Atkinson v The Queen [2013] NTCCA 05

PARTIES:	ATKINSON, Gary Wayne v THE QUEEN
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CRIMINAL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	CCA 6 of 2013
DELIVERED:	2 April 2013
HEARING DATES:	2 April 2013
JUDGMENT OF:	RILEY CJ, SOUTHWOOD and BLOKLAND JJ
APPEALED FROM:	MILDREN J

CATCHWORDS:

CRIMINAL LAW — Sentencing — Appeal against sentence — Criminal property forfeiture — Forfeiture subsequent to sentence — Fresh evidence — Forfeiture mitigating factor.

REPRESENTATION:

Counsel:

Appellant:	J Adams
Respondent:	W Karczewski QC

Solicitors:

Appellant:	Pipers
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	B
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IN THE COURT OF CRIMINAL APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Atkinson v The Queen [2013] NTCCA 05
No. CCA 6 of 2013

BETWEEN:

GARY WAYNE ATKINSON
Appellant

AND:

THE QUEEN
Respondent

CORAM: RILEY CJ, SOUTHWOOD and BLOKLAND JJ

Ex Tempore

REASONS FOR JUDGMENT

(Delivered 2 April 2013)

The Court:

[1] The issue for determination in this appeal is the impact upon the sentence of an offender of a forfeiture of property order under the *Criminal Property Forfeiture Act*, where the forfeiture takes place after the sentencing process has been completed. Can the forfeiture be relied upon in an appeal against sentence as a basis for reopening the sentencing discretion?

[2] On 25 October 2010, following a trial before a jury, the appellant was sentenced to imprisonment for a period of six years with a non-parole period of three years and six months for a series of offences under the *Misuse of*

Drugs Act 1990 (NT). The sentence was deemed to have commenced on 22 January 2010. At the time of sentencing the learned Judge observed:

> On 5 February 2009, Thomas J made a consent restraining order affecting all of your property under the provisions of the *Criminal Property Forfeiture Act*. Under s 5(4)(b) of the *Sentencing Act*, I can take into account a forfeiture order to the extent that the order relates to crime-used property in relation to the offences [for] which you are being sentenced.
>
> A sentencing hearing has been adjourned on a number of occasions to enable this to be done. The property which is relevant is your unit. I do not know what its present value is. You bought it four years ago for $250,000. It is well-known that property values have increased since then, but by how much your property has increased in value, I do not know. The best I can do is to find that it has not decreased in value. I am not able to take the loss of value of the property into account because you have decided, as is your right, to challenge the application to forfeit your property and that challenge has not yet been disposed of and may take some time to resolve.

[3] The sentencing Judge was clearly correct in his approach to this issue. Section 5(4) of the *Sentencing Act 1995* (NT) is in the following terms:

> In sentencing an offender, a court:
>
> (a) may have regard to any co-operation by the offender in resolving any action taken against the offender under the *Criminal Property Forfeiture Act* in relation to the offence or offences for which the offender is being sentenced; and
>
> (b) may have regard to a forfeiture order under the *Criminal Property Forfeiture Act* to the extent that the order relates to property that is crime-used property (within the meaning of that Act) in relation to the offence or offences for which the offender is being sentenced; and
>
> (c) must not make any allowance for any other property that has been or may be forfeited to the Territory by operation of the *Criminal*

> *Property Forfeiture Act* or in any proceedings under that Act in which the offender is, was or may be a respondent.

[4] The application for forfeiture came before Barr J who delivered reasons for decision on 28 September 2011.[1] The appellant had challenged the application of the *Criminal Property Forfeiture Act 2002* (NT) in his particular circumstances. His Honour found that the home unit, which was worth at least $370,000, was crime-used in the offending for the purposes of the Act. His Honour also found that the unit had been 'legitimately purchased' by the appellant with funds that were not crime-derived. In all the circumstances the Judge made a restraining order in relation to the unit. On 15 January 2013, by consent, his Honour made an order under the *Criminal Property Forfeiture Act* that the unit be forfeited to the Northern Territory. By this time the property was valued at $445,000.

[5] The appellant contends that the forfeiture of his property, occurring as it did after the sentencing process was complete, can now be received as fresh evidence and taken into account in an appeal against the sentence. It was submitted that the loss of the appellant's unit should be a substantial mitigating factor in sentence because of, inter alia, the value of the unit and the hardship upon the appellant consequent upon forfeiture of the unit.

[6] It was submitted that in light of these matters a substantial miscarriage of justice occurred because a different and lesser sentence would have resulted from a consideration of the material that is now available. It was submitted

[1] [2011] NTSC 73.

that this Court should allow the appeal against sentence and resentence the appellant.

[7] The same issue has been addressed in the Supreme Court of Victoria in relation to the equivalent provisions in the *Confiscation Act 1997* (Vic) in a number of cases, including *R v McLeod*[2] and *R v Dang*.[3] In *R v McLeod* the Court of Appeal held that, in the circumstances of the case, the fresh evidence of the forfeiture was admissible on established principles and, in those circumstances, a different sentence should be substituted. It was noted that at common law forfeiture of lawfully acquired property is generally regarded as a mitigating factor in sentencing. It has the effect of placing an offender in a worse position and was therefore of punitive or deterrent effect.

[8] In that case, as with the matter presently before this Court, no sentencing error was established. In the present matter there was no basis upon which the sentencing Judge could have taken into account the threat that forfeiture might occur. At the time of sentencing, the appellant's property was exposed to the risk of forfeiture and, through that forfeiture, the appellant was exposed to an additional penalty. However, the risk could not be quantified. The subsequent making of the forfeiture order '[throws] new light on that matter.'[4]

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[2] (2007) 174 A Crim R 526.
[3] (2009) 197 A Crim R 53.
[4] *R v McLeod* (2007) A Crim R 526 at 536 [35] per Maxwell P, Redlich JA and Habersberger AJA.

[9] As the respondent acknowledged, the approach taken by the courts in Victoria in relation to the reception of fresh evidence is consistent with the approach taken by this Court in a series of decisions commencing with *Dooley v The Queen*[5] and followed in *Leach v The Queen*[6] and *Payne v The Queen.*[7] In those cases it was noted that the basis for receiving the new evidence was that it demonstrates the true significance of facts in existence at the time of sentence. If the fresh evidence 'would probably have altered the sentence imposed had it been before the sentencing Judge, it is in the interests of justice that appellate courts receive such evidence and reconsider the sentence.'[8] The information is admissible as fresh evidence.

[10] In the circumstances this Court must determine whether, on the entirety of the material now available, a sentence different from that imposed by the sentencing Judge is appropriate. All of the matters that were before the sentencing Judge are before this Court, along with the additional information that, as a consequence of his actions, the appellant has forfeited his unit valued at $445,000.

[11] In our opinion a sentence different from that imposed by the sentencing Judge is called for in light of the entirety of the material now available for consideration. We allow the appeal.

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[5] *Dooley v The Queen* [2003] NTCCA 6 at [28], [30].
[6] *Leach v The Queen* [2005] 159 A Crim R 183 at 195 [45].
[7] *Payne v The Queen* [2007] NTCCA 10 at [21] per Martin (BR) CJ, Angel and Riley JJ.
[8] Ibid.

[12] Without deciding whether this Court has power to remit the matter to the sentencing Judge, we will proceed to resentence the appellant under s 411(4) of the *Criminal Code*. In so doing, we have taken into account the matters set out in his Honour's sentencing remarks and the significant further penalty suffered by the appellant by virtue of the forfeiture of his property. We set aside the sentence and impose a sentence of imprisonment for a period of 5 years backdated to commence on 22 January 2010 to allow for time in custody. We deem the appellant eligible to apply for parole as of this day.

[13] The sentence we have imposed reflects the circumstances of this particular case and should not be seen as an appropriate response to other cases with other circumstances.

Legislative change

[14] In *R v McLeod*, the Court of Appeal in Victoria called for legislative change, noting that it was unsatisfactory for the issue of subsequent forfeiture of property to be dealt with by the appellate court. The Court observed:[9]

> Subsequent forfeiture is not a true appeal ground, precisely because the sentencing judge could not have known what the appeal court subsequently learns about the forfeiture. The need to take account of the new information about forfeiture means that in every such case this court is required to act effectively as the primary sentencing court, which is not appropriate.

[9] *R v McLeod* (2007) 174 A Crim R 526 at 537 [40]–[43] per Maxwell P, Redlich JA and Habersberger AJA.

...

> In our view, the proper approach, where forfeiture occurs after sentence and has not been able to be adequately taken into account at the time of sentencing, is for the sentenced person to have the right to apply to the sentencing judge (or another judge of the sentencing court, if the sentencing judge is unavailable) for a review of the sentence in the light of the subsequent forfeiture. This would ensure that every case of subsequent forfeiture could be considered on its merits, by the judge (or at least the court) which imposed the original sentence.
>
> Legislative change would be required to enable this procedure to be adopted. Given the frequency with which forfeiture occurs, we recommend that this be done as a matter of urgency.

[15] Those observations are equally applicable in the present proceedings and in relation to the Northern Territory legislation.

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