

IN THE PRIVY COUNCIL

No. 34 of 1975

O N A P P E A L

FROM THE FULL COURT OF THE SUPREME COURT
OF WESTERN AUSTRALIA SITTING AS A COURT
OF CRIMINAL APPEAL

B E T W E E N :

SANTO OTERI and GAETANO OTERI

Appellants

- and -

THE QUEEN

Respondent

CASE FOR THE RESPONDENT

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ON APPEAL

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B E T W E E N :

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INTRODUCTORY

Record

1. This is an appeal brought by leave of the Supreme Court of Western Australia granted on the 16th June 1975 from a judgment of the Full Court of the Supreme Court of Western Australia delivered on the 6th December 1974 answering points of law reserved for the opinion of the Court.

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2. The Respondent respectfully submits that leave was granted per incuriam for the reason that the Order in Council dated 28th April 1909 relating to Appeals from the Supreme Court of Western Australia to Her Majesty in Council pursuant to which the Court purported to act has no application to a criminal cause or matter. The Respondent has petitioned Her Majesty in Council to dismiss the Appeal on this ground.

HISTORY OF THE PROCEEDINGS

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3. An indictment was presented in the District Court of Western Australia on the 1st October 1974 jointly charging each of the Appellants with two counts of theft. The indictment charged that

pp.1-2

- Record. each of the offences occurred "on the vessel 'Providence' on the high seas approximately 22 miles from the coast of Western Australia within the jurisdiction of the Admiralty of England".
- p.3,11.10-21 4. When arraigned on the 17th October 1974 each of the Appellants demurred to each of the counts in the indictment on the ground that no offence was disclosed cognisable by the Court as "no relevant law of Western Australia nor of the United Kingdom had force or effect to make the conduct alleged against the accused, when committed on board the 'Providence' at the place alleged, an offence". The Appellants also pleaded that the Court had no jurisdiction to try an offence committed at the place alleged. 10
5. The trial Judge (O'Connor J) acting pursuant to section 49 of the District Court of Western Australia Act 1969-1974 which provides,
- "A District Court Judge may reserve any point of law arising in any trial of a person on indictment for the opinion of the Full Court sitting as a Court of criminal appeal, and defer passing judgment therein until that opinion has been given, and in such case shall pass judgment in conformity with that opinion", 20
- p.4,1.30 to p.5,1.7 reserved for the opinion of the Full Court of the Supreme Court of Western Australia points of law arising out of the demurrers and the pleas to the jurisdiction. The trial of the Appellants was adjourned and remains adjourned pending this Appeal. No jury has yet been empannelled. 30
- p.3,1.22 to p.4,1.29 6. Incorporated as part of the reference by O'Connor J to the Supreme Court were facts asserted by the Appellants and agreed by the Crown the material effect of which is that :-
- (a) Each of the Appellants had at all material times the status of British subjects pursuant to section 1 of the British Nationality Act 1948 (11 & 12 Geo.VI c.56) (U.K.) they being Australian citizens pursuant to the Australian Citizenship Act 1948-1973 (Cwlth). 40
- (b) The conduct of the Appellants alleged to constitute the offences charged occurred on board the vessel 'Providence' then on the high seas some 22 miles off the Western Australian coast.

(c) The 'Providence' was at all material times a powered fishing vessel of some 24.6 gross tons and some 46 feet in length. She was owned wholly by persons residents of Western Australia each of whom had the status of British subjects pursuant to section 1 of the British Nationality Act 1948. She was licensed under the Western Australian Marine Act 1948-1973 and the Fisheries Act 1905-1973 (W.A.) but not under the Merchant Shipping Act 1894 (U.K.).

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7. The Respondent supported the indictment in argument before the Supreme Court as alleging offences against section 1 of the Theft Act 1968 (U.K.), or alternatively, if that Act had no application beyond England and Wales (as submitted by the Appellants), as sufficiently alleging offences of simple larceny at common law.

8. The Respondents further submitted that the offences alleged in the indictment were triable in Western Australia by force of section 1 of the Admiralty Offences (Colonial) Act, 1849 (12 & 13 Vict. c.96) (U.K.) which reads :

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"If any person within any colony shall be charged with the commission of any treason, piracy, felony, robbery, murder, conspiracy, or other offence, of what nature or kind soever, committed upon the sea, or in any haven, river, creek, or place where the admiral or admirals have power, authority, or jurisdiction, or if any person charged with the commission of any such offence upon the sea, or in any such haven, river, creek, or place, shall be brought for trial to any colony, then and in every such case all magistrates, justices of the peace, public prosecutors, juries, judges, courts, public officers, and other persons in such colony shall have and exercise the same jurisdiction and authorities for inquiring of, trying, hearing, determining, and adjudging such offences, and they are hereby respectively authorized, empowered, and required to institute and carry on all such proceedings for the bringing of such person so charged as aforesaid to trial, and for and auxiliary to and consequent upon the trial of any such person for any such offence wherewith he may be charged as aforesaid, as by the law of such colony would and ought to have been had and exercised or instituted and carried on by them respectively if such offence had been committed, and such person had been charged with having committed the same, upon any waters situate within the limits of any such colony, and within the limits of the local jurisdiction of the courts of criminal justice of such colony." ,

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and punishable pursuant to section 3 of the Courts (Colonial) Jurisdiction Act, 1874 (37 & 38 Vict. c.27) (U.K.) which reads:-

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"When, by virtue of any Act of Parliament now or hereafter to be passed, a person is tried in a court of any colony for any crime or offence committed upon the high seas or elsewhere out of the territorial limits of such colony and of the local jurisdiction of such court, or if committed within such local jurisdiction made punishable by that Act, such person shall, upon conviction, be liable to such punishment as might have been inflicted upon him if the crime or offence had been committed within the limits of such colony and of the local jurisdiction of the court, and to no other, anything in any Act to the contrary notwithstanding: Provided always, that if the crime or offence is a crime or offence not punishable by the law of the colony in which the trial takes place, the person shall, on conviction, be liable to such punishment (other than capital punishment) as shall seem to the court most nearly to correspond to the punishment to which such person would have been liable in case such crime or offence had been tried in England."

9. The hearing on the reference took place in the Supreme Court (Virtue, A.C.J., Burt & Wallace JJ.) on the 19th and 20th November 1974, and the Court delivered its reserved decision on the 6th December 1974, answering unanimously the questions submitted for its opinion as follows:-

p.6,11.7-23

"(a) Does the indictment disclose any offence under the laws of Western Australia or otherwise triable in Western Australia?

Answer - Yes.

(b) Has the District Court of Western Australia jurisdiction to try the accused for the offence?

Answer - Yes.

(c) Is the matter :-

(i) Within the ordinary jurisdiction of the Court? 40

Answer - No.

(ii) Within the Admiralty jurisdiction of the Court? Record.

Answer - Yes.

(iii) Otherwise cognisable by the Court?

Answer - Unnecessary to answer."

10. Separate written reasons for decision were published by Burt J. and Wallace J. These reasons were in substantial agreement and were adopted by Virtue A.C.J. pp.7-15

10 SUBMISSIONS OF THE RESPONDENT.

11. The Respondent respectfully submits that the 'Providence' being a ship owned wholly by British subjects is a British ship. It therefore attracts, in relation to offences committed on board on the high seas, the criminal jurisdiction of the Admiralty of England. The fact that it has not been registered pursuant to the Merchant Shipping Act 1894 (U.K.) as a British ship, although having the effect that it will not be recognised as a British ship, is nevertheless immaterial to the Respondent's proposition because section 72 of the said Act on its proper construction requires that the ship be dealt with in all respects as if it were recognised as a British ship so far as concerns the punishment of offences committed on board.

12. The Respondent respectfully submits that the effect of the Offences at Sea Act, 1799 (39 Geo.III, c.37) (U.K.) as amended, which so far as is material reads,

30 "...that all and every offence and offences which after the passing of this Act shall be committed upon the high seas, out of the body of any county of this realm, shall be and they are hereby declared to be offences liable to the same punishments respectively, as if they had been committed upon the shore " ,

40 is, in relation to conduct on the high seas of a British subject or of any person on a British ship which if committed in England would be an offence, to make that conduct an offence and liable to the same punishment as if it had been committed in England. It follows that the conduct complained

of in the indictment constitutes offences under section 1 of the Theft Act 1968 (U.K.). It is not material to this argument that within the United Kingdom the Theft Act is limited in its application to England and Wales.

13. The Respondent respectfully submits that the offences in the indictment are triable in any court of competent jurisdiction in Western Australia by virtue of the provisions of section 1 of the Admiralty Offences (Colonial) Act 1849. 10

14. The Respondent respectfully submits that the District Court of Western Australia has jurisdiction to try the offences in the indictment by reason of the provisions of -

(a) section 42 of the District Court of Western Australia Act, 1969-1974, which reads, inter alia:-

"42. (1) Except as provided in subsection (2) of this section, the Court has all the jurisdiction and powers that the Supreme Court has in respect of any indictable offence. 20

(2) The Court has no jurisdiction to try an accused person charged with an indictable offence, in respect of which offence, the maximum term of imprisonment that can be imposed exceeds fourteen years, or for which the penalty is death " ,

(b) section 16 of the Supreme Court Act, 1935-1975 (W.A.) which reads, inter alia:- 30

"16. (1) Subject as otherwise provided in this Act, and to any other enactment in force in this State, the Supreme Court -

(a) is invested with and shall exercise such and the like jurisdiction, powers, and authority within Western Australia and its dependencies as the Courts of Queen's Bench, Common Pleas, and Exchequer, or either of them, and the Judges thereof, had and exercised in England at the commencement of the Supreme Court Ordinance, 1861; and 40

- (b) shall be at all times a court of oyer and terminer and general gaol delivery in and for Western Australia and its dependencies; and
- (c) is authorised, empowered, and required to take cognisance of and hold all pleas and all manner of causes, suits, actions, pleas of the Crown, prosecutions, and informations, whether civil, criminal, or mixed, with the same and as full power within Western Australia and its dependencies to hear, judge, determine, and execute therein, as the Courts of Queen's Bench, Common Pleas, and Exchequer, and as justices of oyer and terminer and general gaol delivery, had in England at the commencement of the Supreme Court Ordinance 1861, and as shall be necessary for carrying into effect the several jurisdictions, powers, and authorities committed to the Court, and shall adjudge and determine in all and every the same matters according to the laws and statutes of the realm of England in force in Western Australia, the laws and statutes of Western Australia, and the Acts of the Commonwealth of Australia; ... " ,

- (c) section 378 of the Criminal Code of Western Australia, which provides that the maximum punishment for stealing is imprisonment for three years.

15. The Respondent respectfully submits that alternatively to the submission contained in paragraph 12 hereover the provisions of section 1 of the Admiralty Offences (Colonial) Act 1849 and of section 686 of the Merchant Shipping Act 1894 independently of each other and of the Offences at Sea Act 1799 on their proper construction have the effect of making the conduct complained of in the indictment punishable as for an offence under section 1 of the Theft Act 1968.

40 16. The Respondent respectfully submits that alternatively to the submissions contained in paragraphs 12 and 15 hereover if the Theft Act 1968 did not apply the provisions of the common law as to simple larceny applied to the Appellants at all material times by reason of their being British subjects on board a British ship.

17. The Respondent respectfully submits that the appeal should be dismissed for the following amongst other

REASONS,

- (a) BECAUSE the Supreme Court has no power to grant leave to appeal in a criminal cause or matter;
- (b) BECAUSE the Supreme Court correctly answered the questions of law referred to it;
- (c) BECAUSE the Appellants were within the jurisdiction of the Admiralty of England whilst they were on board the 'Providence' on the high seas; 10
- (d) BECAUSE at all material times the Theft Act 1968 applied to each of the appellants;
- (e) BECAUSE alternatively to reason (d) hereover the provisions of the common law as to simple larceny applied to each of the appellants;
- (f) BECAUSE the District Court of Western Australia had jurisdiction to try the offences set out in the indictment. 20

R. Carlson
W. Parker

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