24/85

SUPREME COURT OF VICTORIA

Re ESPERALTA

Gobbo J

15, 17 May 1984 — [1987] VicRp 18; [1987] VR 236

EXTRADITION PROCEEDINGS – WARRANT ISSUED IN A FOREIGN STATE – APPLICATION FOR EXTRADITION – NATURE OF DOCUMENTARY MATERIAL NECESSARY TO SUPPORT APPLICATION – WHETHER MERE ACCOUNT OR NARRATIVE SUFFICIENT: *EXTRADITION (FOREIGN STATES) ACT* 1966 (CWTH), SS17(6), 18(1), 26(1).

An application was made to a Magistrate for the issue of a warrant in respect of E. who had allegedly committed a number of robberies and abductions in Spain. Amongst the documents placed before the Magistrate was one critical document which gave an account or narrative of the alleged crimes committed by E. but did not identify any witness or the source of any of the material. The Magistrate granted the application and committed E. to prison to await his extradition. On order nisi to show cause why a writ of *habeas corpus* should not issue—

HELD: That E. should no longer be detained under the warrant.
(1) In deciding whether to issue the warrant, the Magistrate was required to consider whether the documentary material placed before him was sufficient evidence to justify E's trial as if the acts alleged to constitute the crimes took place within Victoria.

(2) As the documentary material was in the form of an account or narrative of the crimes charged (rather than evidence in the conventional use of that word) and it did not purport to set out testimony – whether on oath or following a declaration or an affirmation – it did not fall within the meaning of evidence which would justify E's trial in Victoria.
***Dowse v Government of Sweden* [1983] 2 AC 464; [1983] 2 All ER 123; [1983] 2 WLR 791, considered.**

(3) Accordingly, the condition necessary for the issue of the warrant was not fulfilled and E's detention under the *Extradition (Foreign States) Act* 1966 was unlawful.

GOBBO J: [1] This is the return of an order nisi calling upon the Governor of Pentridge Prison to show cause why a writ of *habeas corpus* should not issue in respect of Juan Casatejada Esperalta (whom I shall hereafter refer to as "the applicant"). The applicant is held in prison pursuant to a warrant issued by a Magistrate on 26th April 1984 under the *Extradition (Foreign States) Act* 1966. Section 18(1) of that Act provides for a prisoner who seeks to assert that his detention is unlawful to apply to a court for a writ of *habeas corpus*. The Commonwealth Director of Public Prosecutions has come forward to sustain the Magistrate's order and has been added as a respondent.

The principal attack of the lawfulness of the detention turns on the argument that the Magistrate was not entitled to make this order because the necessary conditions under s17(6) of the Act were not complied with. Section 11(6) provides as follows:

> "If the person was apprehended under a warrant issued in pursuance of an authority by the Attorney-General in a notice under **[2]** paragraph (a) of sub-section (1) of s15 or the Magistrate receives a notice by the Attorney-General under paragraph (b) of that sub-section and—
> (a) there is produced to the Magistrate a duly authenticated foreign warrant in respect of the person issued in the foreign state that made the requisition for the surrender of the person;
> (b) there is produced to the Magistrate—
> (i) in the case of a person who is accused of an extradition crime— such evidence as would, in the opinion of the Magistrate, according to the law in force in the State or Territory of which he is a Magistrate, justify the trial of the person if the act or omission constituting that crime had taken place in, or within the jurisdiction of, that State or Territory; or
> (ii) in the case of a person who is alleged to have been convicted of an extradition crime—
> sufficient evidence to satisfy the Magistrate that the person has been convicted of that crime; and
>
> (c) the Magistrate is satisfied, after hearing any evidence tendered by the person, that the person is liable to he surrendered to the foreign state that made the requisition for the surrender, the

> Magistrate shall, by warrant in accordance with Form 5 in Schedule 2, commit the person to prison to await the warrant of the Attorney-General for his surrender but otherwise shall order that the person be released."

The allegation in the documents is that about 23rd October 1979 the applicant committed a number of robberies and abductions in Spain in company with two other persons. The applicant admits that he was charged with these offences, placed on bail and then absconded his bail. He denies having committed the offences and alleges that there are political considerations behind his attempted extradition. There were a number of documents placed before the Magistrate. Their due authentication was not an issue before him. The critical document was one certified by the Secretary **[3]** of the Fourth Section of the Provincial Court of Appeal of Madrid and headed "Ordinario (Legal qualifications of the proceedings)". In the translation provided by the Spanish Embassy it reads as follows:

> "The District Attorney, in the suit followed by the 'ordinario' proceedings before the Court of Alcala de Henares number 23 of the year 1980, for the crime of ILLEGAL DETENTION Against MANUEL RODRIGUEZ VELEZ, JUAN CASATEJADA ESPERALTA and ANTONIO MERCADER GARCIA Presents, on a provisional basis, the following conclusions."

There then followed what appears to be a narrative exemplified by the first paragraph, which I will read:

> "A) On a date not determined by exactitude, fixed between the 23rd and 24th October 1979, the accused MANUEL RODRIGUEZ VELEZ, JUAN CASATEJADA ESPERALTA and ANTONIO MERCADER GARCIA – all of them of legal age and with no previous criminal record – carrying out a plan, worked out by the three of them, to take possession of money from the offices of the company 'Matutano', located in the Isabelita Usera St., No. 87 of this capital, parked their car and waited inside it in the immediate surroundings of the abovementioned offices, and awaited for the employee Luis Garcia Estevaranz to come out of the building. They supposed he had the keys of the safe and as the said employee appeared, driving his own car, the accused followed him discreetly through the streets of Madrid."

There then follows the remainder of the narrative as to how these offences occurred. This is followed by a statement as to the crimes that were constituted by the facts in the conclusion and details of the possible penalties. Finally, before a series of further signatures and certificates was this statement:

> "The District Attorney proposes to use, in the act of the hearing, the following means of PROOF 1. Interrogation of the accused. **[4]** 2. Cross-examination of the witnesses that are listed on the reverse side. 3. Reading of the following pages of the summary: 29 to 31, 84, 99 and 106."

The material does not therefore at any stage identify any witness or the source of any of the material. It appears to be merely a narrative or lengthy conclusion. The only reference to matters of proof does not appear, in my view, to refer to what is the source of the conclusion but, rather, refers to the conduct of the future hearing. Though there is a reference to witnesses and to a summary containing presumably at least 106 pages, that conclusion contains no other reference to witnesses, much less an identification of them. Nor was there any production of the summary referred to or indeed any extract of it.

The question therefore that was squarely raised was: Was the material constituted by the "Ordinario" such evidence as would – in the opinion of the Magistrate according to the law in force in the State or Territory of which he is a Magistrate, in this case Victoria, justify the trial of the person if the acts constituting the crime had taken place within that State or Territory?

Mr Gurvich, on behalf of the Director of Public Prosecutions, put a forceful argument that the Magistrate's task was essentially an administrative one and that he was not in the same position as a court trying the charges or even hearing an ordinary committal proceeding. It was also urged that the evidence did not have to be admissible in an Australian Court and that, in particular, hearsay evidence could be received. He relied on the decision of Fox J in the Federal Court in *Butler v Evans and the Commonwealth of Australia* [1983] 50 ALR 593. Reliance **[5]** was also placed on a decision of the Supreme Court of New South Wales, *Bedgood v Keeper of Her Majesty's Penitentiary at Malabar* [1975] 2 NSWLR 144.

This latter decision is not referred to in the judgment of *Butler v Evans and the Commonwealth of Australia* and there may be some differences on matters of substance between the two judgments. It is unnecessary for me to decide whether this is so and to express any view on the matter for I am satisfied that assuming in his favour everything that Mr Gurvich sought to derive from the above authorities, including in particular the limited role of the Magistrate in this type of application and the inapplicability of conventional rules of admissibility of evidence, the application before me must still succeed.

I so find on the basis that the material before the Magistrate did not fall within the meaning of evidence as would, according to Victorian law, justify the trial of the applicant in this State. More particularly, it was not evidence because it was an account rather than evidence in the conventional use of that word, nor did it fall within the description of admissible evidence in s26(1) of the *Extradition (Foreign States) Act* 1966. Section 26(1)(a) provides as follows:

> "(1) In a proceeding under this Act—
> (a) a document, duly authenticated, that purports to set out testimony given on oath, or declared or affirmed to be true, by a person in a foreign state is admissible as evidence of the matters stated in the testimony."

The relevant document here did not purport to set out testimony whether on oath or following declaration or affirmation. An account or narrative of the crimes charged, given without any **[6]** identified source, is not, in my opinion, testimony within the meaning of the section. **[7]** It is not the statement of a person who has testified or who will testify, nor is it material such as real evidence in the nature of photographs, documents or fingerprints which will be testified to by a witness or which will be verified in some other way.

Reliance was sought to be placed on the discussion in the decision of the House of Lords in *Dowse v Government of Sweden* [1983] 2 All ER 123; [1983] 2 AC 464; [1983] 2 WLR 791. The appellant had been the subject of an extradition from the United Kingdom being an application by the Government of Sweden in respect of certain drug charges. In the proceedings before the magistrate there had been received into evidence a statement not on oath and forwarded from Sweden which was made by an accomplice who was, however, liable to a penalty for making a false statement in the course of police interrogation. The statement made by the accomplice had been adopted in a judicial hearing, but it was not made on oath by the accomplice as a witness in those proceedings.

The House of Lords upheld the reception into evidence of this statement as falling within the expression "affirmation" because it was made and recorded before a foreign judge or magistrate. The affirmation there, however, was not that of the judge; it was that of the accomplice. The discussion of the nature of the sanction resting on the accomplice lent weight to the view that the court is to concern itself with evidence from persons who will be providing evidence, not with mere narrative, nor does that decision of the House of Lords offer any support for the wide proposition advanced before me that a statement authenticated or verified by a judicial officer is itself evidence without more and sufficient to found a committal on the basis that that might have sufficed under Spanish law.

Such a proposition would **[8]** ignore the phrase "according to the law in force in the state in which the extradition is sought". It would deprive that phrase of any meaningful operation in the Act. It follows that a condition necessary for the magistrate was not fulfilled here and that the detention under the *Extradition (Foreign States) Act* 1966 is unlawful. I should add that the argument that succeeded before me was not advanced before the magistrate.

In the ordinary course I would order that the writ of *habeas corpus* be made absolute, but, as it was indicated that the applicant was formally being held under the *Immigration Act* and will still be so held hereafter, I will simply order that he is no longer to be detained by the Governor of Pentridge Prison under the warrant issued under the *Extradition (Foreign States) Act* 1966 of 26th April 1984.

Solicitors for the applicant: EH Rodan.
Solicitor for the respondents: JM Buckley, solicitor for the Director of Public Prosecutions.