CITATION: *Commissioner of police v Wendy Dorothy Hopkins & Mark Christopher Farrow & John Adrian Hopkins & Jodie Leigh Farrow & Francisco Pires Goncalves & Deborah Anne Toy Goncalves* [2004] NTMC 078

PARTIES:	COMMISSIONER OF POLICE
	v
	WENDY DOROTHT HOPKINS
	AND
	MARK CHRISTOPHER FARROW
	AND
	JOHN ADRIAN HOPKINS
	AND
	JODIE LEIGH FARROW
	AND
	FRANCISCO PIRES GONCALVES
	AND
	DEBORAH ANNE TOY GONCALVES
TITLE OF COURT:	Local Court
JURISDICTION:	Criminal Property Forfeiture
FILE NO(s):	20313661
DELIVERED ON:	12 October 2004
DELIVERED AT:	Darwin
HEARING DATE(s):	6 September 2004
JUDGMENT OF:	JENNY BLOKLAND SM

CATCHWORDS:

CRIMINAL PROPERTY FORFEITURE – STAY APPLICATION – EXISTENCE OF DISCRETION TO STAY

The Local Court Act (NT) s.28
Criminal Proceeds Confiscation Act NT s.93
Australian Crime Commission Establishment Act (Cth)
Criminal Assets Recovery Act (NSW)
Criminal Property Confiscation Act (WA) s.104

State of Queensland v Shaw [2003] QSC 436
State of Queensland v Henderson (S 1246 of 2003, 16 May 2003)
State of Queensland v Bush [2003] QSC 375
A v Boulton [2004] FCAFC 101
New South Wales Crime Commission v Murchie and another [2000] NSWSC 592
State of Queensland v John William Henderson [transcript of proceedings, 16 May 2003]
Queensland v Cannon [2003] QSC 459
Mule v Western Australia [2002] 29 SRWA 95
Dyers v R [2002] 192 ALR 181

REPRESENTATION:

Counsel:

Respondent Applicant:	Ms Armitage
Applicant Respondent:	Mr Dalrymple

Solicitors:

Respondent Applicant:	Office of the Director of Public Prosecutions
Applicant Respondent:	Dalrymple and Associates

Judgment category classification:	A
Judgment ID number:	[2004] NTMC 078
Number of paragraphs:	22

IN THE LOCAL COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20313661

BETWEEN:

COMMISSIONER OF POLICE
Applicant

AND:

WENDY DOROTHY HOPKINS
1st Respondent

AND

MARK CHRISTOPHER FARROW
2nd Respondent

AND

JOHN ADRIAN HOPKINS
Objector

AND

JODIE LEIGH FARROW
Objector

AND

FRANCISCO PIRES GONCALVES
Objector

AND

DEBORAH ANNE TOY GONCALVES
Objector

REASONS FOR DECISION

(Delivered 12 October 2004)

JENNY BLOKLAND SM:

Background

1. This is an application for a stay of proceedings that were commenced under the *Criminal Property Forfeiture Act* and brought against the first and second respondents. The respondents bring this application. This ruling concerns only whether a discretion exists to order such a stay.

2. Mr Dalrymple acts for various of the respondents and objectors. A restraining order was made by the Court pursuant to the *Criminal Property Forfeiture Act* on 18 July 2003 in respect of cash amounts ($1078; $23000 and $11450) found as a result of a search by police of certain premises and persons on 19 October 2001. The basis of the order was an allegation that the cash was *crime derived* property, as is the appropriate term in the *Criminal Property Forfeiture Act*. As is the usual practice, the restraining order has been extended from time to time and is currently extended to 29 November 2004.

3. The affidavit of Sergeant Richard Short sworn on 16 July 2003, (that the original order was based on) reveals that various amounts of cannabis were found in different places in the premises at 29 Bauer Crescent, Karama. It is alleged the first and second respondents own the premises. Similarly the cash mentioned above was found in three different locations, including an amount of $10,780 on the person of the second respondent. The first and second respondents were jointly charged on information with three counts under the *Misuse of Drugs Act*, including a charge under s.6(1)(a) *Misuse of Drugs Act* that they did receive property, namely $45,230 obtained from the commission of an offence against s.5 *Misuse of Drugs Act*, knowing or believing it to have been so obtained: (Affidavit of David Rawdon

Dalrymple affirmed 22 March 2004 and Affidavit of Wendy Dorothy Hopkins sworn 21 August 2004).

4. In submissions before me, it is not in dispute that prior to committal for trial the information also charged Kylie Macaw, (who I am told is the daughter of the first respondent), with the same three offences. I was advised by counsel that at the commencement of the committal proceedings Kylie Macaw indicated to the court she would be pleading guilty to the charges and the committal did not proceed against her. Counsel advised that it was thought her matter may proceed by way of an *ex officio* indictment, however that process has not transpired.

5. Counsel further advised me, as is evident in the affidavit material filed, that after a five day committal the first respondent was not committed for trial on count three (receive property obtained from the commission of an offence against s.5 *Misuse of Drugs Act*, contrary to s.6 *Misuse of Drugs Act*) , but that subsequently she was indicted on that count in the Supreme Court. To proceed in that way is a matter within the discretion of the Office of the Director of Public Prosecutions: (*ss 299, 300 Criminal Code NT*).

6. The current indictment (signed 14 February 2003), a copy of which is annexed to Mr Dalrymple's affidavit affirmed 22 March 2004 jointly charges the first and second respondents with:

(1) Unlawfully supply cannabis contrary to s.5(1) and (2)(a) *Misuse of Drugs Act.*
(2) Unlawful possession of cannabis (commercial quantity – 786.23 grams) contrary to s.9(1) and (2)(d) of the *Misuse of Drugs Act*, and
(3) Possess property, namely $45,230 cash, obtained directly or indirectly from an offence against s.5, knowing or believing it to have been so obtained, contrary to s.6(1)(a) of the *Misuse of Drugs Act.*

7. I was advised by both Ms Armitage and Mr Dalrymple that the matter has been set for trial in the Supreme Court on 1 November 2004.

Arguments raised in favour of the existence of a discretion to stay proceedings.

8. Section 138 *Criminal Property Forfeiture Act* provides as follows:

> "Proceedings for an order or declaration under this *Act* are not to be stayed or adjourned for the purpose of awaiting the outcome of any criminal proceedings that have commenced or are to commence involving a person whose property is or may be affected by the proceedings under this *Act*".

9. At first blush the intention appears clear – the forfeiture proceedings cannot be stayed for the purpose of awaiting the outcome of criminal proceedings. In many matters brought under the *Criminal Property Forfeiture Act* in this Court, the initial restraining order and subsequent orders occur well before criminal proceedings have run their course or in many cases even before criminal proceedings have commenced.

10. The respondents, applicants in this application have asked this Court to focus on the words in the section: *for the purpose of awaiting the outcome of any criminal proceedings*. Essentially Mr Dalrymple's argument is that the section prohibits stays and adjournments when the intention of the parties is simply to allow the criminal proceedings to determine the issues. He argues that perhaps it covers the situation where the parties are not willing to do the work required for resolutions under the *Criminal Property Forfeiture Act*, alternatively a party may be seeking to avoid inconsistent verdicts or findings. Mr Dalrymple essentially argues that if the stay or adjournment is required on the facts of the case, (particularly here as an objection hearing is to take place), based on prejudice to a party who is defending both criminal proceedings and proceedings under the *Criminal Property Forfeiture Act*, the section does not prohibit a stay or adjournment. The section, he says, does not apply when there are good reasons beyond merely abiding the result of the criminal proceedings; he argues the wording of s.138 *Criminal Property Forfeiture Act* invites such an interpretation as it

prohibits only stays based on the one purpose; other purposes, he argues may ground a stay.

11. Simply put, he argues s.138 *Criminal Property Forfeiture Act* prohibits stays in a "default" sense. I should also note s.28A *Local Court Act(NT)* allows this Court, at any stage of a proceeding, *except where otherwise provided by this or any other Act*, to order a stay of the proceeding on the terms and conditions (if any) as it thinks fit. In my view, although s.28A *Local Court Act* provides the statutory power for this Court to grant stays, in this instance, it is subject to *s.138 Criminal Property Forfeiture Act*.

12. Mr Dalrymple relies on the reasoning in *State of Queensland v Shaw* [2003] QSC 436. In that case, His Honour Justice Mackenzie dealt with an application for a stay of proceedings brought under the *Criminal Proceeds Confiscation Act 2002* (Qld) until after summary charges were finally determined. The charges related to one count of possession of $11,340 reasonably suspected of being proceeds of an offence and one count of possession of property reasonably suspected of having been acquired with the proceeds of an offence. Justice Mackenzie referred to *Section 93* of the Queensland *Act*, similar in some respects to *s.138* of the Northern Territory Act. Section 93 *Criminal Proceeds Confiscation Act 2002* reads as follows:

93 No stay of proceedings

> The fact that a criminal proceeding has been started against a person, whether or not under this *Act*, is not a ground on which the Supreme Court may stay a proceeding against or in relation to the person under this chapter that is not a criminal proceeding".

13. His Honour summarised various single judge decisions in Queensland concerning the operation of *s.93*. He said:

> "Section 93 has not been subject to appellate consideration in Queensland. At Trial Division level, in State of Queensland v Henderson (S 1246 of 2003, 16 May 2003) Fryberg J said that it was incumbent upon the applicant to demonstrate that he had a matter which he wished to raise in defence of the proceedings which, if

> raised, would prejudice the criminal proceedings. In State of Queensland v Bush [2003] QSC 375 Mackenzie J said that *s.93* is not an absolute bar to defence of forfeiture proceedings. However, at the minimum, it would require, in the particular circumstances of the case, a demonstrated reason why the interests of justice would not be served by the forfeiture proceedings being heard in advance of the criminal proceedings before a stay would be given. In State of Queensland v Cannon (S 1166 of 2003, 5 December 2003) White J referred to these two decisions with apparent approval.

I conclude from His Honour's discussion that the rough Queensland equivalent to *s.138 Criminal Property Forfeiture Act (NT)* does not operate as an absolute bar to a stay of forfeiture proceedings pending criminal proceedings if it is in the overall interests of justice to do so. The onus of persuading a court of the need for the stay is on the party seeking the stay.

Arguments raised against the existence of a discretion to stay proceedings

14. Ms Armitage on behalf of the applicant, (respondent in these proceedings), referred me to the Attorney General's Second Reading Speech: (Legislative Assembly (NT), 16 May 2002). Ms Armitage quite rightly points out that the scheme of the *Criminal Property Forfeiture Act (NT)* is to keep the civil process for forfeiture and the criminal process quite separate; unlike the previous scheme this is not a conviction based scheme; that no criminal consequences flow from an adverse finding made under the *Criminal Property Forfeiture Act*; that section *138* facilitates the separate nature of the two processes; that respondents to *Criminal Property Forfeiture Act* proceedings are not compelled to incriminate themselves; that a general objection based around prejudice and potential infringement of the privilege against self incrimination is esoteric; that consequential amendments to the *Sentencing Act NT* at the time of the passing of the *Criminal Property Forfeiture Act* also underline the separate nature of the schemes; that pursuant to *s62A Interpretation Act* the court is obliged to prefer a construction that promotes the purpose or object underlying the Act.

15. Ms Armitage also referred to *Queensland v Shaw* and a number of other inter-state authorities with contextually similar arguments that might be raised around *s.138 Criminal Property Forfeiture Act (NT).* Not all of those authorities were discussed by counsel before me, I am of course aware that the relevant interstate provisions do differ from the Northern Territory provision but they provide useful analogy.

Discussion

16. I was referred to *A v Boulton* [2004] FCAFC 101 that concerned questioning before an examiner appointed under the Australian Crime Commission. The power to compel answers was challenged on the grounds of potential self incrimination given the applicant was of the view he was about to be charged. The Federal Court considered that the *Australian Crime Commission Establishment Act 2002 (Cth)* did effectively remove the privilege against self incrimination. I note that Act provides a *use immunity* that was somewhat influential in the Court coming to that conclusion. Of relevance to these proceedings is that part of the reasoning of the Court referring to the fact that since the very functions of the examiner require a report in order to further investigation of criminal activity of sophisticated means, that factor tended to indicate abrogation of the privilege and allowing the questioning to proceed; to hold otherwise would defeat the purpose of the Act: (see Her Honour Justice Kenny at paras [54]-[71]). I note similar reasoning leading to a similar conclusion was used in *New South Wales Crime Commission v Murchie and another [2000] NSWSC 592* concerning an examination under the *Criminal Assets Recovery Act (NSW).*

17. I have already mentioned a discussion of *Queensland v Shaw (cited above)* that is more closely aligned to this type of case than those that are primarily concerned with investigation and inquiry (such as *A v Boulton).* Although His Honour Justice Mackenzie allowed the stay in *Queensland v Shaw*, it is clear that not every case will enliven exercise of the discretion to stay under

the Queensland legislation. In *State of Queensland v John William Henderson [transcript of proceedings, 16 May 2003],* Justice Fryberg didn't seem to have any difficulty accepting the existence of a power to stay but declined to exercise it in that case as the applicant failed to demonstrate the existence of live issues which would cause prejudice amounting to an abuse of process between the two proceedings. Similarly in *Queensland v Cannon [2003] QSC 459* Justice White acknowledged the existence of the residual discretion to stay forfeiture applications but declined to exercise the discretion in that case. White J referred to *Mule v Western Australia (2002) 29 SRWA 95,* noting that despite a similar legislative provision in Western Australia, the Chief Judge of the District Courts allowed a stay where the applicant would have been required to produce an affidavit or affidavits to defend a forfeiture order which would require him to swear to relevant matters associated with a pending criminal trial. No such exposure existed, in White J's view on the facts of *Queensland v Cannon.* I note the comparable section in the *Western Australian* legislation is *s 104 Criminal Property Confiscation Act (WA)* that reads:

> "The fact that criminal proceedings under this Act or any other enactment have been instituted or have commenced is not a ground on which the court may stay proceedings under this Act that are not criminal proceedings".

18. I accept that the proceedings under the *Criminal Property Forfeiture Act (NT)* are quite separate to any criminal proceedings based around the same subject matter. I accept that the *Criminal Property Forfeiture Act (NT)* should be interpreted in such a way as to enhance that process and should certainly not be interpreted in a way to undermine the efficacy of the scheme. In the usual course of events, there should be no intersection between the civil and criminal proceedings. In my view *s 138 Criminal Property Forfeiture Act* strengthens that position by prohibiting stays of proceedings *for the purpose of awaiting the outcome of any criminal proceedings.* I have come to the conclusion, however, that the prohibition is

not absolute. There may be circumstances where either the fair trial of a person is prejudiced by their participation in civil proceedings under the *Criminal Property Forfeiture Act* or they cannot participate fully in proceedings under the *Criminal Property Forfeiture Act* without risking prejudice at a criminal trial. As yet, I do not know whether that is the case here (although an argument as to prejudice has been flagged) and I will be seeking further submissions. In my view the discussion in the comparable inter-state jurisprudence admits of a similar interpretation. In my view the comparable Queensland and Western Australian legislative provisions admit of a stricter approach than the Northern Territory provision, however both of those jurisdictions have acknowledged a residual discretion in confined circumstances. Such an approach does not undermine the intention of the Act, provided it is in confined circumstances where significant prejudice can be shown. It may be different if this were legislation regulating investigation that possessed certain safeguards such as the *use indemnity*: (as in for example *A v Boulton*) and indeed that type of legislation would be completely ineffective if the criminal process had to be complete before questioning could begin. That situation would truly affect the efficacy of the legislation. Provided the discretion is only exercised in a very confined way, under certain strict conditions, it would not undermine the efficiency of the legislation.

19. It is early days in the development of the operation of the *Criminal Property Forfeiture Act (NT)*. I am not in a position to attempt to lay down what the circumstances would need to be for the favourable exercise of a residual discretion that in my view does exist. I would however at this stage draw upon the comparable albeit embryonic jurisprudence developed elsewhere. In that regard the matters raised in *Queensland v Shaw* (cited above) are persuasive. The matters put to the Court there were that:

- the evidence relevant to defending the forfeiture proceedings would include evidence not presently in the possession of the State of Queensland;

- if the stay was refused the State of Queensland would be alerted to further information concerning the financial position of the applicant;

- by defending the forfeiture proceedings the applicant would be disclosing information which would otherwise be subject to his right to remain silent;

- the State of Queensland would therefore be placed in the advantageous position of being alerted to the need for further evidence and the existence of further chains of inquiry in order to meet the defence raised by the applicant; and

- since the criminal proceedings are listed to be heard in about 3 ½ months time there would be no significant delay to the forfeiture proceedings.

20. A further submission was that *if the applicant was forced to reveal the grounds upon which he will defend the criminal charges it did not only intrude upon the applicant's right to silence but eroded the accusatorial nature of criminal proceedings: Dyers v R* (2002) 192 ALR 181. As has been mentioned above, the Court on that occasion took the view that the interest of justice would not be served by the forfeiture hearings being heard in advance of the criminal prosecutions. All of the cases indicate some significant risk of prejudice would need to be shown by the applicant.

21. I rule there exists a residual discretion to order a stay or an adjournment of the proceedings. I am unable to rule at this stage on whether the circumstances exist to exercise that discretion and I will list the matter for further argument at a date to be fixed.

Dated this 12th day of October 2004.

_____

JENNY BLOKLAND
STIPENDIARY MAGISTRATE