06/85

FEDERAL COURT OF AUSTRALIA

SILBERSHER v GERKENS and CURRY

Lockhart J

14 September 1984 — [1984] 13 A Crim R 1

EXTRADITION PROCEEDINGS – WARRANT ISSUED IN ANOTHER STATE ENDORSED FOR EXECUTION IN VICTORIA – APPLICATION FOR EXTRADITION – WHETHER EXTRADITION ORDER UNJUST OR OPPRESSIVE – MATTERS TO BE CONSIDERED BY MAGISTRATE – CIRCUMSTANCES IN WHICH ORDER SHOULD NOT BE MADE: *SERVICE AND EXECUTION OF PROCESS ACT* 1901 (CWTH), S18.

Section 18(6) of the *Service and Execution of Process Act* 1901 (Cwth) provides:

"If, on the application of the person apprehended, it appears to the Magistrate before whom a person is brought under this section that—
(a) the charge is of a trivial nature;
(b) the application for the return of the person has not been made in good faith in the interests of justice; or
(c) for any reason, it would be unjust or oppressive to return the person either at all or until the expiration of a certain period;
the Magistrate ... may—
(d) order the discharge of the person;
(e) order that the person be returned after the expiration of a period specified in the order and order his release on bail until the expiration of that period; or
(f) make such other order as he thinks just.

S. was charged with indictable offences of conspiracy to defraud the Commonwealth. When S. was apprehended and brought before G., a Magistrate, an application under s18 of the *Service and Execution of Process Act* 1901 was made for the extradition of S. to another State in order to answer the charges. S. contended that he should be discharged on the ground that the application "had not been made in good faith in the interests of justice" or, that "it would be unjust or oppressive" to return him to the other State. The Magistrate granted the application and admitted S. to bail to appear in the other State to answer the charges. Upon order to review the Magistrate's decision—

HELD: Application for review dismissed.
(1) When an application for extradition of an accused person to another State or Territory is made, the magistrate should not undertake his own assessment of the guilt or innocence of the accused person.

(2) However, if it appears that there is no reasonable prospect of any case being made out against the accused, or that the charge is misconceived or without foundation or substance, the Magistrate should discharge the accused under s18(6)(c) of the *Service and Execution of Process Act* 1901.

LOCKHART J: *[After setting out the facts and relevant provisions of the* Service and Execution of Process Act *1901, His Honour continued]*: ... **[7]** The applicant's principal submissions arose from the following passage from the Magistrate's reasons for decision:

> "The suggested grounds of injustice and oppression are:-
> (i) that the defendant would become involved in lengthy committal proceedings and possibly a longer trial in a State in which he does not reside; and/or
>
> (ii) that the evidence upon which the Crown intends to rely does not disclose an offence.
> "It is clear that I am entitled to take into account (and I do so) the fact that extradition of the respondent to Queensland will involve him in very substantial inconvenience and expense. Indeed, it is not difficult to imagine that the cost of accommodation over many months and the disruption of his means of livelihood would be ruinous. Balanced against these factors must be the gravity of the allegations and the right of the community to expect that offenders will be brought to justice. It is not in dispute for the purpose of this proceeding that the public purse has been **[8]** defrauded of revenue amounting to some $16,900,000.00. The allegations then are very serious indeed and, albeit that he will suffer greatly as a result, it is my view that the respondent should be extradited unless he can succeed on ground (ii). I turn to that question."

It was submitted by the applicant that this passage revealed a fundamental misconception by the Magistrate of his function under para 18(6)(b) in that he treated the matters described in paras. (i) and (ii) of his reasons as raising separate and independent issues rather than one issue with two limbs, both relating to the question whether it would be unjust or oppressive to return the applicant to Queensland.

Then it was submitted that this particular passage from the Magistrate's reasons, whether read alone or in the context of his reasons as a whole, demonstrated that the Magistrate overlooked a basic matter namely, that as the offences with which the applicant has been charged are offences against Commonwealth law, the prosecution can prosecute the applicant in whichever part of Australia it chooses, not only Queensland. The prosecution is entitled now to charge the applicant in Victoria with the same offences with which he has been charged in Queensland. Victoria is said to be the more appropriate forum because the applicant resides and carries on business there and his alleged involvement in the matters the subject of the charges against him occurred in, or primarily in, Victoria. It was argued that it would obviously be more convenient to the applicant if he were charged in Victoria, and if the committal proceedings and any subsequent trial were heard there.

[9] It was asserted that the Magistrate should have balanced against the inconvenience and expense to the applicant of the committal proceedings being conducted in Queensland, not the right of the community to expect that offenders will be brought to justice, but the right of the prosecution in a conspiracy trial to proceed in the place of its choice. If these matters had been weighed by the Magistrate it was asserted that he may have concluded that, as the prosecution could choose to prosecute the applicant in Victoria, in all the circumstances it would be unjust or oppressive to return him to Queensland. The circumstance referred to by the Magistrate namely:

> "The gravity of the allegations and the right of the community to expect that offenders will be brought to justice."

was said to be essentially irrelevant because it would be present as a consideration wherever the prosecution chose to lay its information against the applicant. This summarises briefly the principal argument advanced by counsel for the applicant.

The circumstances in which a Magistrate or Justice of the Peace may find that it would be unjust or oppressive to return a person to the State or part of the Commonwealth in which the original warrant was issued have been considered in various cases including *O'Donnell v Heslop* [1910] VicLawRp 31; [1910] VLR 162; 16 ALR 168; 31 ALT 173; *In Re Alstergren and Nosworthy* [1947] VicLawRp 5; [1947] VLR 23; [1947] ALR 85; *Aston v Irvine* [1955] HCA 53; [1955] 92 CLR 353; [1955] ALR 890; 29 ALJR 411; *In the Matter* **[10]** *of Jack Mandel* [1958] VicRp 80; [1958] VR 494; [1958] ALR 1019; *Walker v Duncan* [1975] 6 ALR 254; (1975) 49 ALJR 231; *Skewes v Veen Huizen* (1978) 20 SASR 109; (1978) 46 FLR 130; (1978) 22 ALR 101 and *White v Cassidy* [1979] 40 FLR 249. In *Aston v Irvine* the judgment was that of all seven members of the High Court. Their Honours overruled a challenge to the validity of ss18 and 19 of the *Service and Execution of Process Act* and said of para 18(6)(c) at pp366 and 361:

> "It would be unjust or oppressive to return the accused to Adelaide if the facts as they are alleged or appear make it clear that there was no indictable conspiracy. On this ground it is urged that we should decide in favour of their immediate discharge. To refuse to give effect to this contention means no more than that the men must be remanded to Adelaide. For a decision at this stage for their return does not, of course, mean that we hold that there was a conspiracy. That is essentially a matter of fact depending upon proof beyond reasonable doubt at the trial. Indeed such a decision ought not to foreclose the accused even upon a point of law that might otherwise be raised upon the committal proceedings in Adelaide or at the trial. All that it means is that upon the facts suggested for the prosecution, if made out, what in law may amount to an indictable conspiracy may reasonably be found. It is not enough that the information as laid is open to criticism, as very likely it is. In the circumstances of this case it must appear that upon the suggested facts the charge of conspiracy is misconceived."

The Legislature has conferred a wide discretion upon Magistrates and Justices of the Peace under para 18(6)(c). It is not desirable that I should attempt to do what other courts have consistently declined to do namely, to lay down precise rules as to what is included within the scope of the words: "for any reason it would be unjust or oppressive". But the court whose assistance is sought to return a person to a part of the Commonwealth in which the original warrant for his

apprehension issued does not examine disputed **[11]** questions of fact or determine doubtful or difficult questions of law. The exercise of the power conferred by para 18(6)(c) is called for if it is clear that there is no reasonable prospect of any case being made out against the defendant should he be returned or that the charge is misconceived or without foundation. The question of the guilt or innocence of the defendant is not to be dealt with by the court whose assistance is sought. However, if it is a clear case that there is no substance in the charge brought against the defendant, then the court exercising jurisdiction under para 18(1)(c) should interfere.

It is true that it does not appear from any of the reported cases to which counsel for the applicant referred me that the question arose whether different considerations might apply under para 18(6)(c) where the defendant was charged with an offence against Commonwealth law so that the prosecution could charge him and proceed against him in any State or part of the Commonwealth. But the prosecution has apparently decided in the present case that charges should be brought against the applicant and various other persons in Queensland. I was told from the Bar table that some defendants have been extradited from Western Australia where they reside. I do not know why the prosecution chose to proceed in Queensland. The defendant Maher and other defendants reside, so I was told, in Queensland. This may have some bearing on the prosecution's decision. But it was not suggested that the charges should not have been brought in Queensland. The prosecution may have very good reasons for proceeding there.

Even if it had been a relevant consideration for **[12]** the Magistrate in the present case that the prosecution could proceed against the applicant in Victoria, it cannot in my opinion be suggested that he failed to consider it merely because he did not refer to it. But if the Magistrate did fail to consider this matter (assuming its relevance), although a ground of review may then have been made out (paras 5(1)(e) and 5(2)(b) of the *Judicial Review* Act, I am not persuaded that his decision would have been in any way different from the one which he in fact made. Indeed, I think it unlikely that he would have reached a different conclusion. I would not therefore have granted relief to the applicant in those circumstances. I leave open the question whether it was relevant for the Magistrate to consider the fact that the prosecution could have charged the applicant and proceeded against him in Victoria.

All the Magistrate said in the portion of his reasons presently under consideration was that, on the one hand, he took into account the considerable inconvenience and expense that would attend the applicant if the committal proceedings were heard in Queensland but, on the other hand, he considered the very serious nature of the charges involved and the public interest in the proper enforcement by the Crown of the criminal law. In my view, these were matters which the Magistrate was entitled to consider and evaluate in the process of balancing the various elements in the case before him. Nor is there any substance in the submission that the Magistrate severed impermissibly the considerations numbered (i) and (ii) in the portion of his reasons extracted above. All he was doing, **[13]** as I read his reasons, was to consider two submissions put to him by counsel for the applicant and, for convenience, to deal with them separately. He was not suggesting that they were two discrete matters.

The applicant then submitted that the Magistrate posed the wrong question when he said, in the course of his reasons:

> "The question therefore becomes – does the statement of facts (Ex. C) as clarified by the concessions made by Mr Flood, justify me in finding that there is an arguable case against the respondent so that, to use the words of Madden CJ (*supra*), he is not being sent back to be tried on an alleged issue which does not really exist?"

It was submitted that the correct test to be applied under para 18(6)(c) is not whether the Magistrate is satisfied that there is "an arguable case" against a defendant but whether, in the words of the High Court in *Aston v Irvine* (at p366):

> "It would be unjust or oppressive to return the accused to ... if the facts as they are alleged or appear make it clear that there was no indictable conspiracy."

It was suggested in argument that *O'Donnell v Heslop* was inconsistent with the later judgment of the High Court in *Aston v Irvine* and that the Magistrate erred in applying the earlier case. It is hardly surprising that the two judgments are couched in different language; but I see

no difference of substance between the two. If the Magistrate had referred to *Aston v Irvine* rather than *O'Donnell v Heslop*, he would not in my view have posed a test that differed **[14]** except in verbiage from the one which he expounded. *Aston v Irvine* dealt only briefly with the proper test to apply under para 18(6)(c) because the judgment was principally concerned with constitutional questions. *O'Donnell v Heslop*, and some of the other cases which I cited above, analyse in more detail para 18(6)(c). I reject this submission ...
