

CITATION: *Matthew Parsons v Josef Nona* [2011] NTMC 029

PARTIES: MATTHEW ALAN PARSONS

v

JOSEF MICHAEL NONA

TITLE OF COURT: COURT OF SUMMARY JURISDICTION

JURISDICTION: Criminal

FILE NO(s): 21102836

DELIVERED ON: 8 August 2011

DELIVERED AT: Darwin

HEARING DATE(s): 20 June and 15 July 2011

JUDGMENT OF: Ms Sue Oliver SM

CATCHWORDS:

CRIMINAL LAW- Misuse of Drugs Act – forfeiture of money
Section 34 *Misuse of Drugs Act*
Section 120BA *Police Administration Act*

REPRESENTATION:

Counsel:

Informant: Mr Ledek
Defendant: Ms Black

Solicitors:

Informant: Police Prosecutions
Defendant: NAAJA

Judgment category classification: B
Judgment ID number: [2011] NTMC 029
Number of paragraphs: 19

IN THE COURT OF SUMMARY JURISDICTION
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 21102836

BETWEEN:

MATTHEW ALAN PARSONS
Informant

AND:

JOSEF MICHAEL NONA
Defendant

REASONS FOR DECISION

(Delivered 8 August 2011)

Ms Sue Oliver SM:

1. This matter came before the Court on the basis that there would be a plea of guilty entered but subject to a hearing to determine disputed facts. The Defendant entered his plea of guilty to an amended charge of unlawful possession of cannabis plant material being a trafficable quantity of 73.70 grams contrary to Section 9(1) and (2)(e) of *Misuse of Drugs Act*.
2. The issue in dispute was the ownership of a wallet and an amount of cash (\$1340) inside the wallet, seized by police during the execution of a search warrant, at a residence occupied by the Defendant.
3. The prosecution proceeded to call its witnesses, police officers Konestra and McWatt, who were involved with other officers in the execution of the search warrant. Detective McWatt gave evidence that the Defendant was on a mattress on the floor in the lounge when they arrived and his mother in the kitchen. The door to the Defendant's bedroom was locked. The Defendant and his mother were moved to the front porch area while the dog search was conducted. A photo tendered shows them sitting there, the Defendant

without a shirt. Photos show also a third person, the Defendant's brother in law, Mr Alvin McKenzie, also sitting in the porch area. Evidence was that he arrived back from taking his children to school as the search was in progress. Detective McWatt said that he was not "a person of interest". Detective McWatt said that after the cannabis was found he advised the Defendant that he was under arrest and that he put a shirt on while a vehicle was being organised. He picked up a black wallet that was lying next to the mattress.

4. Detective Konestra then searched the wallet and located the cash. Photos were taken of the black wallet and contents. These photos show a wallet with a Christmas photo of children with Santa inside and cash laid out on the table. The children were subsequently identified as Mr McKenzie's children. The photos indicate that the position of the wallet has been moved during the course of taking the photos. In one it is sitting to the top of the \$20 notes that are laid out and in another it is at the bottom of these notes lying across a \$5 note. The Defendant's driving licence is also shown in two photographs. One against a white background, the object of which is indeterminable and the card itself not clear because of reflection. It is also photographed against a black background that may be the wallet although that is not clear. None of the photos show the Defendant's licence inside the wallet, unlike the photo of the children. The fact that the Defendants licence is photographed twice suggests that the reflective photo was taken first and then the licence moved to the darker background to get a better photo.
5. Detective Konestra was the photographer during the search. He said he seized the wallet from the Defendant's hand. He said that he pulled the licence out from the wallet.

6. The Defendant then gave evidence in relation to the ownership of the wallet and cash. Essentially that both belonged to his brother-in-law, Mr McKenzie, who also lived at the residence at the same time. He said he picked up the wallet because he was going to take it outside to Mr McKenzie. He denied ever selling cannabis to anyone but said that he shared cannabis with his cousin. He does not dispute the presumption of supply under the Act on the basis that the sharing with his cousin makes out an element of supply. He said when the wallet was seized he said that it was his brother in laws. Neither officer recalled this being said. He said he did not know how his drivers licence could have gotten in the wallet as the last time he saw it was in a cabinet with all his ID.

7. Mr McKenzie was then called and gave evidence that the wallet was his and contained money that he had been saving up for the purpose of putting on new tyres and registering his vehicle. His evidence was that it was his belief that the wallet must have come to be beside the mattress that the Defendant was lying on when the search commenced as a result of his daughter “chucking” the wallet back inside when they hurried to get to the shops to get lunch for school. He described this black wallet as his savings wallet and that he had a second brown one that was his day to day one. He did not explain why his savings wallet would be used for the school lunches. He said it was when he returned home later that night that he discovered the contents of his wallet was missing. He wasn’t sure what to do and subsequently obtained some legal advice. He said that he had much later attended the police station with bank statements and Detective McWatt confirmed this attendance. His bank statements were tendered which show wage deposits and regular withdrawals, usually of small amounts of between \$100 to \$200 but substantial withdrawals are shown somewhat proximate to the offence date of 25 January 2011 being \$1000 on 18 November, 2 December, 16 December 2010, a total of \$700 on 23 December 2010, a total of \$800 on 29 December and \$840 on 13 January 2011 which may lend

support to Mr McKenzie's assertion that he was periodically putting away sums in the black wallet as savings, although I note his evidence to be that he put money away from regular withdrawals around \$200-300 hoping to save up around \$1700.

8. The matter was unable to proceed to submissions following the conclusion of the evidence.
9. When the matter came back before me for submissions, the prosecutor put that the matter was one to be dealt with under the terms of section 34 of the *Misuse of Drugs Act*.
10. Section 34(1) provides for the forfeiture of both dangerous drugs and precursors to the Crown upon a finding of guilt for an offence against the Act. Section 34(3) likewise provides that where a person has been found guilty of an offence against the Act various things that *relate to that offence*, may on application made on or on behalf of the Crown, be ordered to be forfeited to the Crown. Money is one of the specified things in that provision. The difference between the two provisions is that drugs and precursors are automatically forfeit on a finding of guilt for an offence against the Act whereas other things, including money, specified in s34(3) are only forfeit if an order is made following application to the Court.
11. The money found in the black wallet appears to meet the definition of being money that relates to the offence in question (possession of a trafficable quantity of cannabis). Section 34(12) provides that for the purpose of section 34, amongst other things, "money" shall be taken to relate to an offence if it:

“(a) is an article referred to in section 120BA of the *Police Administration Act*;.....

whether or not the money, money's worth, valuable security, acknowledgement, note or other thing is or was at any time owned by or in the possession of the person found guilty.”

12. Section 120BA of the *Police Administration Act* provides amongst other things for the seizure by a member of the police force of money that the member suspects, on reasonable grounds, was received or acquired by a person directly or indirectly as or from the proceeds or part of the proceeds of the supply of a dangerous drug, precursor or drug manufacturing equipment. As the money in the wallet was found in close proximity to the Defendant in premises at which a trafficable quantity of cannabis was found, in my view, reasonable grounds would exist for suspicion that it was received or acquired from the supply of the cannabis. The money is therefore a thing that may be ordered to be forfeit to the Crown on application following a finding of guilt for an offence under the *Misuse of Drugs Act*, even if it is found that the money belonged to Mr McKenzie rather than the Defendant.

13. However in circumstances where it is not the Defendant who owns the money or other thing in question, a person who has an interest in the money or thing is required, under s34(4) to be given such notice of the application as the court thinks fit and to appear and be heard on the application. Section 34(5) then provides that where money or the other things specified are liable to forfeiture have been received or acquired by a person who was not a party to the commission of the offence by virtue of which they are liable to forfeiture, an order for its forfeiture may be made unless that person proves that he or she gave valuable consideration for it and at the time of receiving or acquiring it had no reason to suspect the circumstances by virtue of which it is liable to forfeiture. Although not specified, and no authorities seem to have shed any light on this, it is my view that the burden of proof would fall to the person having an interest in the property the subject of the application and would be required to be satisfied on the balance of probabilities. I observe that this latter provision does not seem to fit well with the circumstances of the present matter, that is cases where a person who shares a residence with another who has been found guilty of a drug offence stands

to forfeit money that belongs to them on the basis that it was seized in circumstances where it might reasonably have been suspected of relating to the drug offence. Section 34(5) appears to be directed more to the other things referred to in section 34, for example, a vehicle, vessel, aircraft or other conveyance.

14. In any event, it seems premature to consider that question. Section 34(3) only comes into operation once a finding of guilty of a drug offence under the Act has been made. This matter proceeded on the basis that the prosecution alleged as a matter of fact, that the wallet and contents belonged to the Defendant which he denied. The prosecution are therefore required to prove this fact beyond a reasonable doubt. If the money was found to belong to the Defendant then, given his evidence that he was not working at the time and receiving only small benefits, a strong inference would arise that the money was acquired by supply other than the sharing of the drug with his cousin which he admitted. It is only following determination of the question of ownership of the money and therefore a determination of the facts by which the Defendant is to be found guilty that the forfeiture question under section 34 will arise.
15. Mr McKenzie appeared to me to be a witness of truth. He is not a sophisticated man and did not seek to provide an elaborate story of how the wallet came to be beside the mattress the Defendant was sleeping on but rather offered only that a possible explanation was that it got there by his daughter “chucking” it inside as they left in a hurry. His bank statements establish that he had an income consistent with the ability to build up a sum as he suggested for a specific purpose. I do not think that his method of saving lacks credibility. The Defendant’s account likewise did not seek to establish some explanation for his licence being in his brother in laws wallet as the police witnesses alleged. He could only say that he did not think it was there and couldn’t say how it got there. He said he didn’t look when the photos were being taken as he was with another officer by the front door.

16. If accepted, the presence of the Defendant's licence in the wallet is strongly suggestive of the wallet and contents being his. However I do not think that I can discount the possibility that it might have been either accidentally put there by another occupant of the house (his mother or one of the children) or that Detective Konestra was mistaken in believing that the licence was in the wallet. It was not photographed *in situ* in the wallet although the picture of the children was photographed in position. The licence is not seen on the table in either of the photos that show the wallet and the cash. It is clear from the photos that the wallet itself was moved during photography as was the licence. Some reasonable doubt exists that the licence was in the wallet.
17. Consequently I cannot be satisfied beyond a reasonable doubt that the money belonged to the Defendant. I am satisfied on the evidence taken, including the certificate of analysis of the drug, that the Defendant is guilty of the offence of possession of a trafficable quantity of cannabis, namely 73.70 grams and I find him guilty of that offence.
18. It is a matter for the Crown to now determine whether an application pursuant to section 34 is to be made. As I have said, it is not the case that simply because the money belongs to Mr McKenzie that it cannot be the subject of a forfeiture order assuming I am correct in its characterisation as "money...that relates to that offence" by virtue of s34(13). If the Crown wishes to make an application, Mr McKenzie is entitled to be notified of it and be provided with the opportunity to appear and be heard on the application, particularly with respect to the requirement of s34(5) that he prove that he gave valuable consideration for it and "at the time of receiving or acquiring it had no reason to suspect the circumstances by virtue of which it is liable to forfeiture". Although Mr McKenzie's evidence so far might be taken to address the consideration issue, his evidence was clearly framed at establishing his ownership and not as addressing the requirement of s34(5)(b).

19. I will hear the parties as to submissions on sentence.

Dated this 8th day of August 2011.

Sue Oliver
STIPENDIARY MAGISTRATE