IN THE HIGH COURT OF NEW ZEALAND
DUNEDIN REGISTRY

CRI 2009-412-000036

KEVIN ROBERT BOYD MASON
Appellant

v

POLICE
Respondent

Hearing: 18 November 2009

Counsel: L A Andersen for Appellant
R D Smith for Crown

Judgment: 4 December 2009

JUDGMENT OF FOGARTY J

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[1] On 15 July 2009 the District Court (Judge Garland) ordered that $2,650 found in the appellant's possession upon execution of a search warrant be forfeited to the Crown pursuant to s 32 of the Misuse of Drugs Act 1975.

[2] The relevant provision is s 32(3) which provides:

> **32 Forfeiture**
>
> …
>
> (3) If, on the conviction of any person for an offence against section 6 of this Act, the Judge or District Court Judge is satisfied that money found in the possession of that person was received by that person in the course of or consequent upon the commission of that offence, or was in the possession of

> that person for the purpose of facilitating the commission of an offence against that section, the Judge or District Court Judge may, in addition to any other penalty imposed pursuant to this Act, order that that money be forfeited to the Crown.

[3] The appellant pleaded guilty to charges of supplying cannabis (s 7(1)(b) and 7(2) of the Misuse of Drugs Act 1975) and possession of cannabis for the purpose of supply (s 6(1)(f) and s 6(2) of the same Act).

[4] A total of $3,000 cash was found in his bedroom. Inside a yellow Ripcurl wallet on top of a DVD rack was the sum of $50. The appellant confirmed this was from the sale of cannabis. There was $300 in a Billabong wallet which he acknowledged related to his cannabis sales. There was $200 in a boomerang filter bag in an electronic safe which the appellant said was money relating to his Christmas trip to see his father and there was $2,450 in the same safe which the appellant said was his savings. The Judge ordered the forfeiture of the money found in the safe – totalling $2,650.00.

[5] It may be noted that the power is confined to money received in the course of or consequent upon the commission of offences against s 6 of the Act.

[6] As noted, the appellant had pleaded guilty to charges of supplying cannabis under ss 7(1)(b) and 7(2) for the purpose of supply under s 6(1)(2) of the Misuse of Drugs Act 1975.

[7] Section 6(1) provides:

> **6 Dealing with controlled drugs**
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> (1) Except as provided in section 8 of this Act, or pursuant to a licence under this Act, or as otherwise permitted by regulations made under this Act, no person shall—
>
> (a) Import into or export from New Zealand any controlled drug, other than a controlled drug specified or described in Part 6 of the Schedule 3 to this Act; or
>
> (b) Produce or manufacture any controlled drug; or
>
> (c) Supply or administer, or offer to supply or administer, any Class A controlled drug or Class B controlled drug to any other person, or otherwise deal in any such controlled drug; or

(d) Supply or administer, or offer to supply or administer, any Class C controlled drug to a person under 18 years of age; or

(e) Sell, or offer to sell, any Class C controlled drug to a person of or over 18 years of age; or

(f) Have any controlled drug in his possession for any of the purposes set out in paragraphs (c), (d), or (e) of this subsection.

[8] Section 7(1)(b) provides:

7 Possession and use of controlled drugs

(1) Except as provided in section 8 of this Act, or pursuant to a licence under this Act, or as otherwise permitted by regulations made under this Act, no person shall—

...

(b) supply or administer, or offer to supply or administer, any Class C controlled drug to any other person, or otherwise deal in any such controlled drug.

[9] There is no suggestion that the appellant was dealing in anything other than cannabis.

[10] It may be noted that there is an overlap between s 6(1)(d) and s 7(1)(b). The police could have laid the information of supplying cannabis on these facts under s 6(1)(d) but did not do so. This was probably a mistake. As the charge of supply was laid under s 7 of the Act Judge Garland found he had no jurisdiction to order that the $350 in the two wallets, agreed proceeds of drug dealing, could be forfeited to the Crown. There has been no appeal against this decision.

[11] The charge under s 6 was based on the cannabis found in the possession of the appellant. A search by the police of the appellant's premises found a plastic bag containing nine point bags of cannabis head. The appellant told the police he had been selling cannabis for a few months; that he sold maybe an ounce of cannabis per week; and he told the police that he purchased cannabis in one ounce lots paying anything between $300 and $400 per ounce.

[12] The appellant argued before Judge Garland, and repeats the argument in this Court, that the Judge cannot be satisfied beyond a reasonable doubt that the $2,650 found in the safe was there for the purpose of facilitating the commission of an

offence against s 6 of the Act. Second, that even if the test is on the balance of probabilities the Judge could not find, as he did, that all of it was in his possession for the purpose of facilitating offending under s 6 of the Act.

[13] Mr Andersen has two parts to his argument. Firstly, he argues that for s 32(3) of the Act to apply, the Judge has to be satisfied beyond a reasonable doubt. Second, he argues that the admitted proceeds of drugs of $350 found in the two wallets is a sufficient cash float to purchase an ounce of cannabis; that the knowledge level of trading in cannabis of one ounce per month justifies a float of $350 - $400, but does not justify a float of anything like $2,500.

[14] The Judge's findings were based on the balance of probabilities and are set out in paragraph [55] of his decision:

> [55] I am satisfied on the balance of probabilities that some, if not all, of the cash found in the defendant's possession in the safe was the proceeds of his drug dealing offending, and that all of it was in his possession for the purpose of facilitating offending under s 6 of the MODA:
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> 1 The money was found in the very premises where the defendant was operating from as a drug dealer, selling cannabis.
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> 2 The location of the cash, and the denominations in which it was held, justify the inference that the defendant wanted ready access to it for the purpose of his cannabis dealing.
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> 3 The denominations in which the money was found, is consistent with the sale of point bags of cannabis at $50 each.
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> 4 The defendant admitted he had been selling cannabis for "a few months maybe". Clearly that could be less than three months, but equally it could be more.
>
> 5 Using Detective Smaill's evidence as a basis for profit calculation, conservatively the defendant was making approximately $400 profit per month.
>
> 6 The defendant was not on any benefit and had no other significant source of income from employment. Yet he was purchasing one ounce of cannabis per week at a cost of between $300 and $400. To facilitate his initial and subsequent purchases of cannabis, he obviously needed a cash source or float.

> 7 The defendant admitted exchanging drug money he received with money in the safe. His willingness to intermingle drug money with the money in the safe tends to confirm he was using the money in the safe as a bank. In the absence of any alternative credible explanation, it is reasonable to infer that he used that accumulated source of money to fund his cannabis drug dealing operation in the past, and intended to do so in the future.
>
> 8 In my view, the most likely explanation for the monies in the safe, is that the monies in the safe came from the proceeds of dealing in cannabis, and that it was being held by the defendant for the purpose of purchasing more cannabis which would be on-sold by him.

Balance of probabilities or proof beyond a reasonable doubt

[15] Mr Andersen's argument is that the word "*satisfied*" in s 32(3) of the Misuse of Drugs Act does not specify the burden of proof to be applied and he relies on the decision of the Supreme Court in *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1. Second, he argues that forfeiture is part of the sentence and that s 24 of the Sentencing Act 2002 applies:

> **24 Proof of facts**
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> (1) In determining a sentence or other disposition of the case, a court—
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> (a) may accept as proved any fact that was disclosed by evidence at the hearing or trial and any facts agreed on by the prosecutor and the offender; and
>
> (b) must accept as proved all facts, express or implied, that are essential to a plea of guilty or a finding of guilt.
>
> (2) If a fact that is relevant to the determination of a sentence or other disposition of the case is asserted by one party and disputed by the other,—
>
> (a) the court must indicate to the parties the weight that it would be likely to attach to the disputed fact if it were found to exist, and its significance to the sentence or other disposition of the case:
>
> (b) if a party wishes the court to rely on that fact, the parties may adduce evidence as to its existence unless the court is satisfied that sufficient evidence was adduced at the hearing or trial:
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> (c) the prosecutor must prove beyond a reasonable doubt the existence of any disputed aggravating fact, and must negate beyond a reasonable doubt any disputed mitigating fact

raised by the defence (other than a mitigating fact referred to in paragraph (d)) that is not wholly implausible or manifestly false:

(d) the offender must prove on the balance of probabilities the existence of any disputed mitigating fact that is not related to the nature of the offence or to the offender's part in the offence:

(e) either party may cross-examine any witness called by the other party.

(3) For the purposes of this section,—

aggravating fact means any fact that—

(a) the prosecutor asserts as a fact that justifies a greater penalty or other outcome than might otherwise be appropriate for the offence; and

(b) the court accepts is a fact that may, if established, have that effect on the sentence or other disposition of the case

mitigating fact means any fact that—

(a) the offender asserts as a fact that justifies a lesser penalty or other outcome than might otherwise be appropriate for the offence; and

(b) the court accepts is a fact that may, if established, have that effect on the sentence or other disposition of the case.

[16] In his reserved judgment Judge Garland collects a large number of decisions of the Court of Appeal and High Court finding that standard of proof on the balance of probabilities is the appropriate standard, including quoting a dicta from myself in *R v Chau* HC CHCH CRI 2007-009-008275 18 November 2008 at paragraph [12] where I said:

> The statute requires me to be satisfied, see s 32(3) set out above. **It has been authoritatively and commonly accepted to be satisfied on the balance of probabilities.**
>
> (Emphasis added when cited by Judge Garland)

[17] Mr Andersen submits that none of these authorities have considered the inter-relationship between s 32 of the Misuse of Drugs Act 1975 and s 24 of the Sentencing Act 2002.

[18] Mr Andersen submits that Judge Garland did not square up to his contention that the application of s 32 of the Misuse of Drugs Act is part of the process of "*determining a sentence or other disposition of the case*" in the language of s 24.

[19] There is no doubt that that phrase appearing in s 24(1) has potentially a wide ambit. However, in my view it has to be read in its context. In its context it is directed to the sentence as distinct from the recovery of proceeds of crime. Other disposition of the case can include, for example, discharge without conviction under s 106 of the Sentencing Act.

[20] When the Sentencing Act was passed in 2002 it was well established on the authorities (many of which are collected in Judge Garland's judgment) that the standard of proof to be applied when exercising s 32 is upon the probabilities.

[21] There is absolutely no indication in s 24 or elsewhere in the Sentencing Act that s 24 of the Sentencing Act was intended to guide the application of s 32 of the Misuse of Drugs Act.

[22] Had that been Parliament's intention, given the substitution of a much more onerous burden of proof, one would have expected the statute to clearly enunciate the ambit going well beyond the general phrase "*a sentence or other disposition of the case*" which in its context can naturally be confined to the sentence or substitutes for the sentence.

[23] In *Z* the Supreme Court were unanimous that the presence of the standard "*satisfied*" in the statute does not mandate the civil standard of proof. The onus of proof required to meet that test needs to be inferred if it is not spelt out in the statute and if it is to be inferred it is from the context of the statute. See McGrath J for the majority paragraph [96] and Elias CJ paragraph [26]. Mr Andersen uses this principle to displace the line of authority which essentially infers that where Parliament uses a standard of being satisfied it is usually intending in context the use of a civil standard. I agree as a result of *Z* that presumption cannot be maintained but it does not follow that when examining the context of the statute that one loses sight of the language used by Parliament to indicate the appropriate standard to be

deployed by the Judge. So by contrast if a statutory provision said the Judge had to be sure, that language would be a great assistance to drawing an inference that the appropriate standard was beyond reasonable doubt.

[24] In conclusion I am satisfied that Parliament did not intend by s 24 to disturb the established application of s 32 of the Misuse of Drugs Act. Nor does the decision of the Supreme Court in *Z*.

The merit of Judge Garland's conclusions in his paragraph [55]

[25] As is apparent from the opening sentence of paragraph [55] the Judge found that some but not all of the cash in the safe was proceeds of drug offending, but that all of it was in his possession for the purpose of facilitating offending.

[26] The Judge went on in sub-paragraph 8 to find the most likely explanation for all the money in the safe is that it came from the proceeds of dealing in cannabis.

[27] The first issue is whether that finding is sufficient to justify forfeiture. Mr Andersen argues it is insufficient because it is not a finding that the money found in the safe was received by the appellant in the course of or consequent upon the commission of an offence referred to as "*that offence*" in s 32(3). The s 6 offence that he was convicted of was only having in his possession cannabis for the purpose of supply. Mr Smith for the Crown effectively accepted that the question is whether or not the forfeiture was justified by the finding in sub-paragraph 8 of paragraph [55].

[28] I agree that the most likely explanation for the money in the safe is that it came from the proceeds of dealing in cannabis. It does not follow that a successful trader needs to use all of the money accumulated from such trading to acquire future stock. The Judge made a finding in paragraph [55]6 that he was purchasing one ounce of cannabis per week at a cost of $300 - $400. This was for resale. That meant that the cost of purchase was being recovered upon resale, thereby recovering the cost price for use to purchase another one. Yet, the Judge had to find that the $2,650 in the safe was being held by the defendant for the purpose of purchasing

more cannabis which would be on-sold by him. That purpose was not established on the balance of probabilities. Accordingly, the Judge could not be satisfied.

[29] The Judge's findings in paragraph [55] are not sufficient to meet either of the two threshold criteria in s 32(3). Accordingly, the appeal is allowed. The sums of $2,450 and $200 found in the safe are not forfeited to the Crown.

Solicitors:
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