JUD/*1986*FCA89 -

FEDERAL COURT OF AUSTRALIA

Re: AMRIT LAL NARAIN And: JOHN PARNELL No. 53 of 1986 Administrative Law

COURT

IN THE FEDERAL COURT OF AUSTRALIA NEW SOUTH WALES DISTRICT REGISTRY GENERAL DIVISION

Burchett J.

Judiciary Act 1903, s. 78B

Extradition (Commonwealth Countries) Act 1966, s. 26(2)

Administrative Decisions (Judicial Review) Act 1977

Ex parte Cousens; Re Blacket [1946] NSWStRp 36; (1946) 47 S.R. (NSW) 145

Ammann v. Wegener [1972] HCA 58; (1972) 129 C.L.R. 415

Pearce v. Cocchiaro [1977] HCA 31; (1977) 137 C.L.R. 600

Lamb v. Moss [1983] FCA 254; (1983) 49 A.L.R. 533

R. v. Murphy [1985] HCA 50; (1985) 61 A.L.R. 139

Riley and Butler v. Commonwealth of Australia (1983) 50 A.L.R. 593; and on appeal (1984) 57 A.L.R. 249

Prevato v. The Governor, Metropolitan Remand Centre, Wilcox J., unreported, 6/2/86

Re Groves (1973) Qd. R. 310

R. v. Rademeyer (1985) 1 N.S.W.L.R. 285

Reg. v. Nottingham Justices, Ex parte Davies (1981) 1 Q.B. 38

R. v. Reading Crown Court, Ex parte Malik (1981) 72 Cr. App. R. 146

Kioa v. Minister for Immigration and Ethnic Affairs [1985] HCA 81; (1985) 62 A.L.R. 321

Wheeler v. Leicester City Council (1985) 2 All E.R. 1106

Mahon v. Air New Zealand Ltd. [1983] UKPC 29; (1984) 1 A.C. 808

R. v. Greenham [1940] VicLawRp 39; (1940) V.L.R. 236

Capelvenere v. Omega Developments Corporation Pty. Ltd. (1983) 5 A.T.P.R. 44, 536

Green v. Jones (1979) 39 F.L.R. 428

In the Marriage of Smith and Saywell (1980) 47 F.L.R. 267

In re an Application by the Public Service Association of New South Wales; and In re the Industrial Union of Employees (Commissioned Police Officers) Award [1947] HCA 31; (1947) 75 C.L.R. 430

Hilton v. Wells [1985] HCA 16; (1985) 58 A.L.R. 245

The Australian Commonwealth Shipping Board v. The Federated Seamen's Union of Australasia [1925] HCA 27; (1925) 36 C.L.R. 442

The King v. Bevan [1942] HCA 12; (1942) 66 C.L.R. 452

Mobil Oil Australia Proprietary Limited v. The Commissioner of Taxation [1963] HCA 41; (1963) 113 C.L.R. 475

Carr v. Finance Corporation of Australia Limited [1981] HCA 20; (1981) 147 C.L.R. 246

HEARING

SYDNEY 25 March 1986

DECISION

BURCHETT J.:

1. This is an application, brought under the Administrative Decisions (Judicial Review) Act 1977, to review a decision of a magistrate to refuse to continue or grant bail to the applicant.

2. The applicant was arrested pursuant to warrants issued under the Extradition (Commonwealth Countries) Act 1966 which referred to a charge that at Greytown in New Zealand he did assault a child, namely, Amrit Jason Sich aged about two years, and that at the same place he did unlawfully detain Nell Grace Armitt in a garage pit, without her consent, with intent to cause her to be confined. The offences are alleged to have occurred in the course of communal discipline at a commune, of which the applicant was a leader, and from which the two persons who now accuse him were expelled, apparently at his instigation. The charges are denied, and it is said that the parents of the child the subject of one of the charges will be giving evidence, one of them for the prosecution and the other for the defence. The case has apparently attracted a considerable amount of publicity. The applicant, who is aged about 50 years, has no previous criminal record.

3. The applicant was arrested on 25 January 1986, and was granted bail on 28 January by Mr. Henderson SM, after a contested hearing. His bail was conditioned upon his reporting to the Officer-in-Charge of Police at Castle Hill daily between the hours of 6-00AM and 9-00AM, surrendering his passport, entering into an agreement to forfeit the sum of $20,000 in the event of his failure to appear in accordance with his undertaking, and obtaining a surety in the sum of $20,000, to be deposited in cash. These conditions were fulfilled, and the applicant

was released from prison. However, under Part III of the Extradition (Commonwealth Countries) Act 1966, the part applicable to extradition from Australia to New Zealand, it is common ground that it is not competent for a magistrate to remand a person whose extradition is sought for a longer period than seven days. Accordingly, since the matter was not ready for hearing, and in any case an early hearing date was not available, it was necessary for a succession of seven day remands to occur. Although, as I have said, the original grant of bail was contested, bail was continued on a number of occasions thereafter without opposition, and its conditions were varied by consent on 18 February by Mr. Evans SM, who deleted the requirement to report on those days on which the applicant had to attend at court for the purpose of further remand, and also varied the place of reporting from Castle Hill to Eastwood Police Station.

4. At some stage, a date for hearing was fixed for January 1987, apparently because of unavailability of court time at an earlier date for a matter of the anticipated length of this particular matter. The Director of Public Prosecutions afterwards made representations that so lengthy a delay was inappropriate, and on 4 March 1986 the hearing date was changed, as I was informed by consent. It was still not possible to obtain a date earlier than sometime in July, and, to meet the convenience of counsel, a date was fixed in August. By reason of other commitments of the magistrate by whom the original date was vacated and the new date fixed, and as the applicant wished to seek a further variation of the reporting conditions of his bail in the light of the still distant hearing date, the parties were then referred to another magistrate, who, however, also became unavailable. The matter eventually came on later in the day before Mr. Parnell SM, and it is in respect of his decision that the present application is brought.

5. At the time the matter came before Mr. Parnell, the applicant had been on bail for more than a month following the original bail hearing on 28 January. Since the variation of his reporting conditions made by consent on 18 February, he had had his bail continued on 25 February, without objection, upon the varied conditions. He now sought a relaxation of those conditions by deletion of the requirement of daily reporting and substitution of a requirement to report on one day occurring between each of his weekly attendances at court. Variation of the conditions of bail was opposed, but it was not suggested that there had been any breach of any of the conditions applicable from time to time, nor that bail should be refused or only granted on more stringent terms.

6. The transcript shows that the matter was introduced to Mr. Parnell by Mr. Guy, appearing for the Director of Public Prosecutions, who gave the magistrate a summary of its history, and then said:

> "So as it presently stands, Your Worship,
> daily reporting with the exception of the day he reports to court, that being once a week. I understand my friend wishes to make an application for variation."
> He concluded his submission by saying:
> "My submission is that bail should not be varied."
> Later, after the applicant's submissions had been completed, Mr. Guy reiterated:
> "Whilst we are not saying that we wish the Magistrate's - Mr. Henderson's - decision overturned we say that Mr. Henderson, having made a decision on that, on all the evidence that was presented on that bail application, that it certainly should not be lessened, that the police feel that to guarantee, both from the police and from the community's point of view, that this man attend court and answer these charges and, if the extradition proceedings are successful, faces trial in New Zealand, that there should be some security. The police view is that daily reporting is a proper means of ensuring that attendance."

7. It is clear, from a reading of the transcript, that no contention was raised before the magistrate by either party that the original decision to grant bail, or any of the successive decisions to continue it upon substantially similar conditions, was other than entirely appropriate, except that the applicant contended the reporting conditions should be relaxed. Whilst various matters were raised by Mr. Guy against the applicant, they were raised only in the context of opposition to a relaxation of conditions of bail. It is not surprising that, in that context, both parties relied upon statements from the bar table, and there was no suggestion that sworn evidence should be proffered on either side. Nothing was said, either by Mr. Guy or by the magistrate, which would have put the applicant's solicitor upon notice that the matters previously determined, at the contested hearing of 28 January, were required to be completely reopened.

8. The magistrate delivered reasons in which he referred to the number of attendances at court which had been and would be required, the original and varied hearing dates, the seriousness of the offences and the attitude of the applicant to the proceedings, the fact that there had

been threats, allegedly, against the life of the applicant both here and in New Zealand, his Worship's understanding (which both counsel told me was incorrect) that the applicant had only reluctantly accepted advance of the hearing date from January 1987 to August 1986, his Worship's view that as the applicant was contesting the proceedings he might be unwilling to comply with orders made in them, and concluded as follows:

> "It is the future prospect which is relevant. The duty of the court is to ensure that the defendant attends on future occasions, whether it is seven days or seven months, and at this stage, on the material before me, I am doubtful. The prosecuting authority, the Director of Public Prosecutions, has not pressed any particular view on that. I infer from what has been said that the original conditions were accepted with some reluctance. In my view the proper order for me in the circumstances, on the view I have taken of the material set out just prior to this observation, is to refuse bail and strongly urge the executive to proceed to an early hearing date. Certainly, an early commencement date, which in my view ought to be fixed shortly after the next return date, which I fix by adjourning this matter now until 11 March 1986. Bail will be refused in accordance with the observations I have just made."

9. For the applicant it is said that this decision was an administrative decision made under s. 26(2) of the Extradition (Commonwealth Countries) Act 1966, a provision in Part III which deals with extradition to and from New Zealand. Section 26(2) reads as follows:

> "2. A Magistrate may remand a person brought before him under this section, either in custody or on bail, for a period or periods not exceeding seven days at any one time and, where a Magistrate remands a person for such a period, the person may, at the expiration of the period, be brought before that Magistrate or before any other Magistrate."

10. That the decision upon the question of bail is an administrative one seems to me to follow from the nature of the functions of a magistrate under the Act, to which I shall refer later in these reasons, and to be in keeping with the authorities which hold that a magistrate hearing committal proceedings is acting in an administrative, not a judicial, capacity. In Ex parte Cousens; Re Blacket [1946] NSWStRp 36; (1946) 47 SR(NSW) 145 at 146-7, Jordan C.J., speaking for a Full Court, contrasted the judicial duties of magistrates with their duties in respect of committal hearings. He said:

> "In relation to charges of offences which they have no jurisdiction to try and dispose of, their authority is not judicial; they do not determine whether the accused is guilty or not guilty; they consider the evidence adduced against him, and if they think that there is enough to justify putting him upon his trial, they direct that he be held, or bailed, for trial by a Court which has jurisdiction to try him. This is essentially an executive and not a judicial function; and although magistrates have been exercising this authority for nearly four hundred years, no instance can be found of a superior Court having interfered with a magistrate by certiorari or prohibition in his exercise of this function: Cox v. Coleridge (1822) 1 B & C. 37. It is quite true, as was pointed out by Griffith C.J. in Huddart Parker & Co. Proprietary Ltd. v. Moorehead (1908) 8 CLR 330 at 357, that, in the course of the nineteenth century, many laws were passed both in England and Australia regulating the procedure in such inquiries, but, as his Honour also pointed out, they have not the effect of altering the essential nature of the inquiry, which cannot be regarded now, any more than formerly, as an exercise of judicial functions."

11. There have been a number of more recent decisions affirming the administrative character of committal hearings (see Ammann v. Wegener [1972] HCA 58; (1972) 129 CLR 415 at 435; Pearce v Cocchiaro [1977] HCA 31; (1977) 137 CLR 600; Lamb v Moss [1983] FCA 254; (1983) 49 ALR 533; and R. v. Murphy [1985] HCA 50; (1985) 61 ALR 139 at 144), but I have quoted from the judgment of Jordan C.J. in Cousens' Case, perhaps unnecessarily, because its language emphasises that the decision whether to release on bail is an integral part of the administrative function of the magistrate. (As to this, see also the Chief Justice's further remarks at p. 147.)

12. In the present case, the decision was not made in the exercise of a general power to grant bail to persons charged with indictable offences. It was made under the specific power conferred by s. 26(2). But I think that power is likewise administrative in nature, being not only comparable to the corresponding power of a committing magistrate, but also an incident of the performance of duties in respect of extradition procedures which are themselves administrative: Riley and Butler v. Commonwealth of Australia (1983) 50 ALR 593, and on appeal (1984) 57 ALR 249; Prevato v The Governor, Metropolitan Remand Centre (Wilcox J., unreported, 6 February 1986).

13. It cannot be suggested that the power of this Court to review a decision concerning bail in an extradition matter should not be exercised because of the availability of an alternative

remedy of application to the Supreme Court of the State. An argument of that kind would be open upon refusal of bail at a committal hearing in respect of a Commonwealth offence, but it has been held that there is no jurisdiction in a Supreme Court of a State to grant bail, where a magistrate has refused it, in a matter under the Extradition (Commonwealth Countries) Act 1966 or the Extradition (Foreign States) Act 1966: Re Groves (1973) Qd.R. 310; R. v. Rademeyer (1985) 1 NSWLR 285

14. So I turn to the challenges brought by the applicant to the Magistrate's decision. The Application, which raised in general terms a number of grounds under s. 5 of the Administrative Decisions (Judicial Review) Act, was somewhat lacking in precision, doubtless because of time constraints and the delay which occurred in the obtaining of a transcript, which only became available during the course of the hearing, but the argument before me highlighted as issues the applicant's claims: (1) that there had been a breach of the rules of natural justice by the effective denial of an opportunity to present a case for bail, since the only issue raised before the magistrate was the terms of bail; (2) that an error of law was involved in that a relevant consideration was ignored, namely, that at a contested hearing the applicant had satisfied a magistrate that he should be granted bail, and the only significant change of circumstances since then was that the applicant had fully complied with the conditions of his bail; and (3) that irrelevant considerations were taken into account, namely, the magistrate's erroneous views about the fixing of the delayed hearing date, and his concern to ensure an early hearing, although the hearing date had already been fixed by another magistrate who had been apprised of the facts relevant to that question.

15. I think there is substance in each of these contentions. Indeed, though they were debated, the emphasis of the respondent's argument was placed on a submission under s. 78B of the Judiciary Act 1903, with which I shall deal later in these reasons.

16. It was not only a relevant, but also a most important, consideration that the applicant had been granted bail after a contested hearing, and had since complied with its conditions. So much is established by the decision of the Divisional Court, delivered by Donaldson L.J. (as the Master of the Rolls then was), in Reg. v. Nottingham Justices, Ex parte Davies (1981) 1 Q.B. 38. (See also R. v. Reading Crown Court, Ex parte Malik (1981) 72 Cr App R 146) The judgment of Donaldson LJ (at p. 44) makes it clear that justices should not, on a second or subsequent bail application, "ignore their own previous decision or a previous decision of

their colleagues." Donaldson L.J. referred to a finding on a relevant issue on an earlier application for bail as requiring "to be treated like every other finding of the court. It is res judicata or analogous thereto. It stands as a finding unless and until it is overturned on appeal. And appeal is not to the same court, whether or not of the same constitution, on a later occasion." The application there in question concerned the effect of a prior contested application which had resulted in the refusal of bail. The Court (again at p. 44) went on to say:

> "But the starting point must always be the finding of the position when the matter was last considered by the court. I would inject only one qualification to the general rule that justices can and should only investigate whether the situation has changed since the last remand in custody. The finding on that occasion that Schedule 1 circumstances existed will have been based upon matters known to the court at that time. The court considering afresh the question of bail is both entitled and bound to take account not only of a change in circumstances which has occurred since that last occasion, but also of circumstances which, although they then existed, were not brought to the attention of the court. To do so is not to impugn the previous decision of the court and is necessary in justice to the accused. The question is a little wider than 'Has there been a change?' It is 'Are there any new considerations which were not before the court when the accused was last remanded in custody?'."

17. It is not necessary, for the purposes of this application, to go the full distance of the Nottingham Justices Case. At least, in my opinion, that case is compelling in favour of the view that the earlier decision of Mr. Henderson SM to grant bail was a very important matter to be taken into account. It was, as I read the decision of Mr. Parnell SM, simply ignored. And it was ignored notwithstanding the absence of any submission that it was erroneous, or that there was any new consideration adverse to the applicant which modified its effect.

18. The duty to accord natural justice has also been referred to as a "duty to act fairly" (see, for example, Kioa v. Minister for Immigration and Ethnic Affairs [1985] HCA 81; (1985) 62 ALR 321 at 346; Wheeler v. Leicester City Council (1985) 2 A11 ER 1106 at 1111). The exemplar of one kind of breach of natural justice is a denial of an opportunity to be heard. In this case the applicant was heard, but on an issue which assumed he would be granted bail, and without any notice either that bail was opposed or that it was intended to treat the matter as entirely unaffected by the earlier decision to grant bail. In my view the duty of fairness

demanded he be told in the clearest terms that he must call all his evidence over again. I should in this matter accept the law as stated in the Nottingham Justices Case, but in any event it so clearly represents virtually universal practice that a departure from it, without adequate warning, would be highly likely to mislead a party into failing to present all his evidence. In Kioa's Case (supra, at p. 349) Mason J. referred to "the importance which the law attaches to the need to bring to a person's attention the critical issue or factor on which the administrative decision is likely to turn so that he may have an opportunity of dealing with it." The circumstances of the present case conspired to ensure that the applicant's attention was on one issue, while his application was rejected upon another issue to which his case was not directed. His opportunity to be heard was an illusion. (Cf. Mahon v. Air New Zealand Ltd. [1983] UKPC 29; (1984) 1 AC 808 at 820-1)

19. Finally, on this aspect of the application, I have concluded, after reading and re-reading the transcript, that the Magistrate did take into account, in refusing bail, his view that the matter should not have been fixed for hearing in August, but should be heard within a week or two. Bearing in mind that another Magistrate had fixed it, that there was no reason to think all the factors which had warranted the other Magistrate in doing so were before Mr. Parnell SM, and that the legitimate purposes of bail do not include compelling a party to alter his approach to the conduct of his case, I think an error of law is demonstrated. In R. v. Greenham [1940] VicLawRp 39; (1940) VLR 236 at 239 Mann C.J. said: "The discretion in certain circumstances to refuse bail can never be used by way of punishment or by way of putting coercion on a prisoner to do something he is not bound in law to do." This, of course, is not to say that practical realities, related to the projected hearing date of a case, cannot enter into a determination with respect to bail.

20. Accordingly, the decision should be set aside, unless the submission which I shall now consider prevails.

21. Counsel for the Director of Public Prosecutions claimed that I ought not to proceed to determine this matter until satisfied that appropriate notices had been given, and a reasonable time had elapsed, under s. 78B of the Judiciary Act 1903. To have acceded to counsel's submission would, of course, have completely stultified the present proceedings, which relate to a period of seven days only. But if s. 78B has indeed the effect asserted, it is the duty of the

court to apply it, notwithstanding that the consequences may seem to reveal it as a draconian provision.

22. The section, which was inserted (together with s. 78A) into the Judiciary Act in 1976, and amended in 1983, reads as follows:

> "(1) Where a cause pending in a federal court including the High Court or in a court of a State or Territory involves a matter arising under the Constitution or involving its interpretation, it is the duty of the court not to proceed in the cause unless and until the court is satisfied that notice of the cause, specifying the nature of the matter has been given to the Attorneys-General of the Commonwealth and of the States, and a reasonable time has elapsed since the giving of the notice for consideration by the Attorneys-General, of the question of intervention in the proceedings or removal of the cause to the High Court.
>
> (2) For the purposes of sub-section (1), a court in which a cause referred to in that sub-section is pending -
> (a) may adjourn the proceedings in the cause for such time as it thinks necessary and may make such order as to costs in relation to such an adjournment as it thinks fit;
> (b) may direct a party to give notice in accordance with that sub-section; and
> (c) may continue to hear evidence and argument concerning matters severable from any matter arising under the Constitution or involving its interpretation.
>
> (3) For the purposes of sub-section
>
> (1), a notice in respect of a cause -
> (a) shall be taken to have been given to an Attorney-General if steps have been taken that, in the opinion of the court, could reasonably be expected to cause the matters to be notified to be brought to the attention of that Attorney-General; and
> (b) is not required to be given to the Attorney-General of the Commonwealth if he or the Commonwealth is a party to the cause and is not required to be given to the Attorney-General of a State if he or the State is a party to the cause.
> (4) The Attorney-General may authorize the payment by the Commonwealth to a party of an amount in respect of costs arising out of the adjournment of a cause by reason of this section.

(5) Nothing in sub-section (1) prevents a court from proceeding without delay to hear and determine proceedings, so far as they relate to the grant of urgent relief of an interlocutory nature, where the court thinks it necessary in the interests of justice to do so."

23. Of this section, Fitzgerald J. said in Capelvenere v. Omega Developments Corporation Pty. Ltd. (1983) 5 ATPR 44,536 at 44,546:

"There is need for sec.78B of the Judiciary Act to be reconsidered. It creates an impediment to the orderly disposition of the business of the Courts which is disproportionate to any benefits which it provides. It is not obvious why at least this Court and the Supreme Courts should not generally decide all questions of law which are raised in proceedings before them, particularly questions concerning the ambit of their respective jurisdictions. It is necessary for the legislature to recognize that matters which fall within sec.78B of the Judiciary Act may arise at any time in the course of proceedings. Often such matters are raised, but, if the litigation could be concluded, would not have to be decided. Further, often such matters are raised which are patently without substance. Many jurisdictional questions afford good examples. Even if the High Court has recently decided the precise point in indistinguishable circumstances, a party can raise it again and halt proceedings. It is impractical to require that proceedings always be stopped whenever such a matter is raised to enable the Attorneys-General to consider whether they wish to become involved or to have the proceedings removed to the High Court which is already over-burdened. When an action has to be stopped it causes great inconvenience to the Court, the parties, their witnesses and indeed other litigants whose cases could have been set down for hearing during the days wasted because allotted to the matter which cannot go forward. Further, the already burdensome cost of litigation is increased, and judicial resources are used inefficiently, at a considerable cost to the public purse. It would not require an excess of confidence in the judges of the superior courts to permit them a discretion as to when notice should be given to the Attorneys-General. No doubt it would be necessary to take into account circumstances such as the possibility that an order, e.g. an acquittal, might not be able to be challenged on appeal, as well as the efficient operation of the judicial system."

24. In two reported decisions, courts have felt able to avoid the extreme example offered by Fitzgerald J. of an alleged constitutional point recently and precisely decided by the High Court. In Green v. Jones (1979) 39 FLR 428, the discretionary remedy of a declaration having been sought to compel a magistrate to interrupt a committal hearing upon such a point being asserted by the defence, Hunt J. refused it on the ground that the circumstances did not justify an exceptional use of the declaratory power. But he said at p. 435:

> "Although, in a strictly technical sense, such a challenge may be said to be a matter arising under the Constitution, I cannot imagine that s. 78B was intended to permit never-ending challenges to matters which have already been determined by the High Court, particularly recently by that court.
> However, I am not prepared in these proceedings finally to determine that question."

25. In In the Marriage of Smith and Saywell (1980) 47 FLR 267 at 296, the majority judgment (delivered by Watson J.) of the Full Family Court rejected the application of s. 78B to a constitutional challenge to its powers under a provision the validity of which had previously been tested and upheld in the High Court.

26. On the other hand, in In re an Application by the Public Service Association of New South Wales; and In re the Industrial Union of Employees (Commissioned Police Officers) Award [1947] HCA 31; (1947) 75 C.L.R. 430, dealing with an application for removal into the High Court under s. 40 of the Judiciary Act, Williams J. said at p. 433:

> "It was submitted that no cause or part of a cause arises under the Constitution or involves its interpretation because this Court has already decided the question which the Attorney-General applied to have removed into this Court. . . . But however close and authoritative the previous
> decisions, if the
> cause, as it does here, really and substantially arises under the Constitution or involves its interpretation, the Court has no option but to grant
> the application."

27. In the present case, as will appear, it is unnecessary to attempt to resolve these problems.

28. What was claimed to be a "matter arising under the Constitution or involving its interpretation" was a submission that the applicant's case depended upon an invalid attempt

by the Parliament to invest a State Court with non-judicial power pursuant to s. 77(iii) of the Constitution (see Hilton v. Wells [1985] HCA 16; (1985) 58 ALR 245 at 251 and cf R v Murphy [1985] HCA 50; (1985) 61 ALR 139). The contention related to the power conferred upon the magistrate by s. 26(2) of the Extradition (Commonwealth Countries) Act 1966 to deal with the question of bail. Of course, if the power to remand in custody, conferred by the same sub-section, is, according to the argument put on behalf of the Director of Public Prosecutions, similarly tainted, there could be difficulties about the legality of the applicant's imprisonment. The proposition was put on the assumption that the powers of the magistrate, other than in respect of bail, to deal with the applicant, were judicial powers (not administrative powers conferred upon the magistrate as a persona designata - see Hilton v. Wells and cf. ss. 31 and 32 of the Extradition (Commonwealth Countries) Act), but that the power to deal with an application for bail was purportedly an independent grant of administrative power. The argument assumed that the case was analogous in that respect to Hilton v. Wells, where the power to issue warrants under s. 20 of the Telecommunications (Interception) Act 1979 was "not ancillary or incidental to any judicial function" (Hilton v. Wells at p. 250). I have considerable difficulty in appreciating this step in the argument, since it seems to me that, both historically and conceptually, the power to grant bail is an essential incident to a civilised exercise of criminal jurisdiction, including jurisdiction with respect to extradition. According to O.W. Holmes J. in the seventh of his famous lectures on The Common Law, its origins as a feature of the criminal law can be traced back to Charlemagne.

29. But whether the magistrate's power to grant bail in an extradition matter, under the Extradition (Commonwealth Countries) Act, is or is not incidental to his powers in respect of extradition procedures, is a question which will only have significance if, in relation to those procedures, the Magistrate is properly to be regarded as exercising judicial power of the Commonwealth, and not an administrative function. I have already referred, in these reasons, to Riley and Bulter v. Commonwealth of Australia (1983) 50 ALR 593, and on appeal (1984) 57 ALR 249, and Prevato v. The Governor, Metropolitan Remand Centre (Wilcox J., unreported, 6 February 1986), where extradition procedures under the Extradition (Foreign States) Act 1966 were held to be administrative in nature, so as to be subject to review under the Administrative Decisions (Judicial Review) Act 1977. I think it was also implicitly accepted that, in such proceedings, the magistrate was acting as a persona designata by virtue of an arrangement between the Governor-General and the Governor of the relevant State for the performance by him of the functions of a magistrate under the Act. In the case of the

Extradition (Commonwealth Countries) Act, the contrast between ss. 31 and 32 (notably prior to the amendment of the latter section in 1985, but also thereafter) adds weight to the view that there is an investment of federal judicial power in the Supreme Court of the State, but not in the Magistrate's Court. (See Re Groves (1973) Qd.R. 310 at 311.)

30. Unless I first construe the Extradition (Commonwealth Countries) Act in the manner contended for, that is as attempting to invest with an independent non-judicial power, not a persona designata, but a State Court as such, the constitutional point simply does not arise. (Cf. The Australian Commonwealth Shipping Board v. The Federated Seamen's Union of Australasia [1925] HCA 27; (1925) 36 CLR 442 at 450-1; The King v Bevan [1942] HCA 12; (1942) 66 CLR 452 at 466, 480; Mobil Oil Australia Proprietary Limited v. The Commissioner of Taxation [1963] HCA 41; (1963) 113 CLR 475 at 492) I do not think, particularly in the light of the Riley and Butler Case, that I should so construe it. Section 78B only operates when the circumstances it postulates are made to appear to the Court: it does not operate simply because a party asserts those circumstances. It is clear, from the reference to the possibility of intervention or removal of the cause to the High Court upon the initiative of an Attorney-General, that what the section contemplates is a constitutional question which is a live issue in the proceedings. On the basis that the constitutional point depends entirely upon an erroneous construction of the Extradition (Commonwealth Countries) Act, the cause pending in this Court does not "really and substantially" (to use the language of Williams J. in the passage cited above) involve a matter arising under the Constitution or involving its interpretation.

31. Furthermore, if the case is within sub-s. (1) of s. 78B, I think it is also within sub-s.(5), which takes from the Court the paralysis laid on it by sub-s.(1), so far as the proceedings "relate to the grant of urgent relief of an interlocutory nature where the Court thinks it necessary in the interests of justice" to determine the proceedings. In Carr v. Finance Corporation of Australia Limited [1981] HCA 20; (1981) 147 CLR 246 the High Court considered the meaning of the word "interlocutory" in another section of the Judiciary Act, s. 35. The Court accepted that the test was "whether the judgment or order appealed from, as made, finally determines the rights of the parties" (per Gibbs C.J. at p. 248). Mason J. at p. 255 quoted from a judgment of Taylor J. a passage which included the following:

> "So an order made in the course of an action or suit which does not conclude the rights of the parties inter se, although it may, of course, conclude the fate of the particular application in which it is made, is interlocutory only."

At p. 256 he referred to the traditional classification of orders refusing to set aside a judgment as interlocutory "because there is the right to make another application and because the order does not deal directly with the rights in contest in the action". According to these tests, an order granting or refusing bail for a seven day period of remand, prior to the hearing of proceedings for extradition, should, in my opinion, be regarded as "of an interlocutory nature".

32. But it was objected by counsel for the Director of Public Prosecutions that if I made an order pursuant to the Administrative Decisions (Judicial Review) Act, which had the effect of setting aside the decision of the Magistrate, my order could not be of an interlocutory nature. It does not seem to me that this argument rebuts the application of sub-s. (5) of s. 78B. For the sub-section does not except proceedings only in which this Court, or another court to which s. 78B is directed, makes an interlocutory order; it provides that the Court may without delay hear and determine proceedings so far as they relate to the grant of urgent relief of an interlocutory nature. The expression "relate to" is an expression of very wide import. In R. v. Murphy [1985] HCA 50; (1985) 61 ALR 139 at 145 the joint judgment of the High Court states:

> "The words 'in relation to' simply connote the existence of a connection or association . . .".

Accordingly, in that case what was said to have occurred in committal proceedings, which were not themselves an exercise of judicial power, was nevertheless regarded as occurring "in relation to the judicial power of the Commonwealth", which would be exercised at any subsequent trial. Analogously, it seems to me that the proceedings in this Court relate to the grant of urgent relief of an interlocutory nature with which the decision under review is concerned. That the matter was urgent, the alternative being immediate imprisonment, cannot I think be doubted. In all the circumstances I unhesitatingly thought it necessary, in the interests of justice, that the Court should proceed without delay to hear and determine the proceedings.

33. For the foregoing reasons, which I now deliver, I did on 7 March 1986 set aside the decision to refuse bail with effect form 10-00AM on Monday 10 March 1986, and directed that the applicant should be brought before a magistrate at St. James Local Court, having authority under s. 31 of the Extradition (Commonwealth Countries) Act 1966, for reconsideration of the question of bail and conditions of bail at that time and date.