



SENTENCING AND FORFEITURE

Mileto v The Queen [2014] VSCA 161

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Sentencing appeal following forfeiture; fresh evidence

by Christian Juebner

On 31 July 2014, the Court of Appeal (Whelan and Priest JJA) handed down its decision in *Mileto v The Queen* [2014] VSCA 161.

The Court allowed an appeal against sentence on the basis of forfeiture of property occurring after the conviction of the offender.

In short, the facts were as follows; the offender had been convicted of drug trafficking and sentenced to a term of imprisonment. Between the time of arrest and sentencing, a restraining order had been made over a property under the Confiscation Act 1997 for the purpose of automatic forfeiture. That property was registered in the name of the offender, following a family law settlement with his ex-wife, which had taken place prior to the offending period. The property was used in connection with the drug

trafficking activities, but was not derived (in a financial sense) from the drug-trafficking activities.

After the offender was sentenced in the County Court, the proceedings under the Confiscation Act 1997 were settled on the basis that the offender's 50% interest in the restrained property was forfeited to the Minister and the offender's de facto's 50% interest in the property was excluded from the restraining order.

The ground of appeal against sentence was framed as follows:

On the basis that because fresh evidence concerning the automatic forfeiture of the applicant's property has come into existence

after the applicant was sentenced, a miscarriage of justice has arisen warranting the imposition of a lesser sentence upon the applicant.

Priest JA (with whom Whelan JA agreed) stated that:

"In my opinion, the evidence concerning forfeiture of the applicant's interest in the property is admissible as fresh evidence since it shows "the true significance of facts in existence at the time of sentence". It should thus be regarded as reopening the sentencing discretion." [At 21]

Having made that finding, the Court reduced the sentence.

Relevantly, Priest JA referred to earlier authority (*R v McLeod* (2007) 16 VR 682) which drew a distinction between the forfeiture of proceeds of crime and forfeiture of lawfully acquired property, wherein the former cannot be used to mitigate sentence whereas the latter can [at 23]. In regard see also Sentencing Act 1991 (Vic), section 5(2A).

The significance of the decision is that it highlights the opportunity to seek to appeal a sentence in an appropriate case where forfeiture occurs post conviction.

About the author

Christian Juebner is a barrister at the Victorian Bar and practices extensively in proceeds of crime litigation in various Australian jurisdictions. He was admitted to practice in 1996 and, prior to coming to the Bar 10 years ago, was a partner with Deacons (now Norton Rose Fulbright).

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