SUPREME COURT OF QUEENSLAND

CITATION:	*R v Jenkins, Rollason & Brophy* [2008] QCA 369
PARTIES:	**R** **v** **JENKINS, Darren John** (applicant) **R** **v** **ROLLASON, John Leslie** (applicant/appellant) **R** **v** **BROPHY, Jason Edward** (applicant)
FILE NO/S:	CA No 362 of 2007 CA No 375 of 2007 CA No 377 of 2007 SC No 475 of 2006
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Applications
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	28 November 2008
DELIVERED AT:	Brisbane
HEARING DATE:	29 September 2008
JUDGES:	McMurdo P, Jones and Daubney JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. In CA No 362 of 2007, *R v Darren John Jenkins,* the application for leave to appeal is refused.** **2. In CA No 375 of 2007, *R v John Leslie Rollason,* the application for leave to appeal against sentence is granted, the appeal allowed to the limited extent of setting aside the order that he be imprisoned for a period of 12 years on count 2 of Indictment 475 of 2006 and substituting an order that he be imprisoned for a period of 11 years. The original sentence is otherwise confirmed.** **3. In CA No 377 of 2007, *R v Jason Edward Brophy,* the application for leave to appeal against sentence is refused.**

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – three applicants involved in large scale ecstasy trafficking ring – Brophy was head of operation in Australia, organising purchase of ecstasy once it was imported – Rollason organised distribution of tablets to dealers for sale – Jenkins involved in transport of and payment for ecstasy – Rollason pleaded guilty to one count of trafficking and sentenced to 12 years cumulative upon an earlier sentence – Brophy found guilty of one count of trafficking and three counts of supply, after a trial, and was sentenced to 17 years imprisonment – Jenkins found guilty of one count each of trafficking and supply after a trial and was sentenced to 10 years imprisonment – whether sentences were manifestly excessive

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – OTHER MATTERS – Rollason's 12 year sentence was cumulative on his earlier 10 year sentence for trafficking drugs because the offence was committed while he was on parole – effect of a 12 year sentence was a 22 year total sentence and about 13 years and nine months imprisonment since arrest before parole eligibility – judge was erroneously informed that Rollason's total sentence would be 21 years – this error caused the Court of Appeal to re-sentence Rollason to 11 years imprisonment cumulative so that he would serve just over 13 and a half years before becoming eligible for parole

Drugs Misuse Act 1986 (Qld), s 5(b), Sch 2
Penalties and Sentences Act 1992 (Qld), s 156A

Mill v The Queen (1988) 166 CLR 59; [1998] HCA 70, applied
R v Assurson (2007) 174 A Crim R 78; [2007] QCA 273, applied
R v Bosnjak [2007] QCA 325, compared
R v Bradforth [2003] QCA 183, compared
R v Cannon [2007] QCA 205, compared
R v Donnelly and Corbic [2007] QCA 77, compared
R v Lowe [2004] QCA 398, compared
R v Murray [2006] QCA 154, compared
R v Nabhan; R v Kostopoulos [2007] QCA 266, compared
R v Omer-Noori [2006] QCA 311, compared
R v Rizk [2004] QCA 382, compared
R v Saunders [2007] QCA 93, compared
R v Walton; ex parte A-G (Qld) [1997] QCA 411, compared

COUNSEL: M J Byrne for the applicant, Jenkins
A M Hoare for the applicant/appellant, Rollason
J A Fraser for the applicant, Brophy

G P Long SC for the respondent

SOLICITORS: Lawrence & Associates for the applicant, Jenkins
Legal Aid Queensland for the applicant/appellant, Rollason and the applicant, Brophy
Commonwealth Director of Public Prosecutions for the respondent

[1] **McMURDO P:** On 20 November 2007, the applicant, John Rollason, pleaded guilty to one count of unlawfully trafficking in a dangerous drug, namely 3,4-methylenedioxymethamphetamine (MDMA, also known as ecstasy) between 16 September 2004 and 19 November 2004 at the Gold Coast. A co-offender, Robert John Green, pleaded guilty to a like charge of trafficking in MDMA. The applicant, Jason Edward Brophy, pleaded not guilty to one count of trafficking in MDMA and to three counts of unlawfully supplying MDMA. The applicant, Darren John Jenkins, pleaded not guilty to one count of trafficking in MDMA and one count of unlawfully supplying MDMA.

[2] On 30 November 2007 after a nine day trial, Jenkins and Brophy were both convicted on all counts. Jenkins and Brophy originally appealed against their convictions. At the hearing, their counsel indicated that they were no longer pursuing those appeals and their appeals against conviction were dismissed.

[3] On 6 December 2007 Brophy was sentenced to 17 years imprisonment for trafficking in MDMA and convicted but not further punished in respect of the counts of supplying MDMA. Rollason was sentenced to 12 years imprisonment for trafficking in MDMA, to be served cumulatively upon a sentence of 10 years imprisonment imposed in the Supreme Court, Brisbane, on 5 November 1998. Jenkins was sentenced to 10 years imprisonment for trafficking in MDMA and was convicted but not further punished for the offence of supplying a dangerous drug. Green was sentenced to six years imprisonment for trafficking, with parole eligibility on 3 April 2009. In each case, time served in pre-sentence custody was declared as time served under each offender's sentence. The trafficking offences for Brophy, Rollason and Jenkins were all declared to be serious violent offences. Green's trafficking offence was not the subject of a declaration. The applicants, Jenkins, Brophy and Rollason, each apply for leave to appeal against their respective sentences.

[4] At the relevant time, the maximum penalty for the offence of trafficking in MDMA was 20 years imprisonment.[1]

The applicants' antecedents

[5] Jenkins was 30 years old at the time of his present offending and 33 years old at sentence. He had a criminal history involving breaches of bail undertakings and a weapons offence. More relevantly, on 26 March 1999 he was sentenced by Ambrose J in the Supreme Court, Brisbane, to an effective term of four years imprisonment suspended after 12 months with an operational period of five years for possessing dangerous drugs with circumstances of aggravation. On 3 June 1999, he was sentenced in the Southport Magistrates Court to lesser concurrent terms for

1 *Drugs Misuse Act* 1986 (Qld), reprint 5, s 5(b) and Sch 2.

possessing utensils or pipes used in connection with dangerous drugs and possessing instructions for producing dangerous drugs. The operational period of the suspended sentence expired on 26 March 2004, about six months before the commencement of his present offending. Ambrose J's sentencing remarks were tendered and disclosed the following information. Police found Jenkins in possession of 19.2 g of cocaine as well as methylamphetamine, cannabis, 96 squares of LSD, small clip-seal plastic bags, scales, and white powder commonly used to "cut" drugs. Jenkins contested the factual basis of his alleged offending at the sentence: he gave evidence that all the drugs were for his own use; and that although he was in receipt of social security payments he had won otherwise unexplained money by gambling. Ambrose J rejected his evidence and concluded that he possessed the drugs for a commercial purpose.

[6] Brophy was 38 years old at the time of his offending and 41 at sentence. He had no prior criminal history.

[7] Rollason was also 37 and 38 at the time of his offending and 41 at sentence, but unlike Brophy he had a significant criminal history. It commenced with minor drug offences in 1993. In January 1994, he was fined for assaulting police, obstructing police and wilful destruction of property. In September 1994 he was sentenced to two years imprisonment, suspended forthwith with an operational period of two years, for three counts of false pretences. In that same month, he was convicted and fined for further drug offences. In July 1996 he was convicted and fined for dangerous driving. Later that year he was dealt with for unlicensed possession of a weapon, further drug offences and being a prohibited person in a casino. Of most significance were his convictions on 5 November 1998 in the Supreme Court at Brisbane before Atkinson J for trafficking in a dangerous drug and for lesser related drug offences for which he was effectively sentenced to 10 years imprisonment with a recommendation for parole eligibility after serving four and a half years. Atkinson J's sentencing remarks were tendered and disclosed the following information. Rollason pleaded guilty on the seventh day of his trial. Recordings made by police listening devices demonstrated that he had been trafficking in cocaine and cannabis for a considerable period of time at a high level in a dealer to dealer situation. He was apprehended at a Gold Coast casino with $90,660 in cash and 41.8 g of powder containing 19.4 g of pure cocaine. Its street value was between $10,500 and $12,600. When police searched Rollason's home, they found 157.9 g of cannabis, a cannabis press, a scanner tuned to the Gold Coast police frequency, some clip-seal bags and three boxes of glucodin, a common cutting agent for drugs such as cocaine. An analysis of his financial documents showed $340,000 of unexplained income. His offending was committed during the operational period of the suspended sentence imposed in 1994 for false pretences. Atkinson J accepted that Rollason had a poly-substance abuse problem.

The circumstances of the present offending

[8] The learned sentencing judge found that the circumstances surrounding the present offending were as follows.

[9] A person by the name of Radunovich was the ultimate supplier of the large quantity of MDMA involved in this offending. He operated from outside Australia and has not been charged in connection with the present offences. The MDMA tablets were

allegedly held in Sydney by Livius Mircea Cirin for distribution.[2] Cirin released MDMA tablets by instalments for sale on Queensland's Gold Coast. Those involved in their sale and distribution accounted for the proceeds up the chain of responsibility, ultimately to Radunovich. Brophy negotiated directly with Radunovich over the supply arrangements on matters such as timing, location and other conditions of sale. Agents of Brophy and Radunovich effected transfers of the drugs in Gosford, New South Wales, on 20 October and 18 November 2004. Rollason acted as the intermediary between Brophy and those who collected the drugs from Cirin for transportation to the Gold Coast. On 20 October 2004, Green and another person collected MDMA tablets from Gosford and took them to the Gold Coast. Jenkins and Rollason were both substantially involved in the sale on the Gold Coast of these tablets.

[10] Radunovich and Brophy arranged for Abdul Hameed to travel to Australia to collect the money owing to Radunovich from the sales. Hameed received part payment on 10 November 2004. On 18 November 2004, Jenkins and Green drove to Gosford where $250,000 cash, the balance owing to Radunovich from the sale of the MDMA tablets delivered to Green on 20 October 2004, was exchanged for further MDMA tablets, allegedly supplied by Cirin. Cirin was found in possession of more tablets in Sydney, held on behalf of Radunovich.

[11] The prosecutor at sentence described this operation as "the largest ecstasy trafficking case to come before the Queensland Courts". It planned to distribute about 500,000 tablets on the Gold Coast. Ninety thousand tablets were obtained at Gosford on 20 October, and again on 18 November 2004. A further 298,000 tablets were later found at Cirin's home in Sydney.

[12] The tablets seized on 18 November 2004 weighed approximately 20 kg and contained about 9.6 kg of pure MDMA. The judge inferred that the delivery of tablets on 20 October 2004 involved a similar amount of MDMA. The tablets found at Cirin's home weighed 68.285 kg and contained 36.4 kg of pure MDMA. The total weight of pure MDMA involved in the entire Australian operation was about 54 kg. The wholesale value of each tablet was about $16 so that the wholesale trafficking business involved about $8 million worth of MDMA. The prosecutor submitted that the retail value of the drugs was at least $16 million. It was a serious case of organised crime involving layers of responsibility, with each of the four protagonists playing different but complementary roles.

[13] Brophy was at the head of the Australian business. He alone was in communication with Radunovich and together they set the parameters of the business, including the timing and conditions of release of the drugs into the market. Brophy had to account to Radunovich for the proceeds of sale. Brophy alone had contact with the "bagman", Hameed. Brophy had authority over the distribution process and reported directly to Radunovich about it on many occasions. Brophy was in a clear position of authority over Rollason, to whom he issued instructions and chastised for the late payment to Hameed.

[14] Rollason was the "sales manager" in the business. He was aware of the full parameters of the trafficking. He was very familiar with Brophy; they spoke

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[2] Cirin was originally charged in the same indictment as the applicants but on 20 November 2007 the prosecution elected not to proceed against him. This Court was told by the respondent during the appeal hearing that Mr Cirin was then awaiting trial on related counts in New South Wales.

regularly by telephone and met from time to time. Rollason supervised and reported on the sales of the tablets to Brophy. He also made the administrative arrangements for the collection of tablets at Gosford. He managed the sales of the first 90,000 tablets. He directed Jenkins as to the terms of distribution to the dealers referred to in the covert police recordings as "Airfields", "Thirties" and "Maccas". Rollason had authority to set and vary prices and to make special arrangements as to sales. Rollason had been involved in other incidents of trafficking before the arrival of "the Brophy stock". When Rollason was arrested, he was in possession of $8,000 cash and another $25,000 was found at his home. He pleaded guilty in March 2007 but not at the earliest opportunity.

[15] Her Honour found that Jenkins:

> " … was essential to the business. He had a network of contacts which were exploited in the sales and attempted sales of stock obtained on 20 October 2004 …
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> He also accompanied Green on the second trip to Gosford to collect stock. The extent of Mr Jenkins' knowledge of the business is not clear. He was aware that there was a very large enterprise with multiple participants.
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> In what the prosecutor described as the anticipation phase, that is before the arrival of the Brophy stock, Jenkins expressed concern at the potential for flooding the market. He himself expected substantial rewards from the business. He discussed with Rollason the possibility of buying a house. Rollason suggested he would be able to place a deposit of $100,000 and meet monthly mortgage payments on a week's work.
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> He knew that the deals that he did, or attempted to do, involved between 1000 and 10,000 tablets per deal. He knew from Rollason that there were others to whom Rollason was accountable. He was clearly in a close relationship with Rollason. He knew the business was ongoing. As I say, he took the second trip to Gosford, and I am sentencing on the basis that he knew the purpose of that trip was to obtain a large quantity of stock and to deliver a large quantity of money.
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> He had an arrangement with Rollason whereby he would be given 20,000 tablets at a time to sell and to account for at his discretion. I accept that his actual rewards have not been established." [3]

[16] The judge described Green as "slightly less culpable than Jenkins" and "simply a courier". He was not involved in the November sales and attempted sales but he travelled twice to Gosford, each time collecting 90,000 tablets and, on at least the second occasion, was entrusted with $250,000. He was fully aware of what he was doing on each occasion. He was 34 at the time of his offending and 37 at sentence. He had some criminal history including a conviction for possession of a dangerous drug for which he was sentenced to 12 months imprisonment to be served by way of an intensive correction order. Following a motor cycle accident he suffered chronic

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[3] RB 661 - 662.

pain and had a poly-substance abuse problem. He had good prospects of rehabilitation. He pleaded guilty to an ex officio indictment and so his sentence was reduced from nine to six years imprisonment.

The application of Darren John Jenkins

(a) Submissions

[17] Mr M J Byrne QC, who appeared for Jenkins in this application, made the following submissions. The primary judge took into account a number of irrelevant considerations in sentencing Jenkins. It did not matter that he was part of a large scale business because there was no evidence that he was aware of its scale or involved in its establishment. He was at the lower end of the business and involved only in the distribution of unknown quantities of MDMA over a two month period. Although the evidence suggested that he was commercially motivated, there was no evidence as to the extent of his commercial gain. There was no evidence that the $250,000 given to Hameed were the proceeds of sales solely arranged by Jenkins. There was no evidence that Jenkins was aware that $250,000 was being transported in the car in which he and Green were located in Gosford on 18 November 2004. Jenkins should have been sentenced on the basis that he was a minor player in the enterprise. In *R v Assurson*[4] this Court stated that drug traffickers should not be punished for ambitions which, if realised, could have resulted in a larger business and greater profit; they must be sentenced for their actions at the time of arrest. The judge sentenced Jenkins for what he might have achieved if his trafficking had continued.

[18] Referring to *R v Rizk*,[5] *R v Murray*,[6] and *R v Donnelly and Corbic*,[7] Mr Byrne submitted that Jenkins should have been sentenced to six to eight years imprisonment without a declaration that he had been convicted of a serious violent offence under Pt 9A *Penalties and Sentences Act* 1992 (Qld).

(b) Discussion and conclusion

[19] The prosecution case against Jenkins at trial was essentially as follows. At least between 2 November and 16 November 2004, and probably before that time, Jenkins involved himself in sales of MDMA which had been acquired at Gosford on 20 October 2004 and brought to the Gold Coast. He assisted in acquiring further stock of MDMA on 18 November 2004 with a view to selling it. The guilty verdicts in Jenkins' case indicated that the jury generally accepted the prosecution contentions as to the inferences to be drawn from the recorded intercepted phone calls between Jenkins and others which were in evidence at trial.

[20] The learned primary judge observed in her sentencing remarks that the extent of Jenkins' knowledge of the trafficking business was not clear. The findings made by her Honour in respect of Jenkins' involvement and knowledge in the business with which Mr Byrne takes issue and which are set out earlier in these reasons,[8] were all well open on the evidence at trial. Her Honour was also cognisant of the principle stated by this Court in *Assurson*, specifically adverting to it in her sentencing

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4 (2007) 174 A Crim R 78; [2007] QCA 273 at 81-82 [19].
5 [2004] QCA 382.
6 [2006] QCA 154.
7 [2007] QCA 77.
8 See these reasons, [15].

remarks.[9] There is no reason to conclude her Honour did not act on it. The judge did not take into account irrelevant considerations in sentencing Jenkins. The irresistible conclusion from the evidence was that Jenkins was knowingly involved in a large MDMA trafficking ring for significant commercial gain. He made a number of significant sales at a wholesale dealer level. He and Green were well below both Brophy and Rollason in the hierarchy of the business, but unlike Green, he did not have the mitigating benefit of an early plea of guilty.

[21] The maximum penalty for trafficking in MDMA was then 20 years imprisonment.[10] The prosecution sought a sentence of 12 years imprisonment. The cases to which Mr Byrne has referred us in which head sentences of six years imprisonment were imposed, were all less serious than Jenkins' offending. *Murray* involved four charges of supplying MDMA, not trafficking in it. Unlike Jenkins, in *Rizk*, *Murray* and *Donnelly and Corbic* the applicants all pleaded guilty and had no relevant criminal history.

[22] By contrast, Jenkins was involved in a far more serious trafficking business. He did not co-operate with the authorities. He was a mature man with a concerning criminal history including a conviction for possessing dangerous drugs for a commercial purpose for which he was sentenced in 1999 to four years imprisonment suspended after 12 months with a five year operational period. He began his present offending about six months after the end of that operational period. There were matters in his favour. Whilst on bail, he made efforts to rehabilitate. He was said to have been drug-free for 16 months prior to sentence. He re-established positive contact with his young children. The cases to which Mr Byrne has referred us, as well as *R v Bradforth*,[11] *R v Saunders*,[12] *Assurson* and *R v Bosnjak*,[13] which were also less serious examples of trafficking in dangerous drugs than Jenkins' case, fully support Jenkins' sentence of 10 years imprisonment. As he will have to serve eight years of that sentence before becoming eligible for parole, it is a salutary penalty and one at the high end of the appropriate range. It meets principles of personal and general deterrence and reflects Jenkins' previous relevant criminal history and his knowing and active involvement as a wholesale dealer in a large scale sophisticated trafficking business in MDMA for significant commercial gain.

[23] Jenkins' application for leave to appeal against sentence should be refused.

The application of Jason Edward Brophy

(a) Submissions

[24] Mr J Fraser, on behalf of Brophy, made the following submissions. Brophy's trafficking occurred over a relatively short period of about two months. There is no evidence of the profits he received. He had no criminal history. The maximum penalty was 20 years imprisonment. The cases of *R v Cannon*,[14] *R v Lowe*,[15] *R v Nabhan; R v Kostopoulos*[16] and *R v Omer-Noori*[17] demonstrated that the sentence

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9 *R v Brophy, Jenkins, Rollason & Green*, 6 December 2007, pp 5 – 6.
10 *Drugs Misuse Act* 1986 (Qld), s 5(b) and Sch 2.
11 [2003] QCA 183.
12 [2007] QCA 93.
13 [2007] QCA 325.
14 [2007] QCA 205.
15 [2004] QCA 398.
16 [2007] QCA 266.

imposed on Brophy of 17 years imprisonment was manifestly excessive; a sentence in the range of 13 to 14 years imprisonment should be substituted.

(b) Discussion and conclusion

[25] Brophy was at the head of the Australian arm of this sophisticated and large scale business operation of trafficking in MDMA. He has shown no remorse and did not co-operate with the authorities in any way. The only matters in his favour were that he had no prior convictions and his counsel at sentence tendered references attesting to his skill as a roof-tiler.

[26] The cases to which Mr Fraser has referred us are all less serious instances of trafficking than in Brophy's case. In *Cannon* the applicant, like Brophy, was convicted after a trial and, unlike Brophy, he had some previous convictions. Cannon's offending, which involved having access to about 7.8 kg of methylamphetamine over a two year period,[18] was not as serious as Brophy's. Cannon had spent time in custody which could not be declared as time already served under the sentence, so that Cannon was effectively sentenced to 15 years imprisonment. The Court of Appeal dismissed Cannon's application for leave to appeal against sentence.

[27] *Lowe* involved large scale trafficking of between 8 kg and 16 kg of methylamphetamine over about 18 months.[19] At that time the maximum penalty for that offence was, as here, 20 years imprisonment. Lowe had significant health problems and pleaded guilty. Brophy had neither of those mitigating factors. Lowe was originally sentenced to 18 years imprisonment which was reduced on appeal to 14 years, largely because of his health problems. This Court noted that the appropriate head sentence would otherwise have been 16 years imprisonment.[20]

[28] In *R v Nabhan; R v Kostopoulos*, Nabhan received 13 years imprisonment and Kostopoulos received 15 years imprisonment to be served cumulatively with the 21 month balance of previously suspended terms of imprisonment. They each pleaded guilty, although Nabhan attempted to withdraw his guilty plea. Their trafficking was at a high level, but it did not match the sophistication of Brophy's offending: Kostopoulos and Nabhan dealt with 19,000 MDMA tablets and 2 kg of methylamphetamine during three of the six months of the trafficking period[21] and Nabhan dealt with 14,000 MDMA tablets and 5 kg of cocaine separately to his dealings with Kostopoulos.[22] The Court of Appeal dismissed both their applications for leave to appeal against sentence.

[29] In *Omer-Noori* the applicant's sentence of 13 years imprisonment after pleading guilty to trafficking in a variety of drugs was not disturbed on appeal. There were aggravating features absent in Brophy's case: the maximum penalty in Omer-Noori's case was 25 years imprisonment and his trafficking continued whilst he was on bail. Despite those features, Omer-Noori's offending was not at a level comparable to Brophy's serious offending. Omer-Noori seemed to be involved with a couple of

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17 [2006] QCA 311.
18 [2007] QCA 205 at [14].
19 [2004] QCA 398 at [43].
20 [2004] QCA 398 at [48].
21 [2007] QCA 266 at [20].
22 [2007] QCA 266 at [18].

thousand MDMA tablets and a couple of hundred grams each of heroin and cocaine,[23] much less sch 1 drugs than involved in the present applicants' trafficking.

[30] *R v Walton; ex parte A-G (Qld)*[24] was an example of high level trafficking in methylamphetamine. At the time, the maximum penalty was 20 years imprisonment, as here. Walton pleaded guilty and was sentenced to 15 years imprisonment. His trafficking was described as "large scale", involving large sums of money and quantities of drugs and demonstrated an involvement in the drugs trade "to an extent rarely seen in these Courts".[25] It was committed whilst he was on parole for an earlier trafficking offence. This Court dismissed this Attorney-General's appeal against Walton's sentence. That does not suggest, however, that 15 years imprisonment was at the top or even the mid-point of the appropriate range, this Court noting that the penalty was not "a particularly harsh one".[26]

[31] Brophy's sentence of 17 years imprisonment for trafficking in MDMA when the maximum penalty was 20 years imprisonment is, self-evidently, heavy. Brophy was the Australian head of this large and lucrative business; he directed those below him and liaised with the ultimate overseas supplier, Radunovich. As in *Walton*, Brophy's offending was at a level and on a scale rarely seen in the criminal justice system. High level drug traffickers like Brophy are difficult to detect, apprehend and bring to justice. Brophy did not co-operate with the authorities at any stage of this process. His actions were entirely commercially motivated. His only redeeming features were that he had no prior convictions and his skill as a roof-tiler may give him some employment prospects when he is finally released. Those factors are minimal considerations when weighed against the gravity of his offending. His conduct was at a level close to the most serious example of the offence of trafficking in MDMA, save that he was not a repeat offender. This was an appropriate case in which to impose a sentence approaching the maximum penalty available as a deterrent, both to Mr Brophy and to others like him who would cynically involve themselves in large scale illegal commercial trafficking in dangerous drugs. Those who engage in such anti-social behaviour must understand that there is a real likelihood of them being apprehended, convicted and sentenced to heavy terms of imprisonment. The sentence of 17 years imprisonment is deservedly heavy. It is not manifestly excessive.

[32] Brophy's application for leave to appeal against sentence should be refused.

The application of John Leslie Rollason

(a) Submissions

[33] Mr A Hoare, on behalf of Rollason, made the following submissions. Rollason's cumulative sentence of 12 years imprisonment was manifestly excessive. Rollason pleaded guilty. He trafficked in MDMA over a two month period. Because the present offence was committed whilst he was on parole, s 156A *Penalties and Sentences Act* requires the present sentence to be served cumulatively on the earlier sentences. Rollason's previous sentence does not expire until 6 January 2009. He will not be eligible for parole until serving 80 per cent of the 12 year sentence

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23 [2006] QCA 311 at [4]-[7].
24 [1997] QCA 411.
25 [1997] QCA 411 at pp 2-3.
26 [1997] QCA 411 at p 10.

commencing on 6 January 2009, that is, 11 August 2018. His full-time release date is not until 6 January 2021. This means that he will not become eligible for parole on the present offences until more than 13 and a half years after his arrest. If he remains in custody until his full-time release date he will have served over 16 years imprisonment from the time of his arrest. The total cumulative sentence for his 1998 convictions and the present convictions is 22 years imprisonment. The combined effect of these sentences is so harsh that it offends the principle of totality discussed in *Mill v The Queen*.[27] In these circumstances, the sentence imposed on Rollason for the present offence was manifestly excessive.

[34] Mr Hoare explained that the information given to the sentencing judge as to Rollason's release date upon the imposition of a 12 year term of imprisonment for the present offence was not entirely accurate. He corrected this information in his written and oral submissions before this Court. The only errors of present relevance were that the judge was told the combined total of the cumulative sentences was 21 years and one month imprisonment when it was 22 years imprisonment.

(b) Discussion and conclusion

[35] Rollason was not as high in the management of this sophisticated drug trafficking business as Brophy but he was, as the primary judge recognised, very substantially involved. He was the "sales manager" and was fully aware of the scale and scope of the trafficking. His culpability was greater than that of Jenkins and Green, especially as he had a prior conviction for trafficking in a potpourri of dangerous drugs for which he was sentenced to 10 years imprisonment in 1998. He was on parole for that offence at the time of his commission of the present offence. The only mitigating feature in Rollason's case was that he pleaded guilty, albeit on the morning of trial. Nevertheless he should receive some credit for this limited and belated assistance with the administration of justice. The prosecutor at sentence submitted that a cumulative period of 15 to 17 years imprisonment was appropriate but for the plea of guilty which justified a discounted cumulative sentence of 12 to 13 years imprisonment. Mr Hoare at sentence and in this Court submitted that a cumulative penalty of about nine years imprisonment was appropriate.

[36] The learned primary judge was wrongly informed that the combined total sentence for the 1998 offences and the present offence, if a cumulative 12 year sentence was imposed for the present offence, was 21 years and one month imprisonment. It was, however, 22 years imprisonment. The judge needed to accurately appreciate the total effect of these combined sentences in determining Rollason's sentence for the present offending because of the totality principle discussed in *Mill*. Rollason deserved a salutary penalty to reflect the seriousness of his present offending whilst on parole for other similar and serious offences. But the combined effect of all those sentences must not be crushing or, indeed, disproportionate to the sentence imposed on the even more culpable Brophy. For that reason, this error is significant. On the present sentence, Rollason could serve up to 22 years imprisonment for his combined offending and up to 16 years and two months imprisonment from the time of his arrest for the present offending compared to Brophy's 17 years imprisonment. Rollason's earliest parole eligibility date would be 11 August 2018, about 13 years and nine months after his arrest. Brophy, who was mostly on bail during the more than three years between arrest and sentence, will

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27 (1988) 166 CLR 59; [1998] HCA 70.

spend around 13 years and seven months in custody before his parole eligibility on 23 June 2021. Rollason's lesser role and his plea of guilty should result in a sentence of post-offence custody that is less than Brophy's, even allowing for Rollason's criminal history and that some of his post-offence custody relates to his prior offending. This identified error in the material placed before her Honour may well have affected the exercise of the sentencing direction. It requires the granting of Rollason's application for leave to appeal, the allowing of the appeal and this Court to re-sentence him.

[37] Rollason, like his co-offenders, unquestionably deserved a salutary penalty but some moderation was required because of his late plea of guilty, his subordinate role to Brophy and because this sentence had to be served cumulatively on his 1998 sentence. An appropriate cumulative sentence in all these circumstances is one of 11 years imprisonment. That makes for a total term of imprisonment for the 1998 offending and the present offending of 21 years imprisonment, a sentence closer to the learned primary judge's apparent initial intention. This sentence also maintains appropriate parity with the sentence imposed on the even more culpable Brophy.

Conclusion and orders

[38] The learned primary judge rightly imposed heavy sentences on Jenkins, Brophy and Rollason. Her Honour correctly considered that substantial deterrent penalties were warranted. Their offending was plainly motivated by greed. Brophy, who was at the head of the Australian operation of this sophisticated MDMA trafficking business, and his offsider and "sales manager", Rollason, were 41 years old at sentence. Rollason has been in custody since his arrest when he was 38 years old. He will be at least 51 years old before he is released on parole and 57 years old before his sentence expires. Brophy will be at least 54 years old before he is released on parole and 58 years old before his sentence expires. Would-be large-scale commercial traffickers in unlawful dangerous drugs like Brophy and Rollason should understand that they are likely to be apprehended and convicted, in which case they will be sentenced to spend decades of their lives in jail. Brophy and Rollason were in their thirties when apprehended and they will be nearly 60 when their sentences expire. Courts will continue to impose sentences to demonstrate to such offenders that, on a cost-benefit analysis, the ultimate consequences to them will heavily outweigh any short-term profits.

Orders

1. In CA No 362 of 2007, *R v Darren John Jenkins,* the application for leave to appeal is refused.
2. In CA No 375 of 2007, *R v John Leslie Rollason,* the application for leave to appeal against sentence is granted, the appeal allowed to the limited extent of setting aside the order that he be imprisoned for a period of 12 years on count 2 of Indictment 475 of 2006 and substituting an order that he be imprisoned for a period of 11 years. The original sentence is otherwise confirmed.
3. In CA No 377 of 2007, *R v Jason Edward Brophy,* the application for leave to appeal against sentence is refused.

[39] **JONES J:** I agree with the reasons of the President and the orders proposed.

[40] **DAUBNEY J:** I respectfully agree with the reasons for judgment of the President, and with the orders proposed by her Honour in each application.