SUPREME COURT OF QUEENSLAND

CITATION:	*State of Queensland v Shaw* [2003] QSC 436
PARTIES:	**STATE OF QUEENSLAND** (respondent) **v** **MATTHEW FERGUSON SHAW** (applicant)
FILE NO/S:	S5277 of 2003
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	19 December 2003
DELIVERED AT:	Brisbane
HEARING DATE:	12 December 2003
JUDGES:	Mackenzie J
ORDERS:	**1. The application for a forfeiture order filed on 22 August 2003 be stayed until determination of the prosecution proceedings in respect of the charges under s 10A of the *Drugs Misuse Act* 1984 (Qld*)* pending in the Magistrates Court Southport** **2. Costs are costs in the cause**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PRACTICE UNDER RULES OF COURT – STAYING PROCEEDINGS – where applicant charged under s 10A *Drugs Misuse Act* with possession of suspected property – where summary offences – where criminal charges not yet heard – where applicant seeks to give an explanation for the possession and lead evidence – where possibility that applicant would need to make application for exclusion order if forfeiture proceedings not delayed – where alleged this would require disclosure of his defence to the criminal proceedings – where issues same in s 10A and criminal proceedings – whether application for orders under ss 56 and 58 *Criminal Proceedings Confiscation Act* should be stayed until summary charges are finally determined – whether demonstrated reasons why interests of justice require the criminal proceedings to be heard in advance of the forfeiture proceedings

Criminal Proceeds Confiscation Act (2002) (Qld), s 56, s 58
Drugs Misuse Act 1984 (Qld), s 10A

Dyers v The Queen (2002) 192 ALR 181
Gough v Braden [1993] 1 Qd R 100
Mule v State of Western Australia (2002) 29 SR (WA) 95
State of Queensland v *Henderson*, S1246 of 2003, 16 May 2003
State of Queensland v Bush [2003] QSC 375; S6311 of 2003, 5 November 2003
State of Queensland v Cannon, S1166 of 2003, 5 December 2003

COUNSEL: C Jennings for the applicant
M D Hinson SC for the respondent

SOLICITORS: Nyst Lawyers for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **MACKENZIE J:** This is an application for a stay of an application for orders under s 56(1) and s 58(2) of the *Criminal Proceeds Confiscation Act* 2002 (Qld) until after summary charges currently before the Magistrates Court at Southport are finally determined. The charges in question are two charges under s 10A of the *Drugs Misuse Act* 1984 (Qld). One relates to possession of $11,340 in Australian currency reasonably suspected of being proceeds of an offence. The other relates to possession of property reasonably suspected of having been acquired with the proceeds of an offence.

[2] The present stay application was filed on 3 December 2003. There had been an earlier application in which McMurdo J gave directions on 3 October 2003 with a view to provision of material to be relied on in the application. On 11 November 2003 that application was dismissed by consent, following the offering of no evidence on charges of trafficking in amphetamines and cannabis, supplying those drugs, production of amphetamine and attempting to pervert the course of justice. According to an affidavit by Mr Nyst the applicant was listed to plead guilty at Southport on 15 December 2003 to charges of possession and production of cannabis, possession of amphetamines, MDMA and possession of a water pipe used for smoking cannabis. The two charges of possession of suspected property previously mentioned are set down for summary trial at Southport on 4 March 2004.

[3] Section 10A for present purposes provides as follows:

> "A person who has in his or her possession any property (other than a dangerous drug, hypodermic syringe or needle) reasonably suspected of –
>
> …
>
> (d) being the proceeds of such an offence; or
>
> (e) having been acquired with the proceeds of such an offence;
>
> …
>
> who does not give an account satisfactory to the court of how the person lawfully came by or had such property in the person's possession commits an offence against this Act.
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> Maximum penalty – 2 years imprisonment."

[4] In *Gough v Braden* [1993] 1 Qd R 100 the Court of Criminal Appeal held that for something to be "reasonably suspected" of having a particular characteristic relevant to s 10A the suspicion must be that of a reasonable man warranted by facts from which the inference can be drawn as to the property's character (104). A reasonable apprehension falling short of proof suffices (104, 108). Once evidence sufficient to establish that the property is reasonably suspected of being the proceeds of an offence or acquired with the proceeds of an offence is led, the onus is on the defendant to give positively, on the balance of probabilities, a satisfactory account of how he lawfully came by or had the property in his possession.

[5] Because of that construction of s 10A, it is, in practical terms, necessary to either attack the basis for the reasonable suspicion or to give a satisfactory explanation for the possession of the property. In the present case, the grounds upon which the suspicion is said to be based are physical evidence suggesting that the applicant has been involved with drugs, information to the same effect from informants and financial analysis suggesting unsourced income of about $128,000. In a case of this kind it is almost inevitable that, irrespective of the line of attack chosen, it will be necessary for the defendant to go into evidence.

[6] It can be inferred from affidavits filed on behalf of the applicant that sufficiency of the physical evidence tending to prove that the applicant was involved with drugs will be tested, that the information given by the informants will be also tested and that evidence of a forensic accountant to the effect that the significant property which is the subject of the application has been legitimately acquired. It may be inferred also that evidence of people who had dealings with the applicant with regard to the property and perhaps in other respects will be called in this connection. By the time of the hearing of this application, some affidavits, including that of the forensic accountant, had been sworn. There was also evidence that an offer had been made to the Office of Director of Public Prosecutions, which was declined, to provide all financial material that would be tendered at an exclusion application provided that an undertaking was given by the CMC that "they would vouch safe the contents of that material" until the possession of suspected property matters had been resolved. Precisely what would be provided is not absolutely clear.

[7] In a case of a prescribed respondent an exclusion order can be made to exclude property from the scope of an application or order at various stages of proceedings (eg ss 47-48; ss 65-69). The pattern of the procedure for doing so is that the applicant prescribed respondent must give notice of the making of the application and the ground of the application to the State of Queensland and anyone else who has an interest in the property. The State must be made a party to the application. Anyone else who is given notice of the application may appear at the hearing. If the State proposes to oppose the application, it must give the applicant notice of its intention to do so and the grounds for opposing it. An essential finding for the purposes of ordering exclusion is that the court is satisfied that it is more probable than not that the property to which the application relates is not illegally acquired property.

[8] Section 8 provides as follows:

> "**8 Proceeding other than for offence is not criminal proceeding**
>
> (1) This section applies to a proceeding under this Act other than a prosecution for an offence against this Act.
>
> (2) The proceeding is not a criminal proceeding.

(3) Questions of fact in the proceeding must be decided on the balance of probabilities
(4) The rules of evidence applying in civil proceedings apply to the proceedings.
(5) The rules of construction applying only to the criminal law do not apply in the interpretation of this Act for the proceeding."

[9] Section 93 is as follows:

"93 No stay of proceedings
The fact that a criminal proceeding has been started against a person, whether or not under this Act, is not a ground on which the Supreme Court may stay a proceeding against or in relation to the person under this chapter that is not a criminal proceeding."

[10] On the facts of the present case the fundamental question in both the prosecution under s 10A of the *Drugs Misuse Act* and the application for exclusion under the *Criminal Proceeds Confiscation Act* is essentially similar. In the former, the primary allegation is that money is the proceeds of a drug offence and that because of circumstances known to the police, the other property is reasonably suspected of having been acquired with the proceeds of criminal offences. The onus then lies upon the defendant, on the balance of probabilities to give a satisfactory account of how he lawfully came by the property or had it in his possession. In the latter the onus is on the person resisting the order to show on the balance of probabilities that the property is not illegally acquired property (as to which s 15 and s 22 provide definitions). Proof that it is property that is not the proceeds of a drug offence, on the facts of the case, or is not acquired with the proceeds of a drug offence is necessary.

[11] The question whether, although the onus is placed on the accused in s 10A proceedings, it is always necessary in practical terms for him to actually give evidence himself is raised in this case by the vagueness of the evidence as to what material will be placed before the court in those proceedings. Leaving aside the issue of any inference that might be drawn if the accused himself did not give evidence, it may be theoretically possible that in a case where a forensic audit of his affairs, supported by the evidence of other persons as to the nature of critical transactions was led, such course might avoid the need for the defendant himself to give evidence. As I have previously noted, nothing in the affidavit material filed on his behalf clearly says that he himself intends to give evidence.

[12] Section 93 has not been subject to appellate consideration in Queensland. At Trial Division level, in *State of Queensland v Henderson* (S1246 of 2003, 16 May 2003) Fryberg J said that it was incumbent upon the applicant to demonstrate that he had a matter which he wished to raise in defence of the proceedings which, if raised, would prejudice the criminal proceedings. In *State of Queensland v Bush* [2003] QSC 375 Mackenzie J said that s 93 is not an absolute bar to a defence of forfeiture proceedings. However, at the minimum, it would require, in the particular circumstances of the case, a demonstrated reason why the interests of justice would not be served by the forfeiture proceedings being heard in advance of the criminal proceedings before a stay would be given. In *State of Queensland v Cannon* (S1166 of 2003, 5 December 2003) White J referred to these two decisions with apparent approval.

[13] The starting point of the applicant's argument was that a court may only make an exclusion order if satisfied that the applicant has an interest in property and it is more probable than not that the property is illegally acquired property. It was submitted that, therefore, to successfully exclude property the subject of the forfeiture proceedings the applicant must disclose his defence to the criminal proceedings. The submissions proceed on the principle that s 93 does not purport to exclude the inherent jurisdiction of the court to stay proceedings. It merely says that commencement of criminal proceedings without more will not be sufficient for the purposes of granting a stay.

[14] It was submitted that if the forfeiture proceedings were not delayed the applicant would be forced to disclose material in an attempt to exclude property from the forfeiture application. That material, which included a forensic accountant's report and other documents, was not in the possession of the respondent at the present time. The material was directly relevant to the criminal proceedings as it disclosed the grounds upon which the applicant would defend the criminal proceedings.

[15] Reference was made to the offer to make the evidence available to allow the forfeiture proceedings to proceed if it was quarantined, which had been rejected by the respondent. It was asserted that any evidence relied on by the applicant to defend the forfeiture proceedings would be available to the police prosecuting authorities in respect of the criminal charges. It was submitted that the prejudice which flowed from the continuance of the forfeiture proceedings prior to the hearing of the s 10A charges would be that the applicant was forced to expose the basis of his defence in the criminal proceedings. This would alert the Queensland Police Service to further investigations and further evidence which may be necessary to meet such defence.

[16] It was submitted that there was sufficient justification for granting a stay until the completion of the criminal proceedings on the grounds that:

(a) the evidence relevant to defending the forfeiture proceedings would include evidence not presently in the possession of the State of Queensland;
(b) if the stay was refused the State of Queensland would be alerted to further information concerning the financial position of the applicant;
(c) by defending the forfeiture proceedings the applicant would be disclosing information which would otherwise be subject to his right to remain silent;
(d) the State of Queensland would therefore be placed in the advantageous position of being alerted to the need for further evidence and the existence of further chains of inquiry in order to meet the defence raised by the applicant; and
(e) since the criminal proceedings are listed to be heard in about 3 ½ months time there would be no significant delay to the forfeiture proceedings.

[17] It was also submitted that if the applicant was forced to reveal the grounds upon which he will defend the criminal charges it did not only intrude upon the applicant's right to silence but eroded the accusatorial nature of criminal proceedings. *Dyers v The Queen* (2002) 192 ALR 181 was referred to in that regard.

[18] The argument exposes two things. One is that it is no secret that the applicant intends to call evidence consisting, at least, of a forensic accountant's opinion based on other evidence of the nature of transactions entered into with respect to his

property. The precise contents of that evidence are not known but the fact that the evidence will present a different interpretation of the applicant's financial position is expressly revealed in the affidavit evidence. The affidavits do not say expressly that that evidence is to be led in the s 10A proceedings, but it was an integral part of the applicant's submissions that the issues were the same in both proceedings (eg T10.28, T10.48, T12.35).

[19] The second is that it is difficult to characterise the case as one where the right to silence is infringed in the ordinary sense of the term. It must be kept in mind that s 10A proceedings are not ones where the prosecution bears the onus of proof throughout. Further, the applicant has, at least partially, waived the right to remain silent by speaking to the extent of indicating, in summary form, what his defence in each case will be. In particular, the applicant has indicated the nature of his defence in s 10A proceedings and the proposition that is said to be established by the material he intends to rely on. The disadvantage to him will in practical terms only be that, if directions orders are made in the application to exclude property in the criminal proceeds confiscation proceedings and the detail of the evidence has to be revealed, the respondent will have the opportunity to make it available to the police with a view to testing its validity and cogency before the hearing of the s 10A proceedings. It would really only be the element of surprise, which would ordinarily be available to the defendant in s 10A proceedings, requiring the prosecution to confront a mass of accounting evidence on the run in the criminal proceedings, that would be lost.

[20] This is precisely the kind of vice that led to the amendment of the law with respect to alibi (s 590A) and expert evidence (s 590B), together with the power to order exchange of experts' reports in advance of trial (s 592A) in respect of indictable offences. Viewed in that context the emphasis in the submission on the paramount importance of abrogation of the right to silence has a certain artificiality about it. However, since those provisions do not apply to summary proceedings, the critical problem will remain unless what will presumably be an similar and continuing difficulty in cases where forensic accounting is important is altered legislatively. In the kinds of cases where the evidence is the same in both forfeiture and s 10A proceedings, if disclosure of expert evidence were to be required as a result of legislative amendment, there may from that time onwards be little practical benefit in staying the confiscation proceedings.

[21] Having said that, and accepting that as the law stands there is no obligation to disclose the details of expert evidence or other to be relied upon by a defendant in s 10A proceedings, the only remaining issue is whether the fact that allowing the forfeiture proceedings to be proceed first may allow the State to expose defects in case relied on by the person who will be a defendant in s 10A proceedings and repair any deficiencies in its own evidence which are exposed in the forfeiture proceedings is a reason for requiring the s 10A proceedings to be heard first. In saying that I am referring to what might happen in practice, not to any evidence that there is any such motive in the present case on the part of the State.

[22] It was submitted on behalf of the respondent that no account should be taken of that possibility, since a person who relied on false evidence in the forfeiture proceedings should gain no benefit from doing so and a person who relied on truthful evidence would suffer no detriment. In my view, there is another issue to be taken into account as well as truth or falsity. It is that, in some cases, a weakness in the State's

case may become apparent in the course of the forfeiture proceedings, or it may become apparent that an aspect of a respondent's financial situation or an aspect of other evidence (not merely one of credit of a witness) required further attention before the s 10A proceedings were heard.

[23] If an opportunity of that kind were to occur, the question is whether the State would, in such a case, gain an undue advantage in the prosecution proceedings. In other words, where the issues are identical in the forfeiture proceedings and the s 10A proceedings, should the State be afforded the opportunity to use the civil proceedings to test and potentially improve the case that it will rely upon in the criminal proceedings which involve identical issues?

[24] In my view it is not appropriate to do so. Firstly, as the law stands, the respondent is in a more favourable position in the s 10A proceedings with regard to disclosure of the material upon which his exculpatory explanation is based. Secondly, there are penal consequences flowing from a conviction.

[25] The case is one where there is a well defined and real advantage available to a person in criminal proceedings in respect of revealing evidence in advance. Depriving a defendant of such an advantage by requiring him to undergo prior proceedings where the State may, in effect, test-run the same case it proposes to lead in the prosecution proceeding and if necessary improve it if it can prior to that time is in my view sufficiently of the character of a demonstrated reason why the interests of justice would not be served by the forfeiture proceedings being heard in advance of the criminal proceedings. In my view the circumstances in which a stay is justified are established by the particular facts of the case.

[26] This outcome is consistent with that in *Mule v State of Western Australia* (2002) 29 SR (WA) 95 where a provision identical to s 93 was considered by Hammond CJDC. The report does not contain much detail concerning the facts before the learned judge. I would only observe that the present application has probably involved perhaps a more rigorous analysis of the evidence than was thought necessary in that case. In my view, such analysis will generally be of importance in determining whether the requirements for a stay are made out.

[27] Accordingly I order as follows:

1. The application for a forfeiture order filed on 22 August 2003 be stayed until determination of the prosecution proceedings in respect of the charges under s 10A of the *Drugs Misuse Act* 1984 (Qld) pending in the Magistrates Court Southport.
2. Costs are costs in the cause.