25/98

SUPREME COURT OF VICTORIA

BAILEY v ATTORNEY-GENERAL for VICTORIA

Kellam J

7, 21 April, 8 May 1998

CRIMINAL LAW – PROCEDURE – INTERSTATE TRANSFER OF PRISONER – TRANSFER OPPOSED – WHETHER "HARSH OR OPPRESSIVE" TO ORDER TRANSFER – MEANING OF "HARSH" "OPPRESSIVE" – PERSONAL FACTORS OF PRISONER – DELAY IN REQUESTING TRANSFER: *PRISONERS (INTERSTATE TRANSFER) ACT* 1983, SS15(b), 16.

B. a prisoner, opposed an application for his transfer interstate on the grounds that it would be harsh or oppressive or not in the interests of justice. The transfer was sought in order for B. to be dealt with for charges involving the driving of a motor vehicle in a dangerous manner causing death. B. submitted that the delay of less than 5 months in the making of the application, his insulin-dependent diabetic condition, the possibility of his being called as a witness in proceedings in Victoria, the separation from his wife and child and the disruption to his course of study made it harsh or oppressive or not in the interests of justice to order his transfer interstate. The magistrate rejected this submission and issued an order for B.'s transfer. Upon application for review—

HELD: Application refused. Order to transfer confirmed.
1. The words "harsh" and "oppressive" in s15 of the *Prisoners (Interstate Transfer) Act* 1983 are by no means mutually exclusive. The word "harsh" means "unfairly severe". The word "oppressive" means "unjustly burdensome" and is directed to hardship to the prisoner resulting from changes in the prisoner's circumstances which have occurred during the period under consideration.

2. Whilst it is accepted that B.'s transfer would cause anxiety and disruption to his family, it could not be said that the transfer was harsh or oppressive. Further, in view of the seriousness of the alleged offences and the desirability that the charges be finalised as soon as possible, it could not be said that the transfer was not in the interests of justice.

[Note: On 16 June 1998, the Court of Appeal (Charles and Batt JJA and Vincent AJA) [1998] VSC 343; [1998] 4 VR 523; (1998) 101 A Crim R 133 dismissed B.'s appeal and rejected an application for a stay pending an application for special leave to appeal to the High Court. Ed.]

KELLAM J: [1] This is an application under s16(1) of the *Prisoners (Interstate Transfer) Act* 1983 for a review of a decision of the Melbourne Magistrates' Court dated 23 February 1998. On that date the Magistrates' Court ordered the transfer of the prisoner Paul Wayne Bailey to New South Wales. The background to the application may be summarized as follows. On 26 March 1997 at the County Court in Melbourne the applicant was sentenced to a term of five years' imprisonment with a minimum term of three years to be served before being eligible to be released on parole. The exact date of his earliest possible release on parole is not entirely clear, but on any view it is not before 21 January 1999 and may be somewhat later. The applicant is imprisoned in Victoria in consequence of convictions in respect of two counts of armed robbery, one count of threatening to cause serious injury and one count of causing injury.

The evidence before me establishes that the applicant has been charged with driving a motor vehicle in a dangerous manner causing death, negligent driving of a motor vehicle and of an offence of consumption of alcohol after a motor vehicle accident. These offences are alleged to have taken place in New South Wales on 22 March 1995. Indeed, a committal hearing in respect of the charges outstanding in New South Wales commenced prior to the applicant coming to Victoria and committing the offences for which he was arrested on 13 March 1996 and which resulted in the aforesaid convictions in the County Court at Melbourne and his subsequent imprisonment. The part heard committal hearing has now been adjourned on a number of occasions. By letter received on 13 August 1997 the Attorney-General for the State of New South Wales made a request to the Attorney-General for the State of Victoria for the transfer of the applicant to face the charges in New South Wales. By letter dated 28 November 1997 the Attorney-General for the State of Victoria informed the Attorney-General for the State of New South Wales that she consented to

the application to transfer the applicant from Victoria to New South Wales. An application **[2]** was made to the Magistrates' Court and the relevant order was made on 23 February 1998.

The sections of the *Prisoners (Interstate Transfer) Act* 1983 which are relevant for present purposes are ss15 and 16, the relevant sub-sections of which read:

> "15. The Magistrates' Court shall—
> (a) issue an order for the transfer of the prisoner to the participating State ... specified in the certificate issued in accordance with s13(2) in respect of the prisoner; or
> (b) if the Court, on the application of the prisoner, is satisfied that it would be harsh or oppressive or not in the interests of justice to transfer the prisoner to that participating State or Territory or that the trivial nature of the charge or complaint against the prisoner does not warrant the transfer, refuse to issue such an order.
>
> 16. (1) Where the Attorney-General or the prisoner, ... is dissatisfied with the decision of the Magistrates' Court under s15, the prisoner or that person, as the case may be, may, within 14 days of the decision, apply to the Supreme Court for a review of the decision and the Supreme Court may review the decision.
> (2) ... (3) ...
>
> (4) The review of the decision shall be by way of rehearing on the evidence, if any, given before the Magistrates' Court and on any evidence in addition to the evidence so given.
>
> (5) Upon the review of a decision, the Supreme Court may confirm the decision or quash the decision and substitute a new decision in its stead."

The applicant appeared before me in person on 7 April 1998 and on 21 April 1998. He called his wife to give evidence before me and gave evidence before me himself. In addition he produced a number of documents as exhibits. He does not contend that the certificates and consents of the Attorney-General for New South Wales and the Attorney-General for Victoria do not comply with the Act. Furthermore, he does not contend that the charge of dangerous driving occasioning death is not a **[3]** trivial offence. He does contend, however, that it would be harsh or oppressive and that it would not be in the interests of justice to transfer him to New South Wales at the present time. The applicant's wife gave evidence before me that prior to the conviction of her husband in Victoria in March of 1997 she had suffered threats made towards her by her father who is resident in New South Wales. She had obtained restraining orders under a New South Wales *Family Violence Act* restraining her father from making threats against her or her child for a period of two years from 8 June 1995. She moved to Castlemaine in August 1997 with, Monica, who is now two and a half years of age and who is the daughter of the applicant and his wife. She has leased a flat in Castlemaine for a period of 12 months which lease expires in August of this year. She moved to Castlemaine because her husband at that time was incarcerated in the Loddon Prison in Castlemaine. She gave evidence that her daughter was well established with friends and childcare arrangements and that she and her daughter had commenced to build and maintain a relationship with the applicant. When the applicant was first arrested in March 1996 and his wife was living in New South Wales it was possible for her to visit him only three or four times a year. She believes that it will cause heartbreak and stress to her daughter if the applicant is now removed to New South Wales. Furthermore, she is concerned that if she moves to New South Wales her father, who has made threats against her in the past, may ascertain her whereabouts and make further threats. She has decided to stay in Victoria with her child for this reason irrespective of whether or not her husband is transferred to New South Wales in the near future. Accordingly, it is the applicant's submission that if he were to be transferred to New South Wales at this time there would be no prospect of him seeing his wife and child until the outstanding matters in New South Wales are concluded. In addition, the applicant gave evidence before me that for the last six months he has been undertaking a certificate in occupational studies/recreation at Bendigo Regional Institute of TAFE. He expects to complete this course in July 1998 although the applications to the Court in respect of the matter with which I am presently concerned have caused some disruption to his progress in this regard. There is no **[4]** evidence available to me that the applicant will be able to continue the course at the Long Bay Prison Complex although attempts have been made by the applicant to ascertain whether or not such evidence can be placed before the Court. In addition, the applicant has produced evidence to the Court that he is an insulin dependent diabetic. He has submitted that he may suffer increased stress as a result of being transferred away from his family, thereby leading to an increase in his blood sugar level.

In addition he has produced evidence before the Court that he may be required to give evidence as a defence witness in criminal proceedings presently being conducted in the Supreme Court. Furthermore, he submitted to the Court that delay has occurred on the part of the authorities and that this delay has in his submission created prejudice to him. The offences with which he is charged are alleged to have occurred on 22 March 1995. He was taken into custody in Victoria on 13 March 1996 after his arrest on the charges of armed robbery. He was convicted in Victoria in March 1997 and he has submitted that the Attorney-General for New South Wales delayed to a considerable extent in making the request for transfer pursuant to the *Prisoners (Interstate Transfer) Act* 1983 of Victoria by not making such application before August of 1997.

There do not appear to be any reported decisions which deal specifically with the provisions of s15 of the *Prisoners (Interstate Transfer) Act* 1983. I have been referred to two unreported decisions, *Re Dalton,* Teague J, unreported, 20 June 1995 and *Re Brincat* Beach J, unreported, 12 May 1994. There are several decisions concerned with the *Service and Execution of Process Act* 1901. In *Re Maher* [1983] 2 Qd R 695; (1983) 76 FLR 284 Douglas J said (at p288):

> "As I have indicated earlier it is plain that authorities applicable to the *Service and Execution of Process Act* 1901 seem to recognise delay as one of the reasons for determining whether 'it would be unjust or oppressive' under the Act to return a person to a State."

In *In re Alstergren and Nosworthy* [1947] VicLawRp 5; [1947] VLR 23; [1947] ALR 85 Lowe J said at VLR p30:

> "The fact that the defendant may be returned to a State far from his home is alone insufficient to constitute injustice or oppression, however inconvenient it may be to the defendant. Within the State **[5]** where an offence is alleged to be committed it is clear that a defendant may be apprehended and sent to be tried far from his home, and in extending the operation of the State's process it is not to be supposed that such a matter alone could be a ground of discharge. I am far from saying, however, that in conjunction with other circumstances it could not become a factor of injustice or oppression."

In *Perry v Lean and Fry,* a decision of the Court of Criminal Appeal of South Australia (1985) 39 SASR 515; (1986) 85 FLR 29; (1985) 63 ALR 407; 19 A Crim R 457 Olsson J said:

> "The words 'unjust' and 'oppressive' are directed to two quite separate and different concepts. The former primarily (but not exclusively) concerns itself with the risk of prejudice to the accused in relation to the conduct of a proposed trial. The latter is more related to hardship to an accused resulting from changes in his or her circumstances that have occurred during the period to be taken into consideration. However, there is room for overlapping and between them the two concepts cover all cases where to return the accused would in the whole of the circumstances, simply not be fair."

It should be noted that in that case the decision depended principally upon matters which were concerned with possible prejudice to the prisoner arising from lengthy delay in the matter coming on for trial and the effect of that delay upon the evidence of witnesses in the context of an application to return the prisoner to another State where he had been charged with murder. In the case before me I do not conclude that there is any risk of prejudice occurring to the applicant in relation to the conduct of a trial in New South Wales if he is committed for trial. The issue in this case and the main basis upon which the applicant opposes the transfer order made by the Magistrates' Court is that it is, in his submission, harsh or oppressive by reason of personal factors relevant to him, his wife and child.

In *McDonald v McDonald* [1965] ALR 166 and in the course of referring to the phrase 'harsh and oppressive' where it appeared in the *Matrimonial Causes Act* 1959, Herron CJ said at p175:

> "Each of the two words in the phrase "harsh and oppressive" must be given its meaning. The test of harshness and oppressiveness is subjective and must relate to the respondent. What is envisaged is not some such concept in the **[6]** abstract or as applying generally to others, or even to the reasonable man or woman. The phrase connotes some substantial detriment to the party before the court."

I note that the word "harsh" is defined by the *Shorter Oxford English Dictionary* as being "repugnant to the feelings, severe, rigorous, cruel, unfeeling." The word "oppressive" is defined by the same source as being "unjustly burdensome, harsh or merciless." The word "oppressive"

has been defined in Company Law cases as having its ordinary meaning "i.e. burdensome, harsh and wrongful" – See *Scottish Co-operative Wholesale Society v Meyer* [1959] AC 324; [1958] 3 All ER 66; [1959] 3 WLR 404. It requires at least unfairness. *Re Five Minute Car Wash Service* [1966] 1 WLR 745 and *Re Tivoli Freeholds Ltd* [1972] VicRp 51; [1972] VR 445. In the case of *Dalton* (referred to above) Teague J noted that delay by the authorities could be "potentially oppressive" in the circumstances of that case.

In the present case, the applicant has submitted that there has been a change in his circumstance during his period of imprisonment in Victoria in that his wife and child have come to Victoria to live near the place at which he has been imprisoned and that they will not be able to return to New South Wales at least for some time if he is returned to New South Wales. I accept the evidence of the applicant and his wife that a transfer at this time to New South Wales will cause both of them distress and anxiety. I accept also that it is in the interests of the applicant that he completes the certificate of occupational studies and recreation course, which he has commenced. I accept that the applicant's wife moved to Castlemaine to live near the Loddon prison. There is of course no guarantee, irrespective of whether the applicant is successful in the present application before me, that prison authorities will keep the applicant at Loddon prison. For example, he was recently transferred to Bendigo prison because of an allegedly positive urine sample.

I do not however, accept that the applicant's diabetic condition, or the fact that he may be called as a witness in proceedings in Victoria, or the period of delay between his conviction in Victoria and the application by the Attorney-General of New South Wales to transfer him to New South Wales are matters of great significance in the determination of whether the transfer would be harsh or oppressive in the circumstances. Insofar as the complaint of delay **[7]** is concerned, it was not possible for any application to be made under the *Prisoners (Interstate Transfer) Act* prior to the imposition of the state sentence of imprisonment imposed on 26 March 1997 by the County Court. The alleged delay in making application by the New South Wales Attorney-General is therefore less than five months. In my view such a delay is not a cause of oppression nor is it unjust in all the circumstances.

Accordingly, I am satisfied that the principal matter that the applicant has established is that his transfer will cause distress and anxiety to his wife, his child and himself. It must be accepted, that in the event that the transfer order is not made, it is nevertheless likely that the applicant will be returned to New South Wales to meet the charges alleged against him in that State. There is a high probability that this will occur at the conclusion of the non-parole period of his present sentence. That may well be in January of 1999. Taking into account the fact that the offences which resulted in the imprisonment of the applicant in Victoria were committed by him whilst he was on bail in respect of the charges for which he is to be transferred to New South Wales, there must be at least some doubt as to whether or not he will be granted bail in New South Wales if he is extradited to that State after the completion of his non-parole term in Victoria. Albeit that he may well have completed his course of studies by such time, the necessity for him to return to New South Wales at any time in the future has the prospect of causing hardship for him and his wife and daughter. Whilst I have sympathy for the position in which the applicant and his wife and child find themselves and whilst I accept that a transfer will cause anxiety and disruption to their family, in the end result I am not satisfied that the transfer sought in this case can be said to be harsh or oppressive. It is likely that many if not most cases of transfer of prisoners to another State cause at least some family separation, distress and anxiety. The hardship caused to a prisoner through separation from his family cannot of itself be determinative of the question of whether the transfer would be "harsh or oppressive". See *Re Dalton* at p69, *Re Brincat* at p8 and *Re Maher & Ors* at p286. There are, of course, other matters to be considered in the balance of the exercise of discretion in this proceeding. Obviously, it is in the interests of justice that the charges brought against the applicant in New South Wales are brought to finality at the earliest possible time. Another factor, of course, is that the principal charge which the applicant faces in New South Wales cannot be regarded as other than serious.

[8] In circumstances where I am not satisfied that it would be harsh or oppressive, or not in the interests of justice to transfer the prisoner to New South Wales, I conclude that the application should be dismissed and that the order of the Melbourne Magistrates' Court made on 23 February 1998, namely that the Governor of Her Majesty's Prison at Bendigo in the State of Victoria deliver the applicant together with a copy of the order then made by the Magistrates'

Court and a copy of this order into the custody of the appropriate persons who shall escort the applicant to the State of New South Wales and that the persons named in the order to escort the applicant to New South Wales forthwith and safely keep custody of the applicant for the purposes of conveying him from this State to that State and there delivering him into the custody of the Governor of the prison at Long Bay, New South Wales should be confirmed.

APPEARANCES: The appellant appeared in person. For the respondent: Mr RW Taylor, counsel. Victorian Government Solicitor.
