Director of Public Prosecutions v Hennig [2005] NTSC 41

PARTIES:	DIRECTOR OF PUBLIC PROSECUTIONS
	v
	COLIN JONATHAN HENNIG
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY exercising Territory jurisdiction
FILE NO:	20113016, 20423270
DELIVERED:	04 August 2005
HEARING DATES:	18 April, 21 April, 16 June 2005
JUDGMENT OF:	THOMAS J

CATCHWORDS:

CRIMINAL LAW -- PROCEDURE -- DECLARATION UNDER THE MISUSE OF DRUGS ACT -- S36A DRUG TRAFFICKER

Operation of legislation – statutory interpretation – Misuse of Drugs Act 2003 – Criminal Property Forfeiture Act 2002 – restraining orders – restraint of property – forfeiture of property – declaring a person to be a drug trafficker

REPRESENTATION:

Counsel:

Appellant:	E Armitage
Respondent:	P Elliott

Solicitors:

Appellant:	Office of the Director of Public Prosecutions
Respondent:	Northern Territory Legal Aid Commission

Judgment category classification:	C
Judgment ID Number:	tho200504
Number of pages:	28

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

Director of Public Prosecutions v Hennig [2005] NTSC 41
20113016, 20423270

IN THE MATTER OF the *Criminal Property Forfeiture Act* and
IN THE MATTER OF
Colin Jonathan Hennig

BETWEEN:

DIRECTOR OF PUBLIC PROSECUTIONS
Applicant

AND:

COLIN JONATHAN HENNIG
Respondent

CORAM: THOMAS J

REASONS FOR JUDGMENT

(Delivered 4 August 2005)

[1] The applicant applies for the following declaration(s) and/or orders against Colin Jonathan Hennig:

> "1. Pursuant to Sections 41(2) and 44(1)(a) of the *Criminal Property Forfeiture Act 2002*, and subject to paragraphs 2 & 3 hereof, the following property ("the Property") be restrained:
>
> (a) personal property:
>
> (i) ANZ Bank Account Number 015 901 5995 – 05012 and the Australian currency held therein, namely $33,333.17.

(b) all or any property that is owned or effectively controlled by Colin Jonathon (sic) Hennig as at the date of this application and not currently identified or described in this application.

ON THE GROUNDS THAT

A. Colin Jonathan Hennig was convicted of an offence on 23 March 2005, namely, cultivate a commercial quantity of cannabis, which could lead Colin Jonathan Hennig to be declared a drug trafficker under section 36A of the *Misuse of Drugs Act*.

2. Any income or other property derived from the Property the subject of this Restraining Order while the Order is in force is to be treated as part of the Property (Section 49(2)).

3. The Property is restrained for a period of 3 months or until further order of this Court (Section 51(1)).

4. Pursuant to section 36A of the *Misuse of Drugs Act*, a declaration that the respondent, Colin Jonathan Hennig, be declared a drug trafficker.

5. Pursuant to section 94(3) of the *Criminal Property Forfeiture Act*, a declaration that the property of the respondent, Colin Jonathan Hennig, has been forfeited by operation of section 94(1) of the *Criminal Property Forfeiture Act*."

[2] The application is supported by an affidavit of Elisabeth Helen Armitage sworn 21 April 2005. The background to this application is as follows:

[3] On 6 June 2003, at Darwin in the Supreme Court of the Northern Territory, Colin Jonathan Hennig was convicted of the following four counts on indictment.

"Count 1

Between 1 June, 2001 and 28 August, 2001 at Dundee in the Northern Territory of Australia, unlawfully cultivated a prohibited plant, namely, cannabis.

AND that the unlawful cultivation involved the following circumstances of aggravation, namely,

(i) that the number of prohibited plants was a commercial quantity, namely, 71 plants.

Section 7(1) & (2) of the Misuse of Drugs Act.

Count 2

On 27 August, 2001 at Dundee in the Northern Territory of Australia, unlawfully possessed cannabis plant material, a dangerous drug specified in Schedule 2.

AND that the unlawful cultivation involved the following circumstances of aggravation, namely,

(i) that the amount of the dangerous drug was a commercial quantity, namely 646 grams.

Section 9(1) & (2)(d)(i) of the Misuse of Drugs Act.

Count 3

On 27 August, 2001 at Driver in the Northern Territory of Australia, unlawfully possessed cannabis plant material, a dangerous drug specified in Schedule 2.

AND that the unlawful cultivation involved the following circumstances of aggravation, namely,

(i) that the amount of the dangerous drugs was a commercial quantity, namely 543.4 grams.

Section 9(1) & (2)(d)(i) of the Misuse of Drugs Act.

Count 4

On 27 August, 2001 at Driver in the Northern Territory of Australia, unlawfully possessed cannabis seed, a dangerous drug specified in Schedule 2.

Section 9(1) & (2)(f)(ii) of the Misuse of Drugs Act."

[4] The convictions followed a plea of guilty to each of the four counts. The Court made the following findings of fact with respect to each of the charges:

> "On 27 August 2001, police officers in an unmarked police vehicle, followed a vehicle being driven by the accused in an isolated area north of the Dundee Beach Road, approximately 13 kilometres north-west of the Sand Palms Roadhouse. Police were looking for growing cannabis. Police were driving north along an unmarked dirt track

towards the coastline. They observed the accused's vehicle, which was stationary, facing north, parked in the middle of the track.

Police observed the accused walk out of the bush from the west side of the track and get into the driver's seat of the vehicle. The vehicle drove off. The police followed the accused's vehicle.

I accept that, at this time, the accused was not sure whether or not they were police officers, as they were not in uniform and it was an unmarked vehicle.

The accused threw a green garbage bag of cannabis plant material out of the vehicle and drove away. This bag was later recovered and found to have freshly cropped cannabis plants inside the garbage bag. The total weight of the cannabis found, was 646 grams.

Shortly after this time, the accused stopped his car, raised his hands and was arrested. I accept that where he stopped was in a more populated area, which he thought would be safer, because he was concerned as to just who it was that was following him.

A search of the area was conducted by police officers and a number of cannabis sites were located. The accused admits cultivating cannabis at three of these sites. The total number of plants at these three sites was 71. There was no credible link between the accused and the other sites found by police.

There is nothing to contradict the submission made on behalf of the accused, and confirmed in his own evidence, that he did not plant these plants or organise the planting of the cannabis.

The definition of 'cultivate' under the Misuse of Drugs Act is as follows:

> Cultivate, in relation to a prohibited plant, includes grow, sow or scatter the seed produced by and plant, nurture, tend or harvest the prohibited plant.

The accused has given evidence, which is not contradicted, that he came upon these cannabis sites. He decided to take some for his own use. 27 August 2001 was the second occasion he had visited the cannabis site. He did water the plants which means he nurtured them, and in this sense he is guilty of cultivating the plants.

I accept the evidence given by Mr Hennig, that the extent of his involvement in the cultivation of the plants was that he had watered them. Mr Hennig gave evidence he had no intention of selling or commercially dealing with these plants. He gave evidence he took the plants for his own use. His evidence is he was a heavy smoker of cannabis at that time. He had grown cannabis at home for his own use, but did not feel safe in doing this as he lives in a built-up area.

He stated he took advantage of the opportunity to take some cannabis from these sites for his own use.

The accused has satisfied the onus cast upon him, pursuant to section 37(6) of the Misuse of Drugs Act, that he did not intend to supply the cannabis for commercial gain.

When Mr Hennig found the 71 plants, they ranged in height from 2 centimetres to 60 centimetres. Of the 71 plants, 23 were in five pots, and there were nine pots with 42 plants, and six plants were on another site. It is unlikely that all plants would have reached maturity.

Mr Hennig agreed, in cross-examination, that if he had not been apprehended, he would have continued to return to the crop site to take cannabis for himself, and stated that in doing so he was being greedy in taking the cannabis for his own use.

With respect to counts 3 and 4, the facts are that later in the day, on 27 August 2001, police exercised a warrant on the accused's premises. A total of 543.3 grams of cannabis was found during the search. In addition, small amounts of cannabis seeds were located in a film container."

[5] The Court then set out other matters that were taken into account in the sentencing exercise.

[6] The sentence with respect to Counts 1, 2 and 3 was an aggregate sentence of 18 months imprisonment which was fully suspended with an operational period of two years from 6 June 2003. On Count 4, Mr Hennig was convicted and discharged without sentence.

[7] On 21 March 2005, Colin Jonathan Hennig entered a plea of guilty to the following charge on indictment:

"On 13 October 2004 at Darwin in the Northern Territory of Australia, unlawfully cultivated a prohibited plant, namely, cannabis AND THAT the unlawful cultivation involved the following circumstances of aggravation, namely,

(i) the number of prohibited plants was a commercial quantity, namely, 362 plants.

Section 7(1) & (2)(a) of the Misuse of Drugs Act."

[8] There was some argument on the alleged Crown facts. The Court heard oral evidence and received a number of exhibits. On 23 March 2005, Mr Hennig was convicted of this offence and acknowledged that the conviction meant he was in breach of the suspended sentence imposed by the Court on 6 June 2003.

[9] On 21 April 2005, I proceeded to sentence Mr Hennig on the basis of the following facts (tp 2-8):

"The Crown presented the following allegations:

'The offender is a 35 year old, single, unemployed electrician who resides in rented accommodation in Palmerston. A couple of months prior to 13 October 2004, the offender, Colin Jonathon Hennig, purchased rolls of heavy-duty plastic sheeting, large heavy-duty black plastic growing bags, fertiliser and potting mix.

At some time following the purchase of the above items, the offender drove his vehicle, a white Toyota Land Cruiser Troop Carrier, Northern Territory registration 658 593, from his home address to an area North of the Cox Peninsula Road. The offender stopped approximately 10 kilometres past the Dundee Beach turn off on Cox Peninsula Road and then drove 900 metres to the north of the road on an unmarked bush track.

In this area the offender placed the plastic sheeting down onto clear ground at various points. Onto this plastic sheeting the offender placed the black plastic growing bags and filled them with a mixture of potting mix and dirt. In these bags the offender planted numerous cannabis seeds which eventually germinated and began to grow. Around some of the pots the offender placed lengths of native bush in an attempt to camouflage them.

In some time in early October, Peter James Lisson, the co-offender, asked the offender if he knew where he could get

cannabis. The offender said 'come for a drive and I'll show you something.' The two of them loaded up water containers. The offender drove to a site about 200 metres away from the plantation, parked the car and unloaded a wheelbarrow and the water. They walked to the plantation and together they watered the plantation. The offender picked a couple of heads and the two left and drove back to Palmerston.

Around that time the offender told Lisson that he thought he would get a couple of pounds of cannabis from all of the plants. He said that they were Northern Light strain, an award winning plant. He said that each head would be worth about $50 when mature. He said that he planted them there a couple of months prior.

On 8 October 2004, Police acting on information attended this site. The search of the area located the cannabis plantation, consisting of maturing cannabis plants contained in the black plastic growing bags situated on black plastic sheeting. Police estimated that there was in excess of 300 cannabis plants at the location in 4 separate plots, spaced between 5 and 20 metres apart. The cannabis plantation was located in a remote location without any marked tracks leading to it. The plantation was located on top of a ridge line. which was approximately 250 metres from the nearest bush track. Police then commenced a surveillance operation at the site, utilising physical and electronic surveillance.

On 13 October 2004 the offender told Lisson that the plantation would be ready so they drove back out in the offender's car. Lisson anticipated getting an ounce of cannabis for his own personal use from the plantation, for his efforts.

At 4:05 pm on Wednesday 13 October 2004, the offender and Lisson were observed by Police, driving to a site 250 metres North of the cannabis plantation in a Toyota Troop Carrier, Northern Territory registration 658 953, which belongs to the offender. The offender was observed to remove a shovel, plastic growing bag, gloves and fertiliser from the rear of the vehicle and carry it to the cannabis plantation. The offender was then observed checking and tending the cannabis plants. A short time later, Lisson was observed pushing a wheelbarrow containing four 10 to 20 litre containers to the plantation site. These activities were recorded on video surveillance equipment.

The offender and co-offender were apprehended walking back to the Troop Carrier with the wheelbarrow. A search of the Troop Carrier revealed that it contained further water

containers, plastic growing bags and a large container of potting mix. The offender and co-offender were then conveyed to the Darwin Police Station where they were lodged in the cells.

A subsequent search of the site revealed that there were 362 cannabis plants at the location. The plants appeared to be a hybrid breed, with low canopy and a large amount of head material. 348 of the plants were in the flowering state, with resinous heads, 14 did not have flowering heads. The plants ranged in height from 8 centimetres to 50 centimetres.

The potential illicit value of the cannabis plants was estimated to be between a thousand and $2000 a plant, and that each plant can easily produce 500 grams of useable cannabis leaf and head. The potential illicit value of all 362 plants, can therefore be estimated to be between $372 000 and $744 000.

A search warrant was later obtained for the offender's premises at 10/32 Shearwater Drive, Bakewell. This was executed at 7:45 pm, and during the course of the search the following items were located: A plastic bag of cannabis, with 14.9 grams located in the main bedroom; loose cannabis and joint, 1 gram, located in the lounge on the television; loose cannabis, 0.6 grams, located in a bowl on the lounge table.

The total weight of the cannabis located at the house was 16.5 grams. If the cannabis was divided into 1 gram bags, the value of the cannabis would be $412.50. At the present time a gram-bag will retail for a conservative average price of $25 a bag. The 16.4 grams times 25 equates to $412.50.

In addition, Police observed several large plastic pots in the back garden, which were the same size and colour as those located at the crop. They were filled with potting mixture that looked the same as that located at the crop site.

At 11:19 pm on 13 October 2004, the offender took part in a taped record of interview. When questioned about the cannabis plantation the defendant declined to comment on any of the matters put to him.

362 cannabis plants is 18 times the number of plants deemed to be a commercial quantity, under schedule 2 of the Misuse of Drugs Act. Forfeiture is sought for the cannabis and all equipment used on the crop site including the accused's Toyota Land Cruiser Troop Carrier, registration number NT 658 953. Forfeiture is also sought for the 16.5 grams of cannabis located at the offender's residence. An exhibit list of the items seized was attached to the Crown facts, exhibit P1.

> This matter is before the Court today on ex-officio indictment. The accused was charged on 13 October 2004 and a plea was indicated by Mr Read, of the Northern Territory Legal Aid Commission, on 18 October. He has pleaded guilty at the first opportunity. The accused has remained in custody since 14 October 2004 and has spent 158 days in custody with respect to this matter.
>
> The co-offender, Mr Lisson, pleaded guilty to one count of cultivating a commercial quantity of cannabis and was sentenced on 17 December 2004 to a head sentence of 12 months imprisonment, backdated to 13 October 2004, to be suspended after serving 4 months and with an operational period of 12 months.
>
> During sentencing submissions, Mr Lisson undertook, through his counsel, to give evidence in accordance with his statement at the hearing for Mr Hennig. The Crown informed the Court that this offer would provide real assistance and that Mr Lisson was consequently entitled to a significant discount because of it.
>
> The Crown conceded that Mr Lisson was not going to receive any commercial gain, although he must have known the crop was being grown for commercial gain. This then concludes my reading of the Crown facts.'

The defendant, Mr Hennig, did not seek to disprove the presumption, under s 37(6) of the Misuse of Drugs Act, that the crop was for a commercial purpose.

The Crown allegations are essentially admitted by the defence. Mr Elliott did indicate, on behalf of the defendant, that there was a dispute as to the potential quantity of cannabis that could be collected from these plants. It is the defendant's position that he was growing the cannabis for his own use. If he harvested more than required for his own needs he would supply or sell some to friends.

Essentially the dispute is not that it was for commercial purposes, but as to the extent of the commercial purpose. Mr Elliott, on behalf of the defence, stated the defence dispute that there could be a finding of fact that 180 kilos would have been produced. The Crown position is that this could have grown to a very substantial crop and realised 180 kilograms of cannabis. The Crown called evidence on the disputed aspects of the Crown facts.

Evidence was given by Mr Peter Lisson. Mr Lisson was a co-accused with Mr Hennig. He was convicted on 17 December 2004, following a plea of guilty to one count of unlawfully cultivating a prohibited plant, namely cannabis, with the circumstance of

aggravation that the number of prohibited plants was a commercial quantity, namely 362 plants. Mr Lisson was convicted and sentenced to 12 months imprisonment, suspended after he had served 4 months imprisonment.

In imposing sentence, the learned sentencing Judge stated that amongst other matters, he was discounting the sentence on Mr Lisson's offer to give evidence against his co-accused, Mr Hennig. His Honour noted the Crown had informed the Court, Mr Lisson's offer provided real assistance. His Honour found that Mr Lisson only had a minor involvement in the enterprise and personally did nothing towards the propagation of the plant, and that it was his co-offender that planted and nurtured these plants. I note, from the sentencing remarks, that Mr Lisson was 40 years of age and had a prior record that was relatively minor.

Mr Lisson gave evidence to this Court on 21 March 2005. At that time he was still under the conditions of a suspended sentence. Mr Lisson gave evidence that as at October 2004, he had been living on and off at Mr Hennig's home. Mr Lisson stated that on the day of his arrest he had driven with Mr Hennig to some marijuana plants past Berry Springs. He stated he had earlier, on one occasion, been to these plants with Mr Hennig and they had taken out 4 or 5 20 litre drums of water.

Mr Lisson stated on this first occasion he had helped Mr Hennig to carry the water, put the water onto the crop and return the containers to the vehicle. He states the second occasion he went there they were arrested. It is his evidence that Mr Hennig had told him he would give him some marijuana in exchange for assisting to carry the water. However, the plants were not ready at that time and were to be picked on their next visit.

Mr Lisson gave evidence that although he did not remember the details of any discussions with Colin Hennig, it was Colin Hennig who took him out to the crop and he formed the impression that Mr Hennig had planted the crop, because Colin Hennig knew where it was located.

Mr Lisson agreed in cross-examination that Mr Hennig had told him that he did not want to grow cannabis because he was on a suspended sentence. He was asked questions in cross-examination to the effect that it was he, Peter Lisson, who was agitating for Mr Hennig to grow a crop, and that it was only on the basis of such overtures that Mr Hennig decided to plant some marijuana. Mr Lisson denied that he was involved from the start in the growing of this crop and denied there was any agreement that they would go halves.

I did not find Mr Lisson to be a completely satisfactory or reliable witness. I do not accept all that he says is true, in particular with

respect to what he maintains was the lack of discussion about marijuana between himself and Mr Hennig. However, nothing he says diminishes the role played by Mr Hennig in the cultivation of the crop.

I do not accept that Mr Hennig only planted the crop as the result of overtures made by Mr Lisson and even if he did, that does not, in the circumstances of this case, diminish Mr Hennig's guilt. I find that it was Mr Hennig who planted the crop and nurtured the plants and that he had promised Mr Lisson some marijuana in return for assisting him to water the plants.

The Crown also called Detective Peter John Schiller, who was, at the time he gave evidence on 21 March 2005, a Detective Acting Sergeant in the Drug Enforcement section of the Police Force and has been a Police Officer for some 17 years. I have at an earlier time, during these proceedings, given reasons for my ruling that I accepted Detective Schiller had the necessary expertise to give evidence as to the potential harvest of this crop and the market value of this particular crop when fully matured. The defence had challenged his expertise to give evidence as to what these particular plants would do as they matured and how much cannabis they could yield.

Detective Schiller gave evidence that in his opinion these particular plants would be capable of producing a varying weight of product, but a safe conservative estimate would be, to average it out, in the vicinity of 500 grams per plant. Detective Schiller's estimate of the market value of 180 kilograms of cannabis would be between $372 000 and $744 000. The defence conceded that Detective Schiller is an expert when it comes to the price of cannabis.

I accept the evidence of Detective Schiller as to the potential quantity of cannabis that could be produced from these plants and their possible market price. As stated, I have previously ruled that Detective Schiller has the necessary expertise to give this evidence.

There is a wide range in the estimated market price. I am not able to find what the exact market price could have been. There may also have been reasons why this crop did not realise its potential, and the actual amount produced could differ from the anticipated potential. I am satisfied on the evidence that these plants had the potential to produce a substantial quantity of cannabis and realise a significant value as a commercial enterprise.

In addition to the evidence of Mr Lisson and Detective Schiller, the Court was shown two videos. The first video is a surveillance tape of Mr Lisson and Mr Hennig arriving at the crop site, unaware that they were under surveillance. The second video is a walk-through, by Police Officers, of the site following the arrest of Mr Lisson and Mr Hennig. This video shows the lay-out of the site, and

demonstrated how the site was fairly well hidden. In addition to the two videos, the Crown tendered a number of photographs.

It is Detective Schiller's evidence, in cross-examination, that at the time of the Police walk-through of the site the plants, if stripped at that time, would produce less than 5 kilos of cannabis. The plants were not ready for harvest at that time, but there was some weight in them. Detective Schiller agreed that at this stage of their development there was not a lot of weight in them and it could be as little as one kilogram. He stated, by reference to photograph 30 and 31, from the grower's perspective there were encouraging heads. He agreed that it was perfectly conceivable that a person could grow the plants to the size depicted in the photographs tendered, get a couple of pounds out of it, dry it, and the cannabis would be perfectly good to smoke.

On 23 March 2005, by agreement with Mr Elliott counsel for the defence, I proceeded to conviction on the offence as the area of dispute did not effect the essential elements of the charge.

Upon conviction for this offence, Mr Hennig acknowledged that he was guilty of the offence of unlawfully possessing cannabis material, namely 16.5 grams of plant material in his home, 10/32 Shearwater Drive, Bakewell, on 13 October 2004. This offence was set out on schedule and the Court was asked by the Crown and the accused to take this offence into account in imposing sentence for the offence of cultivating a commercial quantity of cannabis. In sentencing the offender, I have taken the offence of possess cannabis material into account.

In addition to this, the defendant, Colin Hennig, acknowledged that the conviction for the offence of cultivate a commercial quantity of cannabis put him in breach of a suspended sentence imposed by this Court on 6 June 2003. On that date, Mr Hennig was convicted of certain offences under the Misuse of Drugs Act including cultivate cannabis. He was sentenced to a total of 18 months imprisonment, suspended forthwith, the operative period being 2 years. Mr Hennig was about 16 months into the operational period when he was arrested on this further offence. I proceeded to find the breach of suspended sentence proved.

The Crown have made application that the vehicle owned by Mr Hennig and being used by him to travel to the site of the crop, be forfeited to the Crown, together with the forfeiture of the cannabis and all the equipment used on the crop site. This would also include the 16.5 grams of cannabis located at Mr Hennig's home. This application is not opposed.

> I do make an order, pursuant to s 34 of the Misuse of Drugs Act, that the cannabis and all the equipment used on the crop site, including the motor vehicle Toyota Land Cruiser Troop Carrier being registered Northern Territory number plate NT 658 953, owned by Mr Hennig, be forfeited to the Crown. The items of equipment are set out on the exhibit list attached to the Crown facts. The order for forfeiture also includes the 16.5 grams of cannabis located at his home.
>
> I do take into account, when I sentence Mr Hennig, he has been penalised by forfeiture of a vehicle valued at some $8000."

[10] There then followed findings in respect of other matters put forward in mitigation.

[11] Mr Hennig was sentenced to 18 months imprisonment for breach of the suspended sentence. He was sentenced to three years imprisonment for the subsequent offence of cultivate cannabis committed on 13 October 2004. This period of three years imprisonment was made concurrent with the sentence for breach of suspended sentence to be discharged after serving 15 months with an operational period of two years from the date of his release. The sentence was backdated to 14 October 2004 to take account of time spent in custody.

[12] Mr Hennig has been convicted of an offence of cultivate a commercial quantity of cannabis. This offence was committed on 13 October 2004. The facts found by the court on convicting Mr Hennig are that it was for a commercial purpose. However, the Crown had not substantiated that the plants would in fact realise the potential quantity alleged. Mr Hennig was sentenced on this basis.

[13] The application for the restraining order is made by Ms Armitage on behalf of the Crown. It is not alleged that the money being the $33,333.17 in the ANZ bank account to which the respondent is the sole signatory, is the proceeds of an offence. The basis of the application is that the money is in the effective control of the respondent. Upon Mr Hennig being declared a "drug trafficker" under s 36A(3)(b)(ii) of the Misuse of Drugs Act, the Crown seeks forfeiture of these monies pursuant to s 94 of the Criminal Property Forfeiture Act. The Crown do not suggest that there is a criminal connection between this money and this or any other specific offending.

[14] The application involves a consideration of the relevant provisions of the Criminal Property Forfeiture Act. Sections 39 – 40 inclusive, deal with seizure of crime used or crime derived property, and interim restraining orders. An application for an interim restraining order may be made in the Local Court.

[15] Section 41(2) provides that the Director of Public Prosecutions may apply for a restraining order under Division 2 of Part 4 of the Act. Such application may be made ex parte. Section 42 deals with proceedings for restraining orders. Section 43(1) states the Local Court may make a restraining order in relation to property specified in the application if there are reasonable grounds for suspecting that the property is crime used or crime derived. Section 43(2) provides the circumstances in which the Supreme Court on application by the Director of Public Prosecutions may make a restraining order in relation to property specified in the application.

[16] Section 44 relates to restraining orders in relation to property of a person named in the restraining order. Section 44(1)(a) provides as follows:

> "(1) The Supreme Court may, on application by the DPP, make a restraining order in relation to the property of a person named in the application if –
>
> (a) the person has been charged, or it is intended that within 21 days after the application the person will be charged, with an offence that, if the person is convicted of the offence, could lead to the person being declared to be a drug trafficker under section 36A of the *Misuse of Drugs Act*;"

[17] Section 45 relates to specifying grounds in the restraining order. Section 46 deals with the scope of the restraining order. Section 47 provides for service of the restraining order on the person who has custody of the property, the subject of the restraining order, and any person who may have or claims to have an interest in the property subject to the order. Section 48 requires a person served with a restraining order to file a statutory declaration containing certain details. Section 49 sets out the effect of the restraining order. Section 50 provides for circumstances in which the restraining order can be set aside. Subsections 50(2) and (3) provide as follows:

> "(2) The applicant in relation to a restraining order under section 44(1)(a) must request the court that made the order to set the order aside if the person could not be declared to be a drug trafficker.
>
> (3) The applicant in relation to a restraining order may request the court that made the order to set the order aside for any other reason."

[18] Subsequent sections under this part deal with matters such as duration of the restraining order and circumstances in which a restraining order ceases to have effect. A relevant provision is s 52(3) which states:

> " (3) If a restraining order has been issued under section 44(1)(a) in relation to property of a person who was to be charged and a charge has been laid within 21 days after the date of the order, the order ceases to have effect –
>
> (a) if the charge is finally determined but the person is not declared under section 36A of the *Misuse of Drugs Act* to be a drug trafficker; or
>
> (b) if the charge is disposed of without being determined."

[19] Section 53 pertains to real property which is not relevant with respect to this application. Section 54 provides that property may be restrained under more than one order. I note with respect to s 54 that the amount of $33,333.17 in the ANZ bank account under the name of Colin Jonathan Hennig is already the subject of a restraining order in the Local Court at Darwin. Section 65 provides for setting aside of a restraining order. Section 94(1)(a) provides that if a person is declared to be a drug trafficker under s 36A of the Misuse of Drugs Act - "(a) all property subject to a restraining order that is owned or effectively controlled by the person, … is forfeited to the Territory."

[20] It would appear from reading the relevant provisions of the Criminal Property Forfeiture Act 2002, that it was envisaged such an application would, in the normal course of events, be made ex parte. That upon the obtaining of such an ex parte order the owner, or person claiming an interest

in the subject property, was to be served with the restraining order and had certain rights including the right to have the restraining order set aside.

[21] This particular application did not proceed in that way. The application was made following the hearing of the most recent charge. The application was filed on 21 April 2005 being the date sentence was delivered. Copy of this application and supporting documentation was served on the respondent. I note also that the application was referred to by the Crown on 18 April 2005 at the completion of submissions on sentence for the most recent offence. On 18 April 2005, submissions were made by Ms Armitage concerning an application under s 36A(3)(b)(ii) of the Misuse of Drugs Act to have Mr Hennig declared a drug trafficker. Mr Elliott, on behalf of the respondent, made certain submissions in relation to the application to have Mr Hennig declared a drug trafficker. At the conclusion of these submissions, I indicated I would proceed to sentence Mr Hennig on 21 April 2005 and hear further submissions at a later date on the application that Mr Hennig be declared a drug trafficker. Sentence for the offence committed on 13 October 2004 and for breach of the suspended sentence, was imposed on 21 April 2005. Ms Armitage stated she would file a written application with respect to the application for a restraining order and the application that Mr Hennig be declared a drug trafficker pursuant to s 36A(3)(b)(ii) of the Misuse of Drugs Act. This application was filed on 21 April 2005. The application then came before the Court for further submissions on 16 June 2005.

[22] Submissions were made by Ms Armitage for the Office of the Director of Public Prosecutions and Mr Elliott for the respondent. This means that the respondent has had an opportunity to argue the merits of the issuing of the restraining order under s 44(1) of the Criminal Property Forfeiture Act and the application he be declared a drug trafficker under s 36A(3)(b)(ii) of the Misuse of Drugs Act. If an order were to be made under s 44(1) of the Criminal Property Forfeiture Act it would still be necessary to serve that order in accordance with the provisions of the Act. The subsequent requirements of that legislation would need to be fulfilled. This would include, affording a right to be heard to any third party, who may claim an interest in the property.

[23] Ms Armitage agreed that when the Court does look at whether or not to issue a restraining order, the Court has to consider whether it is satisfied that the respondent, having been convicted for an offence committed on 13 October 2004, could be declared a drug trafficker under s 36A of the Misuse of Drugs Act. If the application to have Mr Hennig declared a drug trafficker is not pursued then the Office of the Director of Public Prosecutions would not be in a position with respect to the proceedings in the Supreme Court to request forfeiture of the $33,333.17 in the ANZ bank account under the control of Colin Jonathan Hennig.

[24] I will deal with a preliminary issue raised by Mr Elliott with respect to the interpretation of s 44(1)(a) of the Criminal Property Forfeiture Act. Mr Elliott argued that the application for a restraining order can only be

made prior to the conviction of the person against whom the restraining order is sought. Mr Elliott points to the fact that in this case the Crown did not do that. He also referred to s 36A of the Misuse of Drugs Act which enables an application to be made for a person to be declared a drug trafficker at the time of the hearing of the offence or at any other time. It is Mr Elliott's submission that if a declaration is made under s 36A(3) then all the provisions under the Criminal Property Forfeiture Act subsequent to s 44 are rendered nugatory because under s 94 of the Criminal Property Forfeiture Act the Court is bound to make an order forfeiting the property. In summary, it is the argument on behalf of the respondent that if a s 44(1)(a) restraining order could be obtained after conviction there is nothing to stop the Crown at the same time applying for a declaration under s 36A of the Misuse of Drugs Act making it mandatory for the property to be forfeited, with no rights to a respondent to be heard. In Mr Elliott's submission this would mean substantial portions of Part IV and Part V of the Criminal Property Forfeiture Act would have no purpose. Section 94(1)(a) of the Criminal Property Forfeiture Act provides that if a person is declared a drug trafficker under s 36A of the Misuse of Drugs Act, then all property the subject of the restraining order that is owned or effectively controlled by the person is forfeited to the Territory.

[25] I do not accept the argument put forward by Mr Elliott, that the Crown are precluded from bringing an application for a restraining order, under s 44(1) of the Criminal Property Forfeiture Act 2002, because there has now been a

conviction recorded for the offence. I agree with the submission made by Ms Armitage for the Crown, that the fact that further steps have proceeded since the person has been charged, does not change the fact that Mr Hennig is a person who "has been charged". I also agree with the submission made on behalf of the Crown that there is no unfairness inherent in the process. The granting of an application under s 44(1) does not result in a fait accompli. If an application is granted under s 44(1) then Mr Hennig has certain statutory rights. He must be served with the restraining order (s 48). He is required to file a statutory declaration in the Court, naming any person who may have an interest or claim on the property (s 48). The respondent, Mr Hennig, has a right to file an objection to the restraining order. A court hearing such objection may set aside the restraining order (s 62 – s 65). Accordingly, Mr Hennig's rights are protected if a restraining order were to issue.

[26] The next matter to consider in dealing with the application under s 44(1) is whether Mr Hennig having been convicted of the offence "could lead to the person being declared to be a drug trafficker under s 36A of the Misuse of Drugs Act". I have interpreted this to mean that I must consider whether Mr Hennig "could be declared a drug trafficker". If I conclude he could, then a restraining order should issue and the consequent procedures already referred to under the provisions of the Criminal Property Forfeiture Act would be set in train.

[27] If I were to conclude that he could **not** be declared a drug trafficker by reference to s 36A of the Misuse of Drugs Act then the application for a restraining order should be refused.

[28] I note the Crown do not allege that the $33,333.17, being the subject of the application for the restraining order in the Supreme Court, is from the proceeds of a crime. The application made on behalf of the Office of the Director of Public Prosecutions to the Local Court for a restraining order, is on a different basis. With respect to that application, I am informed Mr Hennig has filed a statutory declaration with supporting documentation asserting the fact that this $33,333.17 was paid into his account by his father to assist Mr Hennig in purchasing a home.

[29] Section 36A of the Misuse of Drugs Act provides as follows:

> "(1) The Director of Public Prosecutions may apply to the Supreme Court for a declaration that a person is a drug trafficker.
>
> .....
>
> (3) On hearing an application by the Director of Public Prosecutions under subsection (1), the court must declare a person to be a drug trafficker if –
>
> .....
>
> (b) subject to subsection (5), in the 10 years prior to the day on which the offence was committed (or the first day on which the offence was committed, as the case requires), the person has been found guilty –
>
> .....
>
> (ii) on one occasion of 2 (or more) separate charges relating to separate offences of which 2 or more correspond to an offence or offences referred to in subsection (6)."

Subsection 36A(3)(b)(i) reads:

> "(i) on 2 or more occasions of an offence corresponding to an offence referred to in subsection (6); or"

[30] I interpret 36A(3)(b)(i) to mean that there have been two prior incidents of offending being two completely separate occasions.

[31] Section 36A(3)(b)(ii) is the provision that is relevant to Mr Hennig. Mr Elliott on behalf of Mr Hennig, argues that this also means two prior incidents of offending which although completely separate were dealt with by the court on the one occasion. I accept this is a situation which can arise where for example (but not limited to this example) an offender is charged with an offence and whilst on bail commits a further offence. Both incidents of offending could then come before the court on the same date or the one occasion and be dealt with together.

[32] Ms Armitage on behalf of the Office of the Director of Public Prosecutions submits that s 36A(3)(b)(ii) applies in this situation where Mr Hennig came before the court and was convicted of three separate offences committed as at the date of his arrest on or about 27 August 2001 and not separated in time. Ms Armitage also submitted that the third offence of possess commercial quantity of cannabis on 27 August 2001, was separate from the other two offences because it related to cannabis found in Mr Hennig's home on the same day he was arrested for cultivate a commercial quantity of cannabis.

[33] I note that the fourth offence of possess cannabis on 27 August is under s 9(1) and (2)(f)(ii) of the Misuse of Drugs Act and is not an offence relevant for the purpose of s 36A(6). It is an offence for which the maximum penalty is a fine of $2,000. I do not consider that offence to be relevant to whether or not Mr Hennig should be declared a drug trafficker. Ms Armitage does not rely on the conviction on Count 4 with respect to her application. The three matters that form the basis of the application are Counts 1, 2 and 3 on indictment.

[34] With respect to Count 3 the facts do not specify where the 543.4 grams of cannabis plant material was derived. The facts are consistent with an inference this cannabis plant material came from the cannabis crop that is the subject of Count 1. The fact that Count 3 pertains to cannabis found at home does not in reality separate it from Counts 1 and 2. The facts in support of Count 2 support a firm conclusion that the cannabis plant material, the subject of Count 2, came from the crop site, that is the subject of Count 1. Mr Hennig was arrested for all four offences on the one day. I consider the four offences amount to one incident.

[35] Mr Hennig was subsequently convicted on all four offences on 6 June 2003. On the argument advanced on behalf of the Director of Public Prosecutions, the fact that there are two or more offences referred to in s 36A(3)(b)(ii) for which Mr Hennig has been found guilty, it is sufficient to satisfy the provisions of s 36A(3)(b)(ii).

[36] Ms Armitage, on behalf of the Office of the Director of Public Prosecutions submitted that, the Crown rely on Counts 1, 2 and 3 on the indictment filed 19 September 2002 for which he was sentenced on 6 June 2003. Mr Hennig was on that occasion, convicted of separate offences, namely an offence of cultivating a commercial quantity of cannabis and two offences of possessing a commercial quantity of cannabis. I agree these are separate offences in that the elements of each of the offences are distinct and separate elements. It is the Crown submission I must then declare the person to be a drug trafficker. The effect of s 94 of the Criminal Property Forfeiture Act is that upon this declaration being made, the property, i.e. the $33,333.17 in the ANZ account, is forfeited to the Northern Territory.

[37] Mr Elliott, on behalf of Mr Hennig, submits that "separate offences" does not mean separate counts that can be produced out of the one set of offending. It is the argument for the respondent that "separate offences" must relate to separate incidents of offending otherwise the words "separate charges" have no meaning.

[38] I find the wording of s 36A(3)(b)(ii) to be ambiguous. I have read the Second Reading Speech with respect to this legislation in an endeavour to clarify the matter.

[39] The reference to the Second Reading Speech is done pursuant to s 62B of the Northern Territory Interpretation Act. The Second Reading Speech of the Criminal Property Forfeiture Act No. 34 of 2002, was presented to

Parliament by the Attorney-General on 16 May 2002. There are two relevant passages from the speech made by the Attorney-General:

page 2:

> "The court will also be able to make forfeiture orders in relation to declared drug traffickers, unexplained wealth, criminal benefits and crime-used property substitution. The court may declare a person to be a drug trafficker when that person has been found guilty of three serious drug offences within a period of 10 years. For the purposes of the declaration, a serious drug offence includes cultivation, possession or manufacture of a commercial or trafficable quantity of an illicit drug."

and at page 3:

> "As I previously outlined, under the new legislation a person maybe declared a drug trafficker and as a result of that declaration all properties subject to a restraining order owned or effectively controlled by the person, and all property that was given away by the person, will be forfeited to the Territory. The *Misuse of Drugs Act* is amended to provided for that declaration and to provide which offences are irrelevant for the purposes of a hearing of an application for a declaration."

[40] The bill was further debated on 18 June 2002. The Attorney-General made the following comments in response to the debate (page 16):

> "To point out the differences that exist between our legislation today and the Western Australian act on which it has been modelled, the Western Australia[n] act does not provide for confiscation to be taken into account in sentencing; ours does. It only requires that one offence of trafficking takes place for declaration of a drug trafficker; in our case, we require three such incidents. The Western Australian act is declaration-based because of their status as a state government; we have to use court orders to mandate the actions taken under our act. Constitutionally, we require orders, and that is a requirement for acquisition on just terms. They are the only differences between the two pieces of legislation. We are, by that way, trying to slip in behind the Western Australian legislation which has already been

> tested in their courts, and therefore avoid potential legal challenges to our legislation."

and page 18:

> "… A restraining order will be made only if a person who is named in the application has been charged, or will be charged within 21 days after the application, with an offence which could lead to that person being declared a drug trafficker; or that an order under the legislation will be made or has been made. There are built-in protections and limitations within the provisions of this bill."

[41] The first quoted reference in the Debate on the Second Reading Speech refers to "**three such incidents**" which would tend to accord with the interpretation urged upon the Court by Mr Elliott.

[42] Section 36A of the Misuse of Drugs Act imposes a sanction with potentially very serious consequences for an individual. In Mr Hennig's case it could have serious consequences involving the forfeiture of $33,333.17. It is a principle of statutory interpretation, that in interpreting legislation involving a criminal sanction, it should be construed strictly (per Lord Reid in *The Director of Public Prosecutions v Ottewell* [1970] AC 642 at 649). Furthermore, his Honour Lord Esher MR said in *Tuck & Sons v Priester* (1887) 19 QB 629 at 638:

> "We must be very careful in construing that section, because it imposes a penalty. If there is a reasonable interpretation which will avoid the penalty in any particular case we must adopt that construction. If there are two reasonable constructions we must give the more lenient one. That is the settled rule for the construction of penal sections."

In *The King v Adams* (1935) 53 CLR 563 at 567:

> "… No doubt, in determining whether an offence has been created or enlarged, the Court must be guided, as in other questions of interpretation, by the fair meaning of the language of the enactment, but when that language is capable of more than one meaning, or is vague or cloudy so that its denotation is uncertain and no sure conclusion can be reached by a consideration of the provisions and subject matter of the legislation, then it ought not to be construed as extending any penal category."

In *Forbes v Traders' Finance Corporation Limited* (1972) 126 CLR 429 at 447 per Gibbs J:

> "… Our duty is to give effect to the intention of the legislature as expressed in the statute, but since the statute imposes a forfeiture we must construe it strictly, in the sense that we must not extend its provisions to cases not clearly within their scope but must resolve any doubt or ambiguity in favour of the subject whose property is sought to be forfeited. …"

In *Murphy v Farmer*(1988) 165 CLR 19 at 28-29 per Deane, Dawson and Gaudron JJ:

> "… The provision is, in our view, properly to be seen as penal or quasi-penal in character and as attracting the rule that '[t]hose who contend that [a] penalty may be inflicted, must shew that the words of the Act distinctly enact that it shall be incurred under the present circumstances. They must fail, if the words are merely equally capable of a construction that would, and one that would not, inflict the penalty' …"

Had Parliament intended the interpretation as submitted by the Office of the Director of Public Prosecutions in respect of s 36A(3)(b)(ii) then it could have been more clearly stated.

[43] In the present case, I interpret s 36A(3)(b)(ii) of the Misuse of Drugs Act to mean the offender must have been found guilty in respect of offences

referred to in s 36A(b) arising from two separate previous incidents in the 10 years prior to the commission of the offence on 13 October 2004. This offence committed by Mr Hennig on 13 October 2004 is in fact the second incident not the third incident.

[44] The consequence of this interpretation is that Mr Hennig could not be declared a drug trafficker in accordance with the provisions of s 36A of the Misuse of Drugs Act.

[45] Accordingly, the Director of Public Prosecutions has not established the basis for the application for a restraining order under s 44(1) of the Criminal Property Forfeiture Act. For these reasons the application for a restraining order pursuant to s 44(1) of the Criminal Property Forfeiture Act is refused.

———————————————————————