14/73

SUPREME COURT OF VICTORIA

HOLLAND v CONDIE

McInerney J

15 May 1973

EXTRADITION – WARRANT ISSUED IN QUEENSLAND – OFFENCE OF "SHOPBREAKING" MENTIONED IN WARRANT NOT AN INDICTABLE OFFENCE – THE CHARGE SHOULD HAVE BEEN "SHOPBREAKING WITH INTENT TO COMMIT AN OFFENCE" – IF MATTER RETURNED TO QUEENSLAND THE DESCRIPTION OF THE OFFENCE WOULD HAVE BEEN AMENDED – IN THOSE CIRCUMSTANCES NOT "HARSH OR OPPRESSIVE" TO ORDER THE RETURN OF PERSON ARRESTED TO QUEENSLAND – WARRANT ISSUED BY VICTORIAN MAGISTRATE NOT IN THE PROPER TERMS OF THE ACT – WARRANT REISSUED: *SERVICE AND EXECUTION OF PROCESS ACT*, S18.

Looking at the terms of the warrant which had been endorsed and produced to the Magistrate and taking into account that the defect in the warrant could be cured by amendment, the Magistrate's order was a valid exercise of power in that it was not unjust or oppressive to return the person arrested to Queensland.

McINERNEY J: This is the return of an Order Nisi granted by me on 10 May 1973 directed to His Worship Mr LT Griffin SM, and to Mr Robert Charles Holland, and returnable before me today to show cause why an Order made by Mr LT Griffin SM, on 9 May 1973 that the applicant, Desmond Michael Condie be returned to Queensland where a warrant for his apprehension was issued and that for such purpose the applicant be delivered into the custody of Robert Charles Holland or members of the police force or persons to whom the warrant was originally directed or any of them should not be set aside.

The grounds on which I granted the Order Nisi were:

(a) The offence charged in the Warrant of Apprehension is not indictable in the State of Queensland;

(b) There was no admissible evidence before the said Magistrate as to the nature of the offence with which the applicant was charged in the State of Queensland or as to the contents of the Information or charge laid against the applicant referred to in the Warrant of Apprehension produced before the Magistrate.

By the same Order Nisi I directed that the applicant be kept in the custody of the Governor of Her Majesty's Gaol, Pentridge, in the State of Victoria until the hearing and determination of this Order to Review.

On the return of the Order Nisi today Mr Uren of Counsel has appeared for Mr Holland. There is no appearance for the Magistrate. Mr Toal assures me he has been instructed that the Order Nisi and supporting documents were served on the Magistrate and he undertakes to have a proper affidavit of service filed. I might say that in all probability, the service will have been short-service since the Order which I made on Friday was not presented to me for signature until some time yesterday afternoon. It appears that in this respect those instructing Mr Toal may have been somewhat dilatory. However, on the return of this Order Nisi Mr Uren called his client, Mr Robert Charles Holland, who is a Detective First-Class of the Queensland Police. Mr Holland gave *viva voce* evidence before me and described the procedure followed in the proceedings in Queensland and produced photostat copies, or what he said were photostat copies of the original court documents.

From the evidence given by Mr Holland and from the documents which he produced, it appears that the police allege that the applicant was arrested on or about 17 September 1972 and, after questioning, admitted having attempted to break into a shop operated by one Ken Beckett, trading as Ken Beckett Watchmaker and Jeweller at Logan Road, Stone's Corner. The applicant is alleged to have admitted to Detectives Holland and French of the Criminal Investigation Branch

that he had broken into the shop to steal property. The procedure in Queensland is, apparently, that when a person is arrested and a decision is made to lay a charge, a document known as a Bench Charge Sheet is prepared in duplicate and the charge as stated in the Bench Charge Sheet is read out to the accused. When the accused is brought before the Court the Bench Charge Sheet, together with a copy of it, is laid before the court and the presiding Magistrate reads the details of the Charge contained in the Bench Charge Sheet to the accused. The details of the charge as set out in the Bench Charge Sheet, a photostat copy of which is produced before me, are as follows;

> "That on the Seventeenth day of September 1972 at Brisbane in the State of Queensland attempted to break and enter the shop of Ken BECKETT trading as KEN BECKETT WATCHMAKER AND JEWELLER."

Mr Holland gave evidence that when the Applicant was brought before the Magistrates' Court at Brisbane on the 17 September 1972 the Charge Sheet was read to him. The applicant had one Mr Bale appearing for him. A remand was asked for and apparently Mr Bale undertook that no objection would be made to the remand if bail was granted. Accordingly Mr Kingston SM made an Order, which is recorded in this document as follows;

> "By consent Defendant is remanded to this Court until the 26th day of September 1972".

then follows some words which I am unable to decipher interlined in the print, which proceeds;

> "Bail allowed self in $600.00 with one surety in $600.00 or two sureties in the sum of $300.00 each. Recognisance to be conditioned for the appearance of the defendant at all times and place to which the hearing is adjourned from time to time."

On the 26 September 1972 when the matter came on for hearing there was no appearance of the defendant and Mr Bale stated he had received no further instructions from the defendant and he was given leave to withdraw. The matter was stood down until 2.30pm on that day. This was before His Worship Mr George Fagg, who is apparently the Chief Stipendiary Magistrate at the Magistrates' Court Brisbane. According to the endorsement on the Bench Charge sheet at 2.30pm there was no appearance of the defendant whereupon Mr Fagg ordered that a Warrant issue to apprehend the defendant to bring him before the Court and the hearing was adjourned until 27 September 1972.

I should add that on the 26 September 1972 Detective Holland gave evidence as to the arrest, as to the circumstance of the applicant having been remanded until the 26 September 1972 and of his having failed to attend on the 18 September 1972 and on the 26 September 1972. Two other witnesses not being in attendance, their depositions were taken on the 27 September 1972, apparently before Mr Fagg SM. On that material His Worship Mr Fagg issued a Warrant to apprehend Desmond Michael Condie and subsequently endorsed it for service in Victoria. I might add that the Bench Charge Sheet has attached to it the antecedents of the accused and the depositions, all of which are before me as photostat copies, and purport to be certified to be true copies of the original and are so certified by Mr Fagg. Mr Uren invited me to receive this evidence under the provisions of s19 ss(4).

That sub-section provides:

> "For the purposes of a review under this section a copy of a public document filed in a Department or office of the Commonwealth or of a State or part of the Commonwealth, certified to be a true copy of the document by the person purporting by the certificate to have charge of the document, shall be received as evidence of the facts stated in the copy."

The Certificate signed by Mr Fagg does not, on the face of it, state that Mr Fagg is the person who has charge of these documents and if one assumes that the procedure and constitution of the Courts in Queensland is the same as in Victoria, and the questions which I asked of Detective Holland on this point suggest that, broadly speaking, the same constitution exists, then it appears the certificate is not signed by the person who has charge of the original documents. The person who would have charge of the original documents would be the Clerk of Counts or a corresponding functionary. It appears the certificate given by Mr Fagg is on the face of it not admissible in evidence. However, Mr Toal, appreciating no doubt that it was to his advantage to have the terms of the Information before him in order to found one of his main arguments, offered no objection

and since it seemed to desirable to have, as far as possible, documentary evidence of the material upon which the original warrant was issued, I received those documents in evidence.

It is, I think, clear from the provisions of the Queensland *Criminal Code* s422 and s535 that the original information charged an offence which was not an offence under the law of Queensland. Under the law of Queensland, and in Particular s422 of the *Criminal Code*, the offence of breaking and entering a shop is not complete unless the breaking and entering was done with intent to commit a crime therein. In other words, there is no such offence in Queensland as breaking and entering a shop. Breaking and entering a shop is a crime only if that breaking and entering was done with an intent to commit a crime in the shop. By virtue of s535 an attempt to commit that crime involves that there must have been an attempt to break and enter a shop with intent to commit a crime in that shop. It follows that the Bench Charge Sheets which for this purpose equate with an information, discloses no offence under Queensland law. Indeed Mr Uren, who conducted his argument with complete candour conceded that the short forms used describing the offence, did not warrant the form used on the charge sheet on this occasion.

He drew my attention to the form at p652 of *Carter's Criminal Law*, Second edition, where the offence of breaking and entering a shop is described in terms which include "with intent to commit a crime therein" and the form used for offences of attempts as set out at p697 of the same volume obviously follows the same form. Mr Uren, however, drew my attention to the terms of s48 of the *Justices Act* 1896-1965 whereby it is provided that if at the hearing of a complaint, it appears to the Justices that there is a defect therein in substance or in form other than non-compliance with the provisions of s43 of the Act, which is not in question in this case, or that there is a defect in any summons or warrant to apprehend the defendant sued on such complaint, then the Justices may make such order for the amendment of the complaint, summons or warrant as appears to them to be necessary or desirable in the interests of justice.

It seems to me, having regard to the statement of the facts contained in the police brief as presented to the Magistrates' Court of Brisbane, that the Court would almost certainly accede to an application by the prosecutor to amend the Bench Charge Sheet, so as to aver what is properly an offence. However, by virtue of the fact that the defendant did not on the adjourned date of this hearing and the fact that the warrant issued then for his arrest, it is in respect of that warrant that an application for an Extradition Order was made to His Worship Mr Griffin on the 9 May 1973.

Section 93 of the *Justices Act* 1886-1965 of Queensland provides by ss1(b) thereof:

> "If a defendant, witness or other person does not appear at any time and place for his appearance at which the recognizance is conditioned or which is mentioned in the recognizance or which has been determined the justices who are then present may issue a warrant for his apprehension.

It would appear therefore that although the Bench Charge Sheet charged something which was not an offence, it was competent for Mr Fagg, Chief Stipendiary Magistrate of the Magistrates' Court, Brisbane to issue a warrant for the apprehension of the defendant Condie. That brings the matter within s18 of the *Service and Execution of Process Act*, sub-s1 of that provides:

> Where a Court, Judge, Police, Stipendiary or Special Magistrate, a Coroner or Justice of the Peace or an officer of the Court has, in accordance with section 18 of this Act or of the law of a State or part of the Commonwealth, being a State or part of the Commonwealth in or on his way to which the person against whom the warrant has been issued or is supposed to be, may on being satisfied that the warrant was issued by the Court, Judge, Magistrate, Coroner, Justice of the Peace or officer (after proof on oath, in the case of a Warrant issued by a Magistrate, Coroner, Justice of the Peace or officer of a court, of the signature of the person by whom the warrant was issued), make an endorsement on the warrant in the form, or to the effect of the form, in the Second Schedule to this Act authorising its execution in that other State or part of the Commonwealth."

That endorsement was made by His Worship Mr J Caven, on the 9 May 1973 and the applicant, having in the meantime been arrested on the warrant as so endorsed, the matter came before Mr Griffin pursuant to s18 ss2 and 3.

Mr Griffin, after reading the deposition of Mr Holland and hearing the cross-examination and re-examination of Mr Holland, which is set out in the transcript of evidence, and having heard the submissions made by Mr Lopes of Counsel on behalf of the applicant, made the order, which

is the subject of these proceedings, for the issue of a warrant to remand the applicant to the State of Queensland. The terms of that warrant, it would appear to me, are not properly adapted to the facts of this case. The warrant would suggest that it is a warrant which, as issued, requires the appearance of the applicant, he having failed to attend at the time and place named in his recognizance.

Looking at the terms of the warrant which had been endorsed and produced to Mr Griffin and which described the offence charged in the warrant as an indictable offence, it appeared to me to be open to serious doubt as to whether the offence charged was an indictable offence. It appeared also to me, that if and insofar as Mr Holland had given secondary evidence on the contents of the original information, His Worship Mr Griffin should not have accepted that evidence. I therefore granted the Order Nisi on the grounds I have earlier set out. But after hearing argument today, I am satisfied that the order of Mr Griffin SM, to issue his warrant to remand the applicant to Brisbane and be brought before a Justice or Justice of the Peace was a valid exercise of power and that there were not any grounds shown which under ss6 of s18 would have justified Mr Griffin in declining to order that the applicant be returned to Queensland.

It was, in the end, not suggested, that either of the grounds mentioned in paragraphs (a) or (b) of ss (6) were made out but it was suggested that it would be unjust or oppressive to return the applicant to Queensland on the basis that he was being returned to answer a charge which disclosed no offence.

If I had been satisfied that the charge was one which could by no possibility of amendment be converted into proper charge or that it charged an offence which under no view of the facts could be an offence under the law of Queensland, I would have been disposed to take the view that it would be unjust or oppressive to return the applicant to Queensland, but, since on the material before me, it appears that the defect in the information or Bench Charge Sheet is a defect which could be cured by amendment and that the facts warrant the exercise by the court in Brisbane of the powers of amendment, and that when the charge sheet is amended there will then be disclosed an offence by the law of Queensland. It seems to me that in those circumstances it would not be unjust or oppressive to make the order and that the Magistrate rightly refused to discharge the applicant and rightly ordered that he should returned to Queensland.

The warrant which has been signed by the Magistrate is, in my view, however not adapted to the circumstances of the case. The warrant should recite that the applicant, having been charged with the offence which is set out in the Bench Charge Sheet, and having been suffered to go at large did not appear at the time and place etc, and that a warrant in accordance with the law of the State of Queensland was issued by a Magistrate for his apprehension. The warrant should then proceed to recite that the warrant thus issued was duly endorsed and has been duly authenticated as directed by the *Service and Execution of Process Act* and issued by a Justice of the State of Queensland.

Then the warrant should go on to recite the defendant is the person named in the warrant and that a warrant has issued for his apprehension in accordance with the law of Queensland to apprehend the defendant and bring him before some one or more of Her Majesty's Justices in the State of Queensland and be dealt with in accordance with the law. The warrant should then proceed to order that the defendant be returned to Brisbane and for that purpose be delivered into the custody of Robert Charles Holland, and thereafter it should proceed as in the terms of the existing warrant.

I have power, I think, under ss(5) of s19 to direct that a warrant issue in the terms which I have suggested. I will order that such a warrant be prepared. When it has been prepared I will be prepared to sign it and then to direct that the applicant be delivered into the custody of Robert Charles Holland for the purpose of conveying him to Brisbane to be dealt with according to law. In those circumstances the Order Nisi should be made absolute. I quash the warrant issued by His Worship Mr Griffin, and order that a new warrant issue in the terms I have outlined, and I direct that the applicant be delivered into the custody of Robert Charles Holland, and so forth. I certify for Counsel.

APPEARANCES: Mr Toal appeared on behalf of the Applicant Condie. Mr Uren appeared on behalf of the Respondent Holland.