20/87

SUPREME COURT OF VICTORIA — FULL COURT

R v PRICE

Crockett, O'Bryan and Gobbo JJ

14 April 1987

CRIMINAL LAW – DRUG OFFENCE – TRAFFICKING/POSSESSION – FORFEITURE ORDER OF PROPERTY RELATED TO OFFENCE – MOTOR VEHICLE/CASH – WHETHER "RELATED TO" OFFENCE – 'GUILTY' PLEA – COURT TO GRANT CREDIT FOR – COURT TO STATE FACT OF REDUCTION WHEN SENTENCING: ***DRUGS, POISONS AND CONTROLLED SUBSTANCES ACT*** **1981, SS71, 73, 85;** ***PENALTIES AND SENTENCES ACT*** **1985, S4(1), (2).**

Section 85(2) of the *Drugs, Poisons and Controlled Substances Act* 1981 ('Act') provides (insofar as relevant) –

> "Where (a) a person is convicted of a drug related offence; ... the court may on the application of the Director of Public Prosecutions order the forfeiture to Her Majesty of property (including moneys, negotiable instruments and securities) which the court is satisfied on the balance of probabilities is related to the offence and may make provision in the order for the destruction or disposal of the forfeited property."

1. Before an order of forfeiture is made under s85(2), the court must be satisfied on the balance of probabilities that a real and substantial connection or a sufficient nexus exists between the property sought to be forfeited and the offence.
(i) Where a motor car was used to transport chemicals and chemical apparatus to premises where amphetamines were manufactured, the court was entitled to be satisfied that the motor car was connected with the manufacture of amphetamines and a sufficient nexus existed for the court to make a forfeiture order.
(ii) Where the sum of $4,500 cash was set aside to buy chemicals and apparatus used in the manufacture of amphetamines and to provide accommodation for the plant and drugs produced, a sufficient nexus existed between the fund of money and the offence for the court to make a forfeiture order.

2. A 'guilty' plea should ordinarily be taken into account in the accused's favour. This means that the Court should grant a credit for a 'guilty' plea, and where the sentence is reduced by reason of the plea, the Court should state the fact of a reduction in the sentence.
R v Morton **[1986] VicRp 82; (1986) VR 863; (1986) 23 A Crim R 433, applied.**

CROCKETT J: *[After setting out the details of the sentences imposed on the accused, the grounds of appeal, the facts of the case and Ground 1, His Honour continued]*: ... **[6]** In the course of his reasons for sentence the Judge said "In sentencing you I take into account that ... you have pleaded guilty to these charges". This statement appears among a number of others each of which deals with matters that operate in mitigation. The conclusion is irresistible that the Judge was intending to convey that by reason of the applicant's plea he had allowed some discount from what otherwise might be thought to be proper. That he should have done so is consistent with, and might be thought in the circumstances to have been required by, the decision of this Court in *R v Morton* [1986] VicRp 82; (1986) VR 863; (1986) 23 A Crim R 433 which indicated that, having regard to the provisions of s4(1) of the *Penalties and Sentences Act* 1985, a guilty plea should ordinarily be taken into account in the accused's favour. The applicant's submission that the Judge's words being (as it was submitted they were) elliptically **[7]** expressed – i.e. he may have meant that he had "borne it in mind" without necessarily deciding to give the applicant the benefit of the plea – together with the non-observance of the provisions of s4(2) meant he had been given no such benefit (though entitled to it) cannot be accepted. This is so not only for reasons already mentioned but also because the wording of s4(1) compels such a conclusion. The sub-section provides that a court may "take into account" a plea of guilty. These are the very words the Judge used. In the context of their use in s4 there can be no doubt that the words are used so as to mean "grant a credit for. In using the words of the statute as he did the Judge must have intended that they carry the same meaning as they do in the enactment.

It is doubtless to avoid doubts about the matter so that accused persons can be positively aware of there being a real advantage to them in pleading guilty that sub- s(2) was included in the legislation. This provision requires the court to state the fact of a reduction in a sentence if it has been reduced by reason of the plea. The failure to comply with the sub-section (although not invalidating the sentence (sub-s (3)) cannot lead to the conclusion in this case that the Judge did not make any reduction. Nevertheless, the provision is explicit and mandatory and courts should be expected to comply with it as a matter of course.

The alternative argument was that, on account of the plea, if it is to be assumed that the Judge intended to reduce the sentence otherwise appropriate, the magnitude of the sentence demonstrates that he did not in fact do so. **[8]** Without any such reduction the sentence was as great as could properly be given and the failure to allow a discount that must as a matter of inference follow amounts to error on the part of the Judge.

A variant of this argument is to be found in the further submission that if the Judge did intend to, and in fact did, make an allowance because of the applicant's plea, as such allowance could not properly be less than a year or two, the term of imprisonment selected for imposition without the discount must have been about eight years or not less than seven. Terms of such length, it was said, were so manifestly excessive that in the selection of the primary sentence the Judge's discretion must be held to have miscarried.

The reasoning that provides the foundation for these submissions may or may not be correct. I express no opinion about that. But the premise upon which it is based is not. In the circumstances of this case in which he was caught red-handed in the manufacture of an illegal drug pursuant to a well-planned and organised laboratory operation the applicant could not, in my opinion, have expected to have his sentence discounted by more than three months by reason of his plea. The question then is whether a term of six years and three months' imprisonment before an allowance of three months for a guilty plea should be treated as unacceptably excessive. Although it is undoubtedly high I do not consider that it should be. It follows that the sentence passed does not of itself when taken in conjunction with the plea of guilty demonstrate a failure to give a mitigating effect to it or that it is manifestly excessive.

[9] The second ground, accordingly, fails. *[His Honour then dealt with Grounds of Appeal not relevant to this Report, and continued]*: ... **[15]** The first question then is – were the items of property in question, or either of them "related to the offence"? As Stephen J observed in *Pioneer Concrete (Qld) Pty Ltd v Brisbane City Council* [1980] HCA 1; (1980) 145 CLR 485; (1983) 4 LGRA 346 at 357 the word "relates" is one capable of wide meaning. I should have thought that both items of property were related to the offence in the first count. There must be a real and substantial connection between the offence and the property. The use of the property that serves to relate it to the offence need not be the dominant use. However, a connection that is merely tenuous is insufficient. In the case of the motor vehicle its detected use on a number of occasions to procure chemicals and equipment permits the inference that it was habitually so used and that its use for such transport means that it had not an insubstantial part to play in the commission of the offence.

On the other hand, although the evidence on the matter is sparse, to say the least, it might be assumed the car was used also for normal domestic and recreational activities to an extent that would mean its employment in **[16]** connection with the manufacture of drugs was merely a subsidiary one. However, its necessary use (and that is how its use should be described) in connection with the commission of the offence means that the car was related to the offence.

In the case of the money the relationship is, I think, more pronounced. The $4,500 was the balance of a fund realised by the sale by the applicant of a car in Tasmania that it must be inferred was that from which the "couple of thousand" was drawn to purchase the materials necessary for drug manufacture. He was not receiving social services nor was he in employment. The fund must, therefore, have been used also for rent and living expenses. But the rent was an outgoing connected with the occupation of the house, which, whilst it provided shelter for the applicant also provided him with his "factory premises". I should have thought that there was a substantial nexus between the fund of money and the offence. The applicant seemed to think that it was being put against him that the money was the proceeds from the sale of amphetamine. The matter could not and was not put that way as plainly there was no evidence of any sales having

been made. Nonetheless, for the reasons given I would conclude that the money was related to the offence.

That leaves for consideration whether this Court should in the exercise of its discretion order that the disputed property be forfeited to the Crown. Counsel's failure at the trial to complain about forfeiture of these items might have some significance; although I are inclined to think it was due to oversight and absence of **[17]** instructions. Certainly before this Court the applicant strongly objected to an order's being made although his lack of professional assistance meant we were denied the aid we might have got on an orderly assembly of the considerations supporting an exercise of discretion in favour of the applicant and an analysis of those considerations.

In the end, and after some hesitation, I have reached the conclusion that the proper way to exercise the discretion is in favour of forfeiture. I have had regard to all the factors that seemed to me to be relevant but, after reflection, I think that the obvious policy of the legislation as evinced by the provisions in Part VI of the Act would seem to require forfeiture in the circumstances of this case.

The consequence is that I do not think a different order from that made in the first place should have been made and the application in this regard must be dismissed. I would therefore propose that the application for leave to appeal be granted: that the appeal be treated as instituted and heard instanter and allowed to the extent that the sentence on count 2 is quashed and in lieu thereof the applicant is sentenced to six months' imprisonment and that otherwise the sentence be affirmed.

O'BRYAN J: *[After setting out the relevant provisions of s85 of the Act and the order made by the trial Judge, His Honour continued].* ... **[3]** The applicant submitted that the Court could not be satisfied that the Holden Station Wagon and/or $4,500 cash which came into the possession of the police when the applicant was arrested on 20th May 1985 at premises situated at Unit 1, 27 Anne St. Knoxfield was or were related to the offence specified in count 1.

The jurisdiction conferred on the sentencing Court by s85(2) was introduced to Victorian law by Act No. 9719 in 1981. The expression 'is related to' means 'is connected or associated with'. Before an order may be made the Court must be satisfied on the balance of probabilities that a sufficient nexus exists between the property sought to be forfeited to Her Majesty and the offence. If a sufficient nexus is proved the Court has a discretion to make an order in the circumstances of the case. The nexus between an item of property and the offence must not be tenuous.

A transcript of the plea and sentence in the present case shows that the forfeiture order sought by the Director of Public Prosecutions was made without objection being raised by counsel who appeared for the applicant on the plea. However, it may not be assumed that counsel tacitly consented to the order. The order appears to have been made without due consideration to the question of whether a sufficient nexus between the **[4]** property and the offence had been proved. In these circumstances it is necessary to examine the evidence afresh.

I have perused the depositions to ascertain whether a sufficient nexus existed between the motor car and the money to entitle the learned Judge to order their forfeiture. There was undisputed evidence that the Holden motor car was purchased in Victoria by the applicant early in 1985 and that from time to time between February and 17th May 1985 the car was used to transport chemicals and chemical apparatus to the premises in Knoxfield which the applicant used as a factory to manufacture amphetamines. In my opinion, the Court was entitled to be satisfied that the motor car was connected or associated with the manufacture of amphetamines by the applicant. Accordingly, a sufficient nexus existed for the Court to make a forfeiture order.

When the police searched the applicant's premises an amount of $4,500 cash was found in his bedroom. The applicant informed the police that the money was part of the proceeds of sale of a motor car that he had sold in Tasmania in November 1984 before he came to Victoria. The applicant said that he had $6,000 and had expended "a couple of thousand" on chemicals and chemical apparatus. The evidence showed that over a period of several months the applicant had purchased from various business houses chemicals and apparatus, such purchases being made for cash. In addition one may **[5]** infer that the applicant expended some of the proceeds to pay

the rent of the premises in which he had set up his manufacturing laboratory.

In my opinion, it was not open to find that the money found in the bedroom represented proceeds from the sale of amphetamines. The learned Judge was entitled to find that the money was the balance of proceeds from the sale of the motor car which was set aside by the applicant to fund the purchase of chemicals and apparatus used in the manufacture of amphetamines and to provide accommodation for the plant and drugs produced. Accordingly, the money was connected or associated with the offence of trafficking in a drug of dependence and a sufficient nexus existed for the Court to make a forfeiture order. The applicant did not suggest that a forfeiture order was not appropriate in respect of the powder, plant material and items in the schedule.

The provisions contained in Part VI of Act No. 9719 relating to Search Seizure and Forfeiture are far-reaching in their operation. However, in enacting Part VI recently Parliament has evidenced an intention that persons charged with or convicted of a drug related offence should be subject to wide-reaching orders in respect of property related to the offence.

GOBBO J: I have read the reasons for judgment of the learned presiding Judge. I have nothing to add. I agree with the order that he proposes.
