Privy Council Appeal No. 34 of 1975

Santo Oteri and Gaetano Oteri – – – – – *Appellants*

v.

The Queen – – – – – – – – *Respondent*

FROM

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

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 4TH OCTOBER 1976

Present at the Hearing:

LORD DIPLOCK

VISCOUNT DILHORNE

LORD HAILSHAM OF ST. MARYLEBONE

LORD EDMUND-DAVIES

LORD FRASER OF TULLYBELTON

[*Delivered by* LORD DIPLOCK]

The appellants Santo and Gaetano Oteri were charged in the District Court of Western Australia with two offences of having stolen crayfish pots and tackle "on the vessel 'Providence' on the high seas approximately twenty-two miles from the coast of Australia within the jurisdiction of the Admiralty of England". Both appellants are Australian citizens by naturalisation. So is Santo Oteri's wife. All three usually reside in Fremantle. The "Providence" is a powered fishing vessel of some 24·6 gross tons. She is owned by Santo Oteri and his wife and normally operates out of Fremantle. She is the subject of a boat licence issued to her owners under Division 1 of Part VIII of the Western Australian Marine Act, 1948–1973, and a Fishing Boat Licence issued pursuant to Regulations made under the Fisheries Act, 1905–1973; but she is not registered as a British ship under section 2 of the Merchant Shipping Act 1894 (Imp.) in Fremantle or at any other port in Australia or the United Kingdom.

Upon arraignment before the District Court the appellants demurred to the indictment upon the grounds (1) that no offence was disclosed, because neither the criminal law of Western Australia nor that of the United Kingdom was in force at the place where the offences were alleged to have been committed and (2) in any event the District Court of Western Australia had no jurisdiction to try an offence committed in the place alleged.

The District Court Judge acting pursuant to section 49 of the District Court of Western Australia Act 1969–1972 reserved for the consideration of the Full Court of the Supreme Court of Western Australia the following points of law:

In respect of each count in the indictment:

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

(*b*) If the answer to question (*a*) is " Yes " has the District Court of Western Australia jurisdiction to try the accused for the offence?

(*c*) If the answer to question (*b*) is " Yes ", is the matter—

(i) within the ordinary jurisdiction of the Court

(ii) within the Admiralty jurisdiction of the Court

(iii) otherwise cognisable by the Court?

The Full Court by an Order of 6 December 1974 answered questions (*a*) and (*b*): " Yes "; and in answer to question (*c*) said that the offences were within the Admiralty jurisdiction of the District Court.

The appellants applied to the Full Court for leave to appeal from this decision to Her Majesty in Council. The application was sought to be founded on Rule 2 (*b*) of the Order in Council regulating appeals from the Supreme Court of Western Australia to His Majesty in Council (S.R. & O. 1909 No. 760). It was resisted on behalf of the prosecution on the ground that the Order made by the Full Court on the reference was not a decision of the Court within the meaning of the Order in Council but was a mere advisory opinion from which no appeal would lie. This contention was rightly rejected by the Full Court. They granted leave to appeal, and expressed their view that the subject was one of great general and public importance " upon which the opinion of the Judicial Committee may properly be considered to be of very great value and importance to this country and also possibly elsewhere ".

Unfortunately in concentrating their argument upon whether or not the order of the Full Court of 6 December 1974 was an advisory opinion only, Counsel for both parties had overlooked the fact that the matter in which the order was made was a criminal matter and for that reason fell outside Rule 2 (*b*) of the Order in Council—as had been decided by this Board in *Chung Chuck v. The King* [1930] A.C. 244, under an identical provision in the British Columbia Order in Council of 1911. An appeal to Her Majesty in Council from an order or decision of the Full Court in a criminal matter lies only with the special leave of Her Majesty granted upon the advice of the Judicial Committee itself. The Full Court itself has no power to grant leave.

The procedural defect has, however, been cured by the appellants' lodging a petition to Her Majesty in Council for special leave to appeal from the order of the Full Court of 6 December 1974. Although it would not normally be in accordance with the practice of the Board to grant special leave to appeal in a criminal matter from the Supreme Court of a State of Australia, their Lordships have taken into account in the instant case the fact that the questions of law that it raises are common to all the States and Territories of Australia, and they have given weight to the strongly expressed desire of the Full Court itself that those questions should be considered by the Judicial Committee. Accordingly they humbly advised Her Majesty that special leave to appeal should be granted, and an Order in Council granting such special leave was made on the 23rd July 1976.

The legislative power of the Commonwealth of Australia does not extend to criminal law. That lies within the competence of the States. It is conceded by the Solicitor-General on behalf of the Crown that the criminal law of Western Australia does not extend beyond the territorial boundaries of the State and accordingly was not applicable in the place, twenty-two miles from the coast, where the offence was alleged to have been committed. He contends that the law applicable was the criminal law of England and that the offence was properly charged under section 1 of the Theft Act 1968 (Imp.).

It may at first sight seem surprising that despite the passing of the Statute of Westminster, 1931, and the creation of separate Australian citizenship by the British Nationality Act 1948 (Imp.) and the Australian Citizenship Act, 1948–1973, two naturalised Australian citizens whose home was in Fremantle should find themselves subject to English criminal law upon leaving that port to fish within a few miles of the coast in a vessel owned by Australian citizens; or, put in another way, that Parliament in the United Kingdom when it passes a statute which creates a new criminal offence in English law is also legislating for those Australian passengers who cross Bass Strait by ship from Melbourne to Tasmania.

In the submission of the Solicitor-General, however, the explanation of this apparent oddity is simple. It depends upon four propositions: (1) "The Providence" was a British ship; (2) the criminal law of England extends to all British ships; (3) offences which are committed on British ships are within the criminal jurisdiction of the Admiralty; (4) in Western Australia the District Court of Western Australia exercises the criminal jurisdiction of the Admiralty.

In the opinion of their Lordships, which accords with that expressed by the Full Court, each of these propositions is correct.

(1) By the law of the sea administered by the Courts of Admiralty as far back as the records go, a ship has been a British (before the Act of Union an English) ship if and only if she is owned by persons, natural or corporate, who are British (formerly English) subjects. Section 1 of the Merchant Shipping Act 1894 (Imp.), which is still in force in Western Australia, takes this for granted. It sets out the qualifications which the owners must possess if a ship is to be a British ship. The relevant qualification in the instant case is "British subjects", an expression which since the passing of the British Nationality Act 1948, section 1, includes persons who are Australian citizens by naturalisation. Section 2 of the Merchant Shipping Act 1894 imposes an obligation to register in the appropriate register of merchant shipping (of which there is one in Fremantle) every British ship, unless it falls within an exempted category. If it is not registered it is not recognised as a British ship; but non-recognition does not deprive the ship of her British nationality: by section 72 it only serves to deprive the unregistered ship of benefits, privileges, advantages and protection usually enjoyed by British ships. So far as concerns offences committed on board the ship or by persons belonging to her, she is to be dealt with in exactly the same way as if she were recognised. The "Providence" was wholly-owned by British subjects: she was accordingly a British ship and, although unregistered, is to be treated as a British ship so far as regards the punishment of offences committed on her.

(2) Again it is trite and ancient law that the criminal law of England extends to British ships upon the "high seas"—an expression which in the context of Admiralty jurisdiction includes in addition to the open sea all waters below low-water mark where great ships can go. See *R. v. Liverpool Justices ex parte Molyneux* [1972] 2 Q.B. 384 and the cases there

cited. The explanation sometimes given of this extension of the applicability of English law that "an English ship may be considered as a floating island" (*see Forbes v. Cochrane* (1824) 2 B. & C. 448 at p. 464 per Holroyd J.) should, however, be understood metaphorically rather than literally. A British ship is not accurately described in law as part of the United Kingdom (*R. v. Gordon-Finlayson* [1941] 1 K.B. 171 at pp. 178/9). A more acceptable rationalisation juristically is that at common law a British ship fell under the protection of the sovereign; those on board her were within the King's peace and subject to the criminal law by which the King's peace was preserved. However this may be, the applicability of English law to "treasons, felonyes, robberies, murders and confederacies . . . committed upon the sea" was recognised by a statute of 1536, An Acte for the punysshement of Pyrotes and Robbers of the Sea. The Offences at Sea Act 1799 was but expository of the common law in providing

> "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."

This is the only part of the Act of 1799 which was left unrepealed by the Criminal Law Act 1967 (Imp.). It is still in force in Western Australia. It is, in their Lordships' view, ambulatory in its effect, with the consequence that when a new offence in English law is created by a statute of the United Kingdom Parliament it *ipso facto* becomes an offence if it is committed on a British ship unless the extension of the statute to British ships is excluded by express words or by necessary implication. Such an implication cannot, in their Lordships' view, be drawn from the fact that the Theft Act 1968 (Imp.) does not apply to Scotland or Northern Ireland. As with Australia, there is not a single criminal law that is common to the whole of the United Kingdom; and it has always been the criminal law of England that was applied to persons on British ships within the jurisdiction of the Admiralty.

Accordingly in their Lordships' view the Theft Act 1968 (Imp.) applied to the appellants when they were on board the "Providence" and that vessel was on the high seas. That this should be so involves no novel concept in Australian jurisprudence. In *William Holyman & Sons v. Eyles* [1947] Tas. S.R. 11 Morris C. J., in a judgment which sets out the history of the law upon this topic lucidly and succinctly, treated the Protection of Animals Act 1911 (Imp.) and not the Tasmanian Cruelty to Animals Prevention Act, 1925, as applicable to an offence of cruelty to animals on board a ship owned by a company incorporated in Tasmania while it was crossing Bass Strait.

(3) In discussing the first two propositions their Lordships have already said enough to indicate their concurrence with the view of the Full Court that all offences committed on board British ships on the high seas were within the criminal jurisdiction of the Admiralty—though in the United Kingdom the Admiralty criminal jurisdiction during the course of the nineteenth century became exercisable through the ordinary criminal courts.

(4) In Western Australia, as elsewhere in Australia, the exercise of the jurisdiction is regulated by the Admiralty Offences (Colonial) Act 1849. The effect of section 1 is to empower the courts of criminal justice in Western Australia to try all offences committed within the jurisdiction of the Admiralty upon the high seas. The effect of the Courts (Colonial) Jurisdiction Act 1874 is to supplement this as respects punishment, by

providing that in the case of conviction for an offence on the high seas, the punishment shall be the same as if the offence had been committed within the limits of Western Australia or if the offence is not punishable under the law of Western Australia, to award such punishment as would " 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 ".

Their Lordships have done little more than to reiterate the reasons that were given in Full Court by Burt J. and Wallace J. and agreed to by Virtue A. C. J. for answering the questions in the manner indicated. Their Lordships are in full agreement with the Full Court in the answers that they have given to the questions. In their view the indictment discloses an offence against English law for which the District Court of Western Australia has jurisdiction to try the accused as being a matter within the Admiralty jurisdiction of the Court. They will humbly advise Her Majesty that the appeal be dismissed.

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In the Privy Council

SANTO OTERI AND GAETANO OTERI

v.

THE QUEEN

DELIVERED BY
LORD DIPLOCK

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