

HIGH COURT OF AUSTRALIA

GUMMOW J

KENNETH IAN O'MEARA

APPLICANT

AND

STEPHEN GRAHAM McTACKETT & ORS

RESPONDENTS

O'Meara v McTackett [2000] HCA 32
31 May 2000
S212/1999

ORDER

1. *Application dismissed.*
2. *Applicant to pay the costs of the first, second, third, fourth and eighth respondents.*
3. *No order as to costs in respect of the fifth, sixth and seventh respondents.*

Representation:

Applicant represented himself

M J Leeming for the first, second, third and fourth respondents (instructed by Australian Government Solicitor) and for the eighth respondent (instructed by Director of Public Prosecutions)

M G Sexton QC, Solicitor-General for the State of New South Wales for the fifth, sixth and seventh respondents (instructed by Crown Solicitor for the State of New South Wales)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

O'Meara v McTackett

Constitutional law (Cth) – Whether authorisation of a search warrant under s 3E of the *Crimes Act* 1914 (Cth) is in breach of s 71 of the Constitution – Whether s 29D of the *Crimes Act* 1914 (Cth) is beyond the legislative power of the Commonwealth Parliament – Whether the State laws authorising the Director of Public Prosecutions of New South Wales to issue indictments under s 10 of the *Criminal Procedure Act* 1986 (NSW) are inconsistent with s 7(2) of the *Australia Act* 1986 (NSW).

Practice and procedure – Jurisdiction invested in State Supreme Courts by the *Judiciary Act* 1903 (Cth) in matters involving interpretation of the Constitution – Relevance of considerations of fragmentation of criminal proceedings.

Constitution, ss 51(ii), 51(xxxix), 109.

Australia Act 1986 (Cth), ss 2, 3, 7(2).

Crimes Act 1914 (Cth), ss 3E, 29D.

Judiciary Act 1903 (Cth), ss 38, 39.

Criminal Procedure Act 1986 (NSW), s 10.

Director of Public Prosecutions Act 1986 (NSW).

1 GUMMOW J. This is an application by motion seeking an order under s 40 of the *Judiciary Act* 1903 (Cth) ("the Judiciary Act") for removal into this Court of part of a cause presently pending in the Common Law Division of the Supreme Court of New South Wales, file No 12390 of 1999 ("the Supreme Court proceeding"). Removal is sought in respect of so much of that pending cause as involves what is stated as the following questions:

1. that the authorisation of the search of the applicant's home and business premises on 23 September 1999, under the authority of a search warrant issued by a Chamber Magistrate under the provisions of the *Crimes Act* 1914 (Cth) ("the Crimes Act"), is invalid, in that it is in breach of s 71 of the Commonwealth of Australia *Constitution Act* ("the Constitution");
2. that the Crimes Act is invalid in that it is in breach of s 51 of the Constitution; and
3. that the attempt by the sixth respondent – the New South Wales Director of Public Prosecutions ("the Director") – to exercise the powers and functions of Her Majesty under the *Director of Public Prosecutions Act* 1986 (NSW) in respect of the indictment laid under the provisions of s 10 of the *Criminal Procedure Act* 1986 (NSW) are prohibited by s 7(2) of the *Australia Act* 1986 (Cth) ("the Australia Act") and s 109 of the Constitution.

The respondents are the Director, two other State officers, and four officers of the Commonwealth.

2 The affidavit in support annexes copies of an indictment dated 29 August 1997, signed on behalf of the Director and charging, first, that:

"[o]n 15 February, 1997 at Tahmoor in the State of New South Wales [the applicant] did cultivate prohibited plants, being a number of plants not less than the commercial quantity."

And charging further that, on that date at the same place, the applicant:

"did possess a firearm, namely a .22 calibre Jennings self loading pistol, without being licensed to do so by license or permit".

And charging, thirdly, that on that date and at that place, the applicant:

"did possess a firearm, namely a 12 gauge Mossberg repeating shotgun, without being licensed to do so by license or permit".

There is also annexed a search warrant issued in expressed reliance upon s 3E of the Crimes Act and copies of charge sheets indicating charges of contravention of s 29D of the Crimes Act allegedly by reason of the applicant having caused the

lodgment of a return of income in his name for the financial years ending 30 June 1995, 1996, 1997 and 1998, in which he claimed primary production business losses which he knew to be false, contrary to s 29D of the Crimes Act. Section 29D renders "[a] person who defrauds the Commonwealth or a public authority under the Commonwealth" guilty of an indictable offence.

3 In the Supreme Court proceeding, the applicant seeks various relief in respect of the search warrant, the indictment and the charges under the Crimes Act. The applicant submits to the contrary, but the Supreme Court of New South Wales has the jurisdiction under s 39 of the Judiciary Act to hear in that proceeding the various arguments which the applicant wishes to advance based on the Constitution. There is no matter which falls within any of the paragraphs of s 38 of that statute which confer jurisdiction exclusively upon this Court. It also would appear that all of these arguments may be put by the applicant by way of defence in the course of the various pending criminal proceedings against him in the State courts.

4 It has been said on various occasions that this Court is reluctant to make orders which fragment or, in this case, would further fragment, pending criminal process against the applicant. Another factor to be taken into account in deciding whether to make an order for removal under s 40 of the Judiciary Act is the apparent cogency or otherwise of the constitutional grounds that are advanced. As matters presently appear to me, there is substance in the grounds in opposition urged by the respondents. They are represented, as to the Commonwealth officers, and as to the State officers, by separate counsel. The applicant appears in person.

5 Returning to the three grounds in the notice of motion, the first concerned the search warrant. It is clearly established by various decisions in this Court that the power to issue such a warrant is not an exercise of judicial power. I refer, in particular, to *Grollo v Palmer*¹ and the earlier decision of *Coco v The Queen*².

6 The second point concerns the alleged invalidity of the Crimes Act. The relevant standing of the applicant is directed to the invalidity of s 29D in its operation in respect of the charges detailed in the annexed materials. The taxation power and the incidental power in s 51 of the Constitution indicate that there is a sound legislative basis for the enactment of s 29D in its present operation. The line of authority commences with *R v Kidman*³. The applicant

1 (1995) 184 CLR 348.

2 (1994) 179 CLR 427.

3 (1915) 20 CLR 425.

3.

refers, amongst other things, to passages in *The Tasmanian Dam Case*⁴. However, these merely restate the general propositions which indicate that there is no unconfined power in the Parliament of the Commonwealth to legislate a general criminal law.

7 The third point directs attention to the construction and operation of s 7 of the Australia Act. The scope and purpose of that statute and its constitutional foundation are explained in the joint judgment of three members of the Court in *Sue v Hill*⁵ and also in the judgment in that case of Gaudron J. Section 7 states:

"(1) Her Majesty's representative in each State shall be the Governor.

(2) Subject to subsections (3) and (4) below, all powers and functions of Her Majesty in respect of a State are exercisable only by the Governor of the State.

(3) Subsection (2) above does not apply in relation to the power to appoint, and the power to terminate the appointment of, the Governor of a State.

(4) While Her Majesty is personally present in a State, Her Majesty is not precluded from exercising any of Her powers and functions in respect of the State that are the subject of subsection (2) above.

(5) The advice to Her Majesty in relation to the exercise of the powers and functions of Her Majesty in respect of a State shall be tendered by the Premier of the State."

8 Section 7 appears to be directed to the question of the division of the exercise in the respective States of the regal functions and prerogatives between the Sovereign personally and the State Governors. Once the section is understood in that way there is no foundation for an argument based upon s 109 of the Constitution to render invalid as inconsistent provisions of the New South Wales statutes involved here.

9 The relevant powers being exercised here by the Director were statutory powers founded in the exercise by the New South Wales Parliament of its legislative power. The legislative power of the State Parliament is underlined and reinforced by the provisions of ss 2 and 3 of the Australia Act.

4 *The Commonwealth v Tasmania* (1983) 158 CLR 1 at 204, 322-323.

5 (1999) 73 ALJR 1016; 163 ALR 648.

10 Accordingly, the arguments which the applicant would seek to advance on the constitutional issues detailed in his submissions appear to me, at this stage, to have serious difficulties in the path of their acceptance. I am not expressing any concluded view since there is before the Court merely an application for removal under s 40 of the Judiciary Act. However, in addition, what is important is the potential for further fragmentation of the criminal process and the presence of jurisdiction in the Supreme Court of New South Wales to deal with these matters in the pending litigation in that Court.

11 Accordingly, the application for removal into this Court is refused. I would order that the applicant pay the costs of the first, second, third, fourth and eighth respondents. I would make no order as to costs of the fifth, sixth and seventh respondents.