IN THE HIGH COURT OF AUSTRALIA No. S246 of 2015
SYDNEY REGISTRY

BETWEEN:

YAU MING MATTHEW MOK
Appellant

and

DIRECTOR OF PUBLIC PROSECUTIONS (NSW)
Respondent

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Part I: Publication

1. The appellant certifies that this submission is in a form suitable for publication on the internet.

Part II: Reply

2. The respondent's written submission[1] that the appellant's contention that, in this case, s. 310D *Crimes Act 1900 (NSW)* operated of its own force is entirely correct. In other words, and to use the language adopted by the respondent himself, s. 89(4) of *SEPA* acts as a "carve out provision". While the respondent is correct in saying that the lawfulness of the custody is determined by the law of the State in which the escape occurs[2], recognition of this fact is in no way any acknowledgement of the assertion that the very foundation for the lawfulness of the custody is the arrest warrant. In the absence of an arrest warrant, there could be (in this context) no lawful custody. There is a very real, geographical nexus between the act of escape and the State in which the arrest warrant was issued. Accordingly, it is quite appropriate to say that the appellant's escape from lawful custody threatened the peace, order, and good government of New South Wales[3], because, by escaping, he frustrated the execution of a warrant issued by a New South Wales judicial officer. His actions have effect in New South Wales, even if the physical acts wholly occur outside of New South Wales[4].

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3. The respondent contends that the effect of s. 89(4) is to create a surrogate offence. In order to do so, the respondent places considerable reliance upon the meaning ascribed to the word "applies", albeit as used in other contexts[5]. It is accepted that in respect of ss. 68 and 79 *Judiciary Act 1903 (C'th)*, s. 4 *Commonwealth Places (Application of Laws) Act 1978 (C'th)*, and s. 74(2A) *Trade Practices Act 1974 (C'th)*, it has been held that the word "applies" means the application of state law as a so-called "surrogate federal law". However, notably, each of those provisions relied upon the

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[1] *Cf.* respondent's written submissions at [28]-[32].
[2] *See* respondent's written submissions at [31].
[3] *See* s. 10B(3)(a) *Crimes Act 1900.*
[4] *See* s. 10C(2)(b) *Crimes Act 1900.*
[5] *See* respondent's written submissions at [30].

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importation of appropriate State law, because, otherwise, there would be a legal void. The Commonwealth legislature has chosen to fill that void by borrowing from State law, instead of itself enacting provisions to fill it. It is unremarkable that the law thereby created is Commonwealth law, since all of the provisions, which are relied upon by the respondent, deal with subjects peculiar to the Commonwealth, such as, in the case of s. 68 *Judiciary Act 1903 (C'th)*, the jurisdiction of State courts to deal with Commonwealth accused.

4. However, for the reasons advanced above[6], two bodies of law could, conceivably, criminalise the actions of the appellant, namely New South Wales law and Victorian law. The effect of s. 89(4) is not to create a third body of law, as the respondent contends. Rather, it operates to denote which law shall apply – in this case New South Wales law, to the exclusion of all other law, in this case, Victorian law. Because s. 89(4) operates not in a legal vacuum, but in a space where there are multiple laws potentially operating, it would be wrong to import, uncritically, a meaning, which had been assigned to a particular word, but in a wholly different context.

5. Even if s. 89(4) does create a surrogate, federal law premised on s. 310D *Crimes Act 1900 (NSW)*, nevertheless, for the reasons advanced in the appellant's original submissions, the element, requiring a person to be an "inmate", cannot be satisfied, merely because that person is a person to whom the provisions of the *Service and Execution of Process Act 1992 (C'th)* apply. Referring to ss. 81-90 *Service and Execution of Process Act 1992*, it has been said that, "such legislation does not expand the 'subject matter' as distinct from the 'territorial' jurisdiction of the State court". [7]

6. In relation to the notice of contention, it is submitted that the Victorian Magistrate was, relevantly, neither a "court" nor a "competent authority". In this respect, the Court of Appeal was quite right to say, "This appeal is not determined by a strained reading of whether the Victorian Magistrate was a 'court exercising criminal jurisdiction', or a 'competent authority'".[8]

7. When s. 89(4) provides that the "law in force in the place of issue of a warrant" applies, such "law" must include all law, whether statutory or common law, necessary to give meaning and content to the law of escape. In respect of New South Wales, such law would include Part 6A *Crimes Act 1900*, relevant portions of the *Crimes (Administration of Sentences) Act 1999*, the common law, and the *Interpretation Act 1987*. It is the submitted that the construction of the expression "court" is governed by s. 12 *Interpretation Act 1987*, which provides that references to New South Wales are to be implied in any act or instrument of that State. Accordingly, the references in s. 4 *Crimes (Administration of Sentences) Act 1999* to warrants, or orders, of "courts" are to be understood as warrants, or orders, of courts of New South Wales.

8. The respondent argues that if the *Interpretation Act* is used to construe the word "court", then it must be applied also to the construction of the expression "lawful custody".[9] In other words, the respondent contends that, on the appellant's argument,

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[6] At [1].
[7] *Lipohar v. The Queen* (1999) 200 CLR 485 at 514 [69] *per* Gaudron, Gummow and Hayne JJ., *citing with approval Flaherty v. Girgis* (1987) 162 CLR 574 at 598.
[8] *Mok v. DPP (NSW)* (2015) 294 FLR 432 at 444 [51].
[9] *See* respondent's submissions at [58].

"lawful custody" must be construed as "lawful custody in and of New South Wales". While one might readily speak of lawful custody in New South Wales, it is submitted one would not speak of lawful custody of New South Wales, in the sense of belonging to New South Wales[10]. It must be remembered that the *Interpretation Act* applies only insofar as the statutory language does not evince a contrary intention.[11] Because the limitation imposed by s. 12 would not apply also to the expression "lawful custody", it is submitted that the application of s. 12 to the expression "court" and "competent authority" would not lead to the absurdity suggested by the respondent.

9. However, even if one were completely to cast aside this important piece of legislation, it is nonetheless clear that, absent an extension of the meaning of the expression "court", such expression must mean a court in New South Wales. "It is a long recognised rule of statutory construction that a reference to courts, matters, things and persons in the legislation of a State is a reference to courts, matters, things and persons in that State."[12]

10. The definition of court, as set out in s. 3 *Crimes (Administration of Sentences) Act 1999,* further supports the appellant's submissions. "Court" is defined as:

> (a) the Supreme Court, the Court of Criminal Appeal, the Land and Environment Court, the Industrial Relations Commission, the District Court or the Local Court, or
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> (b) any other court that, or person who, exercises criminal jurisdiction...

11. It is submitted that the tethering of the expression "court" to bodies exercising "criminal jurisdiction" demonstrates further that the Melbourne Magistrates' Court is not a "court" for the purposes of the *Crimes (Administration of Sentences) Act 1999.* It is submitted that, logically, the words "exercises criminal jurisdiction" must mean that the Court is, in the particular instance, exercising criminal jurisdiction, not simply that the Court has the jurisdiction generally. Irrespective of that, it is submitted that the Melbourne Magistrates' Court was not exercising criminal jurisdiction. It was in no way involved in the process of the determination of guilt or otherwise of the appellant. Instead, it performed a purely administrative role in aid of the criminal process.[13]

12. Nor does the inclusion of the word "person" in subsection (b) undermine this conclusion, as the respondent contends. The respondent argues that a person is a "court" within the meaning of the *Crimes (Administration of Sentences) Act 1999* so long as that person "also exercise[s] criminal jurisdiction".[14] To take the respondent's argument to its natural extreme, any person would be a "court", as long as that person exercises criminal jurisdiction in some capacity, more or less contemporaneously. So,

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[10] *See, generally, R v. Lowe* (2003) 57 NSWLR 102 at 110 at [41]-[44] *per* Handley JA.
[11] Section 5(2) *Interpretation Act 1987 (NSW).*
[12] *Solomons v. District Court of New South Wales* (2002) 211 CLR 119 at 138 [37] *per* McHugh J., *citing with approval Seagg v. The King* (1932) 48 CLR 251 at 255 *per* Rich, Dixon, Evatt and McTiernan JJ., at 130 [9] *per* Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ. ("There is a 'general rule of construction' which would confine the State enactment to State proceedings and officers.").
[13] *Compare Pasini v United Mexican States* (2002) 209 CLR 246 at 254–255 (in determining eligibility to surrender, and in making consequential orders, the magistrate exercises administrative functions, not the judicial power of the Commonwealth).
[14] *See* respondent's written submissions at [49].

for example, a judge in his, or her, private, or leisure time, would constitute a "court" in those periods, so long as he or she exercises criminal jurisdiction during the day. Plainly, that cannot have been the intention of the legislature.

13. In any event, there is no basis for concluding that the order under s. 83(8)(b) was made by a "court", even putting the territorial issue to one side. Section 83(8) relevantly provides that, "Subject to subsections (10) and (14) and section 84, if the warrant or a copy of the warrant is produced, the magistrate must order..." The expression "magistrate" is defined by s. 3 as follows:

> "magistrate", except in sections 57 and 67, includes:
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> (a) a justice of the peace who has power to issue warrants under a law of the State in which the justice holds that office; and
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> (b) a person who is appointed under section 120 of the *Magistrates' Court Act 1989* of Victoria as a bail justice or is a bail justice because of holding a prescribed office within the meaning of section 121 of that Act.

14. In accordance with s. 57(6) *Magistrates' Court Act 1989 (Vic.)*, "Remand warrants may be issued by a bail justice." Therefore, in Victoria, the power under s. 83(3) *Service and Execution of Process Act 1992 (C'th)* may be exercised either by the Magistrates' Court or a bail justice. Because the power may be exercised by an individual person, as opposed to a court, it is plain that the power under s. 83(3) is conferred on the "magistrate" in his personal capacity. Therefore, Magistrate Bazzani, although undoubtedly a member of the Magistracy, was nonetheless acting in a personal capacity, rather than as the Magistrates' Court. Therefore, quite aside from the territorial restriction on the expression "court" in s. 4 *Crimes (Administration of Sentences) Act 1999*, no order was made by a court. For that same reason, the appellant was not an "inmate", within the meaning of s. 301A *Crimes Act 1900*.

15. Furthermore, it is submitted that neither Magistrate Bazzani, nor the Victorian Magistrates' Court, was acting as a "competent authority", within the meaning of s. 4 *Crimes (Administration of Sentences) Act 1999*. It has been said that "the expression 'competent authority' does not have a technical meaning at common law. Instead, the precise definition depends upon the words of the particular statute in question."[15]

16. It is submitted that the interpretation of the compound expression "competent authority" is guided by the first word "competent". In other words, the "authority" has to embody a power, or competency, to "commit[] a person to a correctional centre"[16]. It is submitted that such competence must derive from a statutory acceptance, under New South Wales law, of the burden, which emanates from the duties and responsibilities involved in consigning a person to custody[17]. There is no provision in New South Wales, which would confer upon an individual in Victoria, the power to

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[15] *Barnes v. Kuser* (2007) 179 A.Crim.R. 181 at 185 [25] *per* McKechnie J., *citing Stuart v. The Queen* (1974) 134 CLR 426 at 437 *per* Gibbs J

[16] *See* s. 4(1)(e) *Crimes (Administration of Sentences) Act 1999.*

[17] *See DPP v. Mok* (2014) 296 FLR 1 at 14 [65] *per* Rothman J., *quoting with approval* Australian Concise Oxford Dictionary (4th ed.)

commit a person to a correctional institution in New South Wales. Accordingly, a magistrate acting in accordance with s. 83(8) is not a "competent authority" for the purposes of s. 4(1)(e) *Crimes (Administration of Sentences) Act 1999;* and, therefore, the appellant in the present case was not an inmate, within the meaning of s. 301A *Crimes Act 1900.*

17. Furthermore, for the reasons already outlined in the appellant's principal submissions, the construction advanced by the appellant would not, as the respondent contends[18], render the s. 89(4) *SEPA* nugatory.

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18. Finally, it is noteworthy that the respondent concedes the appellant would not have been liable under s. 310D *Crimes Act 1900*, had he escaped within New South Wales[19]. This demonstrates how the respondent's interpretation would lead to an unwarranted extension of the New South Wales legislation.

19. The respondent seeks to justify such an extension on the basis of the differences in the wordings of the warrants, which have ostensibly resulted from differing views taken on the appellant's suitability for bail. The respondent justifies the differing terms of the *SEPA* order, from those of the warrant issued by Freeman DCJ, on the basis that
20 the appellant had been at large for 5 years, and had committed other offences. These facts led the respondent to conclude that, "it was appropriate for the Victorian Magistrate to require the appellant be conveyed to a correctional centre in NSW before being taken to a court to answer the matters that had originally given rise to the bench warrant".[20] However, the wording of the Freeman DCJ warrant had nothing to do with the appellant's suitability, or otherwise, for bail. The warrant was purely in the same terms as all bench warrants. Historically, such warrants have required, and continue to require, that the person arrested be brought before a judicial officer. Bench warrants do not commit a person to a correctional centre.

30 20. The respondent does not explain why it was "appropriate" for the appellant to be "committed" to a correctional centre, even though s. 83(8)(b) permitted the appellant's transfer to a specified place (such as a court) while in custody, i.e. bail refused. In addition, it is unclear how the appellant's commitment to a correctional centre is "appropriate", when he had been ordered to remain in custody; and the police officer has been ordered to take him before a Magistrate. In short, the differences in the terms of the order, and warrant do not explain why the Commonwealth would have an interest in expanding the reach of New South Wales criminal law beyond that envisaged by the New South Wales legislature.

40 Dated: 18 January 2015

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[18] *Cf.* respondent's written submissions at [57].
[19] *See* respondent's written submissions at [61].
[20] See respondent's written submissions at [63].