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## SUPREME COURT OF VICTORIA

# *RIDER v CHAMPNESS*

**Lush J**

**3 August 1970 — [1971] VicRp 28; [1971] VR 239; (1970) 16 FLR 195**

**EXTRADITION – WARRANT TO ARREST ISSUED IN SOUTH AUSTRALIA – EXECUTED ON APPLICANT IN VICTORIA – THE ONLY DETAILS AS TO THE OFFENCE WAS CONTAINED IN THE WARRANT – NO OTHER EVIDENCE WAS PLACED BEFORE THE MAGISTRATE – MAGISTRATE ADMITTED THE APPLICANT TO BAIL ON CONDITION THAT HE APPEAR IN THE ADELAIDE MAGISTRATES' COURT – WHETHER MAGISTRATE IN ERROR: *SERVICE AND EXECUTION OF PROCESS ACT* 1901-1963 (CTH) S18(3).**

**HELD: Application dismissed.**
**1. The steps contemplated by s18(1) of the *Service and Execution of Process Act* 1901-1963 (Cth) are to be taken upon the production of documents in proper order. When those steps are taken the person to be accused in the State where the proceedings originate may be brought before a magistrate or a justice of the peace pursuant to subs(2). That magistrate or justice must deal with the person so brought before him under subs(3). This sub-section is permissive in its terms.**

**2. The magistrate before whom nothing is placed except a set of documents, which on the face of them and on the proofs provided for in subs(1) are in order, is entitled without more to make an extradition order under subs(3).**

**3. In saying that in a proper case the prosecuting authorities should provide particulars or evidence of the nature of the offence and its circumstances, the evidence to be placed before the magistrate or justice would not necessarily be evidence of a kind which could be used in a prosecution, but might take the form of a statement by a prosecutor or a general description of events by an investigating police officer.**

**4. In relation to the submission that it was unjust or oppressive to return the applicant to South Australia when he had not in the proceedings before him been given any information as to his offence beyond what appeared in the warrant, and no information as to the evidence of his complicity, no demand for further information was made, and the applicant through his counsel adopted the course of relying on the absence of information for the purpose of making a submission which in the result failed before the magistrate and failed also before the Supreme Court.**

**LUSH J:** This is an application made under s19 of the *Service and Execution of Process Act* 1901-1963 (Com.) for a review of an order made in the Magistrates' Court at Melbourne under s18(3)(b) of that Act. The order admitted the present applicant to bail on condition that he appear at the Adelaide Magistrates' Court on 5 August 1970.

The proceedings in the Magistrates' Court, where the applicant was represented by counsel, appear, probably deliberately and at any rate in the result, to have developed into a tactical battle. The point which emerges, however, is one of importance.

When the case came on in the Magistrates' Court the respondent Champness, an officer of the South Australian police force, gave evidence in the course of which he produced the original warrant for the arrest of the applicant which had already been endorsed pursuant to s18(1). That endorsement had been placed on the warrant on 28 July 1970, and the applicant had been arrested and was before the Magistrates' Court on 29 July 1970. Mr Champness gave evidence that the applicant had admitted his identity with the person named in the warrant, and he verified the signature of the justice of the peace on the original South Australian warrant. The only question that was put to him in cross-examination was a question relating to the punishment which could be imposed for the offence charged in the warrant.

The warrant itself so put in evidence is in these terms: "Information on oath was laid this

day by Lionel Edgar Samuels of Adelaide, a Sergeant of police, that John Harvey Rider on the 28th January, 1970 at Adelaide in the said State obtained credit to the amount of $8135.20 by fraud other than false pretences." Then follows the usual command to apprehend.

No other evidence than the warrant was placed before the magistrate in Melbourne to show the nature or the circumstances of the offence with which the applicant was charged. Not only did the Crown add nothing to the evidence which I have outlined, but no attempt was made by the defence to lead evidence, by cross-examination or otherwise, which would initiate consideration of any of the matters referred to in s18(6). Nor was it suggested to the Magistrates' Court that in fact the applicant was unaware of the nature of the charge or the circumstances of the alleged offence. No application was made to the magistrate for a direction that the Crown side should particularize the offence that was alleged or the circumstances in which it was said to have been committed.

There was, therefore, no evidence that a crime had been committed in South Australia or that the applicant was a person guilty of such a crime. The Court, however, had before it a warrant showing that by proper process a prosecution against the applicant had been instituted in South Australia.

In this state of the evidence Mr Coleman, for the applicant, submitted that there was no jurisdiction to make any order under s18. The basic argument was that s18(3), which is the operative sub-section for present purposes, calls for the exercise of a discretion and some material must be placed before the court before the discretion can be exercised.

Secondly, Mr Coleman said that while subs(3) in terms conferred a discretion on the magistrate the magistrate in this case had not purported to exercise any discretion at all, and in any event he had no material before him on which he could have exercised a discretion. The second argument, therefore, echoes the first.

Thirdly, Mr Coleman contended that before an order could be made there must be evidentiary material to lay the foundation for its making. Thus all the submissions are based on the fact that there was no evidence of the crime or its circumstances or the applicant's complicity in the crime before the court.

Elaborating the first argument Mr Coleman submitted that the Act was designed to operate upon a factual situation in which a crime had been committed in one State and the person charged or to be charged with the crime was in another State. This, however, is not a satisfactory exposition of the provisions of the *Service and Execution of Process Act* with which I am concerned. What those provisions are concerned with is a situation in which some legal process has been issued in one State and there is a person involved in another State.

Elaborating the second argument Mr Coleman contended that in all the reported cases the question decided was whether in the circumstances revealed at the hearing an order ought or ought not to be made. He drew from this and from particular citations from the cases the conclusion that the order to be made under subs(3) was essentially discretionary, although he conceded that there might be some circumstances in which it would go as of course, and he contended that material relevant to the exercise of the discretion should, therefore, be led by those seeking an order. He pointed out that the reports indicate that in most cases some evidence of the general nature of the crime and some material which could be described as particulars of the charge had been in fact placed before the court. This was so in *O'Donnell v Heslop* [1910] VicLawRp 31; [1910] VLR 162; 16 ALR 168; *Re Mandel* [1958] VicRp 80; [1958] VR 494; [1958] ALR 1019, and in my own unreported decision, *Stewart v McCallum*, decided in 1969.

Mr Coleman conceded that the onus of establishing any of the matters referred to in subs(6) rested on the person brought before the court on warrant, but this he said did not produce the result that the only discretion to be found in s18 arose out of the making of an application by the person before the court under subs(6). He submitted that the whole plan of the section was discretionary.

Mr Charles, appearing for the Crown, submitted that upon the proper construction of s18

and upon the authorities there was no obligation imposed upon the Crown to place before the court anything more than was placed before the Melbourne court in the present case. If anything more was to be so placed he contended that the matter should be initiated by the person before the court pursuant to subs(6), but he conceded the possibility that triviality might appear upon the face of the warrant placed before the court.

In my opinion, the argument advanced by Mr Charles is substantially correct. As a matter of construction, the steps contemplated by s18(1) are to be taken upon the production of documents in proper order. When those steps are taken the man to be accused in the State where the proceedings originate may be brought before a magistrate or a justice of the peace pursuant to subs(2). That magistrate or justice must deal with the person so brought before him under subs(3). This sub-section is permissive in its terms. It admits of two alternative courses being taken, but the introductory words are: "Subject to this section, the Magistrate or Justice of the Peace before whom the person is brought may" do one of two things. There are many circumstances in which the word "may" is construed as synonymous with the word "must". I have not heard argument on this point in the course of the present application, but I should not think that this was one of them. The section itself contemplates two different sets of circumstances in which the magistrate may not make an order. Those are the circumstances contemplated by subs(5) which deals with remand, and the circumstances contemplated by subs(6) which deals with the ultimate refusal of the order for extradition. The possibility that an order may be refused under those two sub-sections is, of course, contemplated by the introductory words of subs(3) "subject to this section". I would not reject a contention that apart from those introductory words there is still a discretion in subs(3), which might be exercised against those seeking an order if, for instance, they refused after a responsible request to give information about the alleged crime or the evidence implicating the person before the court. In my opinion, however, the magistrate before whom nothing is placed except a set of documents, which on the face of them and on the proofs provided for in subs(1) are in order, is entitled without more to make an extradition order under subs(3).

The view of the meaning of the section which I have expressed appears to me to be supported by authority. In the case of *O'Donnell v Heslop*, *supra*, Madden CJ said, at (VLR) p170:

> "It is a general principle of law that that issue [that is, the issue of guilt or innocence] should be determined where the prosecution was instituted, and that is also the intention of this statute. It would, therefore, be *prima facie* wrong to anticipate the trial of the issue, either in whole or in part, or in a case of this kind to try the case against one of the defendants apart from that of the others. There may, however, be circumstances in some given case which make it quite clear, *prima facie* at all events, that the charge against the defendant was wholly misconceived, and that it cannot possibly be right - e.g., where an alibi is clearly proved. Or it might be that the facts on which the prosecution is launched may be shown to be so flimsy that according to the principles on which preliminary trials are conducted the magistrate would come to the conclusion that no jury would convict the accused. It might be that when the application was made to send the defendant to the State where the charge was laid circumstances might be shown which so clearly established the innocence of the defendant that it would be obvious he would be acquitted if sent back, and that therefore there would be no real use in returning him. In a case of that kind it would be a wise thing for the magistrate to see that something more existed than the formal issue raised by reason of the charge, and the plea of not guilty, and to satisfy himself that there was a real dispute. He might say to the prosecutor, 'You have heard the facts alleged by the defendant; have you any grounds for disputing those facts?' and if the prosecutor gives none, then he may say, 'It would be unjust and oppressive to send this man to the place where he is charged; I will discharge him.' But if the prosecutor says he is instructed that he can or will prove that what the defendant or his witnesses say is untrue; if he formally assures the court that those facts are disputed, or that other facts can be proved which nullify their effect, then the magistrate will order the defendant's return, because he ought not to take upon himself to decide, where there is a dispute, the question of the guilt or innocence of the defendant."

Of this passage it may be said that it contemplates that issue has been joined by a plea of not guilty. As I understand it, issue is not so joined in the ordinary course of events in extradition proceedings. However that may be, the passage quoted clearly proceeds on the basis that the burden of raising matters on which an extradition order should be refused rests on the accused person. It contemplates that the court asked for an extradition order may call upon the Crown to show more of its hand than it has initially done.

At (VLR) p175 of the same case Cussen J said:

> "Whatever may be the case under the provisions of other Acts, under this Act when the defendant is brought up before a justice on a warrant for his apprehension, on the warrant being produced, and proof of identity being given, *prima facie* the justice should order him to be returned in custody. But the defendant may take up either of two positions which may result in that not being done. He may say – 'I wish you to exercise your jurisdiction under s18(4) and discharge me from custody altogether for one of the reasons given in that sub-section,' or he may say – 'Although I cannot urge that I should not be sent back, I wish you to admit me to bail.' In the first alternative the justice would have to consider whether the defendant has brought himself within one of the provisions of s18(4)." That passage, too, contemplates that it is for the person before the court to initiate consideration of matters upon which an extradition order may be refused. At the time when his Honour was speaking the substantial provisions now appearing in subs(6) were part of subs(4).

In *Re Alstergren and Nosworthy* [1947] VicLawRp 5; [1947] VLR 23 at p29; [1947] ALR 85 at p88, Lowe J said:

> "Where the charge is regular on its face and the conditions set out in s18(1) are satisfied it is not unjust or oppressive to return the defendant unless the evidence before the justice, for example, either demonstrates that the defendant has a complete defence to the charge or that the whole evidence which can be adduced by the prosecutor is before the justice and is such that no magistrate could on it properly find a case against the defendant fit to be sent for trial."

Fullagar J at (VLR) p39; (ALR) p91, said:

> "The case is not to be tried in the State where the application is made: per Cussen J in *O'Donnell v Heslop* [1910] VicLawRp 31; [1910] VLR 162 at p174; 16 ALR 168, and it will generally be useless, as it was in *O'Donnell v Heslop*, for an applicant to maintain that he has a good defence to the charge. No issue of fact should be investigated, and I do not think that any doubtful question of law, relating to the admissibility of evidence or otherwise, should be determined. In the normal case I do not think that the evidence will be investigated at all. Where, as here, the prosecution chooses to make available what is, or is likely to be, the whole of the evidence against the person charged, I do not think that a refusal to discharge him is shown to be unjust or oppressive unless it is made abundantly clear that the charge is without foundation...."

Fullagar J in this passage contemplated that the extradition order would in the ordinary course of events be made without any investigation of fact, but he contemplated that as a matter of choice the prosecution might make evidence available.

The cases which I have cited were reviewed by O'Bryan J in *Re Mandel* [1958] VicRp 80; [1958] VR 494; [1958] ALR 1019. In *Re McNamara* (1964) 7 FLR 83; [1965] QWN 2; 59 QJPR 89, Stable J of the Queensland Supreme Court, interpreted s18 in the same way as I have interpreted it in this case.

The essence of Mr Coleman's argument was that until the person before the court is given particulars of the charge against him, or is informed of the circumstances in which it was alleged to have been committed, he is not in a position to enter upon the matters which by subs(6) would give him a right to be discharged. Therefore, he said, the Act must contemplate that some account of these matters is to be given before an order can be made.

In my opinion, the answer to this argument, both on the construction of the Act and upon the authorities, is that it rests with the person before the court to seek particulars of the charge or to indicate to the magistrate that there is a question to be raised under subs(6). It is to be expected that in the ordinary course of events the prosecuting authorities would produce an account of the nature of the offence and its circumstances upon a responsible request, and indeed it would be contrary to the requirements of justice if they did not do so. The matter, however, does not rest upon their goodwill, because the magistrate or justice is empowered by subs(5) to remand the prisoner from time to time, and it would, in my opinion, be a proper exercise of this power to remand the prisoner until such time as particulars are available. Further, it would be open to him to refuse an order if particulars were refused, either as I have already suggested under the basic discretion conferred by subs(3) or under subs(6)(c).

In saying that in a proper case the prosecuting authorities should provide particulars or evidence of the nature of the offence and its circumstances, I have no intention of going beyond what was said by Madden CJ in *O'Donnell v Heslop* in the passage which I cited. In that passage

the learned Chief Justice contemplated that the evidence to be placed before the magistrate or justice would not necessarily be evidence of a kind which could be used in a prosecution, but might take the form of a statement by a prosecutor. In *Stewart v McCallum* I treated as properly admitted a general description of events by an investigating police officer.

Mr Coleman's last submission was that in the present situation it was unjust or oppressive to return the applicant to South Australia when he had not in the proceedings before him been given any information as to his offence beyond what appeared in the warrant, and no information as to the evidence of his complicity. The answer to this argument, I think, emerges from what I have already said, that no demand for further information was made, and the applicant through his counsel adopted the course of relying on the absence of information for the purpose of making a submission which in the result failed before the magistrate and fails also here.

For these reasons, the application will be refused.

The order will be: By consent the order of the Stipendiary Magistrate is varied so that there is an order that the applicant be admitted to bail on his own recognizance in the sum of $1000 with one surety of the like amount, conditioned for his appearance at the Magistrates' Court of Adelaide in the State of South Australia on 9 September 1970 to answer the charge laid against him. Otherwise the application is dismissed. There will be an order that upon the applicant and his surety entering into bonds conditioned as directed, the bonds entered into by them conditioned for the applicant's appearance in Adelaide on 5 August shall stand discharged.

There will be liberty to apply in respect of any matters concerning the grant of the bail to which I have referred. There will be no order as to costs, and I certify for counsel. I refuse the order for costs upon the general basis that this is a criminal matter of a kind in which, in this State, payment of costs is not normally ordered. Application refused.

**APPEARANCES:** For the applicant Rider: Mr Coleman and Mr Rowland, counsel. Mallesons, solicitors. For the respondent Champness: Mr S Charles, counsel. John Downey, Crown Solicitor.

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