27A/07; [2007] VSC 143

SUPREME COURT OF VICTORIA

BERICHON v CHIEF COMMISSIONER, VICTORIA POLICE

Mandie J

10, 14 May 2007 — (2007) 16 VR 233; (2007) 211 FLR 10; (2007) 171 A Crim R 496

EXTRADITION – APPLICATION MADE THAT PERSON IN CUSTODY BE EXTRADITED TO ANOTHER STATE – ORDER MADE BY MAGISTRATE TO THAT EFFECT – APPLICATION TO SUPREME COURT THAT SUCH ORDER INVOLVED AN ABUSE OF PROCESS – STATUTORY INTERPRETATION – WHETHER MAGISTRATE HAD ANY DISCRETION IF WARRANT VALID – WHETHER OPEN TO MAGISTRATE TO REFUSE AN ORDER ON GROUNDS OF ABUSE OF PROCESS – WHETHER MAGISTRATE IN ERROR IN MAKING ORDER: *SERVICE AND EXECUTION OF PROCESS ACT* 1992 (CTH), SS83, 86.

Where a magistrate is dealing with an application for extradition pursuant to s83(8) of the *Service and Execution of Process Act* 1992 (Cth) ('Act'), the magistrate is required to make one or other of the orders contemplated by s83 of the Act. If the magistrate is satisfied that the warrant or a copy of the warrant produced is not invalid, then the magistrate is required to remand the person on bail to appear in the place of issue of the warrant or order that that person be taken in custody to that place. The magistrate has no power to decline to make an extradition order on the ground of abuse of process and the Supreme Court reviewing such an order has no wider power. The question of abuse of process is a matter for the courts of the issuing State.

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

***Re Dalton* (1995) 120 FLR 408; and**

***Rose v Chief Commissioner of Police* MC09/2001; [2000] VSC 281, followed.**

***Loveridge v Commissioner of Police for South Australia* [2004] SASC 195; (2004) 89 SASR 72; 210 ALR 177; 183 FLR 228; 146 A Crim R 84, not followed.**

MANDIE J:

1. By originating motion filed 19 April 2007, the plaintiff seeks to review the order of a Victorian magistrate, namely Magistrate JF Fitz-Gerald, dated 17 April 2007, whereby it was ordered[1] that the plaintiff be taken in custody to Queensland pursuant to s83(8)(b) of the *Service and Execution of Process Act* 1992 *(Cth)* ("the Act") ("the extradition order"). The application is primarily made pursuant to s86 of the Act but also under O56 of Chapter I of the Supreme Court Rules.

2. The plaintiff was the subject of a Queensland warrant issued in 1998 in relation to charges of serious offences[2] allegedly committed in Queensland in 1997. Before that warrant could be executed, he was sentenced in relation to serious offences[3] in Victoria on 31 August 1999 for an effective term of 13 years imprisonment with a non-parole period of 9 years. While in prison in Victoria the plaintiff applied under s12 of the *Prisoners (Interstate Transfer) Act* 1983 (Vic) that he be transferred to Queensland to be dealt with in that State in relation to the outstanding charges against him there. The Victorian Attorney-General consented to this course, but two Queensland Attorneys-General successively refused to consent to such a transfer. The plaintiff was released on parole on 16 April 2007 and immediately apprehended under a fresh Queensland warrant in relation to the original charges and the extradition order was made as a result. Before this Court, the plaintiff attacked the reasons given for the refusal to transfer him while he was in prison and suggested that there were ulterior and improper purposes for doing so that tainted the new warrant and the proceeding for an extradition order. For the reasons that follow, it is unnecessary to consider the facts in any more detail.

3. The plaintiff contends that the application for, or the making or confirmation of, the extradition order is, or would be, or involves, an abuse of process. The nature of the argument advanced on behalf of the plaintiff is conveniently encapsulated in the grounds set out in paragraph 2 of the originating motion:

> "(a) the charges subject of the extradition application arose in 1997;

(b) the plaintiff has consistently sought the cooperation of the Queensland authorities to enable his return to that jurisdiction to face the said charges since May 2003;

(c) the Queensland authorities have consistently refused to allow the plaintiff's return;

(d) the long delay since the alleged events subject of the extradition application;

(e) the plaintiff has taken steps to establish his life in Victoria;

(f) it would be oppressive to order the plaintiff's extradition;

(g) the application to extradite the plaintiff is an abuse of the court's process."

4. Part V of the Act deals with the execution of warrants. Section 82 of the Act provides that the person named in a warrant issued in a State (other than a person who is in prison) may be apprehended in another State. Section 83 of the Act deals with what is to happen after such a person is apprehended and sets out the powers in that regard of "a magistrate of the State" in which the person was apprehended. Section 83 deals with what a magistrate may do if a warrant or a copy of a warrant is not produced. Section 83(10) provides that a magistrate must order that the person be released if the magistrate is satisfied that the warrant is invalid. The key provision for present purposes is s83(8) which provides (subject to immaterial exceptions) as follows:

"(8) ..., if the warrant or a copy of the warrant is produced, the magistrate must order:
(a) that the person be remanded on bail on condition that the person appear at such time and place in the place of issue of the warrant as the magistrate specifies; or

(b) that the person be taken, in such custody or otherwise as the magistrate specifies, to a specified place in the place of issue of the warrant.

5. Section 83(9) of the Act provides that any such order may be subject to other specified conditions.

6. It was not suggested that any other part of s83 of the Act is relevant.

7. Section 86 of the Act relevantly provides:

"(1) If an order has been made under section 83, the apprehended person or a person to whom the warrant was directed may apply to the Supreme Court of the State in which the order was made for review of the order. ...

(3) The respondent is to be:
(a) if the application is to be made by the apprehended person – the Commissioner of the police force of the State in which the person was apprehended; ...

(6) The Supreme Court may, pending its review:
(a) stay the execution of the order; and
(b) order the person to be remanded on bail or in such custody as the Supreme Court specifies.

(7) The review is to be by way of rehearing.

(8) The Supreme Court may confirm, vary or revoke the order.

(9) If the order is revoked, the Supreme Court may make a new order. ...

(14) For the purposes of a review under this section, the Supreme Court of a State is not bound by the rules of evidence."

8. Threshold questions arise as to the power of a magistrate under s83 of the Act and the power of the Supreme Court on a rehearing under s86 of the Act. The first question is whether the magistrate has any discretion to decline to make an order under s83 of the Act if the statutory prerequisites are satisfied and none of the statutory exceptions applicable. More specifically, can a magistrate decline to make an order under s83 on the ground of abuse of process? Clearly, the Supreme Court has on a rehearing, at the very least, all the powers of the magistrate. However, if the magistrate has no discretion to refuse an order if the express provisions of the statute are

satisfied, does the Supreme Court have a wider power or discretion on a review under s86 of the Act and, more specifically, the power to refuse to make or confirm an extradition order (either by implication or pursuant to its inherent jurisdiction) on the ground of abuse of process?

9. In my opinion, on a proper construction of Part V of the Act, a magistrate is required to make one or other of the orders contemplated by s83 if the express provisions of the Act are satisfied. The word used is "must" and there is nothing in the language or structure of Part V to suggest that a magistrate possesses any relevant discretion. Nor do I think that there is any basis for an implication that a magistrate can refuse to make an order on the ground of abuse of process.

10. This conclusion is supported by what was said by the Parliamentary Secretary to the Attorney-General in the Second Reading Speech on the *Service and Execution of Process Bill* 1992 on 9 November 1992[4]:

> "In addition, the grounds upon which an apprehended person may seek release will be narrowed considerably. At present, subsection 18(6) of the *Service and Execution Process Act* 1901 sets out the following grounds upon which a magistrate may release an apprehended person: if the charge is of a trivial nature; if the application for the return of the person has not been made in good faith in the interests of justice; and if for any reason it would be unjust or oppressive to return the person either at all or until the expiration of a certain period. None of theses grounds for release has been included in the Bill. Unless the warrant is invalid, a magistrate will be required to remand the apprehended person on bail to appear in the place of issue of the warrant, or order that he or she be taken in custody to that place. In this respect, the Bill diverges from the Law Reform Commission's recommendation that the Bill should contain a provision to enable a person liable to interstate extradition to obtain relief if he or she satisfied the magistrate conducting the extradition hearing that it would be manifestly unjust or oppressive to order extradition."

11. In *R v Lavelle*[5] the Western Australian Full Supreme Court considered this matter in the same light. Malcolm CJ said that s83(8) of the Act had the effect that, unless the magistrate was satisfied that the relevant warrant was invalid, the magistrate must make one or other of the contemplated extradition orders. He went on to say, in addition:[6]

> "Where the warrant is found to be valid, as in this case, I am quite unable to accept that either the application for or the making of an order for extradition can constitute an abuse of process of the Court of Petty Sessions which would attract the inherent jurisdiction of this Court. One effect of the amendments to the legislation is that any question of abuse of process or stay of proceedings will be one for courts of competent jurisdiction in the State or Territory in which the warrant is issued."

12. In the same case Rowland J said:[7]

> "... the Act of 1992 provided a new statutory scheme. Now, by s83(8) of the Act, the power of the magistrate is limited and, relevant for present purposes, if the warrant or a copy of the warrant is produced and the magistrate is satisfied that the warrant is not invalid, the magistrate must order either that the person be remanded on bail to appear in the place of issue of the warrant, or the person be taken in custody to the place of issue or some other specified place. The order may be made subject to other specified conditions: subs (9). ... 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 ... 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. ... 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."

13. I should follow that decision and, with respect, I agree with it. It is implicit in that decision, probably explicit, that not only does a magistrate have no power to decline to make an extradition order on such grounds as are now relied upon by the plaintiff but that the Supreme Court reviewing

such an order has no wider power. The question of abuse of process is a matter for the courts of the issuing State.

14. In *Re Dalton*[8] Batt J (as he then was) had before him an application for review pursuant to s86 of the Act of an extradition order made by a magistrate under s83 of the Act. His Honour decided that the Court had no power to extend the time for making an application under s86. In the course of doing so, his Honour emphasised the use of the word "must" which he said was "the word of most insistent obligation in the English language" and he also said that s86 constituted "a code for curial challenge to a magistrate's order under s83 and that other procedures cannot be invoked".[9] It is convenient here to note, also, that, in relation to the question of availability of alternative remedies to s86, his Honour said that:[10]

> "... in my view it is clear from the terms and structure of s86 and from the context in which it finds itself in Pt 5 of the *Service and Execution of Process Act* that it is intended to cover the field of proceedings or steps to challenge an order under s83. This reading of s86 is, in my view, confirmed by s8 which does preserve the operation of certain State laws, but not any relevant State law, and in particular not O 56."

15. In *Rose v Chief Commissioner of Police,*[11] Hedigan J of this Court had before him an application for review pursuant to s86 of the Act of an extradition order made by a magistrate under s83 of the Act. Before dealing with that application, his Honour referred to an "accompanying O56 proceeding in this case" and said:[12]

> "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*, 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 O56 procedure in this case, by way of originating motion, fails *in limine*."

16. Hedigan J then referred to another aspect which was not argued before him, 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"[13] and his Honour said:[14]

> "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*. 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."

17. I respectfully agree with the above statement by Hedigan J. I consider that the Supreme Court has no greater power on a review, by way of rehearing, than that expressly conferred upon a magistrate by s83 of the Act. The power of the Supreme Court under s86(8) to confirm, vary or revoke the order must be exercised within the confines of s83 and only in relation to the matters expressly referred to in that section.

18. In *Loveridge v Commissioner of Police for South Australia*[15] White J reached conclusions contrary to those that I have considered above. His Honour decided that the magistrate had power to dismiss an application for extradition on the ground of abuse of process. I consider, with respect, that his Honour was wrong for the reasons already referred to. His Honour in addition to matters of statutory construction referred to constitutional considerations but this aspect was not argued on the present application. His Honour further sought to distinguish *Lavelle* on the basis that the Western Australian Supreme Court was dealing with an argument that the extradition *order* was an abuse of process but that *Lavelle* did not cover the contention that the *application* for an extradition order was an abuse of process and the case could therefore be distinguished on that basis. I do not think that this distinction is well-founded and in any event the reasoning of the Western Australian Court is wider[16] and I prefer it.

19. For the foregoing reasons it follows that the plaintiff cannot rely, within the purview of s86 of the Act, upon the ground of abuse of process, which is the only ground upon which he does rely, to resist confirmation of the extradition order.

20. The plaintiff sought, in the alternative, judicial review under O56, again on the ground of abuse of process. It is unnecessary to decide whether the present defendant is the appropriate defendant on such an application because, for the reasons adumbrated in *Lavelle*, *Re Dalton* and *Rose v Commissioner of Police*, I consider that this alternative remedy is not available. In particular I would respectfully adopt what was said by Batt J in *Re Dalton* in relation to Part V of the Act constituting a code that covers the field and excludes the operation of State law and consequently the Supreme Court's jurisdiction as a superior court to stay a proceeding or order for abuse of process.

21. For the foregoing reasons, the plaintiff is unable to raise before this Court the questions of alleged abuse of process that he seeks to raise. However, a person in the position of the plaintiff is not thereby deprived of any right to obtain relief in respect of an abuse of process involved in or associated with the issuing or enforcement of a warrant or the laying or prosecution of the charges associated with such warrant. As the Western Australian Full Supreme Court emphasised in *Lavelle*, the question of abuse of process in this context is one that is appropriate for the courts of the State in which the warrant is issued and in which the charges are made or to be brought – and, in particular, for the Supreme Court of that State.

22. The extradition order should be confirmed and the originating motion otherwise must be dismissed.

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[1] The precise order was that the defendant (the plaintiff in this proceeding) be taken in the custody of Detective Senior Constable Craig MacDonald to appear in the Brisbane Magistrates' Court in the State of Queensland at 10 am on 18/4/2007 (and, due to this proposed proceeding, that the order be suspended and the defendant remanded in custody). This Court has since stayed the operation of the principal order pending determination of this proceeding.
[2] The alleged offences include aiding persons to escape lawful custody, assault with intent to prevent lawful arrest or detention and harbouring escaped prisoners.
[3] The convictions included one for attempted murder.
[4] Hansard – House of Representatives – Monday 9 November 1992 – p3564.
[5] 125 FLR 110; (1995) 82 A Crim R 187 (Supreme Court of Western Australia: Malcolm CJ, Rowland and Walsh JJ).
[6] 125 FLR 110; (1995) 82 A Crim R 187, 188.
[7] 125 FLR 110; (1995) 82 A Crim R 187, 189-190.
[8] (1995) 120 FLR 408.
[9] (1995) 120 FLR 408, 411.
[10] (1995) 120 FLR 408, 412.
[11] [2000] VSC 281.
[12] [2000] VSC 281 at [6].
[13] [2000] VSC 281 at [7].
[14] [2000] VSC 281 at [7].
[15] [2004] SASC 195; (2004) 89 SASR 72; 210 ALR 177; 183 FLR 228; 146 A Crim R 84.
[16] I note that Malcolm CJ expressly referred to the application for, as well as the making of, an order for extradition – see the passage quoted at para [11] above.

APPEARANCES: For the plaintiff Berichon: Mr S Moglia, counsel. Victoria Legal Aid. For the defendant Chief Commissioner, Victoria Police: Mr B Dennis, counsel. Victorian Government Solicitor.
