HIGH COURT OF AUSTRALIA

GLEESON CJ,
HAYNE, HEYDON, CRENNAN AND KIEFEL JJ

STEVEN ADAMS APPELLANT

AND

THE QUEEN RESPONDENT

Adams v The Queen [2008] HCA 15
23 April 2008
M121/2007

ORDER

Appeal dismissed.

On appeal from the Supreme Court of Victoria

Representation

L C Carter with C B Boyce for the appellant (instructed by Leanne Warren & Associates)

W J Abraham QC with R R Davis for the respondent (instructed by Director of Public Prosecutions (Cth))

CATCHWORDS

Adams v The Queen

Criminal law – Sentencing – Federal offences – Appellant convicted of possessing a "commercial quantity" of the narcotic MDMA (ecstasy) – *Customs Act* 1901 (Cth) fixed the commercial quantities of certain narcotics and imposed maximum penalties that did not distinguish between the narcotics – Whether appellant should have been sentenced on the basis that MDMA was less harmful than heroin.

Practice and procedure – Appellant did not demonstrate factual assertion that MDMA was less harmful than heroin – Whether controversy "moot" or "academic".

Words and phrases – "commercial quantity", "moot", "trafficable quantity".

Customs Act 1901 (Cth), ss 233B, 235.

1 GLEESON CJ, HAYNE, CRENNAN AND KIEFEL JJ. Following a trial by jury in the County Court of Victoria, the appellant was convicted of possessing, on 9 January 2004, prohibited imports contrary to s 233B of the *Customs Act* 1901 (Cth) ("the Customs Act"). The prohibited imports in question were 19.927 kilograms of a mixture that contained 8.916 kilograms of MDMA, commonly known as ecstasy. The appellant, a United States citizen temporarily in Australia, had been charged following the interception by the authorities of containers shipped to Australia from overseas.

2 The Customs Act adopted (and the *Criminal Code* (Cth) as amended since the relevant time adopts) a quantity-based penalty regime, fixing "trafficable" and "commercial" quantities of certain drugs, distinguishing between those drugs in setting such trafficable and commercial quantities, but otherwise making no distinction between them in terms of maximum penalties. Under s 235 of the Customs Act, offences involving a trafficable quantity of narcotic goods carry a maximum penalty of imprisonment for 25 years and/or a fine not exceeding $500,000, and offences involving a commercial quantity of such goods carry a maximum penalty of imprisonment for life and/or a fine not exceeding $750,000[1]. For example, the trafficable quantity of cocaine was 2 grams; that of heroin was 2 grams; that of MDMA was 0.5 grams. The commercial quantity of cocaine was 2 kilograms; that of heroin was 1.5 kilograms; that of MDMA was 0.5 kilograms.

3 This legislative approach, which recognises the financial rewards available from dealing in illicit drugs, thus differentiates between various narcotic substances in designating the trafficable and commercial quantities, but applies the same penalty regime to the quantities so designated[2]. It may be contrasted with legislation in New Zealand[3] and Canada[4], which grades drugs according to a legislative perception of their harmfulness, and prescribes penalties based on harmfulness rather than quantities. (The Court was informed

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1 The amounts are as set out in the respondent's written submissions. The legislation is expressed in terms of penalty units, the value of which changes from time to time.

2 See *Zeccola* (1983) 11 A Crim R 192. An example of a similar State-based penalty regime is the Victorian legislation considered in *R v Pidoto and O'Dea* (2006) 14 VR 269.

3 *Misuse of Drugs Act* 1975 (NZ).

4 *Controlled Drugs and Substances Act* 1996 (Can).

that in each of those jurisdictions MDMA falls within the most serious class of drugs.)

4 Because of the limited nature of the issue raised in this appeal, the circumstances of the importation in which the appellant was involved, and his personal background, are presently irrelevant. It is sufficient to say that, as appears from the above figures, the quantity of MDMA in the appellant's possession substantially exceeded the amount required for a commercial quantity. The appellant was sentenced to imprisonment for nine years from the date of sentence (having been in custody for 260 days), and was made eligible for parole after seven years.

5 The argument for the appellant is based on the second sentence of the following paragraph in the trial judge's remarks on sentence:

> "The serious nature of your offending is indicated by the maximum penalty of life imprisonment that has been prescribed by the legislature. In general terms the courts equate ecstasy, in terms of sentencing, as being similar to heroin. Your role in relation to this very large quantity of drugs was a significant one. Your reward was to be more than the free holiday trip [from the United States of America] that you referred to in evidence. The deterrence of you and more importantly, of others who might be tempted to be involved in the drug trade, is the primary sentencing consideration."

6 The second sentence was an observation that, generally speaking, importing or possessing ecstasy is taken as seriously for sentencing purposes as importing or possessing heroin. Since the maximum penalty prescribed by the Customs Act for possessing a commercial quantity of both was life imprisonment, and since the appellant possessed many times the commercial quantity of MDMA, the observation, in the context of the present case, was unexceptionable. Yet the appellant contends that it represented a serious error. The appellant sought unsuccessfully to persuade the Court of Appeal of Victoria[5], and seeks to persuade this Court, that he should have been sentenced, and should now be re-sentenced, in the words of his counsel, "on the basis that the narcotic he was found in possession of on 9 January 2004, MDMA, or ecstasy, is less harmful to users and to society than heroin."

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5 *R v Adams* [2007] VSCA 37.

7 That proposition invites deconstruction. As a matter of law, the appellant was to be sentenced in accordance with the provisions of the Customs Act referred to above, and of the *Crimes Act* 1914 (Cth), Pt IB, especially s 16A. When invited to identify the aspect of s 16A that was directly relevant to his argument, counsel referred to s 16A(2)(a), which requires the sentencing judge to take account of the nature and circumstances of the offence. It was, of course, common ground that in a given case s 16A(2)(e) will require a judge to take account of the injury, loss or damage resulting from an offence, but, in this case, which involved an interception of a drug importation before any of the product reached consumers, there was no such injury or damage.

8 The most obvious feature of the nature and circumstances of the case of present relevance is that the prohibited drug was MDMA, and that the appellant was in possession of the quantity mentioned above. The relationship of that quantity to the commercial quantity was a matter of mathematical calculation. The appellant, however, argued for a further refinement based upon the fact that the drug was not heroin.

9 The appellant's entire argument is based on the factual assertion that "MDMA ... is less harmful to users and to society than heroin." The quantities in contemplation for the purposes of that comparison are unspecified. How much MDMA is being compared with how much heroin? Other aspects of the meaning of the proposition are equally unclear. Harm to users and society is a protean concept. Counsel had understandable difficulty explaining exactly what the proposition means, let alone demonstrating, by evidence available to the sentencing judge or matters of which a court could take judicial notice, that it was true. What kinds of user, and what kinds of harm to society, are under consideration? The social evils of trading in illicit drugs extend far beyond the physical consequences to individual consumers. As the Victorian Court of Appeal pointed out in *R v Pidoto and O'Dea*[6], "questions arise as to whether the perniciousness of a substance is to be assessed by reference to the potential consequences of its ingestion for the user, or its effect upon the user's behaviour and social interactions, or the overall social and economic costs to the community." Furthermore, in relation to some of these matters, scientific knowledge changes, and opinions differ, over time. Generalisations which seek to differentiate between the evils of the illegal trade in heroin and MDMA are to be approached with caution, and in the present case are not sustained by evidence, or material of which judicial notice can be taken.

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6 (2006) 14 VR 269 at 282 [59].

10 An equally serious difficulty for the appellant's argument is in seeking to reconcile it with the scheme of the Customs Act in relation to penalties. In fixing the trafficable and commercial quantities of heroin and MDMA respectively, and applying the same maximum penalties to the quantities so fixed, Parliament has made its own judgment as to an appropriate penal response to involvement in the trade in illicit drugs. The idea that sentencing judges, in the application of that quantity-based system, should apply a judicially constructed harm-based gradation of penalties (quite apart from the difficulty of establishing a suitable factual foundation for such an approach) cuts across the legislative scheme. This problem was recognised by the Court of Criminal Appeal of New South Wales in *R v Poon*[7]. A similar problem in relation to Victorian legislation underlay the decision in *Pidoto and O'Dea* noted above.

11 Of course, the fixing of a maximum penalty is not the end of the matter, as was emphasised in *Ibbs v The Queen*[8]. But there is nothing in the Customs Act, or the evidence, or the demonstrated state of available knowledge or opinion, which requires or permits a court to sentence on the basis that possessing a commercial quantity of MDMA is in some way less anti-social than possessing a commercial quantity of heroin. Furthermore, the sentencing judge's primary consideration was deterrence. That is not said to involve error. Why there should be a difference in that respect between heroin and MDMA was not explained.

12 The appellant has failed to demonstrate either a legal or a factual foundation for the contention that he should have been sentenced on the basis that MDMA is less harmful than heroin.

13 The appeal should be dismissed.

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7 (2003) 56 NSWLR 284 at 286 [3]-[5] and 293-295 [34]-[43].

8 (1987) 163 CLR 447; [1987] HCA 46.

14 HEYDON J. The appellant contended that he had been sentenced on a wrong basis, namely, that MDMA was not less harmful than heroin. The appellant's primary arguments were arguments of statutory construction but he accepted that they were bound up with a factual proposition – that MDMA is "less harmful ... than heroin".

15 Even if the difficulties analysed in the joint judgment in relation to the meaning of that factual proposition[9] are put aside, the appellant did not demonstrate that the factual proposition was in any sense true. He did not point to any evidence before the sentencing judge suggesting that the factual proposition was true. He did not identify any evidence as to its truth which he was in a position to call before the court having the responsibility of re-sentencing him. He relied upon a statement by the Supreme Court of the Australian Capital Territory[10] that there was "no justification on the evidence ... for treating MDMA as being more harmful than cannabis", but that was a tentative statement of what the evidence before that Court did not establish, as opposed to what it did establish, and it was not directed to a comparison between MDMA and heroin. He also relied on a statement by the Western Australian Court of Criminal Appeal that MDMA was "less serious than LSD, cocaine or heroin"[11]. That statement was based on evidence given by an expert before the sentencing judge in that case, and on information set out in literature provided by the Crown on the hearing of the application for leave to appeal against sentence. The evidence was not described, although the submissions of counsel based on the literature, assuming it to have been admissible, were quoted. A finding of fact by one court does not bind another in unrelated proceedings. It does not appear open to take judicial notice of the proposition stated by the Western Australian Court of Criminal Appeal: it was made nearly 20 years ago, and the field is likely to be one in which, unfortunately, human experience has become much more extensive, although not necessarily decisive. Hence it is not a proposition of which judicial notice could be taken, at least without further inquiry. That is equally true of cases which the appellant submitted showed the courts resisting acceptance of the contrary of the appellant's proposition. The appellant also relied on the contention that while judicial notice had been taken of the harmfulness of heroin, there were no equivalent instances of judicial notice being taken about the harmfulness of MDMA. This is not a legitimate mode of reasoning, in the absence of demonstration (which did not take place) that the courts taking judicial notice about heroin had in mind a comparison with MDMA; even if that had been demonstrated, this reasoning from silence would be highly questionable.

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9 At [9].

10 *R v Crocker* (1992) 107 FLR 63 at 68.

11 *R v Robertson* (1989) 44 A Crim R 224 at 230.

16 It follows that the appellant did not demonstrate either that MDMA was "less harmful than heroin", or that there was any chance that the re-sentencing court would accept that proposition. The appellant was thus not able to show that if the appeal were allowed there would be any difference in the appellant's sentence.

17 Counsel for the appellant put forward learned and forceful submissions; but that is not enough to make the controversy about them anything other than moot and academic. The appellant's argument invited the Court to answer a question which was hypothetical only. It solicited an advisory opinion. The appellant has no interest in the outcome of his construction arguments, because he will not gain any advantage from their success beyond "righting a wrong, upholding a principle or winning a contest"[12] and he will suffer no disadvantage from their failure beyond, perhaps, "a sense of grievance"[13]. The appellant raised a controversy, but he failed to allege "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination"[14]. Without that sharpening, it is inappropriate to seek to resolve the issues of statutory construction raised by the appellant. The appellant's contentions on those issues are irrelevant to the outcome, since even if the contentions were successful, they could not assist him unless he had some prospect of pointing to material which might support the factual proposition he relied on. He did not demonstrate that there was any prospect of that kind.

18 In those circumstances the grant of special leave should be revoked.

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12 If MDMA is not "less harmful ... than heroin", the order of the sentencing judge did the appellant no wrong and contravened no sentencing principle.

13 *Australian Conservation Foundation v The Commonwealth* (1980) 146 CLR 493 at 530 per Gibbs J.

14 *Baker v Carr* 369 US 186 at 204 (1962), approved in *Robinson v Western Australian Museum* (1977) 138 CLR 283 at 344-345 per Murphy J; [1977] HCA 46, *Australian Conservation Foundation v The Commonwealth* (1980) 146 CLR 493 at 530 per Gibbs J and *Mellifont v Attorney-General (Q)* (1991) 173 CLR 289 at 318 per Brennan J; [1991] HCA 53.

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