09/01; [2000] VSC 281

SUPREME COURT OF VICTORIA

ROSE v CHIEF COMMISSIONER of POLICE

Hedigan J

26-28 June 2000

EXTRADITION – TO ANOTHER STATE – WARRANT OF APPREHENSION FOR MURDER – POWERS OF MAGISTRATE – WHETHER WARRANT VALID – HELD BY MAGISTRATE TO BE VALID – POWER OF MAGISTRATE TO ORDER EXTRADITION – BAIL – WHETHER MAGISTRATE HAD POWER TO GRANT BAIL: *SERVICE AND EXECUTION OF PROCESS ACT* 1992 (CTH), SS83, 86.

1. The provisions of Part V of the *Service and Execution of Process Act* 1992 (Cth) provide an exclusive regime or legislative code for dealing with extradition matters. A magistrate has no power to refuse to make an order for extradition based on matters such as delay, oppression and lack of justice.

***Re Dalton* (1995) 120 FLR 408; and**
***Lavelle v R* 125 FLR 110; (1995) 82 A Crim R 187, applied.**

2. When the warrant is produced to the magistrate, the court must determine the validity of the warrant. If the court determines that the warrant is not invalid, the court must order that the person be taken into custody or released on bail.

3. Where a magistrate was satisfied that the warrant was not invalid and had no power to grant bail on a murder charge, the magistrate was not in error in making an order that the person be extradited in custody to another State.

HEDIGAN J:

1. This is a proceeding by way of review of an order made under s83 of the *Service and Execution of Process Act* 1992 ("the Act") made by the Magistrates' Court of Victoria at Moe ordering that Jeffrey William Spencer Rose, the applicant herein, be delivered into the custody of Senior Constable Tony Murphy of the New South Wales Police Force and returned to the State of New South Wales, to be there tried for the crime of murder. Rose had been apprehended in Moe on 5 June under a New South Wales warrant which formed the basis of the application for extradition for murder.

2. The detail of the proceeding at the Magistrates' Court is rather vague, some of it being articulated by counsel for the applicant before me (Mr Carlile), who appeared on that occasion, and other parts emerging from some oral and affidavit evidence given before me. The basis of the warrant (Exhibit A) is a resumed investigation into the death in 1982 of Kristin Anne Rose, the applicant's then wife (although then estranged from him). It appears from the material, including a police resumé of the central features of the case, that the deceased Kristin Rose's body had been found in bushland. The applicant was the last known person to have seen her, on 30 April 1982. The death certificate stated the cause of death was unknown but it appears there was some evidence of manual neck pressure. The Coroner who enquired into the death (the applicant Rose gave some evidence there) formed the view that there was sufficient evidence to indict Rose for murder, but the Attorney-General for the State of New South Wales, after reviewing the evidence, declined to file an indictment. The applicant returned to Victoria and was notified in writing by the New South Wales Attorney-General's office on 12 April 1984 that, after reviewing the evidence available and on the advice of the Solicitor-General for that State, no *ex officio* indictment would be presented in the case.

3. The police summary here and Mr Murphy's evidence in effect claim that not only was the earlier evidence, but evidence gathered since 1995, relied on to lead to the obtaining of the warrant to apprehend, on the charge of murder, that formed the basis of the applications.

4. Since about 1983 the applicant has lived in Moe or thereabouts in Victoria. There are a number of affidavits filed that address his life in Victoria since then, suggestive of a quiet and subdued existence, with regular connection with family and friends. It also describes some physical and nervous disabilities in Mr Rose. These matters are probably directed to the issue of bail.

5. I refer to two matters before considering the key issues.

6. First, the provisions of Part V of the Act concerning the execution of warrants (ss81 to 89) were enacted in 1992. They replaced provisions in the earlier legislation which, in certain circumstances, enabled courts to deny extradition if undue oppression or injustice was thereby occasioned, a power to be exercised only in exceptional and uncommon cases. The present provisions appear to have been enacted to provide an exclusive regime or legislative code for dealing with these cases. I am fortified in that opinion by the decision and reasons of Batt J (now JA) of this Court in *Re Dalton*[1], he expressing the view that, not only did s86 constitute a code for curial challenge to a magistrate's s83 order, but also that the consequence of that view was that other procedures, including an application for judicial review pursuant to O56, cannot be invoked. This view, with which I agree, leads to the second preliminary matter, that the accompanying O.56 procedure in this case, by way of originating motion, fails *in limine*.

7. I briefly refer to another aspect, not argued, namely the issue whether this Court, on a review, has power or jurisdiction to set aside the magistrate's order on the basis of general, or, for that matter, specific considerations of undue oppression or injustice. I do so partly because of the affidavits concerning the applicant's situation that have been filed. Specifically, the evidence establishes that the applicant was told that he would not be indicted for a crime arising out of the death of his wife, and thereafter had lived an apparently blameless life, free of offences, since then. There have been cases under the old legislation in which courts refused extradition on that basis. See, eg, *Carmady v Hinton*[2]; *Edmonds v Andrews*[3]. Even under the modern extradition law contained in Part V, there was at least one judicial opinion expressed that the old power still existed. This was, however, rejected on appeal to the Full Court of the Supreme Court of Western Australia in *Lavelle*[4]. Mr Carlile, for the applicant, did not argue that the modern Act permitted this intervention and was correct not to do so. In my view, once a valid warrant is proved to have been issued by a court of competent jurisdiction of another State or Territory, the Magistrates' Court (in Victoria, as here) is bound by s83, a valid law of the Commonwealth of Australia, to give effect to that warrant. This Court does not have the power on review to override the magistrate's exercise of that power on the grounds described or the general ground of abuse of process. It is perhaps timely to recite, as I do, what Rowland J said in *Lavelle*[5]:

> "It seems to have been overlooked in this case that the Court of Petty Sessions was in fact exercising power under Commonwealth legislation pursuant to which it was directed, relevantly in the circumstances which are not disputed, to make an order for extradition if the warrant issued by a court of competent jurisdiction in another State or Territory was not invalid. In exercising power under the Commonwealth legislation, the Court of Petty Sessions is bound to give effect to a valid warrant issued by a court of competent jurisdiction of another State or Territory. If the issue of that warrant can be challenged on the basis that it is an abuse of process of the court of issue, then that is a matter for that court, or, if it lacks power, to a court of that State or Territory which exercises supervisory jurisdiction over that court. It cannot be an abuse of process of the Court of Petty Sessions of Western Australia to exercise a power it is bound to, and, in the circumstances of this case, obliged to, exercise in accordance with an Act of the Commonwealth. This Court does not exercise supervisory jurisdiction over courts of another State or Territory, valid on their face, issued by those courts. It is apparent from reading the Second Reading Speech when the Act was introduced into the Commonwealth Parliament that the exclusion of the criteria which would enable a magistrate to refuse to make an order of extradition, based on matters such as delay and oppression and lack of justice, were deliberately excluded as a result of discussion amongst the various Attorneys-General of the Commonwealth and States."

This, of course, was the argument pressed and relied upon by Miss Lieder QC, for the respondent, on the basis that the warrant here issued was valid. The statements made in *Lavelle* to which I have referred do not run counter to the proposition set out in *Gummer*[6], a case relied on in a related context by the applicant, that being a case in which the warrant itself was held to be invalid because the alleged offence to which the warrant related was not one which the Western Australian courts had jurisdiction to try, it being common ground that Gummer was not in Western Australia at any time material to the charge.

8. In this case, Mr Carlile mounted his first attack on the validity of the warrant. He argued that the reference to the charge of murder in the warrant wrongly described s19 of the *Crimes Act* of the State of New South Wales as the source of the charge and the warrant. He also relied on one point (or at least elicited material about it) – a claimed error in the name of the deceased, Kristin "Ann" instead of "Anne" Rose, the latter spelling, "Anne", being the spelling in the death certificate. He also drew attention to the fact that the warrant was obtained from Coffs Harbour instead of Armidale. He did not refer to these matters, however, in his final submissions.

9. In my view, these errors (other than the s19 point, which I separately address), if they be such, do not invalidate the warrant, they being neither substantial nor significant.

10. I turn to the principal submissions made, namely whether or not the Magistrates' Court had jurisdiction to entertain the application for extradition and whether the warrant was valid.

11. I deal with the second matter, the validity of the warrant, first.

12. The principal submission by counsel for the applicant on this aspect was that the warrant to apprehend was invalid because on its face it purported to refer to s19 of the *Crimes Act* (NSW) as the source of the charge of murder against the applicant. This, he argued, was a fatal error. This proposition was based on the assumption that the reference in the warrant to s19 of the Act was a statement of the charge on which the applicant was to be tried for murder in New South Wales. The argument was that s19 of the *Crimes Act* had been repealed in 1989 and that it was s19A of the *Crimes Act* (NSW) that applied to all murders committed after the commencement of the amendment. Sec 19A of the New South Wales *Crimes Act* is, however, concerned with penalty for murder, not the substantive law. Sub-s(5) of it applies to murders committed whether before or after the commencement of the amending legislation, unless proceedings have been commenced.

The vice in the argument is the mistaken proposition that the consequence of this is that proceedings are thereafter commenced under s19A. They are not commenced under s19A, nor under s18, which is merely a definition section for the relevant Part of the New South Wales Act. The charge is a charge at common law of murder. The words included in the warrant, "feloniously and maliciously", are traditional verbiage, and unnecessary verbiage, which no more control the singular meaning of the charge of murder at common law than does the mistaken reference to the repealed s19 in the language (hardly mainstream) in the warrant. The suggestion by counsel that the intention of the informant was to try the applicant under the repealed s19, in my view, verges on the absurd. This reference to s19 in the warrant is probably an error, but, even if it is not, it is in respect of an irrelevant and insignificant aspect. The charge of murder is a charge of murder at common law and the warrant, sensibly read, meant nothing else. The defect is minor and immaterial. It would, if necessary, be capable of amendment.

13. But there is no "legislative" charge of murder laid because, as in Victoria, the offence of murder in New South Wales is one at common law. Sec 19A merely refines the wording of the maximum penalty for murder although it is now a discretionary sentence. The definition section, s18, in both Acts is essentially unchanged. Even if the section were the source of the charge, the warrant would still be in appropriate form as it is clear that the charge is one of murder.

14. Miss Lieder for the Commissioner of Police argued that in any event s30 of the New South Wales *Interpretation Act* 1987 validated the form of the charge, on the basis that by a combination of s30(1)(b) and (c) the amendment did not impact on the accrued liability. Thus, it was put that the offence of an earlier time may be prosecuted at a later time but in accordance with the provisions prevailing at the time of the alleged offence, that is, 1982. Thus it was put that it was correct, in any event, to prosecute murder under the old legislation by way of a warrant of apprehension that later prevailed. This is probably correct, although it would have been simpler, and not wrong, to have charged by way of the warrant of apprehension with murder at common law, without distracting statutory references.

They are, however, irrelevant and not misleading in any way, in my judgment. All that has happened is that the opportunity has been seized upon to make an argument – an incorrect one – about it. The reference in the warrant to the penalty section, or the absence of reference to s18, are surplusage, separable and unimportant defects, if they are (in my view they are not). See also

Peters v The Attorney-General and associated proceedings[7]; *Parker v Churchill*[8] and *Beneficial Finance Corp Ltd v Comm'r Australian Federal Police*[9]. For these reasons, I reject the applicant's submission that the warrant was invalid.

15. Mr Carlile raised, however, another submission, which has as its origin the provisions of the *Bail Act* 1977 of this State. It is common ground that the effect of s13 of that Act is that, in the case of a charge of murder, only the Supreme Court, or a judge of it, and the magistrate committing for trial for murder, have the power to grant bail for murder, and even then only in exceptional circumstances and under the criteria set out in the Act. Thus the contention was advanced that, having regard to the provisions of s83 of the *Service and Execution of Process Act*, the magistrate, once he or she determines that the warrant is valid, must order that the person be taken into custody or released on bail (s83(8)). I observe that the magistrate has a choice and may select either option.

16. The submission in effect is this — that the consequence of the limitation in the Victorian *Bail Act* as to what court or judicial officer has power to grant bail on a murder charge is that, the extradition magistrate not having the power to admit to bail, the Magistrates' Court had no jurisdiction to order extradition, even if the warrant is valid on its face. Reliance was placed on *Gummer* (*supra*) and the *Anisminic* line of cases and a decision of Beach J of this Court in *DPP v McKee*. The power to determine the issue of bail was thus said to be inextricably linked by s83, and by the provisions of s88, to the jurisdiction to order extradition because not all of the envisaged powers were capable of exercise. If the Magistrates' Court had no jurisdiction for that reason, it was argued, then this Court could not review the decision under s86, there being no valid decision to review. The Court could only confirm, vary or revoke, but not in respect of a decision that lacked jurisdiction.

17. It does not appear to be in dispute that the magistrate at Moe was not a committing magistrate and could not lawfully have granted bail by reason of s13 of the *Bail Act*. However, this argument can only be accepted if it is concluded that jurisdiction to entertain an application for extradition on a valid warrant necessarily involves the right to exercise power to grant bail, once the validity of the warrant has been determined. The respondent argued that the absence of this power under the Victorian Act did not affect jurisdiction in the Magistrates' Court to carry out the functions described in s83, that is, the extraditing function. There can be no doubt that the Commonwealth Act was intended to operate in all States and Territories and, as s88 indicates, to permit State laws as to bail to have effect. But that effect surely must have been intended to relate to the grant or refusal of bail, and not to impugn the jurisdiction to consider and determine extradition.

The construction argued for by the applicant would have the tail wagging the dog. The effect, in my view, of s13 is merely to produce the self-evident effect, namely that the power to grant bail is denied, not the jurisdiction to order extradition. It should not be overlooked that the State or Territory to which the prisoner is returned has the power to admit him or her to bail, on conditions. The provisions of s88(8) would suggest that the power to order bail is a power subsequent to the finding of validity of the warrant, a function to be completed by the magistrate prior to considering bail or custody. This power is incidental, but not critical, to the exercise of jurisdiction. It is to be noted that there is a power to release if the warrant is determined to be invalid. Once a valid warrant is produced, the magistrate must order return to the place of issue of the warrant. Whether that is return in custody or whilst on bail is another matter, to be subsequently determined.

18. The construction contended for by the applicant would produce such unacceptable consequences that it must be thought that it is prima facie incorrect, and absurd. One such consequence would be that the State of Victoria would be a safe haven against extradition by persons seeking to avoid possible charges of murder in other States. Such a consequence could not have been intended and I decline to construe the statute to produce such a result. The Act should be construed to give effect to its real purpose. In my opinion, there was jurisdiction in the Magistrates' Court at Moe and it was obliged to make the orders that it did. The argument necessarily involves the invalidity of all proceedings for extradition to Magistrates' Courts in Victoria that may have taken place, as it is a point of jurisdiction. Thus all of the cases such as *Dalton* were wrongly decided. However, the consequence, in my view, is that the Magistrates' Court

is not stripped thereby of jurisdiction to order extradition, but only of the power to grant bail. Of course, the Supreme Court retains the power to grant bail under the provisions of the *Bail Act*, but the Act does not envisage an extradition application to this Court, save on review.

19. I raised with counsel for the applicant the issue of what orders might be made by this Court on review. The Court under the Act has power to confirm, revoke or vary the order of the magistrate. In the case of revocation, it may make a new order. This is a new proceeding, as Batt J held in *Dalton*, although it must take place with knowledge of the previous hearing. It would, in my judgment, be a valid and proper order of this Court, once the applicant brings the matter here for review, to revoke the previous order and to make it afresh, if it chose to do so. This would, of course, enable bail to be granted. It would also enable bail to be refused.

20. I conclude, however, that it is unnecessary for me to embark on any order of that kind, that is, to make the same order afresh.

21. I am satisfied that the Magistrates' Court at Moe had jurisdiction and that the warrant was valid.

22. Mr Carlile raised the question of bail with me, contending that I should admit the applicant to bail if I found against the applicant on the principal issue, on conditions to appear at the time and place required in the State of New South Wales. This necessarily involved my taking the view that there are exceptional circumstances. However, I do not intend to grant bail to the applicant, who must remain in custody, and during his return to the State of New South Wales and until further or other order by the appropriate court in that State. This is a most serious charge and the State of New South Wales should be the jurisdiction to determine whether or not the applicant should be permitted to be on bail pending trial. As I indicated in the course of submissions, it would appear that there are personal circumstances and history in the applicant that would found an argument that there are exceptional circumstances so as to permit bail. However, this is entirely a matter for the New South Wales court.

23. Accordingly, I confirm the order of the Magistrates' Court at Moe made on 19 June 2000 that the applicant Jeffrey William Spencer Rose be delivered to the custody of Senior Constable Tony Murphy to return to the Central Local Court in New South Wales.

24. I dismiss the originating motion and summons therein of 23 June 2000, the applicant to pay the respondent's costs of the review and the originating motion, if any.

---

[1] (1995) 120 FLR 408.
[2] (1980) 23 SASR 409; (1980) 41 FLR 242; (1980) 1 A Crim R 312.
[3] (1987) 85 FLR 419.
[4] 125 FLR 110; (1995) 82 A Crim R 187.
[5] (*supra*, at 189-190).
[6] [1995] 1 Qd R 346; (1994) 71 A Crim R 140.
[7] 84 ALR 319; 94 FLR 97; (1988) 16 NSWLR 24; 37 A Crim R 102 at 116.
[8] (1985) 9 FCR 316; (1985) 63 ALR 326.
[9] [1991] FCA 92; (1991) 31 FCR 523; 103 ALR 167; 58 A Crim R 1 at 23; 22 ATR 636.

APPEARANCES: For the applicant Rose: Mr D Carlile, counsel. Simon Parsons & Co, solicitors. For the respondent: Miss L Lieder QC, counsel. Victorian Government Solicitor.
