

39/94

## SUPREME COURT OF VICTORIA

**BRINCAT v R**

Beach J

12 May 1994

**PROCEDURE – TRANSFER OF PRISONER INTERSTATE – TO FACE TWO CHARGES OF ARMED ROBBERY – IF TRANSFERRED PRISONER’S RELATIONSHIP WITH MOTHER COULD BE AFFECTED – MAY SERVE LONGER PERIOD OF TIME IN PRISON – WHETHER “HARSH OR OPPRESSIVE” TO ORDER TRANSFER: PRISONERS (INTERSTATE TRANSFER) ACT 1983, SS13, 14, 15.**

**1. Pursuant to s15 of the *Prisoners (Interstate Transfer) Act 1983* a Magistrate shall issue an order for the transfer of a prisoner interstate unless satisfied that it would be harsh or oppressive.**

**2. Where a prisoner charged with two counts of armed robbery alleged to have been committed interstate opposed his transfer on the grounds that it would have an effect on his relationship with his mother and that he may be required to serve a longer period of time than if he stayed in Victoria, it was open to a Magistrate not to be satisfied that it would be harsh or oppressive to order the prisoner’s transfer.**

**BEACH J: [1]** I have before me an application on behalf of Victor Brincat to review the decision of the Geelong Magistrates’ Court made on 8 April 1994, whereby it was ordered that the applicant be transferred to Western Australia pursuant to the provisions of the *Prisoners (Interstate Transfer) Act 1983*. The background to the application may be summarised as follows. On 6 April 1992 at the Melbourne County Court the applicant was sentenced to a term of 12 years and 6 months imprisonment in respect of a number of offences of armed robbery. It was further ordered that the applicant serve a minimum term of 9 years before being eligible to be released on parole.

The evidence before me establishes that the applicant has been charged with two offences of theft with violence which are alleged to have been committed by him in the State of Western Australia. The applicant has been charged pursuant to ss391 and 393 of the Criminal Code in Western Australia that on 8 June 1990 at Scarborough he stole from Paul Richard Jackson with actual violence a sum of money being the property of the Australian and New Zealand Banking Group Ltd and at the time pretended to be armed with an offensive weapon, namely, a handgun. The applicant was further charged pursuant to those same sections of the Criminal Code that on 13 June 1990 at Canning Bridge, he stole from one Trevor Dean Pescud with actual violence a sum of money, being the property of the National Australia Bank, and at the time pretended to be armed with an offensive weapon, namely, a handgun.

On 16 June 1992 the applicant wrote to the Attorney-General for Western Australia a letter in [2] connection with the charges which had been laid against him in that State. The letter reads:

“RE: EXTRADITION PROCEEDINGS.

Dear Mr Berison

I am writing regarding an outstanding bench warrant for my arrest upon release from prison in Victoria. If in fact extradition proceedings are to take place upon my release, I wish to apply immediately under the Interstate Transfer Act for my transfer to the state of Western Australia so that any matters that may be outstanding can be dealt with accordingly by a court of law. This way any rehabilitation that I may be undergoing in the meantime is not hampered by a further stay of remand time in gaol or upon my release from custody within the near future. As yet I have received no indication from any of your departments regarding what course of action will be taken or whether any charges are pending, nor have I been interviewed. I would appreciate it very much if you could look into this matter at your earliest convenience and at least shed some light as to the eventual outcome upon my release. Thanking you in anticipation. Yours sincerely.”

What then occurred was that on 28 July 1992, the Attorney-General of Western Australia

wrote to the Attorney-General of Victoria the following letter:

“Victor Brincat.

I write to request that Victor Brincat, currently serving a term of imprisonment in Victoria and the subject of a Western Australian Arrest Warrant issued on 3 March 1992, (a copy of which is enclosed), be transferred to Western Australia to be dealt with according to law. This request is made under Section 16 of the *Prisoners (Interstate Transfer) Act* 1983 Western Australia, which corresponds to s18 of the *Prisoners (Interstate Transfer) Act* 1983 Victoria. The Arrest Warrant relates to a charge alleging that on 8 June 1990 Brincat stole, with actual violence, a sum of money the property of a specified bank and at the time he pretended to be armed with an offensive weapon, namely, a [3] handgun. The charge was laid pursuant to Sections 391 and 393 of the Criminal Code and, if convicted, Brincat is liable to imprisonment with hard labour for life. There is a further outstanding charge against Brincat, also laid pursuant to Sections 391 and 393 of the Criminal Code, which will be dealt with.”

The remainder of the letter is irrelevant for present purposes. On 3 November 1993, the Attorney-General for Victoria wrote the following letter to the Attorney-General for Western Australia:

“I refer to your letter dated 28 September 1993 concerning the above matter.”

(I do not know what that particular letter said as it has not been produced in evidence).

“I wish to advise you that I consent to the transfer of the prisoner Victor BRINCAT a.k.a. Victor John ALBANO of HM Prison Barwon, to Western Australia so that he might be dealt with according to law. I will arrange for the prisoner to be advised of my consent.

An application for an Order of Transfer will be made in the Magistrates’ Court as soon as possible. Arrangements for the transfer will be made directly with Departmental officers in Western Australia when the Order of Transfer has been issued.”

In addition to those letters, the Attorney-General has tendered in evidence a certificate which is dated 12 November 1993 and reads:

**“Prisoners (Interstate Transfer) Act 1983 (Victoria)**

Pursuant to s13(2) of the *Prisoners (Interstate Transfer) Act* 1983 (Victoria), I certify that:

(a) the Attorney-General of Victoria has in writing consented to the transfer of Victorian prisoner Victor John ALBANO a.k.a Victor John BRINCAT from Victoria to Western Australia, and that

(b) the Attorney-General of Western Australia has, in writing, requested the transfer of Victorian prisoner Victor John ALBANO a.k.a [4] Victor BRINCAT from Victoria to Western Australia, in order that the prisoner may be dealt with in accordance with the law of Western Australia.”

The certificate is signed “Warren McCann, Secretary to the Department of Justice”. In due course an application to have the applicant transferred from this State to Western Australia was made to the Magistrates’ Court at Geelong, and upon the hearing of that application, the Order of Transfer, to which I have already referred, was made. The sections of the Victorian Act relevant for present purposes are ss13, 14, 15 and 16 the relevant sub-sections of which read:-

- “13(1) An order of transfer shall be issued under this Part only if
  - (a) the Attorney-General has, in writing, consented to the transfer of the prisoner to whom the order relates to the participating State: and
  - (b) the Attorney-General of the participating State has, in writing, either consented to or requested the transfer. (c) ...
- (2) A certificate signed by a prescribed officer certifying that any consent or request required under sub-section (1) for the transfer of a prisoner to a participating State specified in the certificate has been given or made is, in the absence of evidence to the contrary, proof that the consent or request has been given or made”.
- 14(1) The Magistrates’ Court, upon proof to its satisfaction that conditions precedent specified in s13(1) have been complied with, shall by order in writing direct the gaoler of the prison where the prisoner to whom the certificate relates is then imprisoned to bring the prisoner before the Court on the date and at the time specified in the order for determination as to whether an order of transfer shall be issued.
- 15. The Magistrates’ Court [5] shall—
  - (a) issue an order for the transfer of the prisoner to the participating State specified in the certificate issued in accordance with section 13(2) in respect of the prisoner; or

- (b) if the court, on the application of the prisoner, is satisfied that it would be harsh or oppressive or not in the interests of justice to transfer the prisoner to that participating State or that the trivial nature of the charge or complaint against the prisoner does not warrant the transfer, refuse to issue such an order.
- 16(1) Where the Attorney-General, the Attorney-General of the participating State or the prisoner is dissatisfied with the decision of the Magistrates' Court under section 15, the Attorney-General or the prisoner, as the case may be, may, within 14 days of the decision, apply to the Supreme Court for a review of the decision and the Supreme Court may review the decision. (2) ... (3) ....
- (4) The review of the decision shall be by way of re-hearing on the evidence, if any, given before the Magistrates' Court and on any evidence in addition to the evidence so given.
  - (5) upon the review of the decision, the Supreme Court may confirm the decision or quash the decision and substitute a new decision in its stead."

Counsel for the applicant has raised a number of what I might describe as technical matters in relation to the application to transfer the applicant to the State of Western Australia. In the first place, he has contended that I should not act upon the two certificates, the two documents signed by the respective Attorneys-General, on the basis that they are hearsay. In my opinion, such a contention cannot be sustained. The consents, in my view, are in the [6] appropriate form as required by s13(1) of the Act and they have been verified on oath by Robyn Margaret Howson in the affidavit sworn by her on 19 January 1994.

The second point that is raised is that pursuant to the provisions of the *Prisoners (Interstate) Regulations* 1984, the person given the authority to sign a certificate pursuant to s13(2) of the Act, certifying that any consent or request required under sub.s13(1) has been given or made is the Secretary to the Law Department. In the present case the certificate has been signed by the Secretary to the Department of Justice. It is said therefore that the certificate is invalid. In my opinion, I am entitled to take judicial notice of the fact that the Department of Justice is the successor in law to the Law Department.

[7] The third point raised by counsel for the applicant is that there is no evidence before the court that the *Prisoners Interstate Transfer Act* 1983 of Western Australia is an interstate law within the meaning of the *Prisoners (Interstate Transfer) Act* of Victoria. There is no substance to that submission. On 14 August, 1984, the *Prisoners Interstate Transfer Act* 1983 of Western Australia was declared to be an interstate law for the purpose of the *Prisoners (Interstate Transfer) Act* 1983 of the State of Victoria and that declaration was published in the *Victorian Government Gazette* on 15 August, 1984.

In my opinion the requirements of Section 13 of the Act have been satisfied in the present case and the real question for me to determine is whether it would be harsh or oppressive or not in the interests of justice to transfer the prisoner to Western Australia, or that the trivial nature of the charge or complaint against him does not warrant the transfer. It is not suggested that the charges laid against the applicant are trivial in nature and that aspect of the matter can be put to one side. What is said on behalf of the applicant is that it would be harsh and oppressive to transfer him to the State of Western Australia because of the effect that would have upon the applicant's relationship with his mother and because there is a prospect that if the applicant was transferred to Western Australia he may be required to serve a longer period of time in respect of the 1992 offences, that is, the offences of which he was convicted at that time, than he would if he remained in the State of Victoria.

[8] Whilst one can understand the applicant's apprehension in so far as his relationship with his mother is concerned and the hardship that may be caused not only to him but to his mother if he is transferred to the state of Western Australia, in my opinion such matters do not constitute anything that could be described as harsh or oppressive within the meaning of s15(b) of the Act. As to whether or not the applicant may be required to serve a longer term of imprisonment in respect of the Victorian offences if he is transferred to Western Australia, I am unable to say. There is no evidence before me to that effect. Merely the applicant's assertion that that may be so.

But as against that, if the applicant is transferred to Western Australia and is convicted of the two offences of what I would describe as armed robbery with which he has been charged in that State, it is equally likely that some portion of any sentence imposed in respect of those

offences will be ordered to be served concurrently with the penalties imposed upon him in this State. It would seem to me it is far better for the applicant to have all these outstanding matters dealt with now rather than to await a further period of two years or so, that period being the time the applicant has yet to serve in Victoria, and then have him transferred to the State of Western Australia and dealt with in respect of those offences.

The application to transfer the applicant to Western Australia was triggered off by the applicant himself, by his request to the Attorney-General of Western Australia that he be so transferred. He has of course changed his [9] mind about that now, but in my opinion his application in 1992 was well-founded and I can find no basis upon which this court can say that the Magistrates' Court erred in the matter.

Accordingly, I confirm the decision of the Geelong Magistrates' Court made on 8 April, 1994, namely, that the Governor of Her Majesty's Prison at Barwon in the State of Victoria deliver the applicant, together with a copy of the order then made by the Magistrates' Court and a copy of this order, into the custody of the appropriate persons who shall escort the applicant to the State of Western Australia and that the persons named in the order to escort the applicant to Western Australia forthwith take and safely keep custody of the applicant for the purposes of conveying him from this State to that State and there delivering him into the custody of the Governor of the Casuarina Prison. The applicant may be removed.

**APPEARANCES:** For the applicant Brincat: Mr J Rutherford, counsel. For the respondent: Mr G Fraser, counsel. Victorian Government Solicitor.

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