not committed to absolve him of responsibility, to make them purchase items in their names so as to obscure money he was making from the trafficking. He used violence and threats to make others work at his place of business. He threatened to kill others or their families if they spoke to police. He threatened drug debtors with violence, including shooting.
>
> He always carried a gun and fired guns in close proximity to others to intimidate purchasers and assert his power over his associates and customers.
>
> Further, Rodd threatened and intimidated witnesses who were summoned to appear before the Australian Crime Commission in April 2004. While on remand, he made threatening calls over the prison ARUNTA telephone system."

[8] The learned Judge pointed out that "a considerable part of Rodd's offending took place whilst he was on bail. After the offending…he was…in due course, granted bail…he continued to traffick, and as his activities came to police attention, simply moved to other addresses."

[9] Her Honour viewed the respondent's pleas of guilty as "indicative of an ultimate willingness to facilitate the course of justice…for which he (was) to be given some credit. The trial could have been expected to take several weeks." Yet there had been a lengthy committal including oral evidence and cross-examination of many witnesses, and two pre-trial enquiries. The indictment was originally presented on 27 January 2006. The Judge took the view that "a good deal of the delay was attributable to the Crown".

[10] The learned Judge dealt as follows with the respondent's personal drug dependency:

> "Rodd was himself seriously addicted to amphetamines throughout the period of trafficking. He began using illicit drugs by using

> marijuana on a recreational basis to about 2000, that is, about the age of 26. He was introduced to amphetamines by his brother, who was a heavy user. At first it was a matter of experimentation, but his use escalated, particularly after the break up of his relationship with a young woman when he was aged about 26. By the age of 28, he was dependent on amphetamines for his daily functioning. At the height of his addiction, he was using more than a gram of amphetamine per day.
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> I am prepared to accept that securing a reliable supply for his own consumption may have been the initial motivation for his offending, but given the scale of the trafficking and his extravagant lifestyle, I cannot accept that commercial gain remained merely a secondary ancillary aspect of the business. It soon became of at least equal significance with feeding his habit."

[11] Her Honour then referred to the report of a psychologist, Dr Frey, and observed:

> "Over the four years that Rodd has been on remand he has been drug free. He has completed a narcotics anonymous 12 step program and worked as a voluntary prison unit worker. The psychologist has expressed concern that it will be more difficult for him to maintain sobriety once he re-enters the community."

[12] The positions as to penalty taken before Her Honour were as follows. The prosecutor submitted that the sentence imposed for the trafficking should be 10 years imprisonment, automatically attracting the serious violent offence declaration (s 161A(a)(ii) *Penalties and Sentences Act* 1992 (Qld)). Defence counsel submitted that it should be in the range eight to nine years with no declaration.

[13] The learned Judge offered the following summary of the respondent's conduct:

> "Rodd's involvement in trafficking and manufacture of (methylamphetamine) was over a period in excess of two years. He was one of the principals of the operation. It was a large scale wholesale business. He enlisted others to fulfil various roles and to hide some of his ill-gotten gains. He used violence and threats of violence and weapons to ensure their compliance. The offending was relentless. It attracted police attention but he simply moved his operations to other locations. This occurred several times."

[14] Her Honour explained as follows her determination of the penalty for the trafficking:

> "I have concluded that the applicable range is eight to 10 years imprisonment. If I imposed 10 years, Rodd would have to serve eight years before becoming eligible for parole because of the effect of the automatic serious violent offender. If I imposed eight or nine years, I would have a discretion whether to make such a declaration.

> Sentencing is an integrated process and I have to consider all relevant circumstances, including the consequences of such a declaration in determining penalty. Were it not for Rodd's own addiction, I would have concluded that the level of violence was such that he should be required to serve 80 per cent of the term. But I take account of his own addiction, as well as of his pleas of guilty and of his efforts at rehabilitation whilst on remand.
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> Ultimately, I have concluded that on the trafficking charge there should be a term of imprisonment of nine years. There should be a declaration with respect to pre-sentence custody, and the parole eligibility date should be fixed after approximately six years in prison."

[15] This was a particularly serious instance of trafficking in a schedule one drug. It persisted over more than two years; the offending was relentless, moving from one address to another; it continued while the respondent was on bail; the amounts produced were large; the respondent both produced and sold on a wholesale basis; the respondent was commercially motivated, funding an extravagant lifestyle and regularly in possession of very large amounts of cash; and the trafficking was attended by gangster-type actual and threatened violence. (The violence was a concomitant of the trafficking, and properly taken into account: *R v D* [1996] 1 Qd R 363, 403-4.)

[16] In relation to the financial returns to the respondent, it is useful to refer to material put before the sentencing Judge as "uncontested prosecution facts". It included the following passage:

> "Herbert told police that he had observed at least 100 transactions between the (respondent) and people purchasing drugs and that the most methylamphetamine that he had observed the respondent sell to the one person was one pound. He also told police that of the transactions he saw, he estimates that cash to the value of between $1,000 to $50,000 would have been exchanged. He once saw the respondent give Garfath a bag of $130,000 to bury. According to the witness, the respondent charged $45,000 per pound and $3,000 cash for an ounce. If an ounce of methylamphetamine was purchased on credit, the respondent would charge $3,200. *He said that he would see piles of tens of thousands of dollars at the Ranch and that the respondent was making so much money that instead of counting it, he would weigh it.*"

[17] On the other hand, as the Judge found, the respondent was at the time addicted to methylamphetamine, using more than one gram per day. That was drawn from the psychologist's report, based on what the respondent said at an interview conducted on 4 June 2008 in anticipation of sentence. It is also consistent with the respondent's hand-written letter provided to the court in relation to the sentencing. But any significance arising from that, in relation to penalty, was substantially diminished by Her Honour's conclusion "that commercial gain…soon became of at least equal significance with feeding his habit". As mentioned during the

submissions at the hearing of the appeal, the massive scale of this production and trafficking operation dramatically surpassed anything justified on the basis simply of the maintenance of the respondent's own drug habit.

[18] The level of gangster-style violence which attended the commission of the offences of production and trafficking, prima facie rendered this a clear case for a serious violent offence declaration. The learned Judge declined to make a declaration because of the respondent's drug addiction. Instead of effectively requiring him to serve 80 per cent of the nine year term she imposed, Her Honour made an order obliging the respondent to serve six years (instead of the usual 4.5 years). Her Honour was no doubt concerned not to prejudice the respondent's drug rehabilitation. But having regard to the legislative intention founding the serious violent offence regime, I respectfully conclude that the feature of the respondent's drug dependency should not have excluded a declaration.

[19] The only other mitigating circumstance was the respondent's pleas of guilty. The learned Judge approached them on the basis that they entitled the respondent to some reduction because of his cooperation in the administration of justice. They were not indicative of remorse. In this case the respondent did not take part in any interviews or in any other way cooperate with the authorities. Even while in prison, he was recorded speaking about still wanting to get his money back from people and threatening violence if they did not pay him.

[20] Further, it was not a timely plea. This summary is taken from the appellant's Counsel's outline:

> "The respondent had a committal over five days between 9 September 2004 and 2 August 2005 with 24 witnesses cross-examined or giving full evidence. The indictment was presented on 27 January 2006 (later a housekeeping nolle prosequi was entered and a new indictment presented on 26 April 2007 to join all three on the one indictment), the prosecution indicating its position on sentence both factually and in relation to range on 26 July 2006. That position remained relatively unchanged from that point on, and was reiterated on two subsequent occasions on 27 April 2007 and 7 February 2008. Despite that, the respondent had two Basha enquiries on 1 October 2007 and 19 March 2008 and was listed for trial twice, the second occasion being to commence 5 May 2008. Despite the applicant's intimations of factual basis and sentence submission as early as 26 July 2006, it was only one and a half weeks before the final trial listing at an arraignment brought on at the prosecution's insistence on 24 April 2008, that a plea was entered. Negotiations had been entered into in early April 2008, but a plea was not certain until the day of arraignment."

[21] Mr Meredith, who appeared for the appellant, submitted that the sentence which should have been imposed for the trafficking was ten years imprisonment, which would automatically attract the serious violent offender declaration (s 161A(a)(ii)), and alternatively, that even with the nine year term, a declaration should have been made under s 161B(3). Mr Meredith relied particularly on *R v Kashton* [2005]

QCA 70, for a contention that the appropriate range of penalty applicable to this case of trafficking was 10 to 12 years imprisonment. In *Kashton* (p 12), Fryberg J, with the agreement of Williams JA, endorsed the view expressed in *R v Raciti* [2004] QCA 359, that the range applicable to "large scale trafficking in schedule one drugs" is 10 to 12 years imprisonment (after allowing for a plea of guilty).

[22] While there are considerable similarities between the circumstances of this case and *Kashton*, and while *Kashton* bore some more serious aspects, in that he was trafficking in more than one drug, was not addicted to the drugs in which he was trafficking, and was burdened by an arguably more serious criminal history, I accept the significance of the countervailing differences to which Mr Meredith referred: "that (this) respondent was at the top of the chain, manufacturing his own drugs, with no nine month break in offending, with a much later plea and most serious of all (having) involved a number of others in his business, seriously manipulating them in a variety of ways, and using violence and weapons to conduct his business".

[23] The maximum penalty for trafficking in a schedule one drug is 25 years imprisonment (s 5 *Drugs Misuse Act* 1986 (Qld)). While in *Kashton* the court worked within a 10 to 12 year range, and allowing for the more serious aspects of this case just mentioned, while I accept that 10 years represents the foot of the presently relevant "range" (after allowing for the plea of guilty), I would not regard 12 years as its upper limit. As in *R v Christensen* [2002] QCA 113 "the starting point could well have been a sentence as high as 13 or 14 years if one took into the calculation of the head sentence the fact that the trafficking had been carried on after the applicant had been arrested and released on bail on two occasions".

[24] I respectfully consider that the sentence of nine years imprisonment imposed for the trafficking, even with the contemplation of parole after six years, was manifestly inadequate for this crime. The range from which the Judge proceeded, that is, eight to 10 years imprisonment, was too low. The relevant range in my view began at 10 years imprisonment, meaning that the serious violent offender declaration automatically applied (s 161A(a)(ii) *Penalties and Sentences Act* 1992 (Qld)). In the result, the penalty imposed failed sufficiently to account for the aspects of punishment and general deterrence discussed in *R v Tilley; ex parte A-G* (1999) QCA 424, and gave too much weight to factors going to mitigation, particularly in view of Her Honour's finding that the respondent's commercial motivation was at least as significant as the relevance of his drug addiction.

[25] While a sentence of 12 or 13 years imprisonment would have been appropriate, in the event that the sentencing were proceeding afresh at first instance, the appellant sought before us no more than 10 years imprisonment, and the newly imposed sentence should not exceed that term, this being an Attorney's appeal. As has been mentioned a number of times, a term of 10 years imprisonment will automatically attract the serious violent offender declaration, with the consequence that the respondent will have to serve at least 80 per cent of that term: s 182(2) *Corrective Services Act* 2006 (Qld). (There must nevertheless be a declaration: s 161B *Penalties and Sentences Act* 1992 (Qld).)

[26] I would order:

1. that the appeal be allowed in respect of count one;
2. that in respect of count one, the sentence of nine years imprisonment, with a parole eligibility date fixed at 8 October 2010, be set aside;
3. that on count one, the respondent be imprisoned for 10 years;
4. that in respect of count one, there be a declaration that the respondent's conviction is of a serious violent offence;
5. that the other sentences imposed, and other orders made, on 27 June 2008, be confirmed.

[27] **WHITE AJA**: I have read the reasons for judgment of the Chief Justice and agree with him that the appeal by the Attorney-General should be allowed and a term of imprisonment of 10 years on the trafficking charge be substituted for the sentence of nine years with a parole eligibility date fixed at 8 October 2010. I agree with the other orders proposed by his Honour.

[28] I would also endorse his Honour's comment that a sentence as high as 12 to 13 years would not have been excessive at first instance when the aggravating features mentioned by his Honour in respect of the drug trafficking offending are considered. The tactics of terror which were bound up with the trafficking and which the respondent employed against numerous associates make that a particularly serious feature of his criminal activity. The most egregious aspect of that violent conduct described in the schedule of uncontested facts was the respondent's use of:

> "... threats of violence and actual violence that allowed him to exercise power and control over his minions such as to make them confess to crimes that they did not commit. Those crimes included stealing cars and other vehicles and possession of weapons....
>
> [The respondent] also threatened and intimidated many of the witnesses who have provided statements to police after he became aware that they had been summonsed to appear before the Australia Crime Commission in April 2004. He threatened to kill witnesses or the families of witnesses if they gave evidence in proceedings pending in the ACC...
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> [The respondent's] course of threatening behaviour continued even after [the respondent] was remanded in custody. Several telephone conversations between [the respondent] and others over the [ ] prison telephone system, were recorded containing threats to be passed on through various people over the period 10/5/04-23/6/04."[1]

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1 Record page 128.

[29] This is conduct, which together with the vast amount of money which the respondent made from trafficking in drugs, caused the mitigating factor of his drug dependency to be of little relevance. Indeed, as the Chief Justice has observed, the only evidence of drug dependency was the respondent's self-reporting. The psychologist noted that the respondent's reported reaction to methylamphetamine was unusual. He told the psychologist that he relied on oral ingestion, never injecting amphetamines; and that he could sleep and eat while taking the drug which was commented to be a variation from the self-reports of most amphetamine users. The psychologist did state that there is a small sub-group of amphetamine users who find the drug calms them and clears their minds - the effect which the respondent reported. The effect might, then, explain how the respondent was able to organise such an extensive illegal operation for two years and maintain his legal occupation as a concreter and yet still be drug dependent.

[30] **MCMEEKIN J:** I have read the reasons of the Chief Justice in draft. I agree with the orders proposed by the Chief Justice and with his Honour's reasons for those orders.