

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

**CA76/2021
[2021] NZCA 517**

BETWEEN COMMISSIONER OF POLICE
Appellant

AND RAYMOND LAW
Respondent

Hearing: 22 September 2021

Court: French, Gilbert and Collins JJ

Counsel: M R Harborow and J T Barclay for Appellant
N T C Batts for Respondent

Judgment: 8 October 2021 at 11.00 am

JUDGMENT OF THE COURT

- A The application to adduce further evidence is declined.**
 - B The appeal is allowed.**
 - C An assets forfeiture order is made over the two gold bars so that they vest
 in the Crown.**
 - D There is no order for costs.**
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REASONS OF THE COURT

(Given by Collins J)

Introduction

[1] The Commissioner of Police (the Commissioner) appeals a judgment in which Palmer J dismissed an application for a civil forfeiture order (the application) made under the Criminal Proceeds (Recovery) Act 2009 (the Act).¹

[2] The application related to two gold bars, worth \$73,224.75, that were found in Mr Law's possession when he was caught committing a burglary at a laundromat in Auckland. He subsequently pleaded guilty to committing burglaries and stealing a total of \$11,000 from five laundromats, including the laundromat where he was found in possession of the gold bars (the laundromat offending).

[3] The grounds of appeal are encapsulated in the following two questions:

- (a) Did the High Court Judge err when he concluded the gold bars were not directly or indirectly acquired or derived from significant criminal activity and therefore not tainted property as defined in the Act?
- (b) Did the Judge err when he determined the value of the unlawful benefit Mr Law acquired from significant criminal activity was limited to the \$11,000 he stole from laundromats?

[4] We need only consider the question posed at [3(b)] if we find against the Commissioner in relation to the question at [3(a)]. Before analysing the issues, we shall explain the facts, relevant law and the High Court judgment.

The facts

[5] Mr Law is a recidivist burglar and thief. He has also acquired a number of other convictions for driving, drugs and dishonesty offences. We need only refer to the following convictions:

¹ *Commissioner of Police v Law* [2021] NZHC 9 [High Court judgment].

- (a) In August 2017, when he was 28 years old, Mr Law was convicted and sentenced on six charges of obtaining by deception. He was sentenced to a total of six months' community detention and ordered to pay reparation totalling \$2,920.45.
- (b) In February 2020, he was convicted in relation to the laundromat offending. He was sentenced in the District Court to 26 months' imprisonment.² On appeal, the sentence was reduced to 23 months' imprisonment, with leave granted to apply for home detention.³

[6] The Commissioner has applied to adduce in this Court evidence of further criminal offending by Mr Law. We do not think that evidence adds in any material way to the case for the Commissioner. We therefore decline to admit that evidence on the basis that it is not relevant.

[7] The laundromat offending occurred between 1 April 2019 and 24 May 2019. It was during the course of the third of those burglaries that Mr Law was arrested. He was caught in the middle of the afternoon breaking into a self-service laundry facility. The owner of the laundromat called the police after seeing Mr Law on CCTV breaking into a laundry machine. When the police arrived, they found Mr Law wearing black rubber gloves and in possession of burglary tools, including screwdrivers, a hammer, a crowbar and a chisel. Inside a bag that was in Mr Law's possession, the police found the two gold bars and a jewellery box containing earrings and a pendant. Mr Law told the police when he was initially spoken to on 10 May that he had sold a gold bar some weeks previously for a "few grands".

[8] When he was questioned by the police about how he came to be in possession of the gold bars, Mr Law gave the following explanations:

- (a) On 31 July, he told the police he was given the gold bars by his Canadian grandmother when he was young.

² *Police v Law* [2020] NZDC 3037.

³ *Law v Police* [2020] NZHC 717.

(b) On 14 September, Mr Law sent an email to the police saying:

I've spoken to my father and he said he got them from my grandmother when we travelled to Canada 1993 that's the only information he can provide on where they have come from.

(c) On 18 September, Mr Law again said the gold bars came from his grandmother in Canada but that his father gave him the gold bars after Mr Law had his children. Mr Law said he had the gold bars in his possession when he was arrested at the laundromat because he took them with him after he had an argument with his partner.

[9] Mr Law was asked for but did not provide any documentary evidence that could explain how he came into possession of the gold bars. When the police spoke to Mr Law's father, he said:

(a) The gold bars came from Canada.

(b) One day Mr Law told Mr Law Senior that he wanted the gold bars.

(c) It all happened a long time ago and Mr Law Senior could not remember anything else.

[10] The police could not find any reports of the gold bars having been stolen. Inquiries of the Perth Mint where the gold bars were cast revealed that the brand stamps on the gold bars were first used in 2010.

[11] The Commissioner filed the application on 3 November 2020. The application and supporting affidavit were served on Mr Law on 17 November, at which time he was told that if he wanted to claim the gold bars, he needed to go to Court to oppose the application. Restraining orders were made by the High Court on 25 November. On 3 December a police officer served the restraining orders on Mr Law's partner, who made it clear to the officer that Mr Law would not be going to Court. In the end, the application was unopposed and proceeded as a formal proof.

Relevant law

[12] Section 3(1) of the Act explains that its primary purpose is to establish a regime for the forfeiture of property that has been acquired or derived, directly or indirectly, from significant criminal activity, or property that represents the value of a person's unlawfully derived income. The aim of the recovery and forfeiture regimes established by the Act include the elimination of "the chance for persons to profit from undertaking or being associated with significant criminal activity".⁴

Asset forfeiture orders

[13] Asset forfeiture orders must be made by the High Court under s 50 of the Act where the Court is satisfied on the balance of probabilities that specific property is tainted property.

[14] "Tainted property" is defined in the following way in s 5(1) of the Act:

tainted property—

- (a) means any property that has, wholly or in part, been—
 - (i) acquired as a result of significant criminal activity; or
 - (ii) directly or indirectly derived from significant criminal activity; and
- (b) includes any property that has been acquired as a result of, or directly or indirectly derived from, more than 1 activity if at least 1 of those activities is a significant criminal activity.

[15] "Significant criminal activity" is defined in s 6 of the Act as covering offending:⁵

- (a) that consists of, or includes, 1 or more offences punishable by a maximum term of imprisonment of 5 years or more; or
- (b) from which property, proceeds, or benefits of a value of \$30,000 or more have, directly or indirectly, been acquired or derived.

⁴ Criminal Proceeds (Recovery) Act 2009, s 3(2).

⁵ Section 6(1)(a) and (b).

[16] Significant criminal activity takes place whether or not the person accused of that activity has been charged with, convicted of, or acquitted of an offence in relation to that activity.⁶

Profit forfeiture orders

[17] A profit forfeiture order must be made by the High Court under s 55 of the Act where the Commissioner establishes on the balance of probabilities that the respondent has unlawfully benefited from significant criminal activity during the relevant period of criminal activity and that the respondent has interests in property.

[18] In the case of profit forfeiture orders, the value of the benefit derived from significant criminal activity is “presumed” to be the amount specified in the application.⁷ In the present case, the Commissioner said in his application that the value of the benefit derived by Mr Law from significant criminal activity was \$73,224.75, being the value of the gold bars.

High Court judgment

[19] After recording the facts we have traversed at [5] to [11], Palmer J set out the essence of his reasoning in the following two paragraphs:⁸

Should an asset forfeiture order be made?

[15] Even though Mr Law has not opposed the application, for it to be granted I must still be satisfied that the legal threshold is met. Mr Law’s varying explanations about where he got the gold bars from are not convincing and are inconsistent with the evidence about when they were cast. But Mr Barclay [counsel for the Commissioner] cannot point to any evidence as to how Mr Law did acquire them or where they came from. He invites me to draw an inference from the offending for which Mr Law was convicted and from Mr Law’s criminal history.

[16] Circumstantial evidence can, of course, be a basis for inferring a fact. But gold bars are not the first, or even the last, item to spring to mind as deriving from the burgling of laundromats. There is no evidence or suggestion that they derived from a laundromat burglary here. Neither do they have any apparent relationship with Mr Law’s previous convictions. Having a criminal record and a general suspicion about undiscovered offending is not a sound

⁶ Section 6(2).

⁷ Section 53.

⁸ High Court judgment, above n 1.

basis upon which to draw an inference that Mr Law acquired the gold bars from criminal activity ...

[20] In relation to the profit forfeiture application, the Judge determined that the only amount Mr Law derived from significant criminal activity was the \$11,000 he acquired during the laundromat offending. The Judge therefore held the amount nominated in the Commissioner's application was not the value of the unlawful benefit Mr Law derived from significant criminal activity.⁹

[21] The Judge dismissed the application for an asset forfeiture order but made a profit forfeiture order against Mr Law for \$11,000. The Judge ordered the Official Assignee to sell the gold bars, pay \$11,000 to the Crown and then return the balance to Mr Law.¹⁰

Analysis

[22] When distilled to its most basic elements, the issue before the High Court was whether the Commissioner had established on the balance of probabilities that the gold bars were stolen property. When answering that question the Judge should have evaluated all relevant strands of evidence.

[23] This Court has frequently emphasised the importance of considering all evidence when drawing inferences from circumstantial evidence. For example, in *Commissioner of Police v de Wys* it was said:¹¹

[9] Circumstantial evidence allows a fact-finder to infer that a particular fact exists, even if there is no direct evidence of it. A single piece of circumstantial evidence will generally allow for more than one explanation. However, a number of separate items of circumstantial evidence, when considered together, may strongly support the drawing of a particular inference. Circumstantial evidence derives its force from the involvement of a number of factors that independently point to a particular factual conclusion. The analogy that is often drawn is that of a rope: any one strand of the rope may not support a particular weight, but the combined strands are sufficient to do so.

⁹ At [31]–[32].

¹⁰ At [33].

¹¹ *Commissioner of Police v de Wys* [2016] NZCA 634 (footnotes omitted). See also *Commissioner of Police v Dryland* [2013] NZCA 247 at [39]; and *Commissioner of Police v Jeffries* [2014] NZCA 566 at [49].

[10] It is only the ultimate issue in a circumstantial case that must be proved to the required standard. In this case that issue is whether the respondents benefitted from significant criminal activity. The Commissioner must prove that they did, on the balance of probabilities. He is not required, however, to separately prove each individual strand of evidence to the balance of probabilities standard before the Court can take that evidence into account ...

[24] There are four pieces of evidence that needed to be taken into account when considering the question we have set out at [22].

Mr Law's explanations

[25] The Judge said Mr Law's explanation as to how he acquired the gold bars was not convincing and inconsistent about when the gold bars were cast.¹²

[26] We agree with Mr Harborow, senior counsel for the Commissioner, that the Judge understated the significance of Mr Law's various explanations to the police. In reality, Mr Law lied to the police and tried to deceive them by proffering demonstrably false and inconsistent explanations as to how he obtained the gold bars.

Circumstances in which Mr Law had possession of the gold bars

[27] The Judge appeared to place weight on the unlikelihood of Mr Law having acquired the gold bars while committing burglaries at laundromats.¹³ It was, however, never the Commissioner's case that the gold bars were stolen from a laundromat.

[28] What is striking is that Mr Law was carrying valuable items in a bag containing burglary tools when he was out committing a burglary. If the gold bars had been legitimately inherited from his family, one would not expect Mr Law to take those items with him while he was committing a burglary in the middle of the afternoon. In this Court, Mr Batts, counsel for Mr Law, submitted that Mr Law provided a rational explanation for the gold bars being in his possession when he was arrested. We make the following two points:

¹² High Court judgment, above n 1, at [15].

¹³ At [16].

- (a) Mr Law did not provide any evidence in the High Court. We will return to this point at [31] to [32].
- (b) We are far from convinced by Mr Law's explanation to the police that he took the gold bars with him on the day he was arrested because he had an argument with his partner. We find it inherently implausible that Mr Law would take gold bars from his home because of an argument with his partner, and even if he did, we would have thought he would have hidden the gold bars somewhere safe rather than take them with him to the scene of a burglary.

Absence of documentary evidence from Mr Law

[29] The Judge did not refer in his analysis to the fact the police asked Mr Law to provide evidence that supported his story about how he acquired the gold bars. In our assessment, it is significant Mr Law failed to produce any documentary evidence that supported his accounts.

Failure to defend the application

[30] It is also significant Mr Law chose not to oppose the application.

[31] The failure of a party in a civil proceeding to call a witness may in itself justify an adverse inference against that party.¹⁴ That principle is more pronounced when a party chooses to call no evidence at all,¹⁵ and even greater when a defendant elects to take no steps to defend a claim against him or her.

[32] It is reasonable to draw the following inferences:

- (a) If Mr Law had innocently acquired the gold bars then he would have taken steps to defend his ownership of that valuable property.

¹⁴ *Ithaca (Custodians) Ltd v Perry Corporation* [2004] 1 NZLR 731 (CA) at [153].

¹⁵ *Tozer Kemsley & Millbourn (A'Asia) Pty Ltd v Collier's Interstate Transport Service Ltd* (1956) 94 CLR 384 at 403.

- (b) Mr Law's failure to take steps to defend the application is difficult to reconcile with his claim that he acquired the gold bars innocently through members of his family.
- (c) His failure to take any steps to resist the application suggests Mr Law knows the gold bars were stolen property.

[33] Mr Batts' primary submission was that the Judge reached the right conclusion because:

- (a) Mr Law had provided the police with a rational explanation for having possession of the gold bars; and
- (b) it was telling there were no reports of the gold bars having been stolen.

[34] We do not find these arguments persuasive for the following reasons:

- (a) As we have already noted, if Mr Law had an honest explanation for having possession of the gold bars, then he probably would have taken steps to resist the application.
- (b) We do not think anything hinges on the absence of reports of the gold bars having been stolen. As we pointed out to Mr Batts during the hearing, the absence of such reports may very well reflect the likelihood the gold bars were stolen from a person or persons who did not have a legitimate claim to those items.

[35] We accept the Commissioner's arguments that the Judge erred by not taking into account all relevant strands of evidence when assessing the strength of the Commissioner's case. While the individual strands of evidence by themselves may not have been sufficient to have granted the application, when all the strands of evidence are considered together, we are satisfied on the balance of probabilities that the gold bars were stolen property.

[36] It therefore follows that the gold bars were acquired directly or indirectly by Mr Law from significant criminal activity and are therefore tainted property within the meaning of the Act.

[37] Our finding in relation to the question posed at [3(a)] means we do not have to consider whether or not the Judge erred in the way he approached the profit forfeiture application.

Result

[38] The application to adduce further evidence is declined.

[39] The appeal is allowed.

[40] An assets forfeiture order is made over the two gold bars so that they vest in the Crown.

[41] We understand Mr Law has been granted legal aid in this Court. In those circumstances we decline to make any order for costs.

Solicitors:
Crown Solicitor, Auckland for Appellant
Haigh Lyon, Auckland for Respondent