

36/89

SUPREME COURT OF VICTORIA — COURT OF CRIMINAL APPEAL

R v ALLEN

Young CJ, Murphy and O'Bryan JJ

17, 20, 21 March, 27 April 1989 — (1989) 41 A Crim R 51

CRIMINAL LAW – DRUG TRAFFICKING – ACCUSED CONVICTED – APPLICATION FOR CONFISCATION AND DISPOSAL ORDERS – NATURE OF SUCH ORDERS – WHETHER MAKING OF ORDER RELEVANT FOR SENTENCING PURPOSES: *CRIMES (CONFISCATION OF PROFITS) ACT 1986*, SS1, 5, 7-9, 12, 13.

Orders under the *Crimes (Confiscation of Profits) Act 1986* are intended to be part of the retribution exacted from offenders on behalf of the community. However, when sentencing a person convicted of a serious crime, a court cannot take into account an application for a confiscation order which has not yet been determined. But, if at the time of sentence, it is apparent that the profits of the crime are confiscated, it is appropriate for the sentencing court to bear that circumstance in mind. The weight to be attached to the effect of the confiscation order will depend on the circumstances of each case.

THE COURT: *[After setting out the offences, sentences and orders, after dismissing the applications for leave to appeal against conviction and confiscation orders and setting out the grounds of appeal relied on by the Director of Public Prosecutions, the Court continued] ... [7] Another matter relied on by Mr Fitzgerald was that the learned Judge took into account the fact that a forfeiture order was made pursuant to the *Crimes (Confiscation of Profits) Act 1986* and the existence of a judgment by the Commissioner of Taxation. His Honour said:*

"I take into account the fact that ... for practical purposes you have been deprived totally of any financial advantage which you obtained from your crime."

Mr Fitzgerald submitted that an order for confiscation of the profits of crime is not relevant to the question of what was a proper sentence to impose in respect of count 1. We turn at once to that important question and first of all refer to some of the provisions of the Act. [8] The *Crimes (Confiscation of Profits) Act 1986* (No. 101 of 1986) was passed for several purposes which are stated in section 1 so far as presently relevant as follows:

- "(a) To provide for the forfeiture of property used in connection with the mission of a crime.
- (b) To provide for the confiscation of the profits of crime, whatever the form into which they have been converted;
- (c) To provide for the freezing of assets;
- (d) To provide for the destruction or disposal of certain illegal goods;"

A confiscation order is defined by section 3 of the Act to mean a forfeiture order or a pecuniary penalty order. A forfeiture order means an order made under section 7(1) and a pecuniary penalty order means an order made under s12(1). Section 7(1) provides:

- "7. (1) If an application is made to a court under section 5(1)(a), the court may, if it considers it appropriate, order that the property be forfeited to the State if it is satisfied that the property—
- (a) was used in, or in connection with, the commission of the offence; or
 - (b) was derived or realised, directly or indirectly, by that person or another person, as a result of the commission of the offence."

Section 12(1) provides:

- "12(1) If an application is made to a court under section 5(1)(b) for an order in respect of the benefits

derived by the person as the result of committing the offence, the court may—

(a) assess the value of those benefits; and

[9] (b) order the person to pay to the Crown a pecuniary penalty equal to the value as so assessed less—
(i) the value (as at the time of making the order under this sub-section) of any property in respect of which a forfeiture order is made in reliance on the same conviction; and

(ii) if the court thinks it desirable to take it into account, any amount payable by way of restitution or compensation in relation to the same conviction."

An important definition in section 3 is that of "Relevant Period" which insofar as here pertinent means "the period of six months after" conviction. "Serious offence" is also defined to mean an indictable offence or any other offence prescribed by the regulations as a serious offence.

Section 5 prescribes, *inter alia*, that the Director of Public Prosecutions or an appropriate officer may (if a person has been convicted of a serious offence) apply to the Supreme Court or the court before which the person was convicted within the relevant period for either a forfeiture order in respect of particular property or a pecuniary penalty order or for both such orders. As a result of section 5(3) such orders may be made at the time of passing sentence "taking into account" the evidence given in the proceedings for the offence.

The Act contemplates that the profits of a crime may have been converted into an another form of property (see purpose (b) s1; s7(2)(b); s7(6)) and that hardship may be caused to some person other than the offender. **[10]** Such hardship may be taken into consideration when the Court is determining whether or not it is "appropriate" to make an order: see 7(2)(b); s7(3)(b); s7(6) and note also ss9, 10, and 11.

Section 8 provides that "if a court makes a forfeiture order in respect of property then immediately on the making of the order the property vests absolutely in the Crown or in such State authority as is specified in the order". The property is, not in the first instance to be directed by the Court to be paid or transferred or returned to any other person. But a person claiming an interest in property which is the subject of a forfeiture order may, within six months (s9(2)) or such later period as the court which made the forfeiture order allows (s9(3)) apply for an order declaring the nature, extent and value of the applicant's interest and directing the Crown to transfer or grant the property or its value to the applicant (s9(4)).

If the Court makes a pecuniary penalty order pursuant to s12 (which is the other form of confiscation order) the Act contemplates that such an order may be made in addition to a forfeiture order (s12(b)(i)). A pecuniary penalty order is made according to the value of the "benefits" derived by the offender as a result of committing the offence. Section 13 provides that on an application for a pecuniary penalty order the Court may treat as benefits such things as it thinks fit including certain specified benefits. **[11]** Thus whereas forfeiture orders are made relating to "particular property" (s5(1)(a)), pecuniary penalty orders relate to the "value" of the "benefits derived" by the offender "as the result of committing the offence." But the two can be made to work together.

It was submitted by Mr Fitzgerald that the situation was analogous to the situation in which orders for compensation under section 92 of the *Penalties and Sentences Act* are made. We cannot accept that submission. Compensation orders have been held to be a means of summary recovery of compensation and not a provision for additional punishment: see *R v Braham* [1977] VicRp 11; [1977] VR 104. Moreover, they are made on the application not of the Crown as prosecutor but of a person who has suffered as a result of the commission of the offence. Orders under the *Crimes (Confiscation of Profits) Act* on the other hand are obtained on the application of the Director of Public Prosecutions and are clearly intended to be part of the retribution exacted from offenders on behalf of the community. In his Second Reading speech in support of the Bill which became the Act the Attorney-General said: "The *Crimes (Confiscation of Profits) Bill* represents a major new weapon in the fight against crime..." Victorian Parliamentary Debates (Legislative Council) 1986, Vol. 384 p970. It was clearly regarded as a deterrent measure and deterrence is one of the chief objects of punishment.

[12] It is clear that a judge when sentencing a person convicted of a serious crime cannot take into account an application for a confiscation order which has not yet been determined.

Indeed, the application need not be made before the offender is sentenced, but may be made within six months of conviction (s5(2) of the Act). Clearly in such a case the sentence could not be affected by the subsequent making of a confiscation order, whether by way of forfeiture order or pecuniary penalty order. However, s5(3)(a) of the Act reads:-

"5(3) If an application is made under sub-section (1) to the court before which the person was convicted of the offence before that court has passed sentence for the offence, the court may —
(a) make a confiscation order at the time of passing sentence and for this purpose the court may, if it thinks it necessary to do so, defer the passing of the sentence until it has determined the application for the confiscation order."

The Legislature appears to contemplate that the Court may wish to postpone sentence until after it has determined the application for the confiscation order, and the sub-section specifically empowers it to do so. It does not say why the Court might wish to do this, and the words "for this purpose" would seem as a matter of construction simply to refer to the "purpose" of making the confiscation order at the same time as sentence is passed.

It is difficult to be sure what the Legislature has in mind when it states "the Court may, if it thinks it necessary to do so, defer the passing of sentence until it has determined the application for the [13] confiscation order." It may be simply an empowering provision or it may be that the Legislature contemplates that the Court may think it "necessary" to know what sort of confiscation order is to be made before fixing an appropriate sentence for the offence.

It is commonplace, when sentencing, to take into consideration the value of any goods stolen or destroyed – and not recovered from the offender. Similarly, the courts invariably take into consideration the fact that an offender has returned goods or money stolen or has made some other form of recompense. Often this is seen, of course, as evidence of remorse, but apart altogether from remorse it is a relevant circumstance when determining the sentence appropriate to the crime. This being so, although an offender may be sentenced before an application for a confiscation order is made, then if at the time of sentencing it is apparent that the profits of the crime are confiscated, it is appropriate to bear that circumstance in mind when sentencing the offender.

The weight to be attached for the purposes of sentencing to the fact that a confiscation order has been made is of course an entirely different matter. Often it may be entitled to little weight. But if, for example, the crime was one involving a fraud of some millions of dollars, it might be seen to have some real relevance when sentencing to be aware that a confiscation order had been made that was likely to be effective in the recovery of the amount of the fraud.

[14] It may be that for some reason the Court may also see that in the very making of a confiscation order, there is something in the nature of punishment wrought. For example, if an offender who has mixed the profits of his crime of fraud with lawfully gotten gains, and purchased a residential property in which his innocent wife and family live with him in apparent respectability, has a confiscation order made apropos that residence, it might be seen that the order, in causing the disruption of his whole family, is in itself a form of punishment to him. The circumstances can vary infinitely, and any attempt to contemplate them in advance is futile.

The scope of the *Crimes (Confiscation of Profits) Act* is so wide that there must be circumstances where the mere making of a confiscation order will be seen to effect some punishment for the crime in addition to the removal of ill-gotten gains from the offender. The respondent argued that the confiscation orders made in his case were relevant to a consideration of the severity of the sentence imposed and he relied upon a decision of the Full Court of the Federal Court, *R v Hoar & Noble* (1981) 34 ALR 357. In that case the Court quoted a passage from Thomas: *Principles of Sentencing* (2nd ed.) (at p336) which reads:

"These cases may justify the view that where the property is specifically adapted for the commission of the offence, or has no other use to the offender, it may be confiscated without regard to the totality of the other sentence or sentences imposed; but where the property is used for a wide variety of purposes and used incidentally in [15] connection with the offence, a confiscation order should be treated as analogous to a fine."

The distinction drawn by Thomas in that passage is, for example, the distinction between

a bank robber using his own car in the commission of a robbery on the one hand and the use of a car specially adapted for the commission of an offence, for example, a car especially fitted with an additional petrol pump and tubing so that petrol could be pumped from other cars into cans placed in the offender's car, on the other. In the first case forfeiture of the car was regarded as an additional punishment, in the second the order for forfeiture was simply the forfeiture of the means of committing the offence.

The present case is not of either character. The learned judge said that he took into account the confiscation orders he had made and we think that his Honour was right to do so. We see nothing to suggest that his Honour gave them insufficient weight and indeed as will appear we think that he may have given them too much weight. The respondent drew to the Court's attention a passage transcribed from a tape recording in which he informed Meehan shortly before his arrest that he intended to give up his drug business. This passage must be understood, however, in the context of the respondent's then existing circumstances, as the owner of a highly lucrative drug business from which he had derived profits of about \$600,000. A further matter relied upon by the [16] respondent was the lengthy period since arrest awaiting sentence and the anxiety he experienced in the meantime. Certainly, a considerable delay occurred between conviction and sentence but the respondent sought deferral of sentencing until the outcome of the confiscation proceeding was known.

The question remains whether the sentence on Count 1 sufficiently marked the serious nature of the offence. The following factors are relevant:

1. The respondent engaged in trafficking in heroin within one month of his release from gaol.
2. He continued that business until April 1986 after being arrested and charged with drug offences on 4th September 1985 and 5th February 1986.
3. When arrested on 4th September 1985 he was found to be in possession of 52.93 grams of white powder analysed as being 38.1 grams of pure heroin. The percentage of pure heroin was 71 per cent and the quantity of pure heroin was 19 times the traffickable quantity.
4. When arrested on 16th April 1986 he was in possession of 27.25 grams of white powder analysed as being 18.3 grams of pure heroin, i.e. 67% or over 9 times the traffickable quantity.
5. The return to the respondent between 4th September 1985 and 16th April 1986 was \$600,000.
6. The evidence revealed a very large number of transactions.
7. The respondent possessed numerous firearms and machine guns in connexion with the heroin business.
8. The respondent's philosophy as revealed on the tapes was that he was a criminal who could outwit the police.
9. The respondent showed no remorse whatsoever.
- [17] 10. None of the heroin was for the respondent's own use as he was not an addict.
11. The respondent's prior convictions were for serious offences and a pre-sentence report refers to his self-centred approach to the world, his lack of conscience, the risk of his re-offending.

The principal factors in the respondent's favour (not overlooking the other considerations rightly taken into account by the learned judge) were:

1. His deprived background.
2. The fact that over 12 months elapsed between conviction and sentence.

We have come to the conclusion that in all the circumstances the sentence on Count 1 was inadequate. It may be that in arriving at the sentence which he imposed the learned judge gave too much weight to the confiscation orders or too much weight to the prospects of the respondent's rehabilitation. We cannot say, but we think that we should pass a fresh sentence.

It has been said over and over again in this Court that persons engaged in the sale of heroin on a large scale are deserving of condign punishment. Persons detected in the business of trafficking in heroin should expect little mercy from the Courts. Very little could be said in mitigation of sentence in view of the respondent's past record and because of the nature of the crimes. The respondent may be regarded as the key figure in a substantial drug business, who used other hapless individuals as dealers and inflicted misery on many others in the community. He has shown no sign of any remorse.

[18] A sentence of twelve years' imprisonment is appropriate on count 1. The sentence

imposed on counts 3 and 4, and the direction that one year of the sentence on count 4 be served cumulatively upon the sentence on count 1 should stand. The total sentence thus becomes thirteen years and we shall fix eleven years as the term to be served before the respondent becomes eligible for parole.

APPEARANCES: For the applicant Allen: In person. For the Crown: Mr G Fitzgerald QC with Mr DB Maguire, counsel. JM Buckley, Solicitor for the DPP.
