

HIGH COURT OF AUSTRALIA

GAUDRON J

MARK RAY HAYDON

APPLICANT

AND

WAYNE CHIVELL

RESPONDENT

Haydon v Chivell [1999] HCA 39

Date of Order: 12 August 1999

Date of Publication of Reasons: 20 August 1999

A20/1999

ORDER

Application for interim injunctions pending an application for special leave to appeal from the orders of the Full Court of the Supreme Court of South Australia dated 10 August 1999 dismissed.

On appeal from the Supreme Court of South Australia

Representation:

M E Shaw QC with C S L Abbott for the applicant (instructed by Lempriere Abbott McLeod)

M D Walter, Crown Solicitor for the State of South Australia for the respondent and intervening on behalf of the Attorney-General for the State of South Australia (instructed by the Crown Solicitor's Office for the State of South Australia)

P J L Rofe QC, Director of Public Prosecutions (South Australia) intervening (instructed by the Office of the Director of Public Prosecutions (South Australia))

D F Stratford intervening on behalf of certain family members of the deceased (instructed by Rowell Forrest)

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

1 GAUDRON J. On 12 August 1999, in Adelaide, I dismissed an application by Mark Ray Haydon ("the applicant") seeking interim injunctions pending the hearing and determination of an application for special leave to appeal from a decision and orders of the Full Court of the Supreme Court of South Australia. The following are my reasons.

2 The applicant is seeking special leave to appeal from a decision of the Full Court dismissing an appeal from a decision of Lander J. His Honour dismissed an application for orders which, in general terms, would have prevented the burial or cremation of certain deceased persons. The applicant has been charged with their murder. In this Court, as before Lander J and the Full Court, the applicant asserted a right to have independent post-mortem examinations of the bodies conducted on his behalf.

3 The interim orders which the applicant sought in this Court were:

1. An order directing the respondent, who is the State Coroner for South Australia ("the Coroner"), to retain possession, custody and control of the body of Ray Allan Peter Davies;
2. An order restraining Blackwell Funeral Directors from disposing of the body of Frederick Robert Brooks; and
3. An order restraining Northwest Funerals from disposing of the body of Suzanne Phyllis Allen.

It should be noted that neither Blackwell Funeral Directors nor Northwest Funerals was joined as a party to the proceedings in this Court. However, that is a matter which can be put to one side. The next of kin of the deceased persons intervened in the proceedings and, if the applicant had otherwise been entitled to the relief claimed, appropriate orders could have been directed to them.

4 The application had its genesis in the finding of a number of bodies in suspicious circumstances. The Coroner took possession or control of those bodies and directed post-mortem examinations. Presumably, that direction was given pursuant to s 13(1) of the *Coroners Act* 1975 (SA) ("the Act"). That sub-section confers various powers, including a power to direct a post-mortem examination, which may be exercised where "the coroner believes on reasonable grounds that it is necessary [to exercise the powers in question] for the purposes of an inquest or the determination of whether or not an inquest is necessary or desirable".

5 No inquest has yet been held by reason that, before it was begun, the applicant was charged with the murder of the various persons concerned. In this regard, s 26(1) of the Act provides:

2.

" A coroner must not proceed with an inquest where a person has been charged in criminal proceedings with causing the event that is, or is to be, the subject of an inquest, unless the Attorney-General directs the coroner to do so."

6 Although no inquest has been held, the Coroner has authorised the disposal of the remains of all but one of the deceased persons. That authorisation was made under s 30 of the Act which provides:

" The coroner may issue an authorisation for the disposal of human remains where the coroner considers the body of a dead person is not further required for the purposes of an inquest into the death of that person."

7 The proceedings before Lander J were directed to quashing the Coroner's authorisation under s 30 of the Act, it being contended that such authorisation was given in circumstances in which the applicant was denied procedural fairness. In particular, it was contended that the applicant was denied an opportunity to request the Coroner's consent to his having further post-mortem examinations conducted on his behalf.

8 It is well settled that this Court has power to make interim orders pending the grant of special leave to appeal if that is necessary to preserve the subject-matter of an appeal¹ or, which is the same thing, to prevent appellate proceedings from being rendered futile. Given the nature of the applicant's claim, this Court clearly has power to make the orders sought. However, interim orders are only made if the applicant has a substantial prospect of obtaining the grant of special leave to

1 See *Jennings Construction Ltd v Burgundy Royale Investments Pty Ltd [No 1]* (1986) 161 CLR 681 at 683 per Brennan J. See also *Tait v The Queen* (1962) 108 CLR 620 at 623-624 (execution of prisoner stayed pending disposal of application for special leave to appeal); *Re Marks and Federated Ironworkers' Association of Australia; Ex parte The Australian Building Construction Employees' and Builders Labourers' Federation* (1981) 55 ALJR 395 at 396 per Mason J; 34 ALR 208 at 211; *Chamberlain v The Queen [No 1]* (1983) 153 CLR 514 at 518 per Brennan J; *Narain v Director of Public Prosecutions* (1987) 61 ALJR 317 at 318 per Brennan J; 71 ALR 248 at 248; *Elspan International Ltd v Aerospatiale Holdings Ltd* (1992) 67 ALJR 177 at 178 per Gaudron J; *Elliott v Seymour* (1993) 68 ALJR 173 at 175-176 per Gaudron J; 119 ALR 1 at 4; *Re Duke Group Ltd (In Liq) and Corporations Law of South Australia; Gerah Imports Pty Ltd v The Duke Group Ltd (In Liq)* (1994) 68 ALJR 196 at 197 per Dawson J; 119 ALR 401 at 403; *Olex Focas Pty Ltd v Skodaexport Co Ltd* (1996) 70 ALJR 983 at 983 per Dawson J; *Pelechowski v Registrar, Court of Appeal (NSW)* (1998) 72 ALJR 711 at 712 per Gummow J (bail granted to prevent substantial completion of sentence pending disposal of application for special leave to appeal).

appeal². And that issue necessitates a consideration of the applicant's asserted right to be heard by the Coroner before authorising the disposal of the bodies in question.

9 It may be accepted that, were an inquest being conducted, the Coroner is bound to observe the rules of procedural fairness³. However, that is not to say that the same is true of a decision to authorise the disposal of bodies in the possession or under the control of the Coroner. The power to authorise that course is independent of the coronial power to hold an inquest for it is a power that may fall for exercise without an inquest ever being held. That being so, the consideration that the rules of procedural fairness apply to the conduct of an inquest does not dictate the consequence that those rules also apply to a Coroner's decision to authorise the disposal of a body. Rather, as the Full Court held, a person is only entitled to procedural fairness in relation to a decision of that kind if he or she has some right, interest or legitimate expectation which is affected by the decision.

10 It was not claimed that anything said or done by the Coroner gave rise to any legitimate expectation on the part of the applicant. Nor was it claimed that the applicant was entitled to possession of any of the bodies in question or that he was a person who might authorise a post-mortem examination pursuant to Pt IV of the *Transplantation and Anatomy Act* 1983 (SA). Rather, his claimed right, interest or expectation was said to be an aspect of his right to a fair trial. And in this regard it was contended that the Full Court erred in failing to exercise either its inherent or supervisory jurisdiction "to make such orders as were necessary to preserve evidence relevant to the fair trial of the Applicant".

11 It may be accepted that an accused person's right to a fair trial may require a trial judge to take steps in addition to those ordinarily required by law, including to stay proceedings, if those steps are necessary to prevent the perceptible risk of

2 See *Jennings Construction Ltd v Burgundy Royale Investments Pty Ltd [No 1]* (1986) 161 CLR 681 at 685 per Brennan J. See also *Narain v Director of Public Prosecutions* (1987) 61 ALJR 317 at 318 per Brennan J; 71 ALR 248 at 249; *Elspan International Ltd v Aerospatiale Holdings Ltd* (1992) 67 ALJR 177 at 178 per Gaudron J; *Elliott v Seymour* (1993) 68 ALJR 173 at 176 per Gaudron J; 119 ALR 1 at 4-5 ("substantial prospect" or "not insubstantial prospect" both mean "a probability of ultimate success"); *Re Duke Group Ltd (In Liq) and Corporations Law of South Australia*; *Gerah Imports Pty Ltd v The Duke Group Ltd (In Liq)* (1994) 68 ALJR 196 at 197 per Dawson J; 119 ALR 401 at 403; *Olex Focas Pty Ltd v Skodaexport Co Ltd* (1996) 70 ALJR 983 at 983 per Dawson J.

3 See *Annetts v McCann* (1990) 170 CLR 596 at 598-603 per Mason CJ, Deane and McHugh JJ, 608-610 per Brennan J, 617 per Toohey J.

a miscarriage of justice⁴. However, this case does not call for any detailed analysis of the right to a fair trial. Nor does it require a consideration of a court's powers to ensure a fair trial even though it may be doubted that a court's powers in that regard extend to the point contemplated by the argument for the applicant.

- 12 The reason why it is unnecessary to consider the nature of an accused person's right to a fair trial or the extent of a court's powers in that regard is because the applicant has pointed to no circumstance or feature of the case which would suggest that further post-mortem examinations are necessary for a fair trial, as distinct from entailing some possible advantage to him. Nor has he pointed to anything which would suggest it is necessary to preserve the remains of the deceased persons pending his trial. In these circumstances, there is, in my view, no error of principle to be ascertained in the decision of the Full Court which would warrant the grant of special leave to appeal and no reasonable prospect that special leave will be granted. For that reason the application was dismissed.

4 See *Dietrich v The Queen* (1992) 177 CLR 292 at 298 per Mason CJ and McHugh J, 327 per Deane J, 356-358 per Toohey J, 362-363 per Gaudron J. See also *Barton v The Queen* (1980) 147 CLR 75 at 96 per Gibbs ACJ and Mason J (with whom Aickin J concurred at 109), 103 per Stephen J, 107 per Murphy J; *Jago v District Court (NSW)* (1989) 168 CLR 23 at 31 per Mason CJ, 58 per Deane J, 71-72 per Toohey J, 77-78 per Gaudron J.