25/12; [2012] VSC 305

SUPREME COURT OF VICTORIA

RODGERS v CHIEF COMMISSIONER of VICTORIA POLICE & ANOR

Pagone J

6, 12 July 2012

PRACTICE AND PROCEDURE – INTERSTATE TRANSFER OF PRISONER – ORDER MADE BY MAGISTRATE FOR TRANSFER OF PRISONER TO NEW SOUTH WALES – REVIEW OF ORDERS MADE BY MAGISTRATE – POWERS OF MAGISTRATE – WHETHER MAGISTRATE IN ERROR IN MAKING TRANSFER ORDER – REVOCATION OF PAROLE ORDER – WHETHER THE PRE-CONDITIONS FOR THE ISSUE OF THE WARRANT WERE PROPERLY SATISFIED – WHETHER THE WARRANT WAS VALID: *SERVICE AND EXECUTION OF PROCESS ACT* 1992 (CTH), SS83, 86.

R. was arrested by a Police Officer and an application was made for R.'s transfer to New South Wales. At the hearing of the application, the warrant was held by the Magistrate to be valid and an order made for the prisoner's transfer. Upon appeal—

HELD: Application for review of the Magistrate's order dismissed.

1. Section 83 of the *Service and Execution of Process Act* 1992 (Cth) ('Act') requires a Magistrate to make orders upon the production of a warrant or copy of the warrant unless the warrant is shown to be invalid.

***R v Lavelle* (1995) 82 A Crim R 187; 125 FLR 110, followed.**

2. Where a warrant is found to be valid a Magistrate must make one of the two orders specified in s83 of the Act upon production of the warrant leaving broader questions of abuse of process or a stay of proceeding to the courts of the state in which the warrant was issued.

3. The warrant as expressed was valid. The precondition for its issue was the revocation of parole upon the Board's determination that the terms of the parole order had been breached. There was no occasion to go beyond the Board's revocation of parole or the fact of its finding of breach as the relevant precondition to the issue of the warrant, to evaluate whether the underlying facts upon which the revocation and finding was made were correctly established.

4. Accordingly, the plaintiff's application was dismissed.

PAGONE J:

1. The Plaintiff has applied under s86 of the *Service and Execution of Process Act* 1992 (Cth) to review orders made by the Magistrates' Court of Victoria on 15 June 2012 under s83 of that Act that the Plaintiff be delivered to the custody of Detective Senior Constable Peter McMaugh (of the New South Wales Police) to be returned to the Sydney Police Centre and revoking the bail granted to the Plaintiff on 31 May 2012.

2. A review by this Court under s86 of a decision by the Magistrate is to be by way of rehearing, but previous decisions of this Court have held that the only considerations relevant to a review under the section are those which the Magistrate was required to take into account when making the order under s83. Sub-section 83(8) imposed a duty upon the Magistrate to make one of two orders upon the production of a warrant or a copy of a warrant. A copy of the warrant produced before the Magistrate was also produced in this review. Sub-section 83(10) provides that the Magistrate must order the release of the person if satisfied that the warrant is invalid but otherwise specifies no other conditions for ordering extradition beyond the production of the warrant or copy warrant. In *R v Lavelle*[1] the Full Court of the Supreme Court of Western Australia held that where a warrant was found to be valid a Magistrate must make one of the two orders specified in the section upon production of the warrant leaving broader questions of abuse of process or a stay of proceeding to the courts of the state in which the warrant was issued. That decision has been followed by this Court in other cases. The Plaintiff, nonetheless, contended in this review that the issue of the warrant was unlawful, that the grounds upon which he may rely in these proceedings were not restricted to those in s83, and that the warrant was invalid.

3. In *Re Dalton*[2] Batt J (as he then was) said that s86 provided a code for curial challenge and was intended to cover the field of remedies available. In *Rose v Chief Commissioner of Police*[3] Hedigan J also held that the provisions were enacted to provide an exclusive regime or legislative code in replacement of earlier provisions with wider considerations.[4] In *Berichon v Chief Commissioner, Victoria Police*[5] Mandie J (as he then was) considered that the Supreme Court on a review under s86 has "no greater power on a review, by way of rehearing", than that expressly conferred upon a Magistrate by s83.[6] Those decisions were based upon a consideration of the text of the provisions, the legislative history of the provisions and reference to the Second Reading Speech when introducing the substance of the current provisions into Parliament. I agree with the conclusions expressed in those decisions for the same reasons as expressed by their Honours in each case. The language of the section evinces a parliamentary intention to provide a mandatory and exclusive regime for applications under its provision and also upon subsequent review by this Court. The substitution of the current provisions for those which had previously been applicable with wider grounds for the release of an apprehended person supports that construction, as does reference to the Second Reading Speech, when the substantial terms of the current provisions were introduced into Parliament and were enacted. I would, in any event, follow those decisions unless they were shown to be clearly wrong which they are not shown to be.

4. A contrary view was reached in *Loveridge v Commissioner of Police (SA)*[7] where White J decided that a Magistrate had power to dismiss an application for review on the ground of abuse of process. His Honour distinguished *Lavelle* on the basis that it was concerned with whether an order, as distinct from its execution, was an abuse. His Honour also referred to, but did not consider in detail, the decisions of this Court in *Dalton* and *Rose*. The decision in *Loveridge* was, however, considered in *Berichon* by Mandie J (as he then was) who declined to follow it, preferring the decision in *Lavelle*. I agree with the decision in *Berichon*. The section requires the Magistrate to make orders upon the production of a warrant or copy of the warrant unless the warrant is shown to be invalid. The legislature is not to be taken to have left room for rejecting an application for extradition on wider grounds by the Magistrate, or on a reconsideration by this Court upon review. It is for the courts in the jurisdiction in which the warrant was issued to consider such questions as abuse of process or the grant of any stay. The distinction between the validity of an order and its application may be significant in some contexts but not in that of s83 where the only ground to resist the making of an order for extradition is that the warrant, intended to be applied, is shown to be invalid. I agree also with the views in that regard expressed by Mandie J (as he then was) in *Berichon*.

5. The Plaintiff argued that the inherent jurisdiction of the Magistrate or of this Court could not be removed. In *Loveridge* White J was of the view that the powers and functions bestowed by s83 were bestowed upon a Court with inherent power to protect itself from abuse[8] and that a contrary construction might call into question the constitutional validity of the provisions,[9] albeit that the point had not been argued.[10] The Plaintiff relied in that context also upon the passage in *Ainsworth v Criminal Justice Commission*[11] that superior courts have inherent power to grant declaratory relief. Constitutional considerations were also referred to, but not argued in *Berichon*.[12] The provisions, however, do not purport to exclude the constitutional jurisdiction of a Court where it is engaged. There is no question in this case of the New South Wales Parole Board acting in bad faith such as to enliven the *Hickman* principle.[13] The decision of the Board is plainly a *bona fide* attempt to exercise its power, it is related to the subject matter of the power and it is reasonably capable of reference to the power the Board was given.[14] The legislature has elected to make the exercise of the power under s83 depend upon the production of a warrant or a copy of the warrant. It is the fact of the issue of the warrant that is the condition for the exercise of the power to order extradition and not the conclusiveness of the facts upon which the warrant was issued; that is for the body which issued the warrant upon its return.[15]

6. The Plaintiff also contended that the warrant was invalid because the precondition for its issue was said not to have been satisfied. In *Gummer v Commissioner of Police*[16] Fitzgerald P said:

> However restrictive a view is taken of the concept of invalidity for the purpose of ss83 and 86 of the *Service and Execution of Process Act*, it must be open to a person adversely affected by a warrant to establish by admitted facts:
>
> (i) that a precondition for its issue was not properly satisfied; and

> (ii) that the alleged offence to which the warrant relates is not one for which the person affected by the warrant could be convicted in the courts of the place where the warrant was issued.[17]

In this proceeding the Plaintiff sought to establish that the precondition for the issue of the warrant had not been satisfied. The warrant relevantly stated:

> The Parole Board ordered the revocation of the parole order for breach of the following terms and conditions of the order, namely:- Prescribed condition
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> (c) – unable to adapt to normal lawful community life (outstanding charges and fail to attend) and Supervision conditions
>
> (a) – fail to obey all reasonable directions of the supervising officer and
>
> (b) – fail to report to supervising officer.

The warrant, expressed in those terms, is valid. The precondition for its issue was the revocation of parole upon the Board's determination that the terms of the parole order had been breached. Its opinion is not evidence of the facts, which exist or do not exist irrespective of the Board's statement of them, and which may be contested upon the return of the warrant.[18] There is no occasion to go beyond the Board's revocation of parole or the fact of its finding of breach as the relevant precondition to the issue of the warrant, to evaluate whether the underlying facts upon which the revocation and finding was made were correctly established. In any event, the Plaintiff conceded that one of the underlying facts was satisfied, albeit that he otherwise challenged the existence of the others. The warrant referred to outstanding charges as one of the findings for its view that the parole conditions had been breached. The Plaintiff conceded that he had been charged with further matters but maintained that the Board's inclusion of the other facts which the Plaintiff contested necessitated the conclusion that this Court could not be satisfied of the correctness of the underlying facts stated in support of the issue of the warrant. I cannot accept the submission that a warrant is invalid or is not to be given effect under the Court's inherent power (if it had been engaged) where only one or more, but not all, of the conditions is shown to exist.

7. It is not necessary for me to consider the other contentions made by the Plaintiff, but it may be desirable for me briefly to express my views on them. The Plaintiff sought to challenge the underlying conclusion of the Board as expressed, namely that the Plaintiff was unable to adapt to normal lawful community life. In particular the Plaintiff gave testimony of having obtained, and held, responsible employment, of having an established domestic relationship and of having a young son. He also maintained that there was no evidence of the Parole Board having ordered the revocation of the parole order which had previously been made in New South Wales. I accept the evidence of the Plaintiff concerning his employment, domestic life and of his relationship with his son. Each of these may, no doubt, be taken into account by the Parole Board in New South Wales and may result in a decision in his favour. I do not accept, however, that he has established the invalidity of the warrant. The warrant on its face stated that the parole which had previously been granted to him had been revoked. The warrant was signed by a judicial member of the Parole Board. Furthermore, the Plaintiff's evidence concerning his ability to adapt to normal lawful community life, if it be relevant, needs to take into account not only his evidence upon release from serving a sentence in Victoria but also his conduct in dealing with the New South Wales State Parole Authority. The Plaintiff had been granted parole in New South Wales and taken into custody to be dealt with in Victoria where he served a sentence. The Plaintiff had correspondence with the New South Wales Parole Board whilst in custody in Victoria and was informed of the revocation dated 19 August 2005 of the New South Wales parole order which had previously been made. The New South Wales State Parole Authority wrote to the Plaintiff on 6 December 2005, whilst the Plaintiff was still in custody in Victoria, in response to correspondence from the Plaintiff raising concerns regarding the revocation of the parole by the New South Wales State Parole Authority on 19 August 2005. It was clear from the Plaintiff's correspondence that the New South Wales Parole Authority had informed him of its view concerning the revocation of the New South Wales parole. The Plaintiff knew before his release from custody in Victoria that his New South Wales parole had been revoked.

8. The Plaintiff also contended that the New South Wales Parole Board delayed in seeking to enforce the warrant in circumstances where it ought to have known that the Plaintiff's appeal

on the Victorian sentence had been dealt with in April 2008 and that he was at liberty on parole in Victoria. I do not accept the passage of time between his release from custody in Victoria and the application for his apprehension for extradition to be an abuse; especially in light of the correspondence between the Plaintiff and the New South Wales Parole Board before his release.

9. The Plaintiff also challenged the validity of the warrant on the grounds that it did not specify a particular correctional centre at which he was to be delivered into custody. Section 181(1B) of the *Crimes (Administration of Sentences) Act* 1999 (NSW) permits the Parole Authority to revoke a parole order. Section 181(3) provides:

> Subject to any order under subsection (1B), a warrant under this section is sufficient authority:
>
> (a) for any police officer to arrest, or to have custody of, the offender named in the warrant, to convey the offender to the correctional centre specified in the warrant and to deliver the offender into the custody of the general manager of that correctional centre, and
>
> (b) for the general manager of the correctional centre specified in the warrant to have custody of the offender named in the warrant for the remainder of the sentence to which the warrant relates, or pending the Parole Authority's decision as to whether or not to make a home detention order under section 165A, as the case requires.

The Plaintiff maintained that the use of the definite article in s181(3)(a) appearing before the words "correctional centre specified" required a specific correctional centre to be specified in a warrant for the warrant to be valid. However, the section does not impose conditions upon the content of the warrant but, rather, authorises a police officer to act according to its terms. What the police officer may do depends upon what is in the warrant. In most cases a specific correctional centre may not be identified beyond a general description as was the case with this warrant. In many, if not most, cases it would not be possible to specify a correctional centre because it will not be known where the person will be apprehended.

10. Accordingly I will dismiss the Plaintiff's application.

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[1] (1995) 82 A Crim R 187; 125 FLR 110.
[2] (1995) 120 FLR 408.
[3] [2000] VSC 281.
[4] *Ibid* [6].
[5] [2007] VSC 143; (2007) 16 VR 233; (2007) 211 FLR 10; (2007) 171 A Crim R 496.
[6] *Ibid* [17].
[7] [2004] SASC 195; (2004) 89 SASR 72; 210 ALR 177; 183 FLR 228; 146 A Crim R 84.
[8] [2004] SASC 195; (2004) 89 SASR 72, [44]; 210 ALR 177; 183 FLR 228; 146 A Crim R 84.
[9] *Ibid* [46].
[10] *Ibid* [47].
[11] [1992] HCA 10; (1992) 175 CLR 564, 581-2; (1992) 106 ALR 11; (1992) 66 ALJR 271; 59 A Crim R 255 (Mason CJ, Dawson, Toohey and Gaudron JJ).
[12] [2007] VSC 143, [18]; (2007) 16 VR 233; (2007) 211 FLR 10; (2007) 171 A Crim R 496.
[13] *R v Hickman; Ex parte Fox* [1945] HCA 53; (1945) 70 CLR 598; (1945) 19 ALJR 246.
[14] *Ibid* 615 (Dixon J); *Federal Commissioner of Taxation v Futuris Corporation Limited* [2008] HCA 32; (2008) 237 CLR 146, 167; (2008) 247 ALR 605; (2008) 69 ATR 41; (2008) 82 ALJR 1177; [2008] ATC 20-039 (Gummow, Hayne, Heydon and Crennan JJ).
[15] See *WR Carpenter Holdings Pty Ltd v Federal Commissioner of Taxation* [2008] HCA 33; (2008) 237 CLR 198, 210-11; (2008) 248 ALR 256; (2008) 69 ATR 29; (2008) 82 ALJR 1211; [2008] ATC 20-040 (Gleeson CJ, Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ).
[16] [1995] 1 Qd R 346; (1994) 71 A Crim R 140.
[17] *Ibid* 143.
[18] *Ibid.*

APPEARANCES: For the plaintiff Rodgers: Mr JR Sutton, counsel. Lewenberg & Lewenberg, solicitors. For the first defendant Chief Commissioner of Victoria Police: Mr AG Burns, counsel. Victorian Government Solicitor's office.
