61/89

SUPREME COURT OF VICTORIA

ADAMS v WARFIELD

Gobbo J

6 July 1989

EXTRADITION PROCEEDINGS – PRISON ESCAPEE – AT LARGE FOR 4½ YEARS – LAW ABIDING AND SUBSTANTIALLY REHABILITATED WHILST AT LARGE – ORDER SOUGHT FOR EXTRADITION – WHETHER MAKING OF ORDER WOULD BE "UNJUST OR OPPRESSIVE": *SERVICE AND EXECUTION OF PROCESS ACT* 1901, S18(6)(c).

Where a person escaped from prison before commencing to serve two prison sentences (5 years and 3 years, minimum 2) and remained at large for 4½ years during which time it was said the person was law-abiding and substantially rehabilitated, there was no reason why it would be unjust or oppressive to make an order for that person's extradition.

GOBBO J: [1] This is an application to secure a discharge under the *Service and Execution of Process Act* 1901, in particular, s18(6)(c) which provides:

> "If, on the application of the person apprehended, it appears to the Magistrate or Justice of the Peace 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 the 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 ..."

In the present case, the matter comes before me under s19 of the Act as and by way of a re-hearing, the learned Magistrate having made an order for extradition of the applicant, and having declined to accept the invitation to treat this as a case falling within the "unjust or oppressive" provision of s18(6)(c). It is not put that this is a case where the relief would be for a certain period. It is not suggested that a delayed order would meet the situation. The substance of the application made is that the prisoner should be wholly discharged under the first part of the section that I have just referred to.

The facts are not greatly in dispute in this case. They are set out in a lengthy and carefully prepared affidavit, which also exhibited the transcript of the evidence before the Magistrate. That evidence included evidence from Dr Bartholomew, who expressed a strong view against the desirability of returning the applicant into custody, and the adverse consequences that might flow if he were returned into custody.

[2] The substance of the argument put is that since his escape from custody, he, the subject of the extradition proceedings, has substantially rehabilitated himself, behaved in a law abiding fashion, developed good relationships with those around him, and earned their faith, trust and affection, and generally demonstrated that he should, if the matter were to be looked at afresh, remain at large. It was that, in effect, to which Dr Bartholomew referred when he said that if the matter were to be dealt with afresh, he would regard a custodial sentence at the moment as inappropriate.

The position was that on 13th September 1983 the applicant had been sentenced to a term of fifteen months, and that was about due to be fully served by December 1984. On 3rd February 1984, he was convicted of two offences, one of cultivating hemp, and the other of supplying hemp. He was sentenced to five years and three and a half years respectively on those two offences, those terms to be served concurrently with a minimum of two years. On Christmas Day 1984,

along with three other prisoners, he escaped from custody. At the date of his escape he had not, it appears, commenced to serve the main two sentences that remained to be served.

It is put, and supported by some material, that the circumstances of the escape do not indicate any carefully planned, deliberately thought out escape, but, rather, something that followed a drunken episode in which all these escapees were involved. It is therefore put that the applicant is not, as it were, seeking to benefit from a deliberately planned escape which was motivated by a desire **[3]** to disappear into the community, and thereby avoid discharging his sentence. In substance, what is put on his behalf by his counsel before me is that it would be effectively a turning back of the clock to return the prisoner to custody because of the rehabilitation that had occurred, and that I could exclude, any suggestion of a contrived rehabilitation designed to benefit from his escape. In addition, the length of time is called in aid in that he has been at large some four and a half years, and the fact that there was no deliberate or obvious attempt to conceal his escape by going to elaborate lengths to assume another identity, or anything of that nature.

The case gives me a great deal of difficulty. In essence, the argument comes down to saying that where a prisoner has escaped, and has remained at large but living in a law abiding constructive way, and also achieved rehabilitation, that there is created thereby a situation of unfairness if he is returned to custody after a substantial period of time. In my view, that proposition cannot be sustained in quite those terms. If that were so, it would always be open to an escapee who had remained at large, and who had successfully rehabilitated himself, to prove that it was oppressive within the meaning of the Statute to return him to custody, especially if that custody was, on one view, likely to expose him to the risk that the benefits of rehabilitation might be lost.

At first glance, a member of the community might think that does have an element of oppressiveness or **[4]** unfairness about it, but, in my view, it is not what that phrase is intended to convey, according to the way it has been interpreted in the cases. Reference has been made to the authorities. It is clear when looking at the authorities that the words "unjust and oppressive" are used in a more precise way. The words were the subject of discussion in the House of Lords decision *Kakis v Government and Republic of Cyprus* [1978] 2 All ER 634; (1978) 1 WLR 779; (1978) Crim LR 498. **[5]** Lord Diplock said at page 406:

> "'Unjust', I regard as directed primarily to the risk of prejudice to the accused in the conduct of the trial itself, 'oppressive' to hardship to the accused resulting from changes in his circumstances that have occurred during the period taken into consideration".

When looking to see what kind of circumstances would readily fit within this notion of creating the hardship His Lordship there pointed out what had happened in that case. The feature of that case was the way in which the authorities had allowed him to live his life openly and to take up quite a different form of life, so that there had been a change of circumstances, but it was a change of circumstances that was in effect assented to by the authorities.

Again in *Carmody v Hinton* (1980) SASR 409, the New South Wales police authorities had actually indicated officially that they did not propose to seek his extradition, so that for 15 months thereafter he pursued a course of action and took up a life relying upon that official intimation. Here again, it was a change in circumstances during that period of 15 months that made it oppressive as between himself and the authorities to compel him to come back into custody. It is not put that there is anything of that nature in this case.

It cannot be the law that mere silence on the part of the relevant authorities, in circumstances where it is not suggested that they knew the whereabouts of the prisoner, or were indifferent in some culpable way to his whereabouts, will suffice. Nonetheless it was urged forcefully on behalf of the applicant that this case might still be able to be regarded as one falling within the type of situation **[6]** demonstrated by the decision of Mr Justice Prior in *R v Placing*, an unreported decision of the South Australian Supreme Court delivered on 12 May 1989. It is always difficult to endeavour to apply decisions in other jurisdictions and in other circumstances; as was properly urged before me by Mr Berman, each case has really got to be regarded as a case standing on its own merits. It needs to be pointed out, however, that as *Placing's* case is relied upon, the circumstances there are significantly different and that the background of the escape is important. There the applicant had virtually served out his minimum term and was eligible for parole and knew that he was eligible for parole, but escaped some two days before the expiration

of the relevant period out of a sense of frustration and grievance at certain conditions that he felt were being unfairly and unjustly imposed upon him in relation to the parole. I have some difficulty nonetheless with the decision in *Placing's* case as fitting within the general propositions that I put earlier, but, accepting nonetheless the decision, I am unable to see that the particular circumstances which seemed to weigh very much with His Honour in that case apply here.

I am therefore driven back to the general proposition which is really relying upon successful rehabilitation and the absence of, as it were, careful or contrived planning in the escape. It may be a matter of some regret that one has to come down with a decision that might be seen in the eyes of ordinary people in the community to lead to what might appear to be an unsatisfactory state of affairs. Nonetheless I have to administer the section as it is put before me, and I do **[7]** not see it as having the wide effect that would be necessary in order to discharge the prisoner in this case.

It has been put that I should take into account that if returned not only would rehabilitation be undone, as it were, but that he would face a substantial penalty. I understand the way the argument is put, but, as I indicated during argument, I cannot give that very great weight for the reason that it seems to me all the factors that have been urged on his behalf – assuming as I must assume that they will be made out again before the sentencing Judge – would operate not to add to his penalty, but if at all to reduce his penalty. As I say, that is not a matter for me to decide, but I cannot accept the argument that I should proceed upon the basis that he would suffer a heavier penalty. It is a result that I have arrived at reluctantly, but in all the circumstances I am unable to uphold the application and discharge the prisoner. The application will be refused and the Magistrate's order therefore remains in force.

APPEARANCES: For the applicant Adams: P Berman, counsel. For the respondent Warfield: G Carroll, counsel.
