

IN THE PRIVY COUNCIL

No. 34 of 1975

ON APPEAL

FROM THE SUPREME COURT OF WESTERN AUSTRALIA

B E T W E E N:

SANTO OTERI and GAETANO OTERI

Appellants

-and-

THE QUEEN

RespondentCASE FOR THE APPELLANTS

- 10 1. This is an appeal by leave of the Supreme Court of Western Australia granted by reason of the great general and public importance of the matter. Record
P.15 -17
2. The appellants respectfully submit that leave to appeal was properly granted but in case the Judicial Committee should hold the contrary view, the Appellants have applied for special leave to appeal. -
- 20 3. The appeal is from a decision of the Full Court of the Supreme Court of Western Australia sitting as the Court of Criminal Appeal on the 6th day of December 1974 on points of law reserved for the opinion of the Court by the District Court of Western Australia (O'Connor J.), under s.49 of the District Court of Western Australia Act 1969-1972 which reads as follows:- P5-6
P2-5
- 30 "49. 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."
4. The appellants had been charged in the District Court on an indictment to the effect that in January 1974 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, they stole two crayfish pots and other articles. P1 - 2

Record

p3 l.9-21

5. At the commencement of the trial before O'Connor J. the appellants demurred on the ground that the indictment did not disclose offences cognizable to the Court and pleaded that the Court had no jurisdiction.

p2 - 5

6. The Judge then referred the points of law to the Full Court setting out in his reference admitted facts to the following effect:-

p3 l.24-37

(a) Each of the appellants and the wife of the first appellant became Australian citizens by naturalization pursuant to the Australian Citizenship Act 1948-1973 before the alleged offence and they retain that citizenship.

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p3 l.40

to

p4 l.8

(b) The alleged offences occurred on board the vessel "Providence" on the high seas some 22 miles from the mainland of Western Australia.

p4 l 9-25

(c) The vessel "Providence" was owned by the first appellant and his wife and is a fishing vessel of some 24.6 gross tons. It was operating out of Fremantle and was the subject of a boat licence granted to the owners pursuant to the Western Australian Marine Act 1948-1973 and a fishing boat licence issued under the Western Australian Fisheries Act Regulations but the "Providence" was not otherwise registered whether in the United Kingdom or elsewhere.

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7. The effect of the admitted facts is that:-

(i) The appellants were at all material times British subjects under the British Nationality Act 1948 (11 and 12 Geo.VI.c.56);

(ii) The vessel "Providence" was not registered under the Merchant Shipping Act 1894 (57 & 58 Vict. c.60).

p5 - 6

8. The Supreme Court (Virtue A.C.J. and Burt and Wallace J.J.) answered the questions raised in the reference to the following effect:

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p6 1 7-10

(a) The indictment does disclose an offence under the laws of Western Australia or otherwise triable in Western Australia

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- (b) The District Court of Western Australia has jurisdiction to try the accused for the offence. p6 1.11-14
- (c) The matter is not within the ordinary jurisdiction of the District Court but within the admiralty jurisdiction of the Court. p6 1 15-23
- 10 9. The respondent contended in the Supreme Court that each of the alleged offences was cognizable by the Theft Act 1968 (1968 c.68) of the United Kingdom and s.378 of the Criminal Code of Western Australia and also the common law crime of larceny. p13 l. 15-19
10. It was later conceded by the respondent that because s.12 of the Criminal Code restricted the Code to acts or omissions in the State of Western Australia, no basis existed for the application of the Criminal Code to the alleged offences. p 10 1.1-4
- 20 11. The Supreme Court made no finding as to the Criminal Code or the common law crime of larceny but unanimously stated its opinion that the Theft Act 1968 applied to the alleged offences and that the District Court had jurisdiction to try the offences. p.6 1.4-23
12. The appellants respectfully submit that the Supreme Court erred in law in finding that the "Providence" was a British ship under the Merchant Shipping Act 1894, notwithstanding that it was not registered under the said Act. p.11 1.8-24
p.14 1.22-38
- 30 13. The Appellants respectfully submit that the criminal jurisdiction in Admiralty does not apply to offences alleged to have been committed on the High seas by British subjects on a ship which is not a British ship, in the circumstances of this case.
14. The appellants respectfully submit that the Theft Act 1968 is a local Act for England Wales and does not apply to the alleged offences on the high seas within the area bounded by the Continental Shelf of Australia. p.10 1.19-35
p.14 1.39-42
- 40 15. The appellants respectfully submit that the Supreme Court erred in applying s.686 of the Merchant Shipping Act 1894 (57 & 58 Vict.c.60) and the Offences at Sea Act 1799 (39 Geo.III c.37) and the Admiralty Offences (Colonial) Act 1849 (12 & 13 Vict.696) as the basis of the jurisdiction of the District Court in respect of the alleged offences. p10 1.19-27
p11 1.22-37
p14 1.39 to
p15 1.7

16. The appellants respectfully submit that the judgment of the Supreme Court of Western Australia sitting as the Court of Appeal was wrong and ought to be reversed and that the questions answered by the Supreme Court should have been answered:-

- (a) no
- (b) no
- (c) unnecessary to answer

17. REASONS:-

- (i) BECAUSE s.1 of the Merchant Shipping Act 1894 merely creates the eligibility for a vessel to be a British ship and under s.2 the "Providence", not being registered, is not recognised as or deemed to be a British ship and s.72 does not on its proper construction apply to the circumstances of this case. 10
- (ii) BECAUSE the Theft Act 1968 is a local Act for England and Wales and does not apply to the alleged offences on the high seas in general or the area bounded by the Continental Shelf of Australia in particular in the absence of a provision in the Theft Act to this effect. 20
- (iii) BECAUSE the Offences at Sea Act 1799 does not itself create offences but only jurisdiction.
- (iv) BECAUSE s.686 of the Merchant Shipping Act 1894 gives jurisdiction to Courts only in respect of offences against the Merchant Shipping Act. 30
- (v) BECAUSE the Offences at Sea Act 1799, the Admiralty Offences (Colonial) Act 1849, and s.686 of the Merchant Shipping Act 1894 do not apply in the case of offences created by Act of Parliament passed after 1799, 1849 and 1894 respectively.

COLLISON

COUNSEL

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