52/69

SUPREME COURT OF VICTORIA

STEWART v McCALLUM

Lush J

3 October 1970

EXTRADITION – WARRANT OF APPREHENSION ISSUED IN SOUTH AUSTRALIA – EXECUTED ON THE APPLICANT IN VICTORIA – ORDER MADE BY MAGISTRATE THAT THE APPLICANT BE RETURNED TO SOUTH AUSTRALIA – EXTENT TO WHICH DETAILS OF THE ALLEGED OFFENCE NAMED IN THE WARRANT SHOULD BE GIVEN – WHETHER MAGISTRATE IN ERROR: *SERVICE AND EXECUTION OF PROCESS ACT* 1901-1963 (CTH) S18(2).

HELD: Order committing the accused into the custody of the police officer varied by substituting an order that the accused be admitted to bail.
1. The authorities show that the function of the Court when dealing with an application for extradition is not to decide issues of fact but to decide whether there is a genuine issue fit for trial.

2. The Court was unable to treat the case made against the accused as one which was so flimsy as to be unjust. The effect of the record of interview was a matter to be assessed ultimately by a jury. The record of interview appeared to have implicit in it the proposition that the accused was in a position to control the movements or the use of his wife's car. The fact that he telephoned the Adelaide police about the theft was in the circumstances capable of the construction that it may well have been related to the commission of the crime, and the answers concerning another person and the inconsistency between the story of the loan of the car to that person and the theft of the car from Glengowrie could be viewed by a jury as an indication of guilt, particularly as the statement about that person and the refusal to reconcile his two accounts of the loan of the car, was made at a time when the accused knew exactly what it was that the police were inquiring about and the allegation against him.

LUSH J: I have before me on summons under s19 of the *Service and Execution of Process Act* an application for review of an order made by a Stipendiary Magistrate pursuant to s16, sub-section (3), of that Act, directing that the applicant John Anthony Stewart be returned to Adelaide in custody.

The documents show that in South Australia a warrant was issued for the apprehension of John Anthony Stewart on the 29 September 1969, upon an information that he bad broken out of the house of one Ivan Demitrovio, having committed a felony therein, namely stealing a safe and quantity of opals. That warrant was brought to Melbourne and endorsed over the signature of Mr L Griffin, Stipendiary Magistrate, pursuant to s18, sub-section (1) of the Act. Stewart was apprehended pursuant to sub-section (2) of s18 and brought before the same Stipendiary Magistrate, who thereupon signed the warrant remanding Stewart to South Australia, to which I have already referred.

When this case came on this morning, the first submission of Mr Irlicht the applicant's solicitor, was that it was the responsibility of the prosecution to place evidence before this Court. The position at that time was that there were no affidavits and no evidence in any other form accompanying the summons. After a short debate this morning, in which Mr Irlicht contended that under s19, sub-section (3), the review of the order instituted by the summons was to be by way of rehearing and that therefore the prosecution should adduce the evidence, the matter was stood down. I indicated that I had no doubt that the effect of the section was that the person applying for the review was under an obligation to place material before the Court. It was not then necessary to decide, and it is not now necessary to decide, where any onus in the proceedings may lie. I may observe, however, that s18, sub-section (6), on which the applicant now relies, is framed in terms which would support the conclusion that where there is an onus it rests on the accused man and was so construed in *Re Alstergren and Nosworthy* [1947] VicLawRp 5; [1947] VLR 23 at 29; [1947] ALR 85.

When the matter was called on again this afternoon there were still no affidavits, but by consent of the parties I accepted the following documents and the case has been debated on and will be decided on these documents. There is the South Australian warrant to which I referred, and the endorsement on it to which I have already referred. There is an extradition deposition called for by s18, sub-section (1); there is the warrant to remand a person to another State, to which I have already referred; there is a transcribed note of evidence – I am unable to say whether it comes from a longhand on a shorthand note – given by Senior Detective Jennings of the South Australian Police Force before Mr Griffin, and there is a record of interview between Stewart and two unnamed Russell Street detectives. It is not clear exactly how it came about that this evidence was given before Mr Griffin.

It does appear that Mr Irlicht represented Stewart on that occasion and I have no doubt that it was, from the start, Mr Irlicht's intention to lay the foundation for a submission under s18, sub-section (6)(c, that it would be unjust in the circumstances to return Stewart to South Australia to answer the charge set out in the information. If I may say so, I have some doubt whether it was clearly understood such an application could be made only as part of an application by Stewart, and I have even more doubt whether Senior Detective Jennings, or any other pollice officers concerned with the hearing, really understood that an application was being made by the accused. I say that because little attempt seems to have been made to detail the strength of the case – if it has strength to be made against Stewart on his return to South Australia. However that may be, the material that emerged at the hearing before Mr Griffin is the material on which I have to decide this application for a review.

Mr Irlicht really makes two submissions. In the first place he submits that certain observations of a South Australian solicitor, Mr Waye, which were referred to by Senior Detective Jennings, should be ignored by me. These statements come into the case in this way, that the police account of the crime, as I understand it is that two men attempted to remove the safe with opals in it. They were apparently unable to move it, for some reason which does not appear, and the suggestion is that they called in aid three men called Gaye, Corsetti and Burns. In the end, Gaye, Corsetti and Burns were arrested in close proximity to the stolen safe and they appear to have pleaded guilty to charges laid against then. It was in the course of Mr Waye's pleading for them that he said that Stewart and a man named McInerney had been near the scene of the apprehension of the other three men and it seems to be implicit that it was also part of Mr Waye's submission on that occasion that Stewart and McInerney were the two men who called upon Gaye, Corsetti and Burns for assistance in removing the safe. Mr Irlicht contends that I should ignore altogether what Mr Waye said about his three clients. I asked Mr Nettlefold directly if the police had statements from Gaye, Corsetti and Burns implicating Stewart, and I was told that they had no statements from those three men and I was also told in substance that they do not expect to get them. In those circumstances I think Mr Irlicht's submission, that I should take no notice of what has been said about Mr Waye's claim for the three men who have been charged and convicted, appears sound.

The next submission, and the main one, was that apart from the possible evidence of Gaye, Corsetti and Burns, there was nothing more in the police account given to Mr Griffin than the foundation of a suspicion. Mr Irlicht contended on the authorities that it is unjust to extradite a man when no more than a ground for suspicion is proved against him. The authorities cited to me were the cases of *In re Alstergren and Nosworthy*, *supra*, 23; *O'Donnell v Heslop* [1910] VicLawRp 31; [1910] VLR 162; 16 ALR 168; 31 ALT 173, and *In the matter of Mandel* [1958] VicRp 80; [1958] VR 494; [1958] ALR 1019. The two earlier cases are extensively quoted in the judgment in *Mandel's case*, and I do not think that it is necessary for me to go beyond that judgment in the *Alstergren and Nosworthy case*, Lowe J said:

> "Where the charge is regular on its face and the conditions set out in section 18(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."

It is on that last sentence that Mr Irlicht founds his argument.

The whole of the evidence in this case is not before me. Mr Nettlefold assures me that there is

a body of scientific evidence which is not referred to in the material which I have described. I accept Mr Nettlefold's statement that there is such a body of evidence, but I do not think it appropriate to accept from him a statement of the consequences or implication, or possible implications, of that evidence. I think that Mr Nettlefold is entirely within his rights as counsel when informing me of the existence of a body of evidence and I am within my rights as a judge in a court in accepting that statement and acting upon it so far as it goes. But insofar as a statement may be made as to the consequences of evidence which may bear upon the question to be decided under sub-section (6), it appears to me that such a statement should not be made from the Bar table but should be made by the officer in charge of the prosecution. However that may be, Mr Irlicht's submission is that the evidence here raised is such that no magistrate could property find a case against the defendant fit to be sent for trial.

In the earlier case of *O'Donnell v Heslop*, the Chief Justice at page 170 contemplates two at least possible classes of case. One class of case is that in which the accused man may be able to show that the charge against him cannot possibly be right and the example chosen by the Chief Justice is a case in which an alibi was clearly proved. The other class of case was described by the Chief Justice in these words:–

> "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 that he would be acquitted if sent back, and that therefore there would be no real use in returning him."

The authorities show that the function of the Court at this stage is not to decide issues of fact but to decide whether there is a genuine issue fit for trial. The material before me in the present case indicates that the prosecution is it a position to lead evidence that a Holden motor car was used in the course of and for the purpose of the crime with which Stewart is charged. There is evidence that that car belonged to Stewart's wife. The crime was committed early in the morning of the 7 April and the Holden car was found in what I may call incriminating circumstances apparently shortly after seven o'clock the same morning. At quarter to one midday, on the following day, Stewart telephoned the Adelaide police station from Horsham, in Victoria, and said that he wished to report the theft of his wife's Holden car from their address at 32 Fisk Avenue, Glengowrie, which is in South Australia, between the 6 April and the time of the telephone call on the 8th. In the record of interview Stewart admitted that the car was his wife's property. When be was told that the car had been recovered in the foothills outside Adelaide and three men were arrested near the car, where they had just broken open a safe, Stewart said that he lent the car "to a bloke named Nobby Collins". He declined to say when he lent the car to Collins or how he came to lend it to him or why he lent it to him. He admitted that he had reported the car stolen by telephoning the Adelaide police at quarter to one on the 8th April, and when he was asked, "Why did you report the motor car stolen when in fact you had loaned it to the man Collins?", He said, "That's my business." At no time during the record of interview did be make a positive admission of any implication in the crime. It is on this material that I have to decide whether the case against Stewart indicated by this material is so flimsy that it would be unjust to return him to Adelaide. In the course of the debate, *Woon's case* was referred to, and I may read a few lines in the judgment of Kitto J in that case, which is reported in [1964] HCA 23; (1964) 109 CLR 529; [1964] ALR 868; 38 ALJR 32. In that one four men had been charged with breaking, entering and stealing. At page 534, Kitto J gives this account of the relevant events:

> "At the trial the three others denied that they were involved in any way, and consistently with their case they said nothing to implicate the applicant. He gave no evidence himself. The case against him depended upon evidence given by police officers as to his answers to statements and questions that had been put to him during two interrogations. Some of the statements and questions went directly to the question of his complicity in the crime charged; others dealt with subordinate matters. The learned trial Judge, warning the jury repeatedly that they must acquit the applicant unless satisfied beyond reasonable doubt of the facts alleged against him, directed the jury that there was no evidence of any 'express, explicit or direct admission' that he was one of the party that had broken into the bank; but His Honour left it to them to consider whether any of the answers the applicant elected to give persuaded them beyond reasonable doubt that he was conscious of guilt as having been a party to the crime."

I have come to the conclusion that I should not treat the case made against Stewart here as one which is so flimsy as to be unjust. The effect of the record of interview is a matter to be assessed ultimately by a jury. The record of interview appears to have implicit in it the proposition that Stewart was in a position to control the movements or the use of his wife's car. The fact that he telephoned the Adelaide police about the theft is in the circumstances capable of the construction that it may well have been related to the commission of the crime, and the answers concerning the man Collins and the inconsistency between the story of the loan of the car to Collins and the theft of the car from Glengowrie could be viewed by a jury as an indication of guilt, particularly as the statement about Collins and the refusal to reconcile his two accounts of the loan of the car to Collins, was made at a time when Stewart knew exactly what it was that the police were inquiring about and the allegation against him.

The application for review will accordingly be dismissed. I withdraw the direction that I gave, that the application for a review is dismissed, and in place of that my order is that, in substitution for the order of the magistrate, there should he an order admitting the applicant to bail in the sum of $800 with one surety for the like amount on condition that the applicant appears at 10 a.m. on 22 October 1969, at the Adelaide Magistrates' Court, Victoria Square, Adelaide, in the State of South Australia, to answer the charge set out in the warrant to apprehend dated 29 September 1969.

The order made by the Stipendiary Magistrate committing the accused into the custody of Thomas John Jennings be varied by substituting therefor an order that the accused be admitted to bail in the form that I have prescribed.

I will formally have to adjourn these proceedings until ten on Monday morning, respite the accused's bail until then, and pronounce the order then. I will formally adjourn the application.

(When this judgment was delivered orally I did not have in mind the observations about the role of counsel for the prosecution which are to be found at p170 of the report of *O'Donnell v Heslop*.)
