

Background

[2] The applicant was convicted and sentenced to six months' community detention for charges of cultivating cannabis, possession of cannabis, and possession of a firearm without a licence. These charges followed the execution of a search warrant at the applicant's properties in 2017. Police found cannabis being cultivated in multiple grow rooms as well as a large quantity of dried cannabis and cash.

[3] Subsequently, in 2018, a further search warrant was executed at the properties while the applicant was serving his sentence of community detention in relation to the 2017 charges. Police found a significant amount of cannabis at the properties along with grow rooms and cultivation equipment. The criminal prosecution was ultimately dismissed because the evidence from the search warrant was ruled inadmissible.⁴

[4] In terms of the civil forfeiture proceedings, the relevant property over which forfeiture orders were sought and obtained was as follows:

- (a) \$6,000 cash seized from X Street, Winchester;
- (b) X Street itself, being Mr Alexander's residence;
- (c) an adjoining Y property with a shed complex; and
- (d) a third property, Z Street, Winchester.

[5] The police also sought to forfeit a car registered in the name of the applicant's son. This claim was successfully defended.

[6] Over the period leading up to the forfeiture hearing, three counsel were assigned to the applicant but each withdrew. The last withdrawal occurred the day before the High Court hearing. There were various delays, and the proceedings were closely case managed by the High Court. The result was that Mr Alexander was self-represented at the hearing in relation to the forfeiture orders.

⁴ *Alexander v Police* [2019] NZHC 2920.

High Court

[7] The High Court found that there was a disparity of some \$242,000 between the applicant's return income and the level of his cash spending. The Judge found that the items of real property were tainted properties. For example, the payment of rates was funded through the applicant's criminal activity. The Judge also found the properties were indirectly tainted: the applicant could only meet his mortgage payments as his day-to-day expenses were funded through illegitimate means.

Court of Appeal

[8] The Court of Appeal dealt first with the question of whether the High Court hearing was procedurally unfair. There were three aspects to this.

[9] The first of these was the argument that the High Court hearing should have been adjourned and an amicus or standby counsel appointed. The Court of Appeal concluded there was no error in not adjourning the hearing. There had been considerable leniency in relation to timetabling directions and the Court had encouraged the applicant to engage but he would not do so. The Court of Appeal agreed with the Commissioner that there was a clear pattern of "non-compliance, prevarication and delay".⁵ There was also some prejudice as a result to the Commissioner.

[10] Second, the Court of Appeal did not find any procedural unfairness arising in the conduct of the hearing. While the applicant was self-represented, the Court considered that he was aware of the relevant issues and put appropriate questions to witnesses. The Judge had also assisted from time to time, for example, by reframing questions to clarify what was sought.

[11] Third, the Court concluded there was no obligation to appoint standby counsel or an amicus. There was nothing to suggest the applicant was under a disability or otherwise incapable of representing himself. This was not a case where the Judge

⁵ At [43].

needed the assistance of an amicus; there was no important or difficult point of law involved.

[12] Relevantly, the Court also addressed the question of whether forfeiture was unduly harsh. In relation to this question, the Court of Appeal noted that there had been no application as required by s 51 of the Criminal Proceeds (Recovery) Act. Section 51(1) provides that:

The High Court may, on an application made by the respondent before an assets forfeiture order is made, exclude some property from the assets forfeiture order if it considers that, having regard to all of the circumstances, undue hardship is reasonably likely to be caused to the respondent if the property is included in the assets forfeiture order.

[13] The Court of Appeal noted that this Court has yet to consider the question of the extent to which, and whether, the New Zealand Bill of Rights Act 1990 (the Bill of Rights) informs undue hardship as referred to in s 51. However, the Court of Appeal did not consider this was the case for that Court to address the issue. It had not been addressed at first instance. There was no up-to-date evidence directly relevant to undue hardship, as opposed to the hardship generally suffered by a person forfeiting property. In any event, the Court considered that the High Court was precluded from inquiring into that issue by the provisions of s 51, which required an application to have been made in that respect.

Proposed appeal

[14] The applicant wishes to argue that the Court should have ordered relief and that the assets forfeiture orders were unduly harsh. This is because, the applicant says, the orders involved the forfeiture of his only significant asset and/or were grossly disproportionate. The applicant submits that the Court has an obligation to assess hardship even if an application under s 51 is not made. The applicant also says that the proposed appeal raises questions of general or public importance about the relationship between s 9 of the Bill of Rights, which concerns the right not to be subjected to cruel and unusual treatment or punishment, and undue hardship under the Criminal Proceeds (Recovery) Act.

[15] The respondent submits that s 51 is a bar to jurisdiction as it requires an application to have been made for the exclusion of property from a forfeiture order on the grounds of undue hardship. There was, in any event, no gross disproportionality here. No broader questions arise.

Our assessment

[16] It is not disputed that the property subject to the orders was tainted. The only issue on the proposed appeal would relate to the question of undue hardship. As the respondent accepts, the inter-relationship between the approach to hardship in the Criminal Proceeds (Recovery) Act and s 9 of the Bill of Rights Act may give rise to a question of general or public importance.⁶ But, as the respondent also notes, that question was not fully ventilated in the courts below.

[17] In terms of the absence of an application under s 51, the applicant was legally represented up until the day before the hearing but no application for relief on the basis of hardship was made.⁷ In any event, regardless of the effect of s 51 on the jurisdiction of the Court, the fact no application was made means evidence was not advanced going directly to particular hardship and nor, apart from matters advanced by way of submission now, do we have any such evidence. The various assertions made about the impact of forfeiture on the applicant's sons may have been relevant to the question of hardship but, the Crown submits, there was no evidence before the Court that the two sons are currently living at the property. Nor has there been any application from them apart from that made by one of the applicant's sons in relation to the car.

[18] In these circumstances, the proposed appeal is not an appropriate vehicle for this Court to consider the broader question about the inter-relationship with s 9. Nor, against this background, do we see an appearance of a miscarriage of justice.⁸

⁶ Senior Courts Act 2016, s 74(2)(a); and see *McFarland v Commissioner of Police* [2024] NZSC 84 at [6].

⁷ The applicant attaches two letters from two of the counsel who had withdrawn from representation of the applicant prior to the High Court hearing. No formal application for admission of these letters in this Court has been made but, in any event, we do not consider they add materially to the applicant's submissions.

⁸ Senior Courts Act, s 74(2)(b).

Result

[19] The application for leave to appeal is dismissed.

Solicitors:

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