CITATION:	*Julie O'Neill v Gary Smith [2022] NTLC003*
PARTIES:	Julie O'NEILL
	v
	Gary SMITH
TITLE OF COURT:	LOCAL COURT
JURISDICTION:	CRIMINAL
FILE NO(s):	22036222
DELIVERED ON:	6 January & 4 February 2022
DELIVERED AT:	Darwin
HEARING DATE(s):	27 July 2021 & 6 January 2022
DECISION OF:	Judge Greg Macdonald

CATCHWORDS:

Sentencing Act – s 99A - *Liquor Act – ss 274 to 278 – Forfeiture of vehicles*

REPRESENTATION:

Counsel:

Complainant:	Mr L Williamson
Defendant:	Mr P McNally

Solicitors:

Complainant:	DPP
Defendant:	NAAJA

Decision category classification:	B
Decision ID number:	003
Number of paragraphs:	21

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

No. 22036222

BETWEEN:

Julie O'NEILL
Complainant

AND

Gary SMITH
Defendant

REASONS FOR DECISION

(Delivered 4 February 2022)

JUDGE MACDONALD

Background

1. On 16 October 2020 Mr Gary Smith (Defendant) of Galawdjapin outstation, together with two other Ramingining men, were travelling in Mazda 323 NT CA19HF outbound on the Arnhem Highway in the vicinity of the South Alligator River. The vehicle, which was owned but not driven by the Defendant, was the subject of "*a traffic apprehension … for the purposes of a search on a random basis pursuant to section 238 of the … Liquor Act*".[1]

2. Following the vehicle being stopped, the Defendant advised attending members of police that he and his companions were travelling to Oenpelli and then Ramingining. A subsequent search of the vehicle produced several 700ml bottles of Bundaberg Rum, for which the Defendant admitted criminal responsibility in relation to one of those bottles, which equates to approximately 20 standard drinks. As a result, the Defendant was charged with a contravention of s 173 of the *Liquor Act* (Act) and his motor vehicle was seized and impounded under s244(2) of the Act.

The Evidence

3. The vehicle was not then released by the Commissioner or the subject of any application by the Defendant, under s 271 of the Act. Nor, at the time of the guilty plea on 27 July 2021 at Gunbalanya, was any "*notice of application*" on foot through the procedure prescribed by ss 274(3)(a) or (b) and (4) of the Act.[2]

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[1] On 27 July 2021 at Gunbalanya the Defendant pleaded guilty to a charge of contravening section 173 of the *Liquor Act*, so there was no contested issue concerning any relevant 'general restricted area' or special restricted area', or the reasonableness of 'grounds to suspect travel to' any area of that status in support of the "*random*" search; see ss238(b) and 239 of the Act.

[2] The Agreed Facts which became Exhibit P1 did not meet the requirements of s 274(3)(a) or (4), and no "*written notice*" was in evidence.

4. It was following the plea of guilty and conviction on 27 July 2021 that the prosecution raised the spectre of forfeiture of the vehicle.[3] An "*application for forfeiture*" (Application) was then on foot. Interpretive issues as between s 99A of the *Sentencing Act 1995* and Part 12 of the Act are discussed further below.

5. No oral evidence was called from any potential witness. The evidence in addition to Exhibits P1 and P2[4] was essentially agreed and reiterated in detail in counsels' written submissions, which were of significant assistance in determining the Application. The facts comprised;

   (i) The Defendant had recently purchased a vehicle from a second hand dealer in Darwin for approximately $3000, and permitted it to be used to transport him, his co-offenders, and the alcohol seized;

   (ii) The Defendant resides at Galawdjapin outstation, approximately 20 kilometres from Ramingining, and is responsible for two young children, at least one of whom is primary school aged;

   (iii) The Defendant needs or wishes to travel from his residence to Ramingining to take his children to school, and to deliver cultural education at that school from time to time, and to also transport family to the community clinic at times;

   (iv) Other family members who reside at the outstation own motor vehicles, but the Defendant is not always able or permitted to access those vehicles;

   (v) The volume of alcohol for which the Defendant accepted criminal responsibility equated to 20 standard drinks, however the volume located in the search of the Defendant's vehicle equated to 60 standard drinks.

The *Liquor Act* and *Sentencing Act*

6. Section 173 of the Act is a "*forfeiture offence*" by dint of the definition provided by s 4. Despite that Part 12 of the Act provides a comprehensive legislated scheme for the forfeiture and disposition of property seized in connection with any forfeiture offence, where the property is a "*vehicle, vessel or aircraft*", upon a finding of guilt and the complainant informing the court that forfeiture is sought, s 99A of the *Sentencing Act 1995* then applies. That is, to override the detailed and prescriptive application procedure provided by Part 12 of the Act.[5]

7. Neither counsel nor the court identified any Supreme Court authority on the operation and effect of the combined provisions. A definite circuitousness affects the combined reading of Division 2 of Part 12 of the Act and s 99A of the *Sentencing Act*. Section 274(5) provides; "*If the person is found guilty of the offence, **any application for forfeiture must be made** under section 99A of the Sentencing Act 1995*" (**emphasis** added). Section 99A of the *Sentencing Act* provides;

   99A Forfeiture of property orders

[3] Interpretive issues as between s99A of the Sentencing Act 2019 and Part 12 of the Act are discussed further below.

[4] Agreed Facts and Information for Courts respectively, tendered on 27 July 2021.

[5] The scheme of Part 12 draws a clear dichotomy between situations where a person is or is not charged with a "*forfeiture offence*"; see ss 272(1)(a) and (2), 274(1) and 275(3). The scheme draws further distinction between situations in which a person is found guilty compared to where no such finding ensues; see ss 274(5), 275(1) and (3).

> *(1) If a court imposes a term of imprisonment or a fine on an offender, the court may also order that property owned by the offender and used in the commission of the offence for which the offender is being sentenced is forfeited to the Territory.*
>
> (2) ***If a court finds a person guilty** of a forfeiture offence as defined in the Liquor Act 2019, the court must determine any forfeiture of a vehicle, vessel or aircraft **as if a forfeiture application were made by a police officer** under Part 12, Division 2, of that Act.* (**emphasis** added)

8. Section 274(5) first calls up s 99A of the *Sentencing Act*, and s 99A then simply refers back to Part 12 of the Act, of which s 274 is a part, in the context of "*as if*" an application has been made in compliance with s 274.

9. It is not my conclusion that, where property has been seized at the time of offending, a mandatory forfeiture application automatically becomes on foot on a finding of guilt for a "*forfeiture offence*". That conclusion is supported through the Commissioner having discretion under s 271(1)(a) to release a vehicle to its owner at any time[6], and because s 272(1)(d) might possibly operate even following a finding of guilt, and particularly because s 274(5) (above) expressly contemplates a capacity to make an application rather than enacting a *fait accompli*.

10. However, once a complainant submits orally to the court following a finding of guilt that forfeiture is sought, an application *per se* is on foot. That is, an oral application without notice, regardless that the procedure otherwise prescribed by the Act requires not only prior written notice of an intention to make application, but also particulars and practical advice on the effect of s 274 of the Act.[7] That conclusion is reached due to a combined reading of s 274(5) and (6), and particularly through the use of "*as if*" in s 99A(2), which effectively deems a forfeiture application to be on foot once the court is orally advised that such a determination is sought.[8]

11. Despite the obviating effect of s 99A of the *Sentencing Act* on ss 274 and 275 of the Act, the remaining provisions of Division 2 of Part 12 apply. In particular, s 277(1) prescribes a presumption in favour of forfeiture where; "*the quantity of liquor involved in the forfeiture offence exceeds 50 standard drinks*". Conversely, s 277(2) prescribes a presumption against forfeiture where s 99A of the *Sentencing Act* applies but the court is satisfied on the balance that the quantity of liquor does not exceed 10 standard drinks. The second presumption is in the context of s 278(2)(b), which otherwise prohibits any forfeiture order under Part 12 where no finding of guilt has been made against an owner and the quantity of liquor involved did not exceed 10 standard drinks.[9] Where s 99A(2) applies, due to a finding of guilt and application for forfeiture being made, and the alcohol involved is between 10 and 50 standard drinks, no presumption applies either way. The complainant would nonetheless bear an onus.

12. It may also be noticed that a distinction and material difference exists between (1) and (2) of s 99A. Section 99A(1) is only enlivened once the court imposes a fine or term of imprisonment, so following finding guilt, any conviction, and passing sentence. In contrast, s 99A(2) is to be considered and applied upon a finding of guilt. A reading of s 99A as a whole indicates

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[6] Which is in addition to a general law capacity to decide to not seize any particular vehicle involved in relevant offending, in their discretion.

[7] See ss 274(2) to (4) of the Act inclusive. A distinction exits between the necessary "*notice*" and an "*application*" cf ss 275(1) to (5). Application under s 275 is also conditioned on the s 274 procedure having been complied with.

[8] It is noted that s 99A(2) was enacted to commence on the same date as the Act, 1 October 2019.

[9] Which volume is consistent with the precondition prescribed by s 275(1)(b).

strongly that if forfeiture is to be sought by the complainant (noting the conclusion discussed at [9] above) it must be prior to the court proceeding to sentence a defendant. That is, prior to recording any conviction or imposing criminal penalty or sanction having regard to ss 5 and 7 of the *Sentencing Act*. Given the juncture at which s 99A(2) is to be applied, and particularly due to the terms of s 278(4)(c) and (h) of the Act, I also consider that, where the defendant is the owner of the relevant vehicle, the possibility of forfeiture should be considered in light of sentencing principles, including proportionality.[10]

13. Section 278 provides the essential process in determining whether a vehicle should be forfeit, with ss 278(4) prescribing the criteria to be taken into account.[11] Each of those criteria must be considered.

14. I note the second reading speech to the *Liquor Bill 2019* included;

> *It is critical to effectively deter secondary supply in restricted areas, and forfeiture is an important tool in achieving deterrence; however, forfeiture has the capacity to further impact already limited alternative transport options available in remote communities.*[12]

Consideration and findings

15. It is first required to determine the "*quantity of liquor* ***involved in*** *the forfeiture offence*".[13] A narrow reading of that phrase would conclude that the relevant quantity of liquor was 20 standard drinks, with "*involved in*" being wholly constrained by the particulars found beyond reasonable doubt for the criminal charge.[14] However, I consider that in the context of the general nature of relevant forfeiture offences and the standard of proof prescribed by s 277(1), the term "*involved*" imports a broader operation and effect than simply the particulars for which a defendant bears criminal responsibility.[15] It is noted that the Defendant was originally charged on the basis of common purpose, despite that the sole charge to which he pled guilty resolved differently and that doctrine was not advanced or submitted by the prosecution.

16. The circumstances of the subject forfeiture offence are an example of why a broader interpretation would be consistent with Parliament's intent. The Defendant owned the vehicle and from the agreed facts can be taken to have known that his vehicle was transporting the equivalent of 60 standard drinks. It may also be inferred that the Defendant or a co-offender likely purchased or obtained the alcohol in 'one lot', and at least 2 of the 3 occupants of the

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[10] Noting that the forfeiture provisions of the Act may be applied regardless of whether the owner is found guilty of any offence and even where the owner is not present in the subject vehicle. Where the defendant is not the owner of the relevant vehicle, its forfeiture or otherwise will be of no immediate significance to them. Where a defendant is the owner and is guilty of a number of offences, totality may also be a principle requiring consideration.

[11] Section 278(1) may be confined by s 275(3) to matters where there has been no finding of guilt, however I consider the dispositions provide by ss (1) are available on any application under Part 12.

[12] Parliamentary Debates, NT Legislative Assembly, 15 May 2019, 6307 – 6308.

[13] Noting that the standard of proof of the facts to establish the presumption is to balance of probability.

[14] Section 277(1) only requires that the court be satisfied on the balance of probability.

[15] Where private motor vehicles are used, defendants are rarely travelling alone and persons in a vehicle are often acting in concert.

vehicle were aware of the criminality involved. Although under different legislative schemes, a broader interpretation for the phrase also has some support of authority.[16]

17. The presumption in this case is in favour of forfeiture in the circumstances of the alcohol involved in the offence comprising more than 10 standard drinks. The Defendant therefore bears an onus to rebut the presumption by satisfying the Court on the balance of probability that the vehicle should not be forfeit in all the circumstances.[17] That is having particular regard to the circumstances which may be relevant to the eight criteria prescribed by s 278(4) of the Act.[18]

18. Addressing those criteria I find:-

    (i) The presumption is in favour of forfeiture;

    (ii) The value of the vehicle is approximately $3000;

    (iii) Proportionality of forfeiture to the offending is in some respects contingent upon what other penalty may be imposed for the forfeiture offence. That is in the context of s 99A(2) being enlivened by a finding of guilt together with complainant application, and prior to the passing of sentence. If the sentence imposed in this case was simply forfeiture, given the likely value of the vehicle, such an outcome could not be characterised as disproportionate. The offence is at the lower end of the scale, but the value of the vehicle is not significant. That is despite accepting that the social value of vehicles in indigenous communities, including due to remoteness, availability, lack of public transport, and family or cultural obligations, generally renders vehicles more valuable than their market value. In my view the proportionality of forfeiture cannot be fully assessed in a vacuum, so the sentence for the forfeiture offence is relevant in considering the criterion of "*proportionate response*".

    (iv) The hardship which would ensue needs to be considered in light of the evidence, and the context of the Defendant being from an outstation 20 km distant from a remote indigenous community. Here, the hardship of deprivation has in fact already existed for more than 12 months, seizure having occurred on 16 October 2020. The hardship has been and generally would be greater than that which would apply to an urban resident whose charges could have been determined much more expeditiously.

    (v) The role of the vehicle in the community and the effect of forfeiture for the community is only the subject of sparse evidence. However, the relevance of the vehicle to accessing education is accepted. I infer that the offending was not engaged in for any commercial benefit. The Defendant has also cooperated in the proceeding and accepted responsibility for his actions and offending. The criterion

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[16] *Richardson & Wrench Pty Ltd v Ligon No 174 Pty Ltd* (1994) 123 ALR 681 at 692 to 694, *Rural Press Ltd v ACCC* (2004) 203 ALR 217 at 231 and *R v Granger* (2004) 146 A Crim R 344.

[17] Section 278(2)(c) conditions forfeiture on court satisfaction that "*it is appropriate in the circumstances*" to take that course.

[18] Section 278(1) is directed to s 275, which only applies when no finding of guilt for a relevant forfeiture offence has been made. However, ss 278(2) and (4) are not so constrained, and ss 278(3) can only apply in matters involving a finding of guilt. Section 278(4) applies to s99A(2) applications.

prescribed by paragraph (f) of s 278(4) is clearly referenced in the relevant second reading speech through the mischief of secondary supply for commercial gain.

(vi) The Defendant was fully aware of the offence and cooperated in the proceeding to the extent of pleading guilty.

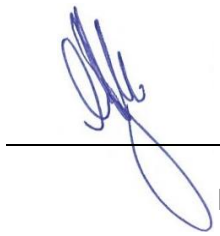
(vii) Both general and specific deterrence are important in this matter, albeit not in terms of secondary supply. Forfeiture would certainly further or advanced those objectives, as does any other appropriate sentence imposed. Knowledge of the seizure and impoundment in a small community may be taken as widespread, so general deterrence has also been operating for in excess of one year.

19. In the circumstances, and particularly the combination set out at (ii), (iii) and (iv) above, together with imposition of a sufficiently stern sentence having regard to ss 5 and 7 of the *Sentencing Act*, I consider the Defendant has rebutted the presumption in favour of forfeiture. Further, that in all the circumstances including the sentence to be imposed, the vehicle should be returned rather than forfeited.

20. On 6 January 2022 brief and incomplete *ex tempore* reasons were given for the orders then made. That was due to decision ultimately being given well after 5pm that day due to a range of factors beyond the court's control. Written reasons were to be published, these being those reasons. It would be appropriate for the appeal period to run from today's date.

21. The Defendant is convicted and fined $1100, with one victim's levy imposed. I also order under s 278(1)(c) that the subject vehicle be released to the Defendant as soon as practicable.

Dated this 9th day of February 2022



Greg Macdonald
LOCAL COURT JUDGE