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Commissioner A. James Vic Bar

MARITIME LAW ASSOCIATION OF AUSTRALIA

CRIME AT SEA

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1. On 4th and 21st October 1976 the Privy Council and High Court of Australia respectively handed down reasons for advice and a decision relating to the applicability of British statute law on board Australian ships. The statutes in question were the Theft Act 1968 (UK) and the Merchant Shipping (Liability of Shipowners and Others) Act 1958 (UK). Neither Act was expressed in terms to apply to Australia or Australian ships. The Privy Council held that the former Act applies on board Australian ships on the 'high seas'. The High Court of Australia held that the latter Act does not. It will be part of the purpose of my discussion to examine these two decisions and see how far, if at all, they can be reconciled.

2. The problem is not to be resolved simply by reference to s. 4 of the Statute of Westminister 1931:

> 'No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to a Dominion as part of the law of that Dominion, unless it is expressly declared in that Act that that Dominion has requested, and consented to, the enactment thereof.'

As Mason J. pointed out in Bistricic v. Rokov (1976) 11 ALR 129, 131 this must be read with s. 9(2)

> 'Nothing in this Act shall be deemed to require the concurrence of the Parliament or Government of the Commonwealth of Australia in any law made by the Parliament of the United Kingdom with respect to any

> matter within the authority of the States of Australia, not being a matter within the authority of the Parliament or Government of the Commonwealth of Australia, in any case where it would have been in accordance with the constitutional practice existing before the commencement of this Act that the Parliament of the United Kingdom should make that law without such concurrence.'

3. Nor can the problem be resolved by simple reference to territorial boundaries. In Croft v. Dunphy [1933] AC 156, 162 the Privy Council said

> 'It may be accepted as a general principle that states can legislate effectively only for their own territories. To what distance seaward the territory of a state is to be taken as extending is a question of international law upon which their Lordships do not deem it necessary or proper to pronounce. But whatever be the limits of territorial waters in the international sense, it has long been recognized that for certain purposes, notably those of police, revenue, public health and fisheries, a state may enact laws affecting the seas surrounding its coasts to a distance seaward which exceeds the ordinary limits of its territory.

This was, of course, a Canadian appeal, but the principles enunciated clearly apply to Australia.

4. The question whether statute law applies on the high seas and, if so, which statutes are applicable has been considered several times in recent years by the High Court and Privy Council. Many of these cases have been criminal cases. The issues involved are:

(a) Legislative competence of Commonwealth Parliament, State Parliaments and U.K. Parliament.

(b) Applicability of common law.

(c) Jurisdiction of Australian Courts.

In the present paper I summarize the facts and decision in some of these cases. In my discussion, I shall try

to set out the general principles that seem to follow.

5. R. V. Bull and Others (1974) 131 CLR 203.

Amongst the several questions that arose in this case, two are important for the purposes of this paper

(a) The applicability of criminal sanctions under the Commonwealth Customs Act 1901 to crimes committed at sea but within three miles of the coast; and

(b) whether the Supreme Court of the Northern Territory has jurisdiction to hear and determine such charges and, if so, whether that jurisdiction is ordinary or admiralty jurisdiction.

The facts of this case were briefly as follows. In March, 1973 the vessel 'Mariana' approached within 3 miles of the coast of the Northern Territory carrying, inter alia, a substantial cargo of cannabis. A launch carrying Customs officers and a helicopter owned by the Australian Army was sent to intercept it. On the approach of the launch and the helicopter, the cannabis was thrown overboard. The accused were charged with and convicted of

(a) importing cannabis into Australia (s. 233B(1)(b));

(b) having in their possession cannabis on board a ship (s. 233B(1)(a));

(c) assembling for the purpose of preventing the seizure of a prohibited import, namely, cannabis (s. 231(1)(c)).

The importation was said to have occurred when the vessel passed within the three mile limit. The possession relied on was possession within the three mile limit.

Similarly, the alleged assembly had also taken place within the three mile limit.

6. Following the trial of the action and the finding of the jury, a case was stated for the Full High Court. So far as relevant, the questions posed and answers given were as follows:

(a) Does the Supreme Court of the Northern Territory have jurisdiction to hear and determine the charges contained in the indictment if the offences were committed between low water mark and the three mile limit?

Answer: Yes.

No answer was given as to the jurisdiction of the Supreme Court of the Northern Territory outside the three-mile limit.

(b) If the Supreme Court of Northern Territory has jurisdiction, is the matter within the ordinary jurisdiction of the Court or can the Court only hear and determine the charges by exercising jurisdiction in Admiralty?

Answer: Ordinary jurisdiction.

(c) It was further held that the Customs Act 1901-1971 could apply to offences committed at sea within the three-mile limit, but no answer was given in respect of waters beyond the three-mile limit. It was further held that the voluntary bringing of prohibited imports within the three-mile limit did not, in itself, amount to importation of those goods.

7. Thus, the decision in this case is of no assistance with respect to crimes committed at sea beyond the

three-mile limit. Within the three-mile limit, it is clear that the Commonwealth Parliament can enact valid criminal legislation (provided, of course, that the subject matter is within its legislative competence). Further, the Supreme Court of the Northern Territory has jurisdiction (in its ordinary jurisdiction) to hear and determine charges brought under such an enactment. The views of the Court were by no means uniform and it is necessary to examine the individual judgments.

8. Barwick C.J. pointed out that the 'three mile limit' did not mark a territorial boundary

> 'It describes an area of the high seas in which by international comity the littoral nation state may exercise control in furtherance of its defence and its domestic welfare. In that respect, that area of the high seas may be said to be within the dominion of the nation state, but laws operating in that area of the high seas are of an extra-territorial character.'

(See page 216.)

9. As a matter of interpretation, the question at issue was the meaning of import into Australia and not where the realm of Australia ended. The question of whether 'the realm' extends beyond low water mark was settled by R. v. Keyn ((1876) LR 2 Ex D 63). His Honour added that the reasoning of the majority and in particular of Lord Cockburn was convincing.

10. His Honour dissented on the question of jurisdiction. At p. 224 he said that the jurisdiction of the Supreme Court of the Northern Territory was wholly statutory and depended on the Northern Territory Supreme Court Act. This in turn incorporated by reference the

jurisdiction of the Supreme Court of South Australia as at the 1st January, 1911. This jurisdiction was expressed to be in addition to that under any Imperial Act. At p. 225 his Honour said:

> 'We are concerned throughout this discussion with jurisdiction of the Supreme Court to try persons present within the colony or State as the case may be for acts committed on the high seas, which undoubtedly commence at low water mark. We are not concerned with the powers of the legislature of the colony or state to pass extra-territorial laws. Nor are we concerned with the question whether colonial or State legislatures had power to increase the jurisdiction of the courts locally administering the jurisdiction of the Admiral, c.f. Prince v. Duncan (1871) 10 SCR (NSW) 253, or with the question whether a local legislature could empower its courts to try persons for acts committed on the high seas or some particular part of it against the laws of the State or colony.'

By its original Letters Patent, the State of South Australia ends at low water mark. However, waters within one marine league of the coast were within the jurisdiction of the admiral. Thus offences committed at sea within the three mile limit were extra-territorial offences. In course of time the common law courts were invested with the capacity to exercise the jurisdiction of the admiral in criminal matters.

> 'The authority so exercised was with respect to offences committed by British subjects anywhere on the high seas and by any person on a British ship on the high seas, and after the Act of 1878 by anybody in Imperial territorial waters, i.e. including foreigners on non-British ships. The jurisdiction of the Admiral was not limited to any class of offence but extended to all offences, including those created by statute.'

(see p. 226.)

11. The position in New South Wales was somewhat different. By statute the Supreme Courts of New South Wales and of Van Diemen's Land were invested with jurisdiction to hear and determine crimes committed by master or crew of a British ship or by a British subject upon the sea or elsewhere within the jurisdiction of the Admiral or in New Zealand, Tahiti, or any other islands in the Indian or Pacific Oceans not directly subject to the British Crown or any European power. This jurisdiction was that of the Supreme Court and not that of the Admiral but the law to be applied was Imperial law. This course was not adopted with respect to any other Supreme Courts. The other Colonial Courts were simply given jurisdiction to try persons charged with criminal acts within the jurisdiction of the Admiral. The penalty to be imposed was that according to the law of the Colony or, where this was not appropriate, Imperial law. No jurisdiction was conferred on the Courts to try persons for acts done on the high seas which, if done on the land, would offend the provisions of the local law.

> 'The situation therefore at the time of Federation was that by virtue of Imperial law the Supreme Court of South Australia had jurisdiction to try Imperial crimes and offences, which included common law offences such as murder and manslaughter, committed anywhere on the high seas by British subjects, by any persons anywhere on British ships on the high seas and by any persons on any ship in Imperial territorial waters, and to inflict what I have called appropriate Colonial punishments therefor. Without repetition, I include in the high seas all those places where the Admiral had jurisdiction. But it had no jurisdiction to try persons for acts done on the high seas of a kind which had only been made criminal in South Australia by South Australian statute.'

(See p. 231.)

The decision in Croft v. Dunphy [1933] AC 156 shows that colonial legislatures may have power to pass criminal statutes having extra-territorial application. Equally, the legislature may give its Supreme Court power to try offences committed under such legislations. But this goes to the power to enact legislation, not the effect of legislation already enacted. His Honour specifically disapproved the decision in Giles v. Tumminello [1963] SASR 96.

12. McTiernan J. held that the jurisdiction of the Admiral to hear and determine offences committed at sea had been transferred to the English common law courts by 1856 and hence was transferred to the Supreme Court of South Australia by the Supreme Court Act 1856.

13. Menzies J. said at p. 245 that it was possible that the ordinary laws of a state would apply beyond the low water mark and that the jurisdiction of the Supreme Court of a State to try a person for an offence so committed against such a law would be the ordinary jurisdiction not the Admiralty jurisdiction. He approved the decision of the High Court in Plomp v. The Queen (1963) 110 CLR 234 in confirming the conviction without enquiring whether that crime had been committed above or below low water mark. In any event, the Supreme Court of the Northern Territory had jurisdiction to try the offences because the Supreme Court of South Australia would have had jurisdiction to try the offences on and before 1st January 1911. Such jurisdiction with respect to Federal matters arose under the Judiciary Act. Keyn's Case did not compel the proposition that the common law courts had no jurisdiction to try offences committed at any place below low water mark.

14. Gibbs J. relied on the Judiciary Act which invested the Supreme Court of South Australia with Federal jurisdiction within the limits of its own jurisdiction. He pointed out that the said limits must be fixed by analogy with the ordinary jurisdiction of the Supreme Court. His Honour expressed no opinion on the correctness or otherwise of the decision in Keyn's Case.

15. Stephen J. agreed that the Admiral's jurisdiction conferred upon colonial courts generally was limited to acts committed at sea and made unlawful by English law. He also agreed that the jurisdiction of the Supreme Court of South Australia did not include the Admiral's jurisdiction over crimes on the high seas. However, this jurisdiction was not relevant in the present case, which was concerned with Commonwealth legislation. Jurisdiction necessarily went with the power to pass the relevant legislation.

16. Mason J. agreed that the Court had jurisdiction.

17. Pearce v. Florenca (1976) 9 ALR 289
This case was primarily concerned with the question of the validity or otherwise of the Western Australian Fisheries Act 1905 - 1975 having regard to the Commonwealth Seas and Submerged Lands Act 1973. The Western Australian Act was held to be valid. However, the question of the capacity of States to pass criminal legislation having extra-territorial applicability was also discussed.

18. The accused was charged with having in his possession on a boat within one and a half miles of the coast of Western Australia undersized rock lobsters contrary to

the provisions of the Western Australian Fisheries Act 1905 - 1975. As to legislative competence, Barwick C.J. said, at p. 291

> 'But, quite clearly, ... the State has legislative power to make laws which touch and concern the peace, order and good government of Western Australia which are operative beyond the margins of the territory of Western Australia, and thus operate in areas of the sea not limited to the marginal seas, commonly described as "territorial waters".'

19. Gibbs J. was concerned to refute the old idea that a colonial legislature has no power to enact laws having effect beyond the limits of the colony. It may be that such a law would prove to be unenforceable, but this did not go to validity. Nor was it easy to see how the often quoted words that a colonial legislature is empowered to legislate for the 'peace, order and good government' of the colony gave an effective territorial limitation. His Honour said at p. 295 that

> 'it has become settled that a law is valid if it is connected, not too remotely, with the State which enacted it, or in other words, if it operates on some circumstance which really appertains to the state.'

He went on to say that the test of nexus should be liberally applied as it was in the public interest that legislation should be held valid if there was any real connection (even a remote or general one) between the subject matter and the state. In any event there is an intimate connection between a State and its off-shore territorial waters and this is sufficient to allow the State to legislate with respect to them.

20. Stephen J. at p. 299 and Mason J., at p. 300, agreed that the Parliament of a State may legislate extra-territorially.

21. Jacobs J. held that t'.e special concern of a State with fishing in its off-shore waters provided sufficient nexus to give legislative competence. He added at p. 304

> 'I would also base on a wider ground my conclusion that the Western Australian legislative provision validly applies. The waters around Australia are Australian waters. With the emergence of Australia as a nation, sovereignty in right of Australia in respect of those waters emerged in international law and could be declared in 1973 by the Australian legislature. After federation of the Colonies the Australian community became one community, one nation. The fact that its internal political organization is that of a federation must never obscure that important fact. Because the waters off the coast of Western Australia are Australian waters they are at the same time Western Australian waters, waters of that part of the community of Australia which is the State of Western Australia. Both before and after the passing of the Seas and Submerged Lands Act 1973 (Com) the fact that the waters are Australian waters and the fact that this part of the waters is adjacent to the coast of Western Australia gives that State, as a part of Australia, a relationship or nexus with those waters which is in itself sufficient to support the application of the law of Western Australia to those waters, provided that that law is intended by the legislature of Western Australia to apply to those waters and provided that it is not inconsistent with a law of the Commonwealth itself.'

These passages would seem to be sufficient to put an end to any argument that questions of legislative competence are to be resolved by a narrowly territorial approach.

22. Statutory Consequences of Pearce v. Florenca

The Victorian Parliament has enacted the Acts Interpretation (Amendment) Act 1976. In moving that the Bill be read a second time, the Attorney-General said that one of the purposes of the Bill was to ensure the application

of criminal law of Victoria (both common law and statute law) in the off-shore areas adjacent to the coast of Victoria. The Attorney-General pointed out that before the decision of the High Court in New South Wales v. Commonwealth (1975) 8 ALR 1, it had been thought that the laws of the Commonwealth and the States operated in the territorial sea within the three mile limit. It was now known that the territorial sovereignty of the State of Victoria ended at low water mark. Accordingly, the Acts Interpretation Act was to be amended to extend and apply both written and unwritten criminal law to the off-shore areas which are beyond the low water mark. Similar legislation had been enacted in Western Australia, Queensland and Tasmania. Further, the legislature of South Australia had applied both its civil and criminal law to its off-shore region.

23. The limitation has a rather complicated structure. Two conditions have to be satisfied. The first is that the area involved should be that specified in the Third Schedule of the Petroleum (Submerged Lands) Act 1967 as being adjacent to the State of Victoria or within any area between the coastal boundary of Victoria and the base line of the said area. The second limitation is that the acts should be within the three mile limit, or that the person subject to the law is 'connected' with the State of Victoria, or, finally, that the subject matter should relate to persons connected with the State of Victoria. Connection with the State of Victoria can arise in more than one way. The important ways are by residence or domicile.

24. As a corollary to this, the several courts of Victoria are invested with the necessary jurisdiction.

25. Bistricic v. Rokov (1976) 11 ALR 129

This case is not a criminal case but is important as containing recent views of the High Court as to the applicability of British law in Australia. The facts were simple. The plaintiff sought to recover damages for personal injuries sustained by him as a member of a crew of a ship moored in Sydney Harbour and owned by the defendants. The defendants, in turn, sought to limit their liability by reference to s. 503 of the British Merchant Shipping Act 1894. It was not in dispute that this Act is in force in New South Wales. However, this Act had been qualified by the Imperial Merchant Shipping (Liability of Shipowners and Others) Act 1958, and the question arose whether the latter Act (and, in particular, s. 2(4) thereof) was in force in New South Wales. All members of the Court (Barwick CJ, Stephen, Mason, Jacobs and Murphy JJ) agreed that it was not. However the reasons advanced do not seem to be uniform.

26. Mason J. held that if a statute of the United Kingdom Parliament is intended to apply to an Australian State it will be expressed to apply to that State.

> 'The legislative policy which undelies s 11 of the Statute of Westminster is as important as the language of the section. This policy, which has evolved over the long history of constitutional development leading to responsible government, legislative autonomy and Australian nationhood, is that a statute of the United Kingdom Parliament, if it is intended to apply to an Australian State, will be expressed to apply to that State.'

(See p. 132.)

The Act in question was not expressed to apply to the State of New South Wales and as a matter of construction was intended not to apply to it. Accordingly it did not apply to it. (This approach is similar to that of Samuels J. at first instance who considered whether the UK Act contained an express declaration that it should apply to New South Wales and then 'whether the terms of the Act are capable of yielding the conclusion that it must necessarily be intended to apply to this State'. See Rokov v. Bistricic [1974] 2 NSWR 143. See also Rokov v. Bistricic [1975] 2 NSWR 201.) Barwick CJ. and Stephen J. agreed with Mason J.

27. Jacobs J. (with whom Stephen J. agreed) pointed out that the Imperial Merchant Shipping Act 1894 was in effect a code governing merchant shipping. The question of whether an amendment thereto applied in New South Wales could not be solved simply by the assumption that if the United Kingdom now intends that a statute shall apply to New South Wales it will expressly say so or that the United Kingdom will legislate with respect to New South Wales only if requested to do so. He pointed out that it was important that New South Wales should be able to have the benefit of amending or modernising laws, especially where New South Wales itself has inadequate legislative power. It must be assumed that the U.K. Parliament in amending such an Act had in mind the effect of the amendment in all places to which the Act applied. However, as a matter of construction, this particular amending Act was not intended to apply in New South Wales.

28. Murphy J. based his judgment on the view that in any event the United Kingdom Parliament has had no power to legislate with respect of Australia since 1901. No authority was cited for this view and it does not seem to be readily reconciled with the views of the other members of the Court.

29. Oteri and Oteri v. The Queen (1976) 11 ALR 142
In the light of this background, the decision of the Privy Council in the Oteri Case is at first sight surprising. The defendants were Australian citizens resident in Western Australia. They were on board a boat owned by Australians, licensed under Western Australian law and not registered as a British ship under the Merchant Shipping Act 1894. They were charged under the Western Australian code with having in their possession stolen crayfish pots on a boat approximately 22 miles from the coast of Western Australia. They claimed that in the circumstances neither Western Australian nor British law applied in respect of the matters alleged in the indictment and that in any event the District Court of Western Australia had no jurisdiction to try an offence committed 22 miles from the coast. The Supreme Court of Western Australia held that the provisions of the U.K. Theft Act 1968 were applicable and this decision was upheld by the Privy Council. As to jurisdiction, it was held that the matter was within the Admiralty jurisdiction of the District Court. In granting leave to appeal, the Privy Council made it clear that in its view the questions of law raised were common to all the States and Territories of Australia. (See p. 145).

30. The reasons of the Privy Council begin with the proposition that the 'legislative power of the Commonwealth of Australia does not extend to criminal law. That lies within the competence of the States'. While no doubt their Lordships had in mind the Statute of Westminster Adoption Act, taken in isolation, this statement is somewhat misleading. It is true that the Commonwealth is not empowered to legislate with respect to criminal law as a separate head of power under s. 51 of the Constitution. However, it may impose criminal sanctions as incidental to any of its other heads of power. For instance, it will be recalled that in The Queen v. Bull (1974) 131 CLR 203 the offences in question arose under the Commonwealth Customs Act 1901. Similarly, in the present case, it would seem that the Commonwealth power with respect to fisheries in Australian waters beyond territorial limits (s. 51(x)) would enable the Commonwealth to pass legislation imposing criminal sanctions for the theft of fishing gear outside the three mile limit. (The power would not be applicable within the three mile limit in view of the decision in Bonser v. La Macchia (1969) 122 CLR 177.)

31. Next, it was conceded by the State of Western Australia that its criminal law did not apply beyond its territorial boundaries. This in fact arose as a matter of construction of the Western Australian criminal code. (See s. 12 of the code and R. v. Oteri and Oteri [1975] WAR 120,122.) However, it is clear that Western Australia has power to pass criminal legislation having extra-territorial application, provided at least that such legislation has sufficient nexus with the State

(Pearce v. Forenco (1976) 9 ALR 289). It would appear from the above quoted debate in the Victorian Parliament that Western Australia has in fact passed legislation giving such application to its criminal code.

32. The result of this preliminary reasoning was that, if any criminal law was applicable 22 miles from the Western Australian Coast, it must be the common law or U.K. statute law. However, in the U.K. the old common law of larceny had been overridden by the Theft Act 1968. It does not appear to have been considered in this case whether the old common law could still apply at sea. There was no suggestion that the Theft Act 1968 was expressed to apply to Australia or Australians.

33. The reasoning of the Privy Council was as follows. The ship was owned by Australian citizens who were, therefore, British subjects. Hence, by ss. 2 and 72 of the British Merchant Shipping Act 1894 (which is still in force in Western Australia) their ship was a British ship for the purpose of punishment of offences. Next it was said that under the common law and by the Offences at Sea Act 1799 (which is also still in force in Western Australia) the criminal law of England extends to British ships on the high seas. Hence,

> '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.'

(See p. 147) As an example, their Lordships cited the British Protection of Animals Act 1911 which, they said, applied to acts done aboard British ships (William

Holyman & Sons v. Eyles [1947] Tas. SR 11). It is thus clear that their Lordships had in mind a much wider application of their reasoning than merely to old common law crimes. It would appear that any British statute imposing criminal sanctions would apply on board a ship owned by Australian citizens. Furthermore, there is no need for the British statute to be expressed to apply to Australia. The Privy Council thus appears to disagree with the view of the majority of the High Court in Bistricic v. Rokov (1976) 11 ALR 129.

34. Finally, their Lordships concluded that (contrary to the reasoning in Bull's Case (1974) 131 CLR 203 - which was apparently not cited to them) the Supreme Court of Western Australia had power to try such offences in its Admirality jurisdiction.

35. Although Bistricic v. Rokov (1976) 11 ALR 129 related to events that occurred in Sydney Harbour and Oteri and Oteri v. R. (1976) 11 ALR 142 related to events that occurred 22 miles from the coast of Western Australia, nothing seems to turn on this distinction. The Privy Council's reasoning applies to all events on the 'high seas' and the latter expression was held to include not only the open sea but all waters below low water mark 'where great ships can go'. This includes ports. Thus, in R. v. Liverpool Justices ex p. Molyneux [1972] 2 Q.B. 384 it was held that a ship was on the 'high seas' when docked in the port of Nassau in the Bahamas. Accordingly, the Liverpool Justices had jurisdiction to try the applicant for the offence of stealing whisky on board a ship so berthed. Similar reasoning applied to a theft on board a ship moored in the river near

Rotterdam (R. v. Carr and Wilson (1882) 10 QBD 76). In the latter case, Stephen J. said at p. 82 that

> 'here we have to decide ... whether the jurisdiction extends to the English ship placed where great ships usually go as part of their voyage for the purpose of its trading, and to all persons who happen to be on board such ship, so as to be entitled to the protection of English law. I see no reason founded on expediency or authority to induce us to say that a ship at anchor is within the jurisdiction, and that a ship moored to the land is not, or to introduce intracacies as to the mode of attachment of the ship to land, or to inquire when the flag is lowered and when hoisted.'

The court held that the jurisdiction extended to all persons on board whether or not they were British subjects.

36. A more plausible distinction between the Oteri and Bistricic cases arises from the fact that in both R. v. Oteri and Oteri [1975] WAR 120, 122 and William Holyman & Sons v. Eyles [1947] Tas. SR 11, 12, it was held that the boats were so far out to sea that local state law could not apply. This feature was not present in Bistricic v. Rokov.

37. I note in passing that as long ago as 17th August, 1975 the then Attorney-General, Mr. Enderby, was reported as being concerned by some of the aspects of Bull's Case. He announced his intention to introduce comprehensive legislation dealing with offences committed at sea, both in the territorial sea and on board Australian ships on high seas. No doubt this legislation, like much else, was stillborn.