0

***42** Regina v. Horseferry Road Magistrates' Court, Ex parte Bennett

House of Lords

HL

Lord Griffiths, Lord Bridge of Harwich, Lord Oliver of Aylmerton, Lord Lowry and Lord Slynn of Hadley

1993 March 3, 4, 8, 9; June 24

Justices--Committal proceedings--Jurisdiction--Defendant removed from South Africa to England--Collusion alleged between police forces--Arrest in London lawful--Whether court having jurisdiction to inquire into circumstances of defendant's presence within jurisdiction--Whether court empowered to refuse trial where abuse of process shown--Whether jurisdiction vested in justices

The defendant, a citizen of New Zealand who was alleged to have committed criminal offences in England, was traced to South Africa by the English police and forcibly returned to England. There was no extradition treaty between the two countries, and although special arrangements could be made for extradition in a particular case under section 15 of the Extradition Act 1989 no such proceedings were taken. The defendant claimed that he had been kidnapped from the Republic of South Africa as a result of collusion between the South African and British police and returned to England, where he was arrested and brought before a magistrates' court to be committed to the Crown Court for trial. The defendant sought an adjournment to enable him to challenge the court's jurisdiction. The application was refused and he was committed for trial. He sought judicial review of the magistrates' court's decision. The Divisional Court of the Queen's Bench Division, refusing the application, held that the English court had no power to inquire into the circumstances under which a person appearing before it had been brought within the jurisdiction.

On appeal by the defendant:-

Held, allowing the appeal

(1) (Lord Oliver of Aylmerton dissenting), that where a defendant in a criminal matter had been brought back to the United Kingdom in disregard of available extradition process and in breach of international law and the laws of the state where the defendant had been found, the courts in the United Kingdom should take cognisance of those circumstances and refuse to try the defendant; and that, accordingly, the High Court, in the exercise of its supervisory jurisdiction, had power to inquire into the circumstances by which a person had been brought within the jurisdiction and, if satisfied that there had been a disregard of extradition procedures, it might stay the prosecution as an abuse of process and order the release of the defendant (post, pp. 61H-62B, F-G, 64E-F, 67F-68B, C-D, 73F-G, 74F-H, 84B-D).

Reg. v. Bow Street Magistrates, Ex parte Mackeson (1981) 75 Cr.App.R. 24, D.C. and Reg. v. Plymouth Justices, Ex parte Driver [1986] Q.B. 95, D.C. considered.

...

Lord Griffiths:

On the question of whether the court could or would exercise a discretion in favour of the applicant to order his release from custody Lord Lane C.J. relied upon a passage in the judgment of Woodhouse J. in Reg. v. Hartley [1978] 2 N.Z.L.R. 199, a decision of the Court of Appeal of New Zealand. In that case the New Zealand police had obtained the return of a man named Bennett from Australia to New Zealand where he was wanted on a charge of murder, merely by telephoning to the Australian police and asking them to arrest Bennett and put him on an aeroplane back to New Zealand, which they had done. Lord Lane C.J. cited the following extract from the judgment of Woodhouse J. [1978] 2 N.Z.L.R. 199, 216-217:

"There are explicit statutory directions that surround the extradition procedure. The procedure is widely known. It is frequently used by the police in the performance of their duty. For the protection of the public the statute rightly demands the sanction of recognised court processes before any person who is thought to be a fugitive offender can properly be surrendered from one country to another. and in our opinion there can be no possible question here of the court turning a blind eye to action of the New Zealand police which has deliberately ignored those imperative requirements of the statute. Some may say that in the present case a New Zealand citizen attempted to avoid a criminal responsibility by leaving the country: that his subsequent conviction has demonstrated the utility of the short cut adopted by the police to have him brought back. But this must never become an area where it will be sufficient to consider that the end has justified the means. The issues raised by this affair are basic to the whole concept of freedom in society. On the basis of reciprocity for similar favours earlier received are police officers here in New Zealand to feel free, or even obliged, at the request of their counterparts overseas to spirit New Zealand or other citizens out of the country on the basis of mere suspicion, conveyed perhaps by telephone, that some crime has been committed elsewhere? In the High Court of Australia Griffith C.J. referred to extradition as a 'great prerogative power, supposed to be an incident of sovereignty' and then rejected any suggestion that 'it could be put in motion by any constable who thought he knew the law of a foreign country, ***55** and thought it desirable that a person whom he suspected of having offended against that law should be surrendered to that country to be punished:' Brown v. Lizars (1905) 2 C.L.R. 837, 852. The reasons are obvious.

"We have said that if the issue in the present case is to be considered merely in terms of jurisdiction then Bennett, being in New Zealand, could certainly be brought to trial and dealt with by the courts of this country. But we are equally satisfied that the means which were adopted to make that trial possible are so much at variance with the statute, and so much in conflict with one of the mostimportant principles of the rule of law, that if application had been made at the trial on this ground, after the facts had been established by the evidence on the voir dire, the judge would probably have been justified in exercising his discretion under section 347(3) or under the inherent jurisdiction to direct that the accused be discharged."

...

The respondent has also relied upon the United States authorities in which the Supreme Court has consistently refused to regard forcible abduction from a foreign country as a violation of the right to trial by due process of law guaranteed by the Fourteenth Amendment to the Constitution: see in particular the majority opinion in United States v. Alvarez-Machain (1992) 119 L.Ed.2d 441 reasserting the Ker-Frisbie Rule. I do not, however, find these decisions particularly helpful because they deal with the issue of whether or not an accused acquires a constitutional defence to the *jurisdiction* of the United States courts and not to the question whether assuming the court has jurisdiction, it has a discretion to refuse to try the accused: see Ker v. Illinois, 119 U.S. 436, 444.

...

The appellant contends for a wider interpretation of the court's jurisdiction to prevent an abuse of process and relies particularly upon the judgment of Woodhouse J. in Reg. v. Hartley, the powerful dissent of the minority in United States v. Alvarez-Machain and the decision of the South African Court of Appeal in S. v. Ebrahim, 1991 (2) S.A. 553, the headnote of which reads:

"The appellant, a member of the military wing of the African National Congress who had fled South Africa while under a restriction order, had been abducted from his home in Mbabane, Swaziland, by persons acting as agents of the South African State, and taken back to South Africa, where he was handed over to the police and detained in terms of security legislation. He was subsequently charged with treason in a Circuit Local Division, which convicted and sentenced him to 20 years' imprisonment. The appellant had prior to pleading launched an application for an order to the effect that the court lacked jurisdiction to try the case inasmuch as his abduction was in breach of international law and thus unlawful. The application was dismissed and the trial continued.

"The court, on appeal against the dismissal of the above application, held, after a thorough investigation of the relevant South African and common law, that the issue as to the effect of the abduction on the jurisdiction of the trial court was still governed by the Roman and Roman-Dutch common law which regarded the removal of a person from an area of jurisdiction in which he had been illegally arrested to another area as tantamount to abduction and thus constituted a serious injustice. A court before which such a person was brought also lacked jurisdiction to try him, even where such a person had been abducted by agents of the authority governing the area of jurisdiction of the said court. The court further held that the above rules embodied several fundamental legal principles, viz. those that maintained and promoted human rights, good relations between states and the sound administration of justice: the individual had to be protected against unlawful detention and against abduction, the limits of territorial jurisdiction and the sovereignty of states had to be respected, the fairness of the legal process guaranteed and the abuse thereof prevented so as to protect and promote the dignity and integrity of the judicial system. The state was bound by these rules and had to come to court with clean hands, as it were, when it was itself a party to proceedings and this requirement was clearly not satisfied when the state was involved in the abduction of persons across the country's borders.

"It was accordingly held that the court a quo had lacked jurisdiction to try the appellant and his application should therefore have succeeded. As the appellant should never have been tried by the court a quo, the consequences of the trial had to be undone and the appeal disposed ***61** of as one against

conviction and sentence. Both the conviction and sentence were accordingly set aside."

...

Your Lordships are now invited to extend the concept of abuse of process a stage further. In the present case there is no suggestion that the appellant cannot have a fair trial, nor could it be suggested that it would have been unfair to try him if he had been returned to this country through extradition procedures. If the court is to have the power to ***62** interfere with the prosecution in the present circumstances it must be because the judiciary accept a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law.

My Lords, I have no doubt that the judiciary should accept this responsibility in the field of criminal law. The great growth of administrative law during the latter half of this century has occurred because of the recognition by the judiciary and Parliament alike that it is the function of the High Court to ensure that executive action is exercised responsibly and as Parliament intended. So also should it be in the field of criminal law and if it comes to the attention of the court that there has been a serious abuse of power it should, in my view, express its disapproval by refusing to act upon it.

Let us consider the position in the context of extradition. Extradition procedures are designed not only to ensure that criminals are returned from one country to another but also to protect the rights of those who are accused of crimes by the requesting country. Thus sufficient evidence has to be produced to show a prima facie case against the accused and the rule of speciality protects the accused from being tried for any crime other than that for which he was extradited. If a practice developed in which the police or prosecuting authorities of this country ignored extradition procedures and secured the return of an accused by a mere request to police colleagues in another country they would be flouting the extradition procedures and depriving the accused of the safeguards built into the extradition process for his benefit. It is to my mind unthinkable that in such circumstances the court should declare itself to be powerless and stand idly by; I echo the words of Lord Devlin in Connelly v. Director of Public Prosecutions [1964] A.C. 1254, 1354:

"The courts cannot contemplate for a moment the transference to the Executive of the responsibility for seeing that the process of law is not abused."

The courts, of course, have no power to apply direct discipline to the police or the prosecuting authorities, but they can refuse to allow them to take advantage of abuse of power by regarding their behaviour as an abuse of process and thus preventing a prosecution.

In my view your Lordships should now declare that where process of law is available to return an accused to this country through extradition procedures our courts will refuse to try him if he has been forcibly brought within our jurisdiction in disregard of those procedures by a process to which our own police, prosecuting or other executive authorities have been a knowing party.

If extradition is not available very different considerations will arise on which I express no opinion.

...

LORD BRIDGE OF HARWICH.

My Lords, this appeal raises an important question of principle. When a person is arrested and charged with a criminal offence, is it a valid ground of objection to the exercise of the court's jurisdiction to try him that the prosecuting authority secured the prisoner's presence within the territorial jurisdiction of the court by forcibly abducting him from within the jurisdiction of some other state, in violation of international law, in violation of the laws of the state from which he was abducted, in violation of whatever rights he enjoyed under the laws of that state and in disregard of available procedures to secure his lawful extradition to this country from the state where he was residing? This is to state the issue very starkly, perhaps some may think tendentiously. But because this appeal has to be determined on the basis of assumed facts, your Lordships, as it seems to me, cannot avoid grappling with the issue in this stark form.

...

When we look to see how other jurisdictions have answered a question analogous to that before the House in terms of their own legal systems, the most striking example of an affirmative answer is the decision of the South African Court of Appeal in S. v. Ebrahim, 1991 (2) S.A. 553 ...

In the United States, the authorities reveal a conflict of judicial opinion. The doctrine established by Supreme Court decisions in 1886, Ker v. Illinois, 119 U.S. 436, and in 1952, Frisbie v. Collins, 342 U.S. 519, accords substantially in its effect with the doctrine of the early English authorities. But more recently this doctrine has been powerfully challenged. In United States v. Toscanino (1974) 500 F.2d 267, 268 the defendant, an Italian citizen, who had been convicted in the New York District Court of a drug conspiracy, alleged that the court had "acquired jurisdiction over him unlawfully through the conduct of American agents who had kidnapped him in Uruguay . . . tortured him and abducted him to the United States for the purpose of prosecuting him" there. The lower court having held that these allegations were immaterial to the ***66** exercise of its jurisdiction to try him, provided he was physically present at the time of trial, he appealed to the United States Court of Appeals Second Circuit. The effect of the court's decision is sufficiently summarised in the headnote. The court held:

"that federal district court's criminal process would be abused or degraded if it was executed against defendant Italian citizen, who alleged that he was brought into the United States from Uruguay after being kidnapped, and such abuse could not be tolerated without debasing the processes of justice, so that defendant was entitled to a hearing on his allegations. . . . Government should be denied the right to exploit its own illegal conduct, and when an accused is kidnapped and forcibly brought within the jurisdiction, court's acquisition of power over his person represents the fruits of the government's exploitation of its own misconduct."

The most recent decision of the United States Supreme Court in United States v. Alvarez-Machain, 119 L.Ed.2d 441 concerned a Mexican citizen indicted for the murder of an agent of the Drug Enforcement Administration (D.E.A.). The District Court had held that other D.E.A. agents had been responsible for the defendant's abduction from Mexico; that this had been in violation of the extradition treaty between Mexico and the United States; and that the accused should be discharged and repatriated to Mexico. This decision was affirmed by the United States Court of Appeals, Ninth Circuit, but reversed by the Supreme Court by a majority of six to three. The opinions related primarily to the question whether the abduction was a breach of the treaty. The majority held that the abduction, although "shocking," involved no breach of the treaty and relied on the earlier decisions in the cases of Ker, 119 U.S. 436, and Frisbie, 342 U.S. 519, for the view that the abduction was irrelevant to the exercise of the court's criminal jurisdiction. The dissenting opinion of Stevens J., in which Blackmun and O'Connor JJ. joined, held that the abduction was both in breach of the treaty and in violation of general principles of international law and distinguished the earlier authorities as having no application to a case where the abduction in violation of international law was carried out on the authority of the executive branch of the United States Government. The minority opinion was that this was an infringement of the rule of law which it was the court's duty to uphold. After referring to the South African decision in S. v. Ebrahim, Stevens J. writes in the final paragraph of his opinion, at pp. 466-467:

"The Court of Appeal of South Africa - indeed, I suspect most courts throughout the civilised world - will be deeply disturbed by the 'monstrous' decision the court announces today. For every nation that has an interest in preserving the rule of law is affected, directly or indirectly, by a decision of this character."

In the common law jurisdiction closest to our own the opinion expressed by Woodhouse J. in the New Zealand case of Reg. v. Hartley [1978] 2 N.Z.L.R. 199, in which he describes the issue as "basic to the whole concept of freedom in society," has already been cited by my ***67** noble and learned friend, Lord Griffiths, and I need not repeat it. In the later case of Moevao v. Department of Labour [1980] 1 N.Z.L.R. 464, 475-476, Woodhouse J. cited the relevant passage from his own judgment in Hartley and added:

"It is not always easy to decide whether some injustice involves the further consequence that a prosecution associated with it should be regarded as an abuse of process. and in this regard the courts have been careful to avoid confusing their own role with the executive responsibility for deciding upon a prosecution. In the Connelly case Lord Devlin referred to those matters and then, as I have said, he went on to speak of the importance of the courts accepting what he described as their 'inescapable duty to secure fair treatment for those who come or are brought before them.' He said that ' the courts cannot contemplate for a moment the transference to the Executive of the responsibility for seeing that the process of law is not abused' ([1964] A.C. 1254, 1354 . . .). Those remarks involve an important statement of constitutional principle. They assert the independent strength of the judiciary to protect the law by protecting its own purposes and function. It is essential to keep in mind that it is 'the process of law,' to use Lord Devlin's phrase, that is the issue. It is not something limited to the conventional practices or procedures of the court system. It is the function and purpose of the courts as a separate part of the constitutional machinery that must be protected from abuse rather than the particular processes that are used within the machine. It may be that the

shorthand phrase 'abuse of process' by itself does not give sufficient emphasis to the principle that in this context the court must react not so much against an abuse of the procedure that has been built up to enable the determination of a criminal charge as against the much wider and more serious abuse of the criminal jurisdiction in general. It is for reasons of this kind that I remain of the opinion that the trial judge would have been entirely justified in the Hartley case in stopping the prosecution against the man Bennett."

Whatever differences there may be between the legal systems of South Africa, the United States, New Zealand and this country, many of the basic principles to which they seek to give effect stem from common roots. There is, I think, no principle more basic to any proper system of law than the maintenance of the rule of law itself. When it is shown that the law enforcement agency responsible for bringing a prosecution has only been enabled to do so by participating in violations of international law and of the laws of another state in order to secure the presence of the accused within the territorial jurisdiction of the court, I think that respect for the rule of law demands that the court take cognisance of that circumstance. To hold that the court may turn a blind eye to executive lawlessness beyond the frontiers of its own jurisdiction is, to my mind, an insular and unacceptable view. Having then taken cognisance of the lawlessness it would again appear to me to be a wholly inadequate response for the court to hold that the only remedy lies in civil proceedings at the suit of the defendant or in disciplinary or criminal ***68** proceedings against the individual officers of the law enforcement agency who were concerned in the illegal action taken. Since the prosecution could never have been brought if the defendant had not been illegally abducted, the whole proceeding is tainted. If a resident in another country is properly extradited here, the time when the prosecution commences is the time when the authorities here set the extradition process in motion. By parity of reasoning, if the authorities, instead of proceeding by way of extradition, have resorted to abduction, that is the effective commencement of the prosecution process and is the illegal foundation on which it rests. It is apt, in my view, to describe these circumstances, in the language used by Woodhouse J. in Moevao v. Department of Labour [1980] 1 N.Z.L.R. 464, 476, as an "abuse of the criminal jurisdiction in general" or indeed, in the language of Mansfield J. in United States v. Toscanino, 500 F.2d 267, as a "degradation" of the court's criminal process. To hold that in these circumstances the court may decline to exercise its jurisdiction on the ground that its process has been abused may be an extension of the doctrine of abuse of process but is, in my view, a wholly proper and necessary one.