20/09; [2009] VSC 355

SUPREME COURT OF VICTORIA

WALLACE v DEBS and ANOR

Pagone J

10 August 2009

PRACTICE AND PROCEDURE - APPLICATION BY POLICE OFFICER FOR AN ORDER TO QUESTION A PERSON IN RELATION TO AN OFFENCE NOT CONNECTED WITH THE STATE OF VICTORIA - APPLICATION REFUSED BY MAGISTRATE - CONSTRUCTION OF "AN OFFENCE" IN S464B(1)(b) *CRIMES ACT* 1958 - STATUTORY PRESUMPTION AGAINST EXTRATERRITORIAL EFFECT - WHETHER "AN OFFENCE" MUST OCCUR UNDER VICTORIAN LAW - WHETHER MAGISTRATE IN ERROR: *CRIMES ACT* 1958, s464B(1)(b).

1. The words "an offence" in s464B of the *Crimes Act* 1958 were intended to refer to an offence under Victorian law and not to any offence wherever it may have been committed and wherever it may have been made an offence. That construction accords with the presumption against the extraterritorial operation of penal provisions even though the section might not itself impose a penalty as strictly understood. There are many instances where it is appropriate for what might loosely be described as the penal statute presumption to be applied, even though the provision in question may not strictly be penal. In each case the task is to construe and apply the intention of the legislature. In this case, the section may itself not impose a penalty but it can only ever be used as an aid to criminal investigations which, of their nature, inevitably expose a person to penalties.

2. The fundamental question of construction is not about whether the section has or does not have extraterritorial effect, but rather, whether its proper construction requires that extraterritorial offences should be understood to be encompassed within the ambit of the operation of the section. It is in that context that the presumption relied upon by the magistrate might helpfully inform construction of the meaning Parliament intended. Accordingly, the words "an offence" appearing in the section refers to offences under Victorian law but do not extend to offences at large wherever they may have been created or committed.

PAGONE J:

1. In this proceeding Detective Jason Wallace applies for judicial review of an order made by his Honour Mr S Garnett, magistrate, on 13 October 2008. The learned magistrate was considering an application by Detective Wallace for an order under s464B of the *Crimes Act* 1958 (Vic) to permit the questioning of Bandali Debs in relation to an offence which, for these proceedings, is accepted to have no connection with Victoria. His Honour declined to make the order on the basis that the proper construction of s464B(1)(b) required the words "an offence" to be construed as referring to an offence under Victorian law and not to any offence under the laws of any other place, whether another jurisdiction in Australia or elsewhere in the world. In reaching his conclusion the learned magistrate drew from and relied upon the statutory presumption that penal provisions are not to be construed as having extraterritorial effect.

2. The challenge to the magistrate's decision contended that s464B was not relevantly a penal provision sufficient to invoke the presumption. In that regard, it was contended that the provision was investigatory rather than penal and quite unlike the penal provisions frequently referred to in application of the statutory presumption.[1] However, in applying such presumptions, it must never be lost sight of the fact that the presumption exists as an aid to determine the meaning of legislation where there is some doubt. In this case whether or not the provision is strictly penal should not distract attention from the primary undertaking of determining the meaning of the words, namely "an offence", which have been used by Parliament in the section. The presumption against the extraterritorial operation of domestic penal statutes may still inform the proper construction of those words.

3. In my opinion the learned magistrate was correct to conclude that the words "an offence" in s464B were intended to refer to an offence under Victorian law and not to any offence wherever

it may have been committed and wherever it may have been made an offence. That construction accords with the presumption against the extraterritorial operation of penal provisions even though the section might not itself impose a penalty as strictly understood. There are many instances where it is appropriate for what might loosely be described as the penal statute presumption to be applied,[2] even though the provision in question may not strictly be penal.[3] In each case the task is to construe and apply the intention of the legislature. In this case, the section may itself not impose a penalty but it can only ever be used as an aid to criminal investigations which, of their nature, inevitably expose a person to penalties.

4. The section is not in its terms directed to offences committed outside of Victoria. Indeed, as is clear from the words of the section, and from the explanatory material to which I was taken, the primary purpose of the provision is to facilitate the investigation by Victorian Police of Victorian offences by permitting questioning of persons held in custody in Victoria. The construction of the section adopted by the learned magistrate does no harm to that purpose and, furthermore, keeps that purpose squarely within the focus of the operation of the provision. The Attorney-General's second reading speech makes clear that the purpose of the provision was to enable questioning by Victorian Police for the purpose of Victorian investigations of Victorian offences. The Attorney-General's second reading speech also makes clear that the provision was to make, as it does, a substantial inroad into the rights of a prisoner and that, therefore, safeguards were provided. Nowhere in the section, nor in the Attorney-General's second reading speech, is there any suggestion that it was intended to facilitate investigations which the Victorian Police might be conducting wholly for or to assist the police force of another state or potentially of another country. There was no contemplation, and there is undoubtedly no express contemplation anywhere to be found in the section or in the second reading speech of the Attorney-General, that the provision could be used as an aid for the investigation through Victorian police by non-Victorian Police into non-Victorian offences.

5. Counsel for the plaintiff urged upon me the width of the language used by the Attorney-General in explaining the purpose of the legislation and its impact. It may be accepted that the language used was broad in explanation of the full and ample effect of the provision in the investigation by the Victorian Police of Victorian offences. It does not follow, however, from what the Attorney-General said in the second reading speech that the reach of the section was to enable non-Victorian Police to investigate non-Victorian offences by asking Victorian Police to invoke the section. There is absent in the remarks of the Attorney-General any reference to such use of the section as was sought in this case and, plainly, such use was not amongst the matters to which he drew attention and of which he was expressly conscious as coming within the ambit of the provision.

6. The word "offence" is not defined in the *Crimes Act*. However, it is clear that the word is used in the *Crimes Act* primarily to refer to offences under Victorian law. Support for this conclusion may in part be gained by the express definition of "offence to which this part applies" in section 340(1). That section is found in Part IIA headed "Extra-territorial Offences" and, in that definition, it is made clear that in that part of the Act the word "offence" is used to refer not to Victorian offences but to those of a reciprocating state. It is, therefore, an indication of a departure from, as would be expected, the usual meaning of the word "offences" throughout the Act as referring to Victorian state offences rather than offences created elsewhere. It is also instructive in that context to note the additional safeguards in that part of the Act limiting the offences to those of a reciprocating state (as defined); no similar extension of the meaning of the word "offence" is found in section 464B, nor is there any safeguarding limitation to offences of “reciprocating states,” or of the legislatures within the Commonwealth of Australia, or otherwise confining the potentially unlimited application of the section to any offence created or committed anywhere. All this points against the construction for which the plaintiff contends.

7. It was contended on behalf of Detective Wallace that the section does not relevantly have extraterritorial effect because what the section authorises is conduct all of which is to occur within Victoria: namely, the questioning in Victoria by a Victorian police officer of a person in Victoria in custody in a Victorian prison. However, this contention misunderstands the nature of the extraterritorial impact about which the courts have been concerned in the past and, in any event, does not address the primary question of construction. The extraterritorial impact which the presumption guarded against was that something which had occurred outside of the jurisdiction

might come to be prosecuted within the jurisdiction.[4] The presumption against extraterritorial application of domestic laws was frequently concerned to prevent the domestic or local impact of events which had occurred extraterritorially. By analogy here the extraterritorial application would be through the construction of the words "an offence" to include extraterritorial offences triggering the application of a section to be applied within the jurisdiction of Victoria. However, the fundamental question of construction is not about whether the section has or does not have extraterritorial effect, but rather, whether its proper construction requires that extraterritorial offences should be understood to be encompassed within the ambit of the operation of the section. It is in that context that the presumption relied upon by the learned magistrate might helpfully inform construction of the meaning Parliament intended. I agree with the learned magistrate but would add that the same conclusion would follow even without recourse to the presumption against the extraterritorial operation of penal provisions. For the reasons I have given above the words "an offence" appearing in the section refers to offences under Victorian law but do not extend to offences at large wherever they may have been created or committed.

8. Finally I should deal with one argument put against this construction; namely, that the provision would be unworkable if it required establishing Victorian jurisdiction before it could be invoked. In my view, this concern is unfounded. The section may readily be invoked whenever it is "reasonably suspected" that the person to be investigated has committed an offence contrary to the laws of the state of Victoria. In other words, it is sufficient to invoke the provision that the investigating officer has a suspicion capable of being described as reasonable. The investigating officer does not first have to establish that the offence was against the state. Rather, all that the investigating officer need do is that which is routinely done when embarking upon any investigation about the possibility of an offence having been committed in Victoria against Victorian law. The construction adopted by the learned magistrate, which I think to be correct, only excludes from operation of the section that narrow class of cases, of which this is one, where it is conceded that the offence has nothing at all to do with Victoria except the presence in Victoria of the person sought to be interviewed. In this case it is properly conceded on behalf of the investigating officer that the investigation to be undertaken is not for the purposes of investigating a Victorian offence but, solely, to enable the police force of another state to investigate a possible offence against the laws of that other state. That limitation is narrow and, it seems, has not otherwise been provided for. The only conclusion by the learned magistrate concerning that issue, with which I also agree, is that there is no justification to assume that section 464B was intended to cover a situation that has not previously been thought necessary to have been covered. Accordingly, I dismiss the application.

---

[1] See, for example, W.F. Craies, *Craies on Statute Law* (7th ed, 1971) 528 and W.F. Craies, *Craies on Statute Law* (11th ed, 2004) 767-772.

[2] See D.C. Pearce and R. Geddes, *Statutory Interpretation in Australia* (6th ed, 2006) [9.30].

[3] See *Smith v Corrective Services Commission of New South Wales* [1980] HCA 49; (1980) 147 CLR 134; *Spautz v Dempsey* [1984] 1 NSWLR 449 and *R v Kiltie* (1986) 41 SASR 52.

[4] See for example *MacLeod v Attorney-General for New South Wales* (1891) AC 455, 458-459 (Halsbury LC).

APPEARANCES: For the plaintiff Wallace: Mr JD McArdle QC and Ms SMK Borg, counsel. Office of Public Prosecutions. For the first defendant Debs: Mr G Thomas SC, counsel. Victoria Legal Aid.
