SUPREME COURT OF QUEENSLAND

CITATION:	*R v Sullivan* [2009] QCA 344
PARTIES:	**R** **v** **SULLIVAN, John Edward** (applicant)
FILE NO/S:	CA No 187 of 2009 SC No 80 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Cairns
DELIVERED ON:	6 November 2009
DELIVERED AT:	Brisbane
HEARING DATE:	23 October 2009
JUDGES:	Chief Justice, Muir JA and A Lyons J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Application for leave to appeal allowed;** **2. Appeal allowed;** **3. The sentence imposed on 5 August 2009 be set aside;** **4. The applicant be sentenced to a term of imprisonment of six and a half years and be eligible for parole after having served two and a half years of such term of imprisonment;** **5. The sentence be served concurrently with the term of imprisonment imposed by the District Court of New South Wales on 24 January 2006**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – OTHER MATTERS – where applicant pleaded guilty to carrying on the business of unlawfully trafficking in 3,4 methylenedioxymethamphetamine ("MDMA") – where primary judge considered applicant's preparatory conduct including the acquisition of equipment and chemicals and the production of 1400ml of isosafrole when sentencing the applicant – whether acts preparatory to the manufacturing of dangerous drugs constitutes trafficking in such drugs – whether primary judge erred in sentencing the applicant on facts attributable to production – whether sentencing discretion miscarried in all the circumstances

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where applicant was sentenced to nine and a half years imprisonment with parole eligibility after three and a half years to be served concurrently with a term of imprisonment of six years, with a non-parole period of four years, imposed by the District Court of New South Wales for the offence of manufacturing a commercial quantity of MDMA – where primary judge purportedly reduced a notional head sentence of 12 to 13 years imprisonment by four and a half years to reflect the applicants pre-sentence custody – whether primary judge insufficiently credited time served by the applicant in respect of the New South Wales sentence – whether sentence manifestly excessive

Drugs Misuse Act 1986 (Qld), s 4

Crampton v The Queen (2000) 206 CLR 161; [2000] HCA 60, cited
R v Bradforth [2003] QCA 183, considered
R v Cannon [2007] QCA 205, cited
R v Elhusseini [1988] 2 Qd R 442, considered
R v Elizalde [2006] QCA 330, distinguished
R v Jenkins, Rollason & Brophy [2008] QCA 369, distinguished
R v Nabhan; *R v Kostopoulos* [2007] QCA 266, considered
R v Patena [1996] QCA 152, considered
R v Raciti [2004] QCA 359, distinguished

COUNSEL: J Cremin (Pro Bono) for the applicant
P F Rutledge for the respondent

SOLICITORS: No appearance for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **CHIEF JUSTICE:** I have had the advantage of reading the reasons for judgment of Muir JA. I agree with the orders proposed by His Honour and with his reasons.

[2] **MUIR JA: Introduction**
The applicant pleaded guilty to carrying on the business of unlawfully trafficking in 3,4 methylenedioxymethamphetamine ("MDMA") between 14 December 2000 and 17 February 2005 at Cairns and elsewhere in the State of Queensland and in New South Wales and was sentenced on 5 August 2009 by a judge of the trial division of the Supreme Court to nine and a half years imprisonment. It was directed that he be considered eligible for parole after serving three and a half years of that term. The sentence was ordered to be served concurrently with a term of imprisonment of six years imposed by the District Court of New South Wales on 24 February 2009[1] for the offence of manufacturing not less than a commercial quantity of MDMA

[1] Stated by the primary judge to be 19 February 2009 in the sentencing remarks.

between 1 and 3 December 2002. A non-parole period of four years commencing on 17 February 2005 was fixed. The applicant thus became eligible for parole on 16 February 2009.

[3] The applicant applies for leave to appeal against his sentence on grounds which, after amendment on the hearing of the appeal, were that:

(a) The learned sentencing judge erred in not sufficiently crediting time served in respect of the New South Wales sentence and by not, in recognition thereof, fixing the parole eligibility date at eighteen months to two years;

(b) The admissible facts relied on by the Crown do not evidence an offence of trafficking in Queensland; and

(c) In the alternative the sentencing judge erred:

(i) In taking into account disputed facts and facts that were not properly associated with the subject offence and in sentencing on the basis of facts not proved beyond reasonable doubt;

(ii) In sentencing the applicant on facts attributable to production and/or manufacturing;

(iii) In not finding and/or acting on a version of facts most favourable to the applicant;

(iv) In admitting facts of production and manufacturing "for which the [applicant] had been sentenced in New South Wales"; and

(v) In taking into account irrelevant matters without declaring that such matters were not part of his sentence.

[4] A schedule of facts before the sentencing judge which was not agreed to by the defence, made the following assertions. The applicant is the brother-in-law of one Ricky Muston. In 2000, 2001 and 2002 Muston purchased MDMA (ecstasy) from the applicant. In late 2000, Muston deposited $5,500 into the applicant's bank account in payment for MDMA produced by the applicant.

[5] In about May 2001, in Cairns, the applicant supplied MDMA powder to Muston for some $15,000. Ten thousand dollars was paid and a balance of $5,000 remained payable. Muston put the powder into capsules which he sold.

[6] Muston, at the applicant's request, purchased a pill press for use by the applicant in the production of MDMA pills at a cost of over $7,000. The press was delivered in July 2001 to the applicant's father's home in New South Wales, where the applicant had chemicals, glassware and equipment for the production of MDMA.

[7] The applicant produced approximately 6,000 pills at his father's home and sold them to Muston on the basis that he would be paid after Muston received the proceeds of his sales of the pills. Muston made regular flights to New South Wales to collect MDMA pills from the applicant. In June 2002, $5,000 was deposited into the applicant's bank account at Byron Bay in return for his supplying 300 MDMA pills to Muston. The pills were stamped "UFO". The police located the drug laboratory in December 2002 and the applicant fled the country for Thailand on 28 December 2002.

[8] In the early part of 2003, when the applicant was still in Thailand, Muston collected a 20 litre container containing approximately 4,000 MDMA pills stamped "UFO" and took it to Cairns. Whilst in Thailand, the applicant received approximately $22,000 from Muston by way of payment for past supplies of MDMA. He said that he was still owed about $70,000 by Muston for such supplies.

[9] The applicant returned to Australia on 26 March 2004 and entered into discussion with Muston with a view to the applicant's setting up a laboratory in Malanda to manufacture MDMA for supply to Muston. To that end, the applicant and Muston acquired equipment and chemicals at a cost of over $9,000 and produced 1400 ml of isosafrole. That quantity of isosafrole was capable of producing a maximum of 10 kilograms of MDMA. However, before the applicant could manufacture the final product, the applicant and Muston were arrested.

The disputed facts at first instance

[10] Defence counsel submitted that the evidence revealed that rather than $9,000 being outlayed in setting up the laboratory after the applicant's return to Australia, only about $70 had been expended. The applicant's account of the setting up of the laboratory was to the effect that he pretended to set up a laboratory in a fraudulent attempt by him to extract from Muston some $30,000 which Muston still owed him for previous supplies of MDMA. If the setting in train of the MDMA manufacturing process was intended never to result in the production of MDMA, it is surprising that 1400 ml of isosafrole was actually produced. Defence counsel, however, admitted that taking steps towards the production of a drug in order to collect a debt for quantities of the drug supplied previously amounted to the "continuation of the carrying on of the business".

[11] The next point raised was that the number of tablets said to have been produced by the applicant in New South Wales for Muston could not be stated accurately. In making that submission, defence counsel, after referring to a statement by Muston's partner, that the applicant told her over the phone from Thailand "that there were 4000 pills in that consignment", said that the applicant himself asserted that the total number of pills was in the order of 6,000. Later in his submissions, defence counsel said "… the total production's in the order of about 6 000 pills or less, but not such that I'm putting a figure of 5 000 or 4 000 or anything."

[12] The next alleged deficiency in the material concerns the amount of money allegedly received by the applicant from Muston. Defence counsel submitted that $32,700 in total was paid into the applicant's bank account by Muston between December 2000 and December 2002. The schedule of facts alleges: a payment of $5,500 in late 2000; a payment of $10,000 in May 2001; a payment of $5,000 in June 2002; and further payments totalling $22,000 when the applicant was in Thailand. The total of these payments is $42,500. The primary judge made no finding as to the total amount of money received by the applicant from Muston. He referred to receipt by the applicant of $16,700 in cash, the receipt of money by the applicant periodically whilst in Thailand and the sale of powder for $15,000.

Relevant findings of fact by the sentencing judge

[13] At the conclusion of defence counsel's discussion of these alleged departures from the schedule of facts, the primary judge observed: "Well, perhaps I should take that schedule of facts and censure parts now and I can read them overnight." The sentencing judge's findings of fact were favourable to the applicant. He concluded

that "… 6,000 pills might have been made, of which Muston collected 4,000" and that the total of the payments made by Muston to the applicant when in Thailand was $22,000. His Honour rejected the applicant's ruse contention, explaining that Muston was the person who had himself purchased the equipment for the unfulfilled MDMA manufacturing project and for the venture in New South Wales. He gave explanations for this finding and there is no reason to doubt its correctness. In any event, it has little, if any, material bearing on the nature and extent of the applicant's offending conduct.

[14] The sentencing judge summarised the relevant facts as follows:

> "So, in summary, what your role in this unlawful business of trafficking, it seems, was: having manufactured tablets in New South Wales and being part of the consortium that was selling them in the year 2000, you have received various sums of money, some $16,700 in cash; you produced powder which you sold for a price of $15,000; you received money periodically whilst in Thailand for your sale of that drug; in 2004 you were involved in advising lists of chemicals and glassware that had to be obtained; you set up an illegal laboratory in Malanda to purchase precursor drugs from the chemicals and using that glassware; you knew that the process was to be ongoing and that, ultimately, that quantity of ecstasy tablets would be on the streets in the markets and be sold to anyone who wished to buy them. It was clearly activity of a commercial purpose. It was organised, it was long-running, and, but for your arrest, would have continued to allow that number of drugs to be on the street. The profit likely to be generated from that business activity is suggested by the Prosecutor as being in the tens of thousands of dollars.
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> The fact that you repeated the distillation process some 10 times and that you were educating Mr Munston (sic) in the process indicates to me a very serious intention for this to be an ongoing process."

The factual errors alleged by counsel for the applicant

[15] Counsel for the applicant asserted that there were five facts in dispute. The first of these was whether the applicant supplied powder to anyone at the Outrigger Hotel in Cairns. The supply of the powder to be made up into tablets was not a matter contested before the primary judge and he was thus entitled to act on the schedule of facts. The applicant is bound by the way his counsel conducted his case at first instance. In this regard, Gleeson CJ said in *Crampton v The Queen*:[2]

> "[17] Thirdly, it is usually difficult, and frequently impossible, for a court of appeal to know why trial counsel did, or failed to do, something in the conduct of the case. Decisions as to the conduct of a trial are often based upon confidential information, and an appreciation of tactical considerations, that may never be available to an appellate court. The material upon which a judge, either at trial or on appeal, may form an opinion as to the wisdom of a course taken by counsel can be dangerously inadequate, and, when it is, the judge may have no way of knowing that. Ordinarily, a barrister knows more about the strengths and weaknesses of his or her client's position than will appear to a judge, whose knowledge of the case is largely confined to the evidence.

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2 (2000) 206 CLR 161 at 173.

> [18] Fourthly, as a general rule, litigants are bound by the conduct of their counsel. This principle, which is an aspect of the adversarial system, forms part of the practical content of the idea of justice as applied to the outcome of a particular case. For that reason, courts have been cautious in expounding the circumstances in which an appellant will be permitted to blame trial counsel for what is said to be a miscarriage of justice." (footnotes deleted)

[16] There does not appear to be a dispute about the second fact alleged to be in dispute. It is asserted that the number of pills the applicant gave to Muston was part of the 6,000 mentioned earlier, not in addition thereto. There is no suggestion that the primary judge acted on a different basis.

[17] The third matter relied on is that, according to counsel for the applicant, Muston, not the applicant, placed the order for $9,000 worth of chemicals and apparatuses. The schedule of facts alleges that the ordering and purchasing was by Muston and the applicant. The sentencing judge in fact found that the applicant advised Muston as to what was to be purchased and set up the laboratory, but that Muston "was the person who directly purchased the equipment". Counsel for the applicant appeared to abandon the contention by defence counsel that only an outlay of $70 was proved. The matter of substance for sentencing purposes was whether a laboratory was set up and used, for what purposes, and to what extent. The cost of the enterprise was of peripheral relevance. The applicant's complaint is unjustified.

[18] The fourth matter alleged is that there was no evidence before the primary judge of the payment of $15,000 into the applicant's bank account. The payment of $15,000 was not a matter referred to in the schedule of facts or relied on by the primary judge and it is not clear what payment was being referred to by counsel for the applicant. There was no elaboration in that regard in counsel's address. If the reference is to the moneys paid and owing in respect of the supply of powder, there was no issue about that at first instance.

[19] The final submission was that there was no evidence that the applicant produced pills from the pill press, other than those for which he was sentenced in New South Wales. The applicant was sentenced in New South Wales on the basis that he intended to manufacture no less than 125 grams. No manufactured drugs were discovered by the investigating police officers in New South Wales. The charge under consideration in this appeal is trafficking, not production. But, in any event, the primary judge acted on the basis that the tablets sold in 2002 and 2003 were made in the applicant's New South Wales laboratory.

[20] Counsel for the applicant also sought to argue that some of the submissions made by defence counsel before the primary judge were "completely false", i.e., not based on fact. It is not established, or even submitted from the bar table, that the factual matters put forward by defence counsel were not based on instructions. Certainly there was no attempt before this Court to swear to what is alleged to be the true facts.

Was the applicant sentenced on the correct factual basis?

[21] The activities which constitute the applicant's trafficking activities consist of: the supply of MDMA powder to Muston for a consideration of $15,000 in about May 2001; the obtaining of the pill press, the setting up of the laboratory and the

production of approximately 6,000 pills; the supplying of approximately 6,000 pills to Muston in 2002 and 2003; Muston's payment of $42,500 to the applicant; and Muston's debt of $70,000 to the applicant arising out of the supply of pills.

[22] The contention by counsel for the applicant that conduct in New South Wales cannot provide evidence of the conducting of a business of trafficking in Queensland is contrary to authority.[3] It must be doubted, however, that the activities in establishing the laboratory and producing isosafrole with a view to the manufacture and supply of MDMA tablets, constituted trafficking in MDMA. There is no evidence that there was any supply to Muston of the tablets manufactured in New South Wales after early 2003. The applicant was in Thailand between 28 December 2002 and 26 March 2004. The only drug related activity shown to be engaged in by the applicant after his return to Australia was his preparation for the manufacture and supply of MDMA from about May 2004 to February 2005.

[23] Counsel for the respondent argued that the evidence disclosed the existence of a business carried on by both Muston and the applicant which did not cease during the alleged trafficking period. The setting up of the Malanda laboratory and the production of isosafrole, it was contended, were acts in continuation of that business or were to be regarded as its resumption.

[24] Those submissions are inconsistent with the prosecution case which was that the applicant, financed by Muston in whole or in part, set up the laboratory in New South Wales to manufacture drugs for supply to Muston. It was alleged that he sold the powder and the tablets to Muston. There was no suggestion that he participated in the proceeds of Muston's re-sales or that there was to be any change in this modus operandi when MDMA was produced in Malanda.

[25] Even if it had been in contemplation that drugs would be produced in Malanda and sold in a joint enterprise between Muston and the applicant, it would have been doubtful that such an enterprise could be regarded, properly, as a continuation of an existing business or the resumption of a business which had been interrupted. As was mentioned earlier, there is no evidence that the applicant relevantly did more than receive moneys on account of past sales while in Thailand between 28 December 2002 and 26 March 2004. There is no evidence that Muston continued to sell MDMA after he disposed of the balance of the pills' manufacture in New South Wales. If he did so, there is no evidence that the sales were on behalf of a joint enterprise between Muston and the applicant. Assuming for the purposes of argument the existence of a joint enterprise in respect of the production in New South Wales, the evidence shows that it ended when the laboratory was seized and the tablets produced from it were sold. Assuming that after 26 March 2004 the applicant and Muston agreed on another joint enterprise, there are no facts which can be pointed to in order to establish that this was a continuation or resumption of an existing business rather than the setting up of a new business.

[26] In *R v Patena*[4], Pincus and Davies JJA gave the following explanation of the concept of carrying on the business of trafficking:

> "It should be noted, however, that the offence commonly referred to as trafficking is in truth one of carrying on the business of

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3 *R v Goulden* [1993] 2 Qd R 534 at 537 per Thomas J, with whose reasons Mackenzie and Byrne JJ agreed.

4 [1996] QCA 152.

> trafficking; see s. 5 of the *Drugs Misuse Act* 1986 ("the Act"). The reference to carrying on business in the section was discussed in Quaile [1988] 2 Qd.R. 103. There, Macrossan J., as his Honour then was, pointed out that a single action, not repeated, can constitute a trafficking and a business can be said to be carried on from the point when the first transaction performed in the conduct of that business has occurred. That conclusion can only be drawn, his Honour said, if the transaction is intended to be repeated (114). In Elhusseini [1988] 2 Qd.R. 442, it was said that carrying on a business for the purposes of s. 5 of the Act implies a degree of continuity (445), that carrying on a business usually involves a series of activities (451) and that evidence of intention with respect to future transactions is particularly relevant where a single sale is relied on by the prosecution (454).
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> These cases, and indeed the simple proposition that even the largest business must have a beginning, show that the offence of trafficking may be proved even though there has been only a small number of dealings - even one dealing can be enough if it is intended to be the first transaction in what is expected to be a continuing activity."

[27] In *R v Elhusseini*, McPherson J said:[5]

> "Carrying on business, particularly where the subject matter of that business is goods or services, usually involves a series of activities, such as advertising or promoting the 'product' by communicating with prospective buyers; setting up lines of supply; negotiating prices and terms of supply and payment; soliciting and receiving orders, arranging for places and times of delivery, and so on. Such activities are the res acta or res gestae of business and the indicia of its carrying on. Invariably they involve conversations because it is scarcely possible to carry on business without communication of some kind. Evidence of the content of such conversation is, however, admitted not to prove the truth of the matter communicated but rather to establish the fact that it was said or stated.
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> …
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> Viewed in this light it cannot be doubted that the activities engaged in by Ali amounted to 'carrying on the business' of trafficking in drugs at the places and dates mentioned. He first made direct contact with his prospective purchasers at Beenleigh when he met them at the service station. There he provided a sample of his wares as a guide to the quality of his product, suggesting arrangements for direct supply of a larger quantity which would eliminate the profit of the intermediate trafficker. He presented a method and system of communication with him or his organisation in Sydney. On the following morning he met them in Brisbane and agreed to supply a quantity of heroin for $100,000. Finally, he and Steve delivered the goods by bringing them from Sydney to Surfers Paradise and exchanging them for the money."

[28] Referring to a direction by the trial judge to the effect that the intention of the accused could be considered in determining whether activities by him in

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5 [1988] 2 Qd R 442 at 451.

Queensland constituted an isolated single transaction or the carrying on of a business, McPherson J said:[6]

> "A direction in that form is supported in law by the authority of a decision of the Court of Appeal in England in *Re Griffin; ex parte The Board of Trade* (1890) 60 L.J.Q.B. 235, where, with the concurrence of Lopes and Kay L.JJ. said, Lord Esher M.R. said at 237:
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> > 'I think that whether one or two transactions make a business depends upon the circumstances of each case. I take the test to be this: If an isolated transaction, which if repeated would be a transaction in a business, is proved to have been undertaken with the intent that it should be the first of several transactions, that is, with the intent of carrying on a business, then it is a first transaction in an existing business. The business exists from the time of the commencement of that transaction with the intent that it should be one of a series and if the business is one in which it is proper to keep books, then books ought to be kept from the commencement of the first transaction'.
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> This passage, or the first two sentences of it, was cited with approval by Morris C.J. in *Lucas v. Smith* [1948] Tas.S.R. 111, at 113, and by Ambrose J. himself in this Court in *R. v. Quaile* [1988] 2 Qd.R. 103. In the same case Macrossan J. said that he agreed with what Ambrose J. had stated 'upon the possibility that a business can be said to be carried on from the point when the first transaction performed in the conduct of that business has occurred'. It was submitted by Mr Nase on behalf of the Crown that in *R. v. Quaile* Macrossan J. had adopted the same view of the matter; but in the form and context in which his Honour's assent was expressed, I am not altogether persuaded that he was agreeing with the whole of the proposition laid down by Ambrose J. He may well have been saying no more than that, once the evidence establishes the existence of a business, the first transaction forming part of it may be regarded as its commencing point."

[29] In his reasons, Williams J sounded a note of caution about the use of evidence of intention in determining whether a single transaction amounted to the carrying on of a business. In that regard his Honour said:[7]

> "What constitutes carrying on the business of unlawfully trafficking in a dangerous drug is a question of fact, and in each case the question for the jury will be whether or not that fact has been established by the evidence. In all cases evidence of intention with respect to future drug transactions will be relevant, and that will be particularly so where the prosecution is relying upon a single sale as indicating the existence of such a business. But such intention will rarely be decisive, and preoccupation with the issue of intent could often create confusion in the minds of jurors. Take, for example, the case of a young man with no assets and no substantial contacts with drug suppliers who happens to be in the position to make a sale of a

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6 [1988] 2 Qd R 442 at 452 - 453.

7 [1988] 2 Qd R 442 at 454.

> small quantity of heroin at a profit. Such a person may very well have the intention at the time that sale is made of repeating the transaction whenever possible so as to make his fortune through selling dangerous drugs; but a jury could hardly, in those circumstances, conclude from that intention that he was in fact carrying on the business of trafficking in dangerous drugs at the time of making that first sale."

[30] Plainly, after his return to Australia, the applicant was engaged in activities preparatory to the manufacture and sale by him of MDMA tablets. It may be that by acquiring laboratory equipment and the raw materials necessary to produce the isosafrole, and by producing it in a quantity sufficient to enable the manufacture of a commercial quantity of MDMA, the applicant had commenced carrying on business. I am not persuaded, however, that if this is right, the business commenced was that "of unlawfully trafficking in" MDMA. Where, as is pointed out in *R v Patena*, the accused has sold a drug with the intention that there be further such transactions, his activities prior to the first transaction can be taken into account in order to determine whether a business is being carried on. In such a case, an essential attribute of a business of unlawful trafficking exists, namely a dealing with the drug alleged to have been unlawfully trafficked. I am fortified in my conclusion by the inability of counsel for the respondent to point to any case in which it has been held that a person has trafficked in a dangerous drug by doing things preparatory to the manufacture of the drug with the intention of selling it. It is unlikely that any such case exists as the obvious offence to charge would be production. The definition of "produce" in s 4 of *Drugs Misuse Act* 1986 (Qld) encompasses acts preparatory to or for the purpose of preparing or producing a drug.

[31] It is apparent from the passage from the sentencing judge's reasons quoted above that the setting up of the laboratory in Malanda, and the activities directed towards the production of MDMA, played a substantial role in his Honour's assessment of the overall criminality of the applicant's conduct. It seems likely that more importance was attached by his Honour to these activities, which he observed were likely to generate profits of tens of thousands of dollars, than to the applicant's relatively modest activities in 2001, 2002 and 2003.

[32] It is therefore apparent that the exercise of the sentencing discretion miscarried and needs to be re-exercised by this Court. One matter which requires particular consideration in this regard is the six year sentence imposed in February 2006 for manufacturing not less than a commercial quantity of ecstasy.

[33] The primary judge observed that the applicant's offending behaviour in New South Wales "was all part and parcel of the bigger picture of [his] trafficking." He took those matters into account by reducing a notional head sentence of 12 to 13 years imprisonment by four and a half years (the time spent in prison by the applicant since his arrest on 17 February 2005), to arrive at a sentence of nine and a half years. This was also said to take into account the applicant's plea of guilty, his health problems, which would make his term of imprisonment less easy to bear, his cooperation with authorities, and the fact that he was in protective custody. If his Honour had in fact deducted four and a half years from 12 to 13 years as he said he was doing, the sentence imposed would have been between seven and a half years and eight and a half years.

Comparable sentences

[34] The authorities relied on by counsel for the respondent to support the sentence imposed on the applicant were all cases, with the exception of *R v Bradforth*, in which the offending conduct was substantially more serious than that of the applicant. In *R v Bradforth*,[8] the 26 year old applicant, with no previous drug-related convictions, was sentenced after a plea of guilty to 12 years imprisonment, attracting a serious violent offence declaration, for trafficking in cocaine over a 12 month period. There was evidence that the applicant had been selling drugs on the Gold Coast for 12 months and had given up his occupation as a plasterer to concentrate on his trafficking business and to establish another business of selling "adult products". When apprehended, the applicant had five mobile phones in his possession and in a bag belonging to him police found 1,386 tablets of MDMA containing 62.086 grams of the drug, 63.398 grams of cocaine and 7.379 grams of methylamphetamine. The drugs, separated by type, were in 82 clip seal plastic bags. The tablets had a street value of approximately $48,000. It was held that the 12 year sentence was manifestly excessive and a sentence of 10 years was substituted for it in order to give appropriate recognition to the early plea of guilty and the nine months spent by the applicant in pre-sentence custody.

[35] In *R v Nabhan*; *R v Kostopoulos*,[9] the applicant, Nabhan, was 34 years of age and had a minor drug-related criminal history. Kostopoulos was 41 years of age with a more substantial drug-related criminal history, for which he had served time in prison. Kostopoulos established what was described as a "sophisticated and well resourced" "trafficking enterprise" during the balance of a suspended sentence imposed for possession of dangerous drugs. The learned sentencing judge described Kostopoulos's trafficking operation as being at "the highest level of drug trafficking". He sold over 19,000 ecstasy tablets and at least two kilograms of speed over a period of about three months. A third kilogram of speed with an estimated street value of many millions of dollars was seized by police. A conservative estimate of the completed sales was in excess of $800,000.

[36] Nabhan was Kostopoulos's principal supplier of drugs and although "in a sense subordinate to Kostopoulos" was described by the sentencing judge as a "major player". During his trafficking period he independently arranged the purchase of, inter alia, five kilograms of cocaine and 14,000 ecstasy tablets. Nabhan's and Kostopoulos's sentences of 13 years and 15 years respectively for the trafficking offences were not interfered with on appeal.

[37] In *R v Cannon*,[10] the 47 year old appellant with a limited criminal history was sentenced to twelve years and eight months imprisonment for trafficking in methylamphetamine over a seven year period. 2.323 grams of pure methylamphetamine and 55.849 grams of pseudoephedrine were found in the appellant's possession when arrested. The evidence revealed that the appellant had received about a million dollars from unknown sources between January 1999 and January 2003.

[38] The sentencing judge concluded that this indicated the scale of the appellant's trafficking activities over that period. The sentencing judge concluded that the ephedrine, to which the appellant had access "in the period 1999 to 2001 … would have [enabled the appellant] to produce about 7.8 kilograms of

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8 [2003] QCA 183.
9 [2007] QCA 266.
10 [2007] QCA 205.

methylamphetamine." Methylamphetamine became a Schedule 1 drug in September 2001, during the trafficking period. The sentence was not disturbed on appeal.

[39] The applicants in *R v Jenkins, Rollason & Brophy*[11] were involved in a drug operation described by the prosecutor in the sentencing hearing as "the largest ecstasy trafficking case to come before the Queensland Courts". It was intended, in the course of the operation, to distribute some half a million ecstasy tablets on the Gold Coast. Tablets seized by police in one raid weighed approximately 20 kg and contained about 9.6 kg of pure MDMA. Another quantity of tablets seized weighed 68.285 kg and contained 36.4 kg of pure MDMA. The wholesale value of the tablets was to the order of eight million dollars and the retail value was estimated as being at least 16 million dollars. Brophy was found to be the head of the Australian business with authority over the distribution process. Rollason was the "sales manager" in the business and was answerable to Brophy. He supervised and reported on the sales of the tablets to Brophy. Jenkins was found to be "essential to the business [with] a network of contacts which were exploited in the sales and attempted sales of stock …" The deals that he did, or attempted to do, involved between a thousand and ten thousand tablets per deal.

[40] Brophy's application for leave to appeal against a sentence of 17 years imprisonment was refused, as was Jenkins's application for leave to appeal against his sentence of 10 years imprisonment. Rollason's sentence of 12 years was made cumulative on an existing sentence resulting in a total term of 22 years imprisonment. The Court concluded that the imposition of the 12 year sentence offended the totality principle discussed in *Mill v The Queen*.[12] Having regard to the totality principle, the crushing nature of the cumulative sentences, and a late guilty plea, the sentence of 12 years was set aside and a sentence of 11 years imprisonment was substituted.

[41] The 25 year old applicant in *R v Elizalde*[13] was refused leave to appeal against a sentence of nine years imprisonment imposed after a plea of guilty to a count of trafficking in MDMA, methylamphetamine and cocaine over a period of about four months. The sentencing judge described the applicant as a large scale drug dealer, stating:

> "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."

[42] 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.

[43] The 40 year old applicant in *R v Raciti*[14] was sentenced to 11 years imprisonment after pleading guilty to trafficking in MDMA, methylamphetamine and cocaine over

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11 [2008] QCA 369.
12 (1988) 166 CLR 59.
13 [2006] QCA 330.
14 [2004] QCA 359.

a period of about four months. He was first arrested after purchasing 6,000 MDMA tablets for $117,000. He was released on bail and arrested about six weeks later when engaged in a transaction involving approximately 5,000 MDMA tablets with a purchase price of $50,000.

[44] The applicant, as manufacturer and initial wholesale supplier, was at the top of the distribution chain. In that respect his criminality was arguably greater than that of the applicants in *Bradforth*, *Elizalde* and *Raciti*, but in my view, when regard is had to the sentences in these cases and to the sentences imposed for trafficking on a massive scale, the appropriate sentencing range after a plea of guilty was 10 to 12 years imprisonment.

[45] The sentencing judge said that he was deducting four and a half years on account of time spent in custody from his starting point of 12 to 13 years to take the New South Wales offence and sentence into account. The learned prosecutor at first instance and counsel for the respondent on appeal took no issue with this approach. I would therefore deduct four and a half years from 11 years to arrive at a term of six and a half years.

[46] The applicant was 51 when sentenced. He had a criminal history which included convictions for relatively minor drug offences in 1990 and the conviction in 2006 for which the six year sentence was imposed.

[47] As well as pleading guilty, the applicant cooperated with authorities and, as a result, has spent a lengthy period in protective custody. His wife and child reside in Thailand and the balance of his family live in New South Wales. As the sentencing judge acknowledged in his sentencing remarks, the applicant also has health problems which will also make his imprisonment more onerous than usual.

[48] Taking these matters into account, I would:

(a) Order that the application for leave to appeal be allowed;

(b) Order that the appeal be allowed and the sentence imposed on 5 August 2009 be set aside;

(c) Order that the applicant be sentenced to a term of imprisonment of six and a half years;

(d) Direct that the applicant be considered eligible for parole after having served two and a half years of such term of imprisonment; and

(e) Order that the sentence be served concurrently with the term of imprisonment imposed by the District Court of New South Wales on 24 January 2006.

[49] **A LYONS J:** I agree with the reasons of Muir JA and with the order he proposes.