[2007–09 Gib LR 12]

DIXON v. SUPERINTENDENT OF H.M. PRISON, GIBRALTAR

COURT OF APPEAL (Stuart-Smith, Ag. P., Aldous and Kennedy, JJ.A.): January 19th, 2007

Criminal Procedure—arrest—European arrest warrant—European Arrest Warrant Act validly passed—requirement in 1969 Constitution, s.35(2) that Governor consent to progress of legislation not concerning "defined domestic matters" satisfied by requirement in s.53(1) that to be kept informed of material considered by Council of Ministers and by assent to legislation—assent given to European Arrest Warrant Act, therefore Act validly passed

The appellant applied to the Supreme Court for a writ of habeas corpus.

The appellant was arrested on a European arrest warrant issued by a Spanish court to ensure the appellant's appearance before it to face the charge that he had committed an offence of violence, contrary to art. 149 of the Spanish Criminal Code. The following month, he was arrested in Gibraltar by the Gibraltar police, on the basis of the European Arrest Warrant Act. The Stipendiary Magistrate ordered that the appellant be surrendered to Spain to face the charge, and committed him to custody pending his extradition. In November 2006, the appellant's application to the Supreme Court for a writ of habeas corpus, on the ground that the European Arrest Warrant Act had not been validly passed, was refused.

On appeal, he submitted that (a) the Act had not been validly passed, and his arrest on a European arrest warrant had therefore been illegal; (b) the Gibraltar Constitution, s.35(2) required the Governor to consent to the

House of Assembly's proceeding with any item of legislation that did not relate to "defined domestic matters"; (c) although no list of "defined domestic matters," as required by s.55 of the 1969 Constitution, had ever been made, the subject-matter of the European Arrest Warrant Act fell outside the suggested list provided in the despatch to the Constitution; and (d) the Governor's consent to proceeding with the passing of the legislation had not been obtained.

The Attorney-General submitted in reply that (a) the Act had been validly passed, and as a consequence the appellant's arrest had been lawful; (b) the requirement in s.35(2) of the Act that the Governor consent to the legislature involving itself with matters that did not relate to "defined domestic matters" was met in practice by his granting assent to the Act; (c) s.35(2) did not contain any key part of the legislative process, but merely allowed the Governor to intervene in the passage of inappropriate legislation, rather than imposing an automatic bar on the legislature undertaking certain business without prior approval from the Governor; (d) the Governor was not required in each and every case to form an opinion as to whether a piece of legislation related to or concerned a matter other than a "defined domestic matter," but could instead signal or explicitly withhold his consent if he deemed it necessary in a particular case; (e) the Governor was kept fully informed of the progress of all legislation through the *Gazette*, and through the Chief Minister, who was required by s.53(1) of the 1969 Constitution to transmit to him copies of all papers submitted for the consideration of the Council of Ministers, which allowed the Governor to intervene in the passage of legislation if he thought it necessary; and (f) since the Governor had not intervened in the passage of the legislation and had indeed given his assent to it, it could be inferred that he consented to it.

Held, dismissing the appeal:

(1) The European Arrest Warrant Act had been validly passed. Although the wording of s.35(2) of the 1969 Constitution was clumsy, its aims were fulfilled by the requirement in s.53(1) of the Constitution that the Governor be kept informed by the Chief Minister of material being considered by the Council of Ministers, and by the requirement for assent in s.33 of the Constitution. The respondent's arrest had therefore been legal, and the appeal would be dismissed (paras. 12–15; paras. 17–18).

(2) It was not necessary to consider whether s.35(2) of the 1969 Constitution was a central part of the legislative process, though the indications were that it was not. It enabled the Governor to intervene in the legislative process in the event that he formed the opinion that a proposed bill did not relate to a defined domestic matter, and did not require him to make a judgment and positively give or withhold his consent to a bill's continued progress in each and every case (para. 14; para. 19).

Case cited:

(1) *Bribery Commr.* v. *Ranasinghe*, [1965] A.C. 172; [1964] 2 W.L.R. 1301; [1964] 2 All E.R. 785; (1964), 108 Sol. Jo. 441, distinguished.

Legislation construed:

European Arrest Warrant Act 2004, s.5: The relevant terms of this section are set out at para. 9.

s.10: "A person arrested under a European arrest warrant shall, as soon as may be practicable after his arrest, be brought before the magistrates' court, which shall, if satisfied that that person is the person in respect of whom the European arrest warrant was issued—

(a) remand the person in custody or on bail (and, for that purpose, the court shall have the same powers in relation to remand as it would have if the person were brought before it charged with an indictable offence) . . ."

Gibraltar Constitution Order 1969 (Unnumbered S.I. 1969, p.3602), s.32: The relevant terms of this section are set out at para. 5.

s.33: The relevant terms of this section are set out at para. 5.

s.34: "(1) If the Governor considers that the enactment of legislation is necessary or desirable with respect to or in the interests of any matter other than a defined domestic matter . . . or that the Assembly is unlikely to pass a bill introduced therein for the purpose, the Governor may, with the prior approval of a Secretary of State, cause a bill for the purpose to be published in the *Gazette* . . .

(2) If the Governor considers that the enactment of legislation is necessary or desirable with respect to any defined domestic matter . . . the Governor may, with the prior approval of a Secretary of State, introduce a bill for the purpose into the Assembly by means of a message addressed to the Speaker . . ."

s.35: The relevant terms of this section are set out at para. 7.

s.55: The relevant terms of this section are set out at para. 8.

D. Hughes for the appellant;
R.R. Rhoda, *Q.C.*, *Attorney-General*, for the respondent.

1 **KENNEDY, J.A.:** This is an appeal against the decision of Dudley, J., who on January 10th, 2007 dismissed the appellant's application for a writ of habeas corpus.

2 On June 12th, 2006, a judge of the Examining and First Instance Court No. 1, La Linea de la Concepción, Spain, issued a European arrest warrant for the arrest of Dean Dixon and his surrender to Spain to face the charge that in August 1992 he had committed grievous bodily harm contrary to art. 149 of the Spanish Criminal Code by inflicting serious injuries on Malcolm Stephen Peel.

3 On July 27th, 2006, the appellant was arrested in Gibraltar by officers of the Royal Gibraltar Police, acting in reliance on the European arrest warrant. As required by s.10 of the European Arrest Warrant Act 2004 (originally the European Arrest Warrant Ordinance), he was brought before the Magistrate and was then remanded in custody. A substantive hearing took place on November 29th, 2006, and the Stipendiary Magistrate then ordered that the appellant be surrendered to the Government of Spain, and committed him to custody.

4 However, by that time an application had been made—on November 10th, 2006—on behalf of the appellant for a writ of habeas corpus. That came before Dudley, J. on November 27th, 2006. The writ was sought because, it was submitted, the European Arrest Warrant Ordinance had not been validly passed by the legislature. The judge did not accept that submission, for the reasons which he gave on January 10th, 2007, and Mr. Hughes for the appellant now renews the submission before us.

5 The case for the appellant carefully, fully and succinctly put by Mr. Hughes is that the European arrest warrant fell into a category of legislation which in 2004 could not become law unless certain action was taken by the Governor. The requisite action was not taken and therefore in 2006 the Ordinance could not be relied upon. The relevant provisions are to be found in Part II of the Gibraltar Constitution 1969, which was in force in 2004, and which dealt with "Legislation and Procedure in the Gibraltar House of Assembly." So far as is material, that part reads as follows:

> "32. Subject to the provisions of this Constitution, the Legislature may make laws for the peace, order and good government of Gibraltar.
>
> 33. (1) Subject to the provisions of the next following section, the power of the Legislature to make laws shall be exercisable by bills passed by the Assembly and assented to by Her Majesty or by the Governor on behalf of Her Majesty.
>
> (2) When a bill is submitted to the Governor for assent in accordance with the provisions of this Constitution he shall signify that he assents, or withholds assent, thereto, or that he reserves the bill for the signification of Her Majesty's pleasure:
>
> Provided that the Governor shall reserve for the signification of Her Majesty's pleasure any bill—
>
> (a) that appears to him, acting in his discretion, to be in any way repugnant to or inconsistent with the provisions of this Constitution; or

(b) that determines or regulates the privileges, immunities or powers of the Assembly or of its members,

unless he has been authorised by a Secretary of State to assent to it."

6 I can now go to s.34, which deals with the Governor's legislative powers. That section indicates, in sub-s. (1), that the Governor retains power to override the Assembly in relation to all non-domestic matters. And, briefly, in sub-s. (2), that even in relation to defined domestic matters the Governor can introduce a matter before the Assembly and ensure that it becomes law.

7 I turn therefore to s.35. Sub-section (1) deals with financial matters. It provides that two persons are to be involved in the procedure in relation to such matters. It reads as follows:

"Except on the recommendation of the Governor signified by the Financial and Development Secretary or by a Minister, the Assembly shall not—

(a) proceed upon any bill (including any amendment to a bill) that, in the opinion of the person presiding in the Assembly makes provision for imposing or increasing any tax, rate or duty, for imposing or increasing any charge on the revenues or other funds of Gibraltar, or for altering any such charge otherwise than by reducing it, or for compounding or remitting any debt due to Gibraltar; or

(b) proceed upon any motion (including any amendment to a motion) the effect of which, in the opinion of the person presiding in the Assembly, would be to make provision for any of the purposes aforesaid."

Then I come to s.35(2), which is the heart of today's hearing. It provides that—

"except with the consent of the Governor, acting in his discretion, signified by the Attorney-General or by the Financial and Development Secretary, the Assembly shall not proceed upon any bill (including any amendment to a bill) that, in the opinion of the Governor, acting in his discretion, signified as aforesaid, relates to or closely concerns a matter that is not a defined domestic matter."

8 Domestic matters are not defined by the Constitution, save that s.55 provides as follows:

"(1) For the purposes of this Constitution 'defined domestic matters' means such matters as may from time to time be specified, by directions in writing, by the Governor, acting in accordance with instructions given by Her Majesty through a Secretary of State.

> (2) Any question whether any matter is a defined domestic matter for the purposes of this Constitution shall be determined by the Governor, acting in his discretion, and the determination of the Governor therein shall not be enquired into in any court of law."

Domestic matters were never specified as envisaged in s.55, but they were dealt with in the despatch to the Gibraltar Constitution Order 1969, which was issued by the Foreign and Commonwealth Office on May 23rd, 1969, the day on which the Gibraltar Constitution Order in Council was made. In that despatch, the then Foreign Secretary, Michael Stewart, said at para. 3, that—

> "directions specifying the defined domestic matters should be given at the stage when the constitution has been brought into operation and the Ministers are appointed following the General Election. You have, however, recommended that particulars should be made known in advance for general information. Accordingly I annex to this despatch a list of matters which in my view should be specified as defined domestic matters at that stage. It must be recognised that this list may need adjustment from time to time."

9 The list in the annex, which was not amended prior to 2004, deals with municipal services, social services, revenue, contributing services and so forth. It does not deal with extradition or European arrest warrants, but the European Arrest Warrant Act is itself of some assistance. At s.5, it provides as follows:

> "(1) The Central Authority for the purposes of this Act shall be the Governor.
>
> (2) The Governor shall delegate to the Chief Secretary his powers under subsection (1) in relation to matters not affecting internal security or defence."

The submission on behalf of the appellant in this court focuses on s.35(2) of the 1969 Constitution. Mr. Hughes submits that the matters dealt with in the 2004 Ordinance are not defined domestic matters, despite the provision in the Ordinance to which I have just referred.

10 The purpose of the Ordinance in 2004 was to give effect to a European Union Council framework decision, and that is no doubt right. So, Mr. Hughes contends, in order to comply with s.35(2) of the Constitution, the Governor had to form an opinion as to whether the Ordinance related to, or closely concerned, matters that were not defined domestic matters.

11 There is no evidence that he ever did form an opinion or was even advised of the existence of the bill. In reality, if he had applied his mind to the bill he would have concluded, so the argument inevitably runs, that it

dealt with matters which were not defined domestic matters. And then the Assembly could only have proceeded with the bill if the Governor consented and signified his consent in the way provided for by s.35(2). If the correct procedure is not followed, the Ordinance has no effect, and the situation can be compared with that considered by the Privy Council in *Bribery Commr.* v. *Ranasinghe* (1). In that case the members of the tribunal were found not to have been validly appointed because they were appointed under the Bribery Amendment Act 1958 which, by virtue of s.29(4) of the Ceylon Constitution, could not be presented for the Royal Assent unless it had endorsed upon it a certificate under the hand of the Speaker as to the number of votes cast. The 1958 Act was not endorsed as required, so the members of the tribunal were not validly appointed, and the conviction which they recorded was a nullity.

12 For the respondent, the Attorney-General submits that, at least when read properly, in the context of the rest of Part II of the 1969 Constitution, the meaning of s.35(2) is clear. He does not accept Mr. Hughes's submission that the Constitution only gave very limited powers to the House of Assembly. He submits that in effect the legislature was given wide, but not unfettered, power to legislate, as can be seen from the provisions to which I have referred.

13 The process of legislation involved the participation of the Governor, as can be seen from the provisions to which I have referred. He would in practice have prior notice of all legislation which it was intended to lay before the House of Assembly. In fact, what happened was that in order to provide the Governor with that information, it would be presented to him by the Attorney-General.

14 If the Governor formed the opinion that a bill related to, or closely concerned, a matter other than a defined domestic matter, then he could consent to the Assembly proceeding with the bill and signify his consent by means of one or other of the two unelected officers, or he could withhold his consent; in which event, having regard to the opinion which he had formed, the Assembly would not be able to proceed. But the sub-section did not, the Attorney-General submits, require the Governor to form an opinion in this or any other case.

15 In practice, as was pointed out by Dudley, J. in the Supreme Court, the Governor, as I have already said, would have been kept fully informed of the progress of bills, because s.53(1) of the 1969 Constitution required the Chief Minister to "cause to be transmitted to the Governor copies of all papers submitted for consideration by the Council of Ministers . . ." So, the Attorney-General submits, Dudley, J. was right to conclude that s.35(2) "allows for intervention by the Governor as opposed to an automatic bar on the Assembly undertaking certain legislative business without the Governor's prior approval."

16 The Attorney-General further submits that even if the appellant were right in relation to the requirements of s.35(2) of the 1969 Constitution, he should not succeed, because that sub-section, unlike the proviso to s.29(4) of the Ceylon Constitution considered by the Privy Council in *Ranasinghe* (1), is not an integral part of the legislative process.

17 In this context, it is relevant to note that under the 1969 Gibraltar Constitution a bill could not become law unless it received from the Sovereign or the Governor the Royal Assent, so that in practice the Governor always had an opportunity to prevent a bill from becoming law. And that opportunity arose because in each case the bill would be presented to the Governor by the Attorney-General with his recommendation that the assent be granted.

18 In my judgment, the Attorney-General is right. His approach as to the meaning of s.35(2) is, for the reasons which he has given, the correct one. Having said that, I, for my part, would entirely concede that, considered on its own, the wording is clumsy and the sub-section could have been much more simply worded. It may have been worded in the way that it is in order to take its place after s.35(1), which in broad terms is a similarly-worded provision. It may be that, as the Attorney-General has suggested, in reality s.35(2) reflects a type of wording which was commonly used at the time of enactment in relation to British Overseas Territories: I know not. But I have reached the conclusion that the submission made by Mr. Hughes must fail, and fail for the reasons given by the Attorney-General.

19 It is in my judgment unnecessary to consider whether s.35(2) was an integral part of the legislative process. It is the Attorney-General's second and alternative submission that it was not. Were it necessary to consider that alternative submission I, for my part, would agree with the Attorney-General's conclusion in relation to that also. I would therefore dismiss this appeal.

20 **STUART-SMITH, Ag. P.** and **ALDOUS, J.A.** concurred.

Appeal dismissed.