CITATION: *Commissioner of Police v Dale Atkinson Marika* [2005] NTMC 015

PARTIES:	COMMISSIONER OF POLICE v DALE ATKINSON MARIKA & SHARON MUNUNGURR
TITLE OF COURT:	Local Court
JURISDICTION:	Criminal Property Forfeiture Act
FILE NO(s):	20417815
DELIVERED ON:	29 April 2005
DELIVERED AT:	Darwin
HEARING DATE(s):	25 January, 10, 14, 24 March, 8 April 2005
JUDGMENT OF:	Jenny Blokland SM

CATCHWORDS:

CRIMINAL PROPERTY FORFEITURE; OBJECTORS HEARING; WHETHER CHARGE OF "DANGEROUS ACT" CAPABLE OF INVOKING FORFEITURE OF MOTOR VEHICLE;

Criminal Property Forfeiture Act (NT) ss 40, 63, 11
Criminal Code (NT) s 154(10
Traffic Act (NT) s 31(1)
Australian Road Rules, rule 304(1)
Professor Fairall, "Review of Aspects of the Criminal Code of the Northern Territory" March 2004
Haywood v Dodd NTSC, Thomas J, 24 October 1997
Pearce [1998] HCA57
The Queen v Hoar [1988] 148 CLR32

REPRESENTATION:

Counsel:

Applicant	Ms Brebner
Respondent:	Mr Lewis

Solicitors:

Applicant:	Office of the Director of Public Prosecutions
Respondent:	Miwatj Legal Services

Judgment category classification:	B
Judgment ID number:	[2005] NTMC 015
Number of paragraphs:	25

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

No. 20417815

BETWEEN:

COMMISSIONER OF POLICE
Applicant

AND:

DALE ATKINSON MARIKA
1st Respondent

SHARON MUNUNGURR
2nd Respondent

REASONS FOR DECISION

(Delivered 29 April 2005)

Ms BLOKLAND SM:

Background

1. This matter concerns objections to the confirmation of a restraining order taken out on the respondent's motor vehicle, Holden Commodore registration number 635 702. The application is brought pursuant to s 41 and 43(1) *Criminal Property Forfeiture Act* (NT). Originally I heard and granted an interim order pursuant to a phone application made on 31 July 2004. That application was brought under s 40 *Criminal Property Forfeiture Act*, and being satisfied of the matters required at that stage, I granted the order.

2. On 3 August 2004 His Worship the learned Chief Magistrate granted a restraining order for three months on the grounds that the property was *Crime Used*. A notice of objection was filed on 17 September 2004 that the

order to restrain the property be set aside pursuant to s 63(1)(a) and s 63(1)(b) of the *Criminal Property Forfeiture Act*.

3. The applicant argues the property is "crime-used" property within the meaning of the *Criminal Property Forfeiture Act*. The relevant part of the definition of "crime-used" property is contained in s 11 *Criminal Property Forfeiture Act*:

> **11. Crime-used property**
>
> (1) For the purposes of this Act, property is crime-used if –
>
> (a) the property is or was used, or intended for use, directly or indirectly, in or in connection with the commission of a forfeiture offence or in or in connection with facilitating the commission of a forfeiture offence;
>
> (b) the property is or was used for storing property that was acquired unlawfully in the course of the commission of a forfeiture offence; or
>
> (c) an act or omission was done, omitted to be done or facilitated in or on the property in connection with the commission of a forfeiture offence.
>
> (2) Without limiting subsection (1), property described in that subsection is crime-used whether or not –
>
> (a) the property is also used, or intended or able to be used, for another purpose;
>
> (b) any person who used or intended to use the property as mentioned in subsection (1) has been identified;
>
> (c) any person who did or omitted to do anything that constitutes all or part of the relevant forfeiture offence has been identified; or
>
> (d) any person has been charged with or convicted of the relevant forfeiture offence

4. The first respondent was charged and convicted of *dangerous act* contrary to s 154 *Criminal Code*. He was convicted in the Juvenile Court sitting at Nhulunbuy on 7 September 2004. Section 6 of the *Criminal Property Forfeiture Act* states that a "forfeiture offence" is:

> (a) an offence against a law in force anywhere in Australia that is punishable by imprisonment for 2 years or more; or

(b) any other offence that is prescribed for the purposes of this section.

5. Although it is not at all necessary for the Crown to secure a conviction to invoke the *Criminal Property Forfeiture Act's* procedures, the fact that in this case there has been a conviction, relieves the applicant of certain proof issues. It is clear from s 11 *Criminal Property Forfeiture Act* that a conviction is not necessary. It is also clear from the *Criminal Property Forfeiture Act* and the Second Reading Speech made by the Honourable Attorney General Dr Toyne that the scheme under the *Criminal Property Forfeiture Act* was intended to operate quite separately from the general processes of the criminal law and indeed proof of an offence under the *Criminal Property Forfeiture Act* is on the balance of probabilities (See Hansard: 18 July 2002)

6. Despite the forfeiture scheme operating independently from the criminal proceedings, in this case where the conviction has actually been secured, there has been no objection to the applicant Commissioner relying on the transcript of the criminal proceedings, indeed it is convenient to do so and a transcript of those proceedings are annexed to the affidavit of Tiarni Kristienne McNamee sworn 29 November 2004. Those proceedings disclose a similar factual basis to those originally alleged in these proceedings in the affidavit of Senior Constable Kieran Michael Wells sworn 23 November 2004 and of Senior Constable Mark Bennett sworn 31 July 2004. In terms of the facts that comprise the charge relevant to these proceedings, I am relying on the facts presented to the Juvenile Court in Nhulunbuy annexed to the affidavit of Tiarni Kristienne McNamee.

7. It is evident from the materials before the Court the first respondent was originally charged with *dangerous act* contrary to s 154 *Criminal Code*, two counts of *aggravated assault* contrary to s 188(2) *Criminal Code*: *drive in a manner dangerous to the public* contrary to s 31(1) Traffic Act and *fail to obey a direction of a police officer* contrary to rule 304(1) of the *Australian*

Road Rules. All charges save the charge of *dangerous act* and *fail to obey a direction* were withdrawn in the criminal proceedings. I note that *dangerous act* (without circumstances of aggravation) carries a maximum penalty of 5 years imprisonment and is therefore a "forfeiture offence": (s 6 *Criminal Property Forfeiture Act*). Similarly, *aggravated assault*, carrying a maximum penalty of 2 years imprisonment may be regarded as a "forfeiture offence" but the *Traffic Act* offences are not. The current forfeiture application nominates only *dangerous act* as the relevant "forfeiture offence": (affidavit of Daniel Kowaleawycz sworn 25 November 2004).

General Arguments made on behalf of the Objectors

8. Counsel for the objectors/respondent argues firstly that notwithstanding *dangerous act* is a "forfeiture offence", the *Criminal Property Forfeiture Act* does not contemplate this type of criminality as falling within the ambit of the forfeiture regime. Counsel relied primarily on the "Objective," as set out in s 3 *Criminal Property Forfeiture Act*:

> "The objective of this Act is to target the proceeds of crime in general and drug-related crime in particular in order to prevent the unjust enrichment of persons involved in criminal activities."

9. Counsel further suggested that the Honourable Attorney General's Second Reading speech indicates much the same. I note the Second Reading Speech does focus on that same objective. To summarise, the Second Reading Speech makes the following points that may have a bearing on the understanding of and construction of the *Criminal Property Forfeiture Act*:

- the ineffectiveness of the (previous) *Crimes (Forfeiture of Proceeds) Act*
- the introduction of a non-conviction based scheme
- the need to prevent unjust enrichment as a result of criminal conduct

- a mechanism outside the criminal jurisdiction for forfeiture of property used in, or in connection with, the commission of a criminal offence

- forfeiture of property of "declared drug traffickers"

- deterrence of those who may be contemplating criminal activity by reducing the possibility of gaining a profit from that activity

- preventing crime by diminishing the capacity of offenders to finance future criminal activities

- remedy unjust enrichment of criminals who profit at society's expense

10. It was argued before me that there was a clear intention manifest that the *Criminal Property Forfeiture Act* covered only property that was capable of generating proceeds or was actually proceeds of crime. It was argued that there was an inconsistency between the definition of c*rime used* property contained in the *Criminal Property Forfeiture Act* and the objectives of the *Criminal Property Forfeiture Act*.

11. Although I agree the *s 3* "Objective" read with much of the Second Reading Speech discloses a primary intention on the part of the legislature to confiscate proceeds of crime, clearly the *Criminal Property Forfeiture Act* targets much more. The clear and specific words of s 11 of the *Criminal Property Forfeiture Act* cannot be limited by the "objective". I note the Second Reading Speech does also refer to "property used in, or in connection with, the commission of a criminal offence". This is dealt with in the legislation, as would be expected in s 11 and elsewhere. The "objective" section cannot limit the express words of the statute elsewhere.

12. Similarly, there is a broader question in this case as to whether the crime alleged here was really in the contemplation of the legislature. The offence of *dangerous act* under s 154(1) *Criminal Code* in this matter does not allege any of the aggravating circumstances often attendant in *dangerous act* cases. In many respects the elements of this type of *dangerous act* are

indistinguishable from a charge of *dangerous driving* under the *Traffic Act*. As noted previously, an offence of *dangerous driving* does not attract the operation of the *Criminal Property Forfeiture Act*. At the stage of prosecuting, as opposed to these proceedings, it is entirely a matter for the Office of the Director of Public Prosecutions to prefer charges. There is one factual matter that sets the offence in this case apart from the more run-of-the-mill dangerous driving cases, and that is, it was alleged and accepted that the respondent drove the vehicle in question directly at two police officers. In my view this was a case where either *dangerous driving* or *dangerous act* (simpliciter) could be preferred and the elements for both offences appear to be made out.

Facts Forming the Basis of the Forfeiture Application

13. The essential facts that are proven on balance of probabilities which I have drawn from the combination of affidavits filed in these proceedings are that on 29 July 2004 the first respondent was driving the vehicle the subject of this application in Lillypilly Close Nhulunbuy. There were two passengers in the vehicle. When the first respondent saw the police vehicle he said "it's the cops". Police had wanted to speak to the first respondent about his driving the previous day. The first respondent stopped his vehicle when police positioned their vehicle eight metres in front and turned on their flashing lights. Police exited their vehicle and told the respondent to turn off the motor of his vehicle. When police approached within about three metres of the respondent's vehicle he quickly reversed backwards about twenty metres. One police officer raised his hand in a stop signal and then crossed his wrists to convey he would be arrested if he did not stop. The first respondent then stopped his vehicle. He placed it in neutral. Both police walked four metres towards the respondents' vehicle. The first respondent placed the vehicle into drive and accelerated causing the rear wheels to spin and drove his vehicle directly at the police officers. One of the police officers was directly in line with the centre of the defendant's and

the other officer was about one metre to the left of the first mentioned officer. The first respondent was looking at the police officers as he continued to accelerate towards them. He did not slow down or attempt to avoid the officers. Both officers had to jump out of the way and narrowly avoided being struck by the respondent's vehicle. The first respondent then took evasive action to avoid colliding with the police vehicle.

"Dangerous Act" and the *Criminal Property Forfeiture Act*

14. As mentioned above, the conduct of the respondent may constitute a number of different offences. In these proceedings, as in the criminal proceedings, the Applicant Commissioner relies on *dangerous act* rather that any lesser or alternative charge. Curiously, and this is one of the odd paradoxes about *dangerous act*, there are a number of persons charged with driving offences of different types that would often result in a charge of dangerous driving that would not invoke of itself the *Criminal Property Forfeiture Act*. However, that impugned driving may well at the same time constitute *dangerous act* simpliciter that could by proven on the balance of probabilities under the *Criminal Property Forfeiture Act*, notwithstanding there was no original charge of *dangerous act*. Initially within these proceedings I thought there may be a danger of inequality of treatment of this respondent *vis a vis* others who had committed similar acts, however, it is another consequence of the *wide net* cast by s 154 *Criminal Code*. (I note this matter of criminal responsibility is being reviewed by Professor Fairall – see "Review of Aspects of the Criminal Code of the Northern Territory" March 2004 at 5 – 25). Not all serious dangerous drivers will, I assume end up having their vehicles confiscated. Similar dilemmas have occurred in the crimes victims jurisdiction where defendants convicted of lesser traffic charges are later the subject of civil proceedings by victims alleging *dangerous act*. At first blush it does not appear that the circumstances of this defendant might lead to forfeiture of his vehicle, but given the structure and broad ambit of s 154 *Criminal Code*, it is indeed no wonder that he has.

This case must also be seen on its own factual basis placing it in a higher category of criminality than most dangerous driving charges.

15. As mentioned above, I have rejected the general arguments put by counsel for the respondent/objector that the conduct of the respondent was never intended to be caught by the *Criminal Property Forfeiture Act*. The definition of "crime used" property puts that beyond doubt – it is as clear as including a knife as "crime used" property in a stabbing case. It matters not that such circumstances are not included in the "Objective" of the *Act*.

16. Counsel also referred the Court to a number of authorities primarily directed at the previous legislation or inter-state legislation. Mr Lewis submitted that on the basis of *Haywood v Dodd* NTSC, Thomas J, 24 October 1997, I should set aside the restraining order on the basis of a double jeopardy defence or a defence akin to double jeopardy. In *Haywood v Dodd* it was held by Her Honour that the wording of the *Domestic Violence Act* did allow for *autrefois convict* to be a bar to subsequent proceedings where the same facts founded a count of aggravated assault and a count of breach of a restraining order. *Haywood v Dodd* is readily distinguishable. That involved criminal proceedings readily invoking ss 17 & 18 *Criminal Code*. This matter involves civil proceedings, admittedly arising out of the same facts as the criminal proceedings but such a course is expressly permitted by the statute itself. I note similar schemes are available in every jurisdiction with respect to compensation proceedings brought by victims. The subsequent civil proceedings do not raise autrefois issues. Counsel also submitted *Pearce* [1998] HCA 57 was relevant, however *Pearce* really reiterates the principle that abuse of process may be available in cases not completely covered by the autrefois pleas. Counsel also drew my attention to *The Queen v Hoar* [1988] 148 CLR 32 but in my view the criticism of the inappropriate use of conspiracy charges in conjunction with the former legislation does not assist here.

The Notice of Objection

17. Having dealt with the general arguments, and I still bear the principles in mind concerning a philosophical approach to interpretation, I turn now to the "Notice of Objection". The "Notice of Objection" states as follows:

> "The Respondent seeks an order of the Court to set aside the restraining order in accordance with section 63(1)(a) and section 63(1)(b) that it is more likely than not the property is used by the respondent who is less than 18 years old and who will suffer undue hardship if the property is forfeited and the property is registered to an innocent party".

18. Essentially the "Notice of Objection" wraps up a number of parts of section 63 of the *Criminal Property Forfeiture Act*. It needs to be born in mind the vehicle is registered in the first respondent's mothers' name, *Sharon Brenda Munungurr* (the second respondent). In his affidavit sworn 15 September 2004 the first respondent states his mother bought the car in April 2003; that the first respondent intended to buy the car from her and began to make payments in early 2004; that he had paid her approximately $2,000 and had approximately $3,000 left to pay. The first respondent states in his affidavit that the restraining order should be set aside on the following grounds:

(a) I am dependant on the owner of the car as the car is registered to my mother. (He relies here on s 63(a)(i) of the *Criminal Property Forfeiture Act*)

(b) My date of birth is the 18 March 1987 so I am less than 18 years old. (He relies here on s 63(a)(ii) *Criminal Property Forfeiture Act*).

(c) I would suffer undue hardship and it is not practical to make adequate provision for myself by some other means. (He relies here on s 63(1)(vi) and s 63(1)(vii) *Criminal Property Forfeiture Act*). He states further:

> "This is because I have paid my mother a substantial amount each week from my wages to purchase the car from her. I have no savings because of the payments I have made to my mother and so I cannot

> afford another car. Nhulunbuy has no public transport except for taxis and I eventually will have to find alternative accommodation and may not be able to always find a lift to work. This means I would be unable to remain in my current employment if I have no transport to work".

At paragraph 11 the respondent states

> "although I have an equitable interest in the Holden Commodore it is registered to my mother and I still have not paid her the full amount owing on the car. She was not involved in any way in the incident that led to the charges and she could not have foreseen that it would have occurred. She is an innocent party in relation to my mother".

19. I will deal with the issue of joint ownership of the vehicle in due course. However, here I will deal with the objections pursuant to s 63 *Criminal Property Forfeiture Act*. Counsel for the respondents developed the objections further in argument. Essentially for his argument to succeed under s 63(1) *Criminal Property Forfeiture Act*, the Court would need to construct each part of s 63(1) disjunctively, that is, that satisfaction of *any* of the parts of s 63 would suffice. Although I warmed to this argument during the hearing, it is now apparent to me that such a construction is not correct. Section 63(1)(a) provides as follows:

> **Setting aside restraining order – crime used property**
>
> (1) The court that is hearing an objection to the restraint of property on the grounds that the property is crime-used may set aside the restraining order if -
>
> (a) the objector establishes that -
>
> (i) the objector is dependant of an owner of the property;
>
> (ii) the objector is an innocent party or is less than 18 years old;
>
> (iii) the objector was usually resident on the property at the time the relevant forfeiture offence was committed or is most likely to have been committed;

(iv) the objector was usually resident on the property at the time the objection was filed;

(v) the objector has no other residence at the time of hearing the objection;

(vi) the objector would suffer undue hardship if the property is forfeited; and

(vii) it is not practicable to make adequate provision for the objector by some other means;

20. Given the use of the word "and" between paragraphs (vi) and (vii) it is clear that the respondent must establish *all* factors (i) – (vii) to succeed. I do not necessarily agree with the Applicant's argument that s 63(1) refers only to *real* property. It might also refer to property such as a caravan or bus or other property capable of forfeiture when a person in the circumstances contemplated in that section is a resident of the affected property. I was initially attracted to the argument that the first respondent should be excluded because he is less than 18 years old. I was influenced by the consequential amendments made to the *Sentencing Act* allowing participation in forfeiture proceedings to be taken into account in sentencing. These were not extended to apply to the *Juvenile Justice Act*. There were no comparable consequential amendments. However, it is clear to me that the use of the word "and" means that each factor must be established for the objector to succeed under s 63(1)(a).

21. An alternative ground of objection is s 63(1)(b). There the objector must establish:

(i) the objector is the owner of the property or is one of 2 or more owners of the property;

(ii) the property is not effectively controlled by a person who made criminal use of the property;

(iii) the objector is an innocent party in relation to the property; and

(iv) each other owner (if there are more than one) is an innocent party in relation to the property;

22. Clearly in relation to s 63(b)(i) the objector is the owner of the property or is one of two or more owners of the property. It must also however be established under s 63(b)(ii) that the property is not effectively controlled by a person who made criminal use of the property. On the material before me this cannot be established. It must also be established that the objector is an innocent party: (s 63(1)(b)(iii)) *and* that each other owner is an innocent party in relation to the property: (s 63(1)(b)(iv). In my view, not withstanding that Ms Munungurr, the second respondent, is an innocent party, because the property is *effectively controlled* by the first respondent who made criminal use of it, the objector cannot rely on s 63(1)(b). Neither can the first respondent or Ms Mununugurr rely on s 63(2) because that section ameliorates the situation only if *the objector fails to establish that each owner is an innocent party*. Section 63(2) only comes into operation if the other criteria in s 63(1)(b) is made out. Here that includes being able to establish that the property is *not* effectively controlled by a person who made criminal use of it. All the material before me points in the opposite direction, including the first respondent's own material indicating his effective control of the vehicle. I note also the first respondent's mother's affidavit (Sharon Brenda Munungurr, the second respondent) sworn 16 September 2004. I accept the material in her affidavit, however, on the crucial question of *effective control* of the vehicle she states:

> "In mid 2004 Dale asked if he could buy the Holden Commodore car from me so the he could be more independent and drive himself to work. I agreed. Prior to this I was responsible fro his transport although I lent the car to him from time to time after he gained his driving licence". (paragraph four affidavit of Sharon Brenda Munungurr).

23. I therefore cannot be satisfied that the property is not effectively controlled by the first respondent although I do accept that Ms Munungurr is an "innocent party". Although I am going to dismiss the objections to the restraining order, there are three matters that I want to draw to the attention of and consideration of the Attorney General because this case has thrown up potential problems that may not have been foreseen. First, given the broad ambit of s 154 *Criminal Code*, whether consideration ought to be given to amending the *Criminal Property Forfeiture Act* to limit the use of s 154 *Criminal Code* as a forfeiture offence to cases where there has actually been a conviction under s 154. I mention this because it appears to me that almost every person committing an offence of dangerous driving under the *Traffic Act* might also be looking at forfeiture of their motor vehicle if at the same time s 154 can be made out on the balance of probabilities. This possibility was canvassed at length with counsel for the applicant at this hearing. Secondly, whether consideration ought to be given to amending the *Juvenile Justice Act* so that participation and cooperation in forfeiture proceedings is formally taken into account in sentencing juveniles as it can be in the *Sentencing Act* for adults. Thirdly, whether s 63(2) *Criminal Property Forfeiture Act* ought to be extended to include an innocent party notwithstanding the property was in the effective control of the person who made criminal use of it.

24. This matter was primarily argued before me on 25 January 2005, however, when writing this judgement I became cognizant of the fact that the respondent was a juvenile. Since the primary argument he has turned 18 years of age. I have called the matter on again a number of times to seek submissions on whether a litigation guardian ought to have been appointed. It seems clear to me, however, given the mandatory nature of the Local Court Rules that there should have been a litigation guardian appointed, however given the written submissions I have obtained from both counsel and the affidavit filed on behalf of the first respondent sworn 12 April 2005,

I do not consider the proceedings a nullity. In my view the initial exparte order made by a Magistrate was valid. The first respondent is now an adult and adopts and confirms his instructions to counsel. I therefore dispense with the requirements for a litigation guardian.

25. I dismiss the objections to the application and will hear counsel on further orders.

Dated this 29th day of April 2005.

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Jenny Blokland
STIPENDIARY MAGISTRATE