

AUSTRALIA / JUDGMENT

Linhart, H. & Anor v Elms, E.E. & Ors [1987] FCA 763

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.. JUDGMENT No. 763.7

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CATCHWORDS

Extradition - Warrants issued for committal of applicants - whether acts or omissions in respect of which surrender requested were set out in warrants - principle of double criminality.

Extradition (Foreign States) Act 1966 ss.4, 15, 16, 17, 18.

HARALD ROLF LINHART and PAULA BONGARDT v. ELWYN EDGARD ERNEST ELMS (First Respondent), THE HONOURABLE LIONEL BOWEN, HER MAJESTY'S ATTORNEY-GENERAL FOR THE COMMONWEALTH OF AUSTRALIA

(Second Respondent) and THE FEDERAL REPUBLIC OF GERMANY (Third Respondent).

No. G665 of 1987

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IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY) No. G665 of 1987))

GENERAL DIVISION

BETWEEN: HARALD ROLF LINHART and PAULA BONGARDT

Applicants

AND: ELWYN EDGARD ERNEST ELMS

First Respondent

THE HONOURABLE LIONEL BOWEN, HER MAJESTY'S ATTORNEY-GENERAL FOR THE
COMMONWEALTH OF AUSTRALIA

Second Respondent

THE FEDERAL REPUBLIC OF GERMANY

Third Respondent

COURT: BEAUMONT J.

PLACE: SYDNEY

DATE: 14 DECEMBER 1987

MINUTES OF ORDER

THE COURT ORDERS

1. Declare that:
 - (a) the warrants of committal are invalid to the extent that they are based on the charges referred to in recital (a)(1ii) of the warrants;
 - (b) otherwise the warrants are valid.
2. Make no order as to costs.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

IN THE FEDERAL COURT OF AUSTRALIA))

NEW SOUTH WALES DISTRICT REGISTRY) No. G665 of 1987))

GENERAL DIVISION

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Applicants

AND: ELWYN EDGARD ERNEST ELMS

First Respondent

THE HONOURABLE LIONEL

BOWEN, HER MAJESTY'S ATTORNEY-GENERAL FOR THE

COMMONWEALTH OF AUSTRALIA

Second Respondent

THE FEDERAL REPUBLIC OF GERMANY

Third Respondent

CORAM: BEAUMONT J PLACE: SYDNEY DATE: 14 DECEMBER 1987

REASONS FOR JUDGMENT The applicants, Harald Rolf Linhart and Paula Bongardt, are German citizens; they entered Australia in November 1985. In January 1987, warrants for their arrest were issued by a judge of the third respondent, the Federal Republic of Germany. In April 1987, a warrant for the apprehension of each applicant was issued by a Magistrate

pursuant to s.16(1)(b) of the Extradition (Foreign States) Act

1966 ("the Act"). In May 1987, a notice was issued by the

Attorney-General,

the second respondent, pursuant to

s.15(1)(b) of the Act. Subsequently, proceedings were brought

under s.17 of the Act. So far as presently relevant, s.17(6)

provides:

(a)

(b)

and,

If...the Magistrate receives a notice by the Attorney-General under paragraph 15(1)(b) and -

there is produced to the Magistrate -

(i) in

the case of a person who is accused

of an extradition crime -

(A)

(B)

(C)

a duly authenticated foreign warrant in respect of the person issued in the foreign state that made the requisition for the surrender of the person or a duly authenticated copy of such a warrant;

a duly authenticated statement in writing setting out a description of each offence for which the surrender of the person is requested and the penalty applicable to each such offence; and

a duly authenticated statement in writing setting out all the acts or omissions in respect of which the surrender of the person is requested;... (Emphasis added) if the application of this Act to the foreign state that made the requisition for the surrender of the person is subject to any limitations, conditions, exceptions or qualifications, any other documents required by those limitations, conditions, exceptions or qualifications to be produced; and the Magistrate is satisfied, after taking into account any evidence properly adduced by the person, that the person is liable to be surrendered to the foreign state that made the requisition for the surrender,

the Magistrate shall either -

(c)

by warrant in accordance with the form

prescribed for the purposes of this sub-section, commit the person to prison to await the warrant of the Attorney-General for the surrender of the person; ..."

On 25 November 1987, the first respondent, a Magistrate, issued a warrant of committal in respect of each applicant pursuant to s.17(6)(c). The warrant in respect of the first applicant contained the following recitals (it is

unnecessary to refer also to the case of the second applicant) -

"WHEREAS

(a) HARALD LINHART, a fugitive from the Federal Republic of Germany who is accused of the offences of:-

(i) having made knowingly false statements as a shareholder' and Director of a private company limited on the paying up of shares in order to have the company officially registered (one count);

(ii) having kept the legally required accounts during the impending insolvency and after insolvency in such a way that it was extremely difficult to get a picture of the financial situation, in coincidence with not having produced the asset and liability statements within the period required by law (two counts);

(lii) having inflicted damage to another party's property by fraudulent misrepresentation causing factual errors with the intention to obtain unlawful enrichment for themselves or a third party (twenty four counts);

against the law of that State, having been apprehended in the State of New South Wales under a warrant issued in pursuance of Section 16 of the Extradition (Foreign States) Act 1966, was in accordance with Section 17 of that Act brought on 14 September and 25

(b)

(c)

decision

alternatively,

November 1987 before me Elwyn Elms, a Magistrate in that State.

all the documents that, under paragraph 17(b)(a) [sc.(6)(a)] of that Act, are to be produced to me in this case, have been

produced to me in accordance with that Paragraph; and

I am satisfied that HARALD LINHART is liable to be surrendered to the Federal Republic of Germany...."

The applicants now seek to review the Magistrate's

in accordance with s.18(1) of the

Administrative Decisions (Judicial Review) Act 1977.

made to the validity of the warrants,

to the terms of the German warrant of arrest.

In order to understand the basis of the challenge

the applicants -

"are

(1)

(2)

(3)

charged in particular

in one case

of having made knowingly false statements as shareholders and Directors of a private company limited on the paying up of shares in order to have the company officially registered;

in two cases

of having kept the legally required accounts during the impending insolvency and after insolvency in such a way that it was extremely difficult to get a picture of the financial situation, in coincidence with not having produced the asset and liability statement within the period required by law;

Act;

review is sought under the provisions of the

It is necessary to refer

It states that

(4) in 23 cases [sc. 24]

of having inflicted damage to another party's property by fraudulent misrepresentation causing factual errors with the intention to obtain unlawful enrichment for themselves or a third party;"

The warrant continues:

"Facts of the Case:

Both persons charged were shareholders as well as de

facto Directors and most of the time also official Directors of the Century-Consumer-Products Video

Handelsgesellschaft mit beschränkter Haftung (Century-Consumer-Products Video-Trading Company Limited) incorporated on July 22, 1983 with headquarters in Unkel and the Century-Consumer-Products

Video-Handelsgesellschaft mit beschränkter Haftung incorporated on January 30, 1984 with registered headquarters in Bad Honnef. Allegedly, it was the object of both companies to set up and manage video shops in supermarkets and department stores.

In the first place the persons charged really wanted to enrich themselves on account of others under the guise

of these companies.

Both companies had only one business establishment in Unkel. There was no business nor financial separation. On the contrary, the persons charged acted at their own discretion on account of one or the other company. When Century-Consumer-Products Video-Handelsgesellschaft mit beschränkter Haftung (Unkel) was incorporated, there was no real shareholders' equity available to speak of. When the Century-Consumer-Products Video-Handelsgesellschaft mit beschränkter Haftung (Bad Honnef) was incorporated, only their co-partner Dieter Braun had paid up his original capital share amounting to 100,000. - Deutschmarks. This amount however was used up within the first weeks. No additional capital was transferred to the companies. At the latest by mid March 1984 both companies were insolvent.

Payments were stopped...."

The warrant then gives the following particulars:

"Relating to (1)

With a motion dated January 30, 1984 the two persons charged and the witness Dieter Braun applied for entry of the Century-Consumer-Products Video-Handelsgesellschaft mit beschränkter Haftung (Bad Honnef) into the commercial register of the District Court in Koenigswinter.

Though only the witness Braun had paid up his original capital

share of 100,000. - Deutschmarks, the persons charged affirmed untruthfully in the application that they too had paid up their original capital shares of DM 100,000.

- each and that these amounts are definitively at the free disposal of the company management. Even later on the persons charged didn't pay up their shares nor parts of them.

Relating to (2)

There was no proper bookkeeping neither for Century-Consumer-Products Video-Handelsgesellschaft mit beschränkter Haftung (Unkel) nor for

Century-Consumer-Products Video-Handelsgesellschaft mit beschränkter Haftung (Bad Honnef). Just the incoming invoices, vouchers and other documents of both companies were put together into files; therefore it was extremely difficult and required much time and effort to get a picture of the financial status of each company at the time of insolvency in March 1984. it's true that the persons charged had the accounts up to the middle of 1984 worked up by the witness Lanzenberger in July 1984, but this did not produce a true picture of the financial status because not all accounts payable in the first half of 1984 had been submitted to the witness Lanzenberger.

The persons charged had not produced any balance sheets for the fiscal years 1984 and 1985 neither for Century-Consumer-Products Video-Handelsgesellschaft mit beschränkter Haftung (Unkel) nor for Century-Consumer-Products Video-Handelsgesellschaft mit beschränkter Haftung (Bad Honnef).

Relating to (4)

- a. In order to obtain fresh money, the persons charged persuaded the witness Dieter Braun by the end of 1983 to become a co-partner with a capital share of 100,000. - Deutschmarks and also a Director of the Century-Consumer-Products Video-Handelsgesellschaft mit beschränkter Haftung (Bad Honnef) which was to be newly incorporated. In this connection they falsely pretended to the witness Braun already having paid up themselves original capital shares in the amount of 100,000. - Deutschmarks each and having bought with it the major part of the actually available video-films of the company. In fact they had not paid up any capital shares but only leased those films. Because of this fraudulent misrepresentation the witness Braun was of the opinion to become a partner in a sound company and

consequently paid the amount of 100,000. Deutschmarks on December 22, 1983 into the company account mentioned to him.

He did not get any money back of his paid up capital share.

b.

In October 1983 the witness Rottmann suggested to the witness Roehr on behalf of the persons charged that he should set up the video-shop "Django" in the Kronecenter in Schweinfurt as licensee under a franchise agreement with Century-Consumer-Products Video-Handelsgesellschaft mit beschränkter Haftung. As licence fee he should be paying a lump sum of 28,500. - Deutschmarks to Century-Consumer-Products. In order to get the money the persons charged made the witness Roehr believe that Century-Consumer-Products would provide for regular exchange of the video-cassettes. The persons charged knew that Century-Consumer-Products was financially not in a position to do so. The fraudulent misrepresentation regarding a regular exchange of cassettes caused the witness Roehr on October 20, 1983 to sign such an agreement with Century-Consumer-Products and to pay a licence fee of 28,500. Deutschmarks. The promised exchange of cassettes did not happen. The witness Roehr had to buy cassettes on his own expense to offer his customers a reasonably attractive programme. He did not get any money back of the paid licence fee."

Xe

Furthermore the persons charged ordered and obtained goods between October 1983 and October 1985 by fraudulently pretending to be solvent and willing to

pay;

they also entered into other financial

obligations. In this connection they acted mostly on behalf of Century-Consumer-Products. The agreed remuneration was only paid in part or not at all, as

was

intended right from the beginning. The goods

obtained were kept. Such fraudulent acts were committed in the following individual cases:

c.

Time of the offence: November 21, 1983

Injured party: Storebest - Shop Equipment Private Company Limited in Luebeck

Kind and object of the transaction: Purchase of equipment on behalf of Century-Consumer-Products Company

Damage: 12,657,41 Deutschmarks.

It is not necessary to set out the details of transactions d. to x. The allegations are in a form similar to c.

Annexed to the German warrant was a certificate with respect to the wording of the relevant provisions of the German Criminal Code as follows:

"Section 263, paragraph 1

Everyone who aims at obtaining unlawful enrichment for himself or a third party and thus inflicts damage to another person's property by causing or maintaining an error due to fraudulent statements, misrepresentation or concealment of facts will be imprisoned up to five years or imposed a fine.

Section 283, paragraph 1 number 5

Up to five years of imprisonment or a fine will be imposed to everyone who refrains from keeping the legally required accounts in case of over-indebtedness, impending or actual insolvency, or who keeps or changes the accounts in such a way that it becomes difficult to obtain a true picture of his financial situation.

Section 283, paragraph 1 number 7

Up to five years of imprisonment or a fine will be imposed to everyone who in case of over-indebtedness, impending or actual insolvency and contrary to the provisions of the commercial law

- a. draws up the balance sheets in a way which makes it difficult to obtain a true picture of his financial situation, or
- b. refrains from drawing up the asset and liability statement or taking the inventory within the required period of time..."

Also annexed to the German warrant was a certificate with respect to the wording of the relevant provisions of the Private Company Limited Act as follows:

"Section 64, paragraph 1

1. If the company becomes insolvent, the Directors have to file a petition in bankruptcy or a petition to institute composition proceedings without undue delay, latest three weeks after becoming insolvent.
2. This applies accordingly if the assets of

the company do not cover the debts.

3. There is no undue delay of the petition, if

the Directors proceed with the institution

of composition proceedings in due diligence

of a businessman.

Section 82 paragraph 1 number 1

Up to three years of imprisonment or a fine will be imposed to everyone who, acting as shareholder or Director for the purpose of registration of the company, makes false statements with regard to the take-over of original capital shares, paying-up of shares, use of paid-in amounts, special advantages, organization expenses, contribution in kind and provisions of security for not fully paid-in money contribution."

On behalf of the applicants, it is first submitted that the warrant now challenged failed to comply with the requirements of s.17(6)(a)(i)(C); it is said that there was not produced to the learned magistrate a statement in writing "setting out all the acts or omissions in respect of which the surrender of the [applicants] is requested." It is convenient

to deal with each set of charges in turn.

It will be remembered that the first charges are that the applicants "made knowingly false statements as shareholders and Directors of a Private Company Limited on the paying up of shares in order to have the company officially registered"; and that s.82 of the Private Company Limited Act makes it an offence for a person who, acting as shareholder or director for the purpose of registration of the company, makes "false statements with regard to [inter alia] the...paying-up

of shares..."

In the general description of the facts, it is said

10.

that when the Bad Honnef company was incorporated, only Braun had paid up his original capital of DM100,000. The specific matters then alleged in respect of the first charges are that by a motion dated January 30, 1984 the applicants and Braun applied for entry of the company into the commercial register, although the applicants had affirmed untruthfully in their application that, as in Braun's case, "they too had paid up their original capital shares of DM100,000 each and that these

amounts [were] definitively at the free disposal of the company management. Even later on the persons charged didn't

pay up their shares nor parts of them,"

It 18 argued, on behalf of the applicants, that these assertions are not statements of acts, as required by s.17(6)(a)(i)(C), but merely a compendious expression of the draftsman's conclusions with respect to the legal classification or characterisation of the conduct alleged - a

matter for the Magistrate under s.17(6)(a)(i)(B).

True It is that the relevant terms of s.17(6)(a)(i)(C) ("acts or omissions") may be contrasted with those of s.17(6)(a)(i)(B) ("a description of each offence"). This indicates that s.17(6)(a)(1)(C) requires more than a mere description of the offence. But what is meant by a setting out of "all the acts or omissions" in respect of which the surrender is requested? Clearly, it will not suffice to mention only some of the relevant "acts"; yet what 1s meant

by "the acts"?

11.

In its primary dictionary meanings, "act"

as -

1s defined

"1. anything done or performed: a doing; deed.

2. the process of doing: caught in the act." (Macquarie Dictionary)

Assistance in construing s.17(6)(a) is, I think, provided by

some observations made by Lord Parker C.J. 1n Reg. v. Governor

of Brixton Prison, Ex parte Gardner [1968] 2 Q.B.

s.3(1) of the Fugitive Offenders Act 1967 (U.K.) -

399.

"For the purposes of this Act an offence of which a person 1s accused . . . in a designated Commonwealth country .. . is a relevant offence if

- (a) in the case of an offence against the law of a designated Commonwealth country, it 1s an offence

which, however described in that law, falls within

any of the descriptions set out in Schedule 1 to this Act, and 1s punishable under that law with imprisonment for a term of 12 months or any greater

punishment . . . and (c) in any case, the act or

omission constituting the offence, or the

equivalent act or omission, would constitute an offence against the law of the United Kingdom if it took place within the United Kingdom. . ."

(Emphasis added)

Lord Parker said (at p-415):

"Mr. Dunn submits that the offences to which the authority to proceed in the present case relates are those set out in the authority to proceed itself, namely the perfectly general description of the offences of obtaining money by false pretences...

In my judgment Mr. Dunn's argument gives really no effect to the provisions of section 3(1)(c). It seems to me that what is clearly contemplated here is that a request coming forward to the Secretary of State must set out in some form, and no doubt the most usual form is the warrant or warrants for arrest, the offence or offences of which the fugitive is accused in this case in New Zealand. Not only must it supply a general description which will fulfil the provisions of section 3(1)(a) but it must condescend to sufficient detail to enable the matter to be considered under section 3(1)(c)."

By

12.

Edmund Davies L.J. said, with reference to s.3(1)(c), (at p.416): "'The offence" there referred to must mean the offence charged in New Zealand, and "the act or omission" refers to the manner or means whereby the offence so charged in New Zealand was committed. This involves examination of the particulars of the offence charged in New Zealand....' The requirement of s.17(6)(a)(i)(C) may also be contrasted with the rule at common law that, in the case of a warrant for apprehension or a warrant for safe custody, a

general description of the offence was sufficient (see Biron

and Chalmers, *The Law and Practice of Extradition* at p.36).

The position may further be compared with the operation of the Extradition Acts 1870 and 1873 (U.K.). In *Ex parte Terraz*

(1878) 4 Ex. D. a warrant for apprehension stated that Terraz had been accused of "the commission of crimes against bankruptcy law within the jurisdiction of the Swiss Confederation". The question was whether the warrant

"sufficiently" indicated the crimes or crimes alleged (per

Kelly, C.B. at p.66}). Kelly, C.B. said (at p.67):

"Now to put that charge into legal language might be difficult for those who had occasion at very short notice to obtain a warrant for the apprehension of an alleged criminal, and who would necessarily be required to act with great celerity and promptitude. For this reason it seems to me the legislature has permitted this comprehensive mode of description, so as to enable the complainant to bring the offender by general words of warrant before the magistrate, with a view to determining whether there is evidence to justify his extradition."

(See also Stanbrook, *The Law and Practice of Extradition* at

13.

p.18; Hartley Booth, *British Extradition Law and Procedure* at

p.53).

It follows, in my opinion, that a general description of the offence will not satisfy the requirements of s.17(6)(a)(i)(C); it is necessary to go further and to specify the details of the conduct alleged by referring to the

manner or means whereby the offence charged was committed.

In my view, the particulars given by the prosecution did state the conduct of the applicants in detail which was sufficient to comply with the requirements of s.17(6)(a)(i)(C). It is alleged that the applicants knowingly made false statements with respect to the amounts paid up on their shares by making a false statement in a motion dated 30 January 1984 for entry of the company into the commercial register of the District Court in Koenigswinter; and that, contrary to the facts, the applicants there stated that they had paid up DM100,000 each on their shares. This appears to be a comprehensive statement of the conduct of the applicants which is alleged. As such, it is sufficient to satisfy

s.17(6)(a)(i)(C).

It is next submitted, on behalf of the applicants, that the prosecution's statement fails to set out all the acts or omissions relied on in respect of the second set of charges. It will be recalled that these charges were those of having kept the legally required accounts during an impending

insolvency and after insolvency "in such a way that it was

14,

extremely difficult to get a picture of the financial situation" in coincidence with not having produced the asset and liability statement within the period required by law. The charges are apparently grounded on s.283 of the German

Criminal Code.

The particulars given by the prosecution state that there was no proper bookkeeping; that the primary records were filed away; that the company had become insolvent by March 1984; that in July 1984, Lanzenberger attempted to prepare some accounts but was hampered by lack of primary records in respect of the first half of 1984; and that no balance sheets were produced for the 1984 or 1985 fiscal

years.

In my view, the prosecution's statement is a sufficient indication of the details of the conduct charged. The essence of the charges, as stated in the particulars given, is the failure, in a situation of threatened or actual insolvency, to produce balance sheets in the fiscal years

mentioned. As particulars of omission, they are, in my

opinion, adequate for the purposes of s.17(6)(a)(i)(C).

In the remaining charges (numbered (4)), a number of distinct allegations are made and it will be necessary to

treat them separately.

The first offence alleged in this set of charges is

the dealings with Braun (transaction (a)). Two false

15.

pretences are alleged: first, that the applicants had already paid up their share capital in the amount of DM100,000; secondly, that they, presumably on behalf of the company, had purchased video-films; whereas, in fact, no capital was paid up and the films had only been leased. However, whilst the terms of the false representations alleged, are stated, there is no mention of how or in what circumstances"- the representations were communicated by or on behalf of the applicants to Braun. In my opinion, the statement did not comply with s.17(6)(a)(i)(C) (cf. *The King v. Weaver* (1931) 45

C.L.R. 321 at p.333).

The next offence alleged, (transaction (b)), is the Roehr allegation of a false pretence that the company would provide for regular exchange of the video-cassettes. But, again, there is no mention of the manner or means by which this false representation was made. In my opinion,

s.17(6)(a)(i)(C) was not satisfied.

The remaining transactions (c. - x.) in this set of charges are also based on allegations of false pretences. It is said that the applicants fraudulently pretended that they were "solvent and willing to pay". But, again, there is no indication of how the pretence was executed. In my view,

s.17(6)(a)(1)(C) was not complied with.

The other main argument put on behalf of the applicants is that, even if the requirement of s.17(6)(a)(i)(C) was met, the "dual criminality" standard

16.

required by s.4(1A) of the Act was not satisfied. It provides:

"(1A) An offence against the law of, or of a part of, a foreign state (including an offence against such a law relating to taxation, customs duties, foreign exchange control or any other revenue matter) for which a requisition for the surrender of a person has been made to _ the Attorney-General is an extradition crime for the purposes of this Act 1f, but only if -

- (a) the maximum penalty for the offence is death or imprisonment for not less than 12 months; and
- (b) had a relevant act or omission by the person taken place, at the time when the requisition was made, in or within the jurisdiction of, the part of Australia, where the person was found that act or omission would have constituted an

offence against the law in force in that part of Australia the maximum penalty for which is death or imprisonment for not less than 12 months."

It is hardly necessary to say that the present question falls to be determined on the proper construction of the municipal statute rather than by reference to any rule of public international law (see *Riley v. The Commonwealth* (1985)

159 C.L.R. 1).

It is submitted on behalf of the applicants that the first charges did not comply with s.4(1A) because the conduct alleged would not have constituted an offence against the relevant local law, viz. that of the State of New South Wales at the time the requisition was made. On behalf of the second and third respondents, it is contended that, if the acts alleged had occurred in this State, offences would have been

committed under the Crimes Act 1900 (N.S.W.) (s.178BB); under 17.

the Companies Act 1981 (N.S.W.) (s.563(2)); and there would also have been a common law conspiracy to cheat and defraud.

In the circumstances, it is necessary to refer only to s.563(2) of the Companies Act as follows:

"563 (2) [Misleading documentation] A person who, in a document required by or for the purposes of

this Act or lodged with or submitted to the Commission, makes or authorizes the making of a statement that to his knowledge is false or misleading in a material particular, or omits or authorizes the omission of any matter or thing without which the document is to his knowledge misleading in a material respect, is guilty of an offence.

Penalty: \$10,000 or imprisonment for 2 years, or both."

It will be remembered that in the first charges it is alleged that, in applying to register the company, the applicants made false statements with respect to the amounts paid up on their shares. If those acts had occurred in New South Wales, that conduct, in my opinion, would have constituted an offence of the requisite kind. In the terms of s.563(2) of the Companies Act, the applicants, in a document required by or for the purposes of the Act or lodged or submitted with the Commission, as the authority responsible for the administration of the law relating to corporations, would have made a statement that to his or her knowledge was false in a material particular. It is true, of course, that the Commission established under the Companies Act is not the authority charged with the administration of the corporate laws of Germany. But this is no more to the point than it

would have been in *Riley*, *supra*, to suggest that the precursor

18.

of the present s.4(1A) was not satisfied because the narcotics were alleged there to have been imported into the United States rather than into Australia (see per Gibbs C.J., Wilson and Dawson JJ. at p.8). The exercise, in terms of New South

Wales law, is necessarily a notional or hypothetical one.

In my opinion, the first charges satisfied s.4(1A).

A similar objection is taken by the applicants to the second charges. Here, the prosecution relies upon a combination of ss.555(1), 267(1), 553(1) and 553(3) of the Companies Act 1981 (N.S.W.) to satisfy the requirement of

s.4(1A).

Section 555 provides -

"Liability where proper accounts not kept

555(1) [Failure to take all reasonable steps] If -

(a) a provision of section 267 was not

complied with, in respect of a company to which this section applies, during the whole or any part of the period of 2 years immediately preceding the relevant day or the period between the incorporation of the company and _ the relevant day, whichever is the shorter; and

- (b) the company was at any time during that period, or became at a later time, a company to which this section applies,

a director of the company who failed to take all reasonable steps to secure compliance by the company with the provision throughout that period and any officer of the company who is in default are each guilty of an offence.

Penalty: \$5,000 or imprisonment for 1 year, or both.

19.

555(2) [Defence] In any proceedings against a person for failure to take all reasonable steps to secure compliance by a company with a provision of section 267, it is a defence if the person proves that he had reasonable grounds to believe and did believe that a competent and reliable person was charged with the duty of seeing that that provision was complied with and was in a position to discharge that duty."

The keeping of accounts is provided for by s.267(1) as follows: "267(1) [Duty to keep accurate accounting records] A company shall -

- (a) keep such accounting records as correctly record and explain the transactions of

the company (including any transactions

as trustee) and the financial position of

the company; and

- (b) keep its accounting records in such a Manner as will enable -

- (i) the preparation from time to time of true and fair accounts of the company; and (121i) the accounts of the company to be conveniently and properly audited in accordance with the Act." By s.553(1)(f£), it is provided that, inter alia,

s.555 applies to a company that has ceased to carry on

business or is unable to pay its debts.

Again, it is objected by the applicants that it is not possible to translate these provisions so as to apply to what the applicants are alleged to have done or failed to do in Germany. But, in my opinion, this argument misconceives the operation of s.4(1A). What it requires is not the actual translation of conduct from one jurisdiction to another, no

doubt a difficult, if not impossible, task. Rather, what is

20.

called for is to inquire what, notionally or hypothetically, would have been the consequences, in terms of any relevant

criminality, if the conduct had occurred here.

The facts alleged by the prosecution are that at a time of both impending and actual insolvency of the company, the applicants, as its directors, failed to produce any accounts. If this had happened in New South Wales, offences under the specified provisions of the Companies Act would have been committed. In my view, s.4(1A) was satisfied on these

charges.

The applicants also objected to the fourth set of charges on this ground. This, of course, was put as an alternative argument in the event that the submission based on s.17(6)(a)(i)(C) were to fail. Since this submission has been upheld, it is not necessary to embark upon a consideration of the alternative.

In the result, it should be declared that the warrants of committal are beyond power in so far as they are based on the fourth set of charges; and that, otherwise, the warrants are valid (cf. Parker v. Churchill (1986) 9 F.C.R. 334 at p.336). In the circumstances, there should be no order as to costs.

21.

I certify this—and the preceding pages to be a true copy of the Reasons for Judgment of his Honour Mr Justiceumont. Associate:

Date: 14 December 1987

Counsel for the Applicants: M.H. Tobias Q.C., S.M. Littlemore

Solicitors for the Applicants: Solicitors for First Respondent:

Counsel for the Second and Third Respondents:

Solicitor for the Second Respondent:

Solicitor for the Third Respondent:

Date of hearing:

Date Judgment delivered:

Hunt & Hunt Crown Solicitor

P. Flemming Q.C., P. Dwyer

Australian Government

Solicitor

Director of Public Prosecutions

7 December 1987

14 December 1987

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