09/86

SUPREME COURT OF QUEENSLAND

Re LOUBIE

Dowsett J

13, 16, 22, 28 August 1985

[1986] 1 Qd R 272; (1985) 62 ALR 139; 19 A Crim R 112

CRIMINAL LAW – BAIL – APPLICATION FOR – ACCUSED RESIDENT IN ANOTHER STATE – ONUS REVERSED – WHETHER DISCRIMINATION ON BASIS OF RESIDENCE IN ANOTHER STATE – WHETHER STATUTORY PROVISION INVALID: *CONSTITUTION* (CTH.), S117; *BAIL ACT* 1980 (QLD) SS8, 9, 16; *BAIL ACT* 1977 (VIC) S4(b).

Section 16(3)(b) of the *Bail Act* 1980 (Qld) prohibits the grant of bail to a person who is ordinarily resident outside of Queensland unless cause is shown.

HELD: As s16(3)(b) of the *Bail Act* 1980 (Qld) appears to discriminate solely on the basis of residence, it is in breach of s117 of the *Constitution* (Cth.) and therefore invalid.

DOWSETT J: *[After setting out the details of the application for bail and holding that the Court was bound to consider the question of constitutional validity even though not raised by the parties, His Honour continued]:* … **[146]** As I understand it, the argument advanced on behalf of the Attorney-General of Queensland is that it is not unreasonable to treat distance from Brisbane (for example) as a relevant consideration in determining whether or not a person committed for trial in Brisbane should be released on bail pending trial. The section in question might be treated merely as a recognition of that relevant consideration and ought not to be treated as discriminatory. The difficulty with this argument is that it does not take account of what the Parliament has in fact done. I accept that residence at a remote place may well be a relevant consideration in granting bail, although in modern times, one would have thought that the importance of such a matter was very much reduced. The difficulty as I see it is, however, that even if the applicant had been committed for trial at the District Court at Southport, and he lived at Tweed Heads, the sub-section would apply. On the other hand, a person committed for trial in Brisbane would not be subject to the sub-section even if he resided at Camooweal or Thursday Island.

It is true that one can imagine areas in which the apprehension of offenders interstate would be more difficult than if they were in Queensland. I would be willing to accept that it might be more difficult to activate the police in another State to execute a warrant than it would be to get the Queensland Police Force to execute a warrant issued in Queensland. However, These difficulties would arise even if the person charged was a resident of Queensland who had chosen to go interstate. In **[147]** other words, the problem arises not because of the purpose for which the section was enacted but because the Parliament has chosen as the criterion for its application the very matter which is prohibited by s117, namely discrimination on the basis of residence in a different State. I am not called upon to decide whether or not a section which discriminated upon the basis of distance between the place of trial and residence would be in breach of s117 if it were the case that the person charged resided outside of Queensland.

In these latter remarks, I have assumed that there is, in fact, a discrimination between residents of different States. At first blush, this is not a difficult conclusion to reach. A person who is normally resident in Queensland will be entitled to bail unless one of the matters prescribed in s16(1) is shown or unless one of the matters prescribed in s16(3) is established. One of the latter matters is of course ordinary residence outside of Queensland. However, it is probably desirable to go to the cases to see whether or not any different meaning has been put upon the concept of discrimination.

I was referred in argument to the decision of the High Court in *Lee Fay v Vincent* [1908]

HCA 70; (1908) 7 CLR 389; 15 ALR 35. That was a case in which a Western Australian Act prohibited the employment of Chinese in factories unless such Chinese had been employed on or before 1 November 1903. It was suggested that this discriminated against residents of other States. Presumably, such discrimination would arise in the case of Chinese not resident in Western Australia as at 1 November 1903. Such persons would not be able to be employed in factories in Western Australia, whilst Chinese residents employed in Western Australia as at that date would be able to be employed. Griffith CJ in delivering the judgment of the court said at p392:

> "That section (s117) only applies to a person who, being resident in one State, is seeking to assert rights in another. In the present case the person in respect of whom the rights are asserted is a resident in Western Australia, not in another State, and the rights are asserted in Western Australia. The section has therefore no application, and the point, although it was raised as a question of Federal Jurisdiction, is not tenable ..."

It seems to me that this case has no application to the present situation. The applicant is clearly resident in New South Wales at the moment, although he is detained in Queensland: see *Ex parte Woods*, noted in the *Queensland Law Reporter* for 10th August 1985 (per Ryan J). I was also referred to the decision of the High Court in *Davies and Jones v Western Australia* [1904] HCA 46; [1904] 2 CLR 29; 11 ALR 73. That was a case concerning the *Administration Act* 1903 of the State of Western Australia which purported to discriminate as to the rate of duty payable on real and personal estates upon the basis that duty was payable at one rate by persons who were "*bona fide* residents of and domiciled in Western Australia" and upon another rate for other persons. The court was of the view that this was not inconsistent with s117 because the test for receiving the discounted rate was dependent upon domicile and not residence. In other words, the addition of the second qualification of domicile took the legislation beyond the prohibition of s117.

[148] I have already referred to *Henry v Boehm* [1973] HCA 32; (1973) 128 CLR 482; [1973] 1 ALR 181; 47 ALJR 429. That was also a case involving the rules relating to the admission of legal practitioners, in that case in South Australia. The rules required a person who had previously been admitted elsewhere to reside for at least three calendar months in South Australia before applying for admission.

The court upheld those rules upon the basis that they applied to persons admitted elsewhere, not to persons who resided elsewhere, and because they required a period of residence in South Australia regardless of whether the person applying had previously been a resident in South Australia or elsewhere. Hence, on their proper construction, the rules did not discriminate between the residents of different States but merely prescribed a residence condition in the case where an applicant had previously been admitted other than in South Australia. This case does not seem to assist in the present situation where there can be no doubt that it is present residence which is treated as the relevant characteristic or factor for the purpose of invoking the operation of s16(3).

Hence, although it may be possible for the State to legislate in such a way pursuant to the so- called "police power" so as to substantially affect the circumstances in which a person not usually resident in Queensland will obtain bail if charged here with an indictable offence, I cannot see that this justifies legislation which appears to discriminate solely on the basis of residence. Section 16(3)(b) seems to me to seek to do so and therefore I am of the opinion that it is in breach of s117 of the Constitution and therefore invalid.

In the course of argument I was informed that there is similar legislation in Victoria. That appears to be so. Section (4)(b) of the *Bail Act* 1977 which was supplied to me is in form similar to the Queensland legislation. An inspection of the *Australian Digest* suggests that there have been no decisions as to the validity or otherwise of that provision. I was also referred in argument to the decision of the Full Court in *R v Hughes* [1983] 1 Qd R 92. That case, I was told, is the most recent decision of the Full Court concerning the Act in question here. However, it was not a case which directly concerned s16(3), although reference was made to that sub-section in the judgment of Connolly J with whom Kelly and Macrossan JJ agreed. There is nothing in that decision which would affect the conclusion to which I have come as to the invalidity of s16(3)(b). In those circumstances, I turn now to consider the application upon the basis that it is one to which s9 of the Act applies subject to the operation of s16(1). *[After considering the application, His Honour granted bail with certain conditions].*