

# Supreme Court Notes

by Anita Del Medico

**FORFEITURE**—application for forfeiture of "tainted property" — "hardship" — effect of forfeiture order on registered mortgagee — effect of forfeiture on third parties — Ss 3, 5 (1) (b) (ii) and 7 Crimes (Forfeiture of Proceeds Act).

## DPP v Helps & Ottens

18.04.94 Martin CJ

Applications were made by the DPP pursuant to s 5 of the Crimes (Forfeiture of Proceeds) Act — (the "Act") for forfeiture orders in respect of certain property alleged to be "tainted property" (s 3 Act), it being used in connection with the commission of an offence against a law of the Territory that may be prosecuted on indictment. The offence in question was that of cultivation of a commercial quantity of a dangerous drug, namely cannabis, contrary to the Misuse of Drugs Act (25 years, maximum sentence). Both Helps and Ottens had pleaded guilty to this offence in relation to the same crop.

As to Helps, the forfeiture application was made in respect of a Ford motor vehicle, valued at \$11,000. As to Ottens, the application was in respect of:

a) a pastoral lease held by a company from the Crown in right of the NT, which pastoral lease was occupied by Ottens and his son;

b) a tractor;

c) a front-end loader;

d) a quantity of fertiliser;

e) \$7000.00.

### HELD,

1. The Helps' motor vehicle, having been used to convey the persons largely responsible for setting up the plantation to the site, was tainted property.

2. The motor vehicle's use in connection with the offence was minor; it had been acquired and ordinarily used

for innocent purposes. Taking into consideration the fact that Helps' mentally incapacitated adult daughter, for whose benefit the motor vehicle might be used by her grandparents (who were otherwise without a vehicle), may be reasonably likely to suffer hardship if an order for forfeiture were made, in the exercise of discretion, application for forfeiture refused.

3. The illicit crop was cultivated and watered from the land comprised in the lease and the land was therefore tainted property. The land's connection with the offence was significant. The land was acquired and developed and ordinarily used over many years for innocent purposes. It could not be forfeited to the Territory as it already owned it. All that could be forfeited was the interest in it granted by the Territory.

What needed to be shown was that the lessee company's interest in the pastoral lease was tainted, for that was all that could be forfeited. Here there was a connection between the lease and the use of the land in or in connection with the commission of the offence by reason of the circumstance that it was the lease which gave the company (of which Ottens and his wife were sole shareholders and directors) and those permitted by it, to enter the land and use it. Ottens, as occupier of the land, with the consent of the lessee company, enabled the commission of the offence. The leasehold interest was therefore tainted property.

4. Hardship may reasonably be likely to arise on the part of the company, beyond that caused by the forfeiture of the lease itself, arising from reduced price upon sale by a bank mortgagee of the lease and thus not reducing the debt of the company to the level which might be expected if the sale was at fair market value. Hardship may reasonably be likely to arise on the part of Ottens and his

wife, who was entirely innocent of the offence, by reason of the reduction in the value of their shares — both in the lessee company and an operating company — and increased liability on personal guarantees for loans. In the exercise of discretion and further taking into account the fact that the proportion of the land used in connection with the offence was "infinitesimal", application for forfeiture refused.

5. In relation to the tractor, on the facts, it was not tainted property.

6. In relation to the front-end loader, it was tainted property, having been used to carry fertiliser to the crop area. But as it was used in only a minor way, and was ordinarily used for innocent purposes, in the exercise of discretion, application for forfeiture refused.

7. On the facts, the fertiliser was not shown to be tainted property. Application refused.

8. The \$7000.00 cash was property derived from the cultivation of cannabis and was ordered to be forfeited to the Territory.

*Application for forfeiture pursuant to the Crimes (Forfeiture of Proceeds) Act.*

J Adams, instructed by the ODPP, for the applicant. S Brown, instructed by NTLAC, for the first respondent. J Waters, instructed by Waters James McCormack, for the second respondent.

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**APPEAL — CRIMINAL LAW — STATUTORY INTERPRETATION** — whether intoxication may be considered in mitigation of sentence for offence of dangerous act where it is not charged as an aggravating circumstance — ss 154, (1), (4) and 305 (4) Criminal Code.

### **Namandali v R**

1.07.94 CCA: Kearney, Angel and Priestley JJ.

In this application, the CCA was called upon to determine whether the fact that an accused was under the influence of liquor could be taken into account as a mitigating factor when sentencing for an offence under s 154 (1) of the Criminal Code.

In charging the applicant ("A") with s 154 (1), the Crown did not allege, as a circumstance of aggravation, that he had been under the influence of liquor at the time of the commission of the offence; the only circumstance of aggravation alleged was that he had caused the victim grievous harm [s 154 (2)].

On the facts, A had been drinking prior to the commission of the offence with the victim; he brought a quantity of liquor with him when they returned home. He drank some of it and then fell asleep.

When he awoke, he became angry upon discovering all the alcohol was gone. He attacked the victim with a knife, slashing her arm and stabbing her in the back, thereby puncturing her lung.

In the course of submissions on sentence at the hearing of the guilty plea, defence counsel argued that as it was clear that A was under the influence of liquor at the time the offence was committed, the sentencing judge was permitted to take this fact into account as a mitigating factor.

The trial judge declined to do so, although he did take into account, by way of mitigation, that A was an alcoholic now seeking a cure.

In rejecting defence counsel's submission, his Honour gave the following reasons:

- The fact of intoxication is a circumstance of aggravation which cannot be converted into a circumstance

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of mitigation simply because the Crown has not alleged it.

- The policy of s 154 is to cover cases where the Crown cannot prove a crime requiring intent or foresight. It would be contrary to that policy, if the lack of intent or foresight were due to intoxication, for a sentencing judge to treat it as a mitigating factor.

**HELD**, per curiam, dismissing the application for leave to appeal;

The applicant's submission, in essence, that a sentencer should ignore the existence of s 154 (4) for the purpose of sentencing, when the Crown does not seek to rely on it pursuant to s 305 (4) of the Criminal Code, is rejected.

In construing s 154, due regard must be had to all of its provisions. It is clear from s 154 (4) that the Legis-

lative Assembly intended that in relation to offences charged under s 154 (1), the fact that an accused at the time of doing the act is "under the influence of an intoxicating substance" is to be treated solely as a circumstance of aggravation.

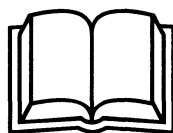
It is a corollary from s 154 (4) that the legislature intended that a person guilty of an offence under s 154 (1) cannot rely on his intoxication as a factor mitigating sentence.

As was pointed out by the High Court in *Baumer v R* (1988) 35 A Crim R 340 @ 344, "it would not be surprising if in many cases under s 154, there being no necessity to prove an intention to cause a specific result, the influence of an intoxicating substance was the only explanation for the commission of the offence".

*Application for leave to appeal against sentence.*

WR Somerville, instructed by NAALAS, for the applicant. RSL Wild QC, instructed by the ODPP, for the respondent.

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## Law Council conference

The General Practice Section of the Law Council of Australia has organised a three-day conference at the Gold Coast from August 24.

The first day will be a property lawyers' conference, including a forum on native title. This panel includes the Native Title Tribunal president Justice Robert French, and Father Frank Brennan.

General practice issues will feature on the second day.

The final day comprises four group sessions. Of particular interest to Territory practitioners will be sessions on tendering for legal work, the application of legal technology and two sessions on "Delivering Quality Service". Practitioners can register for one, two or three days. For details call (06) 247 3788.