Federal application of state laws

Vanja Bulut reports on *Mok v Director of Public Prosecutions (DPP) (NSW)* (2016) 330 ALR 201; (2016) 90 ALJR 506; [2016] HCA 13.

This case concerned Mr Mok, the appellant, who was arrested in Victoria pursuant to a warrant issued in New South Wales and, during his transportation, attempted to escape.

The appellant was charged with attempting to escape from lawful custody in NSW (notwithstanding that he was in Victoria at the time), by virtue of the *Service and Execution of Process Act 1992* (Cth) (the SEP Act).

The very narrow question for the High Court was whether the SEP Act, in applying the NSW law, adopted the elements of the NSW offence.

Facts

The appellant was arrested and charged in NSW in February 2003 with fraud offences. He pleaded guilty in the Local Court and was required to appear in the District Court for sentencing in April 2006. The appellant failed to appear before the District Court and Freeman DCJ issued a Bench Warrant to apprehend him.

Some years later, in December 2011, the appellant was charged in Victoria with two Commonwealth offences relating to the possession of a false Australian passport and money laundering. In February 2013, the appellant appeared in the Melbourne Magistrates' Court on those charges and as he left the court he was arrested by an officer of the Victorian Police pursuant to the warrant which had been issued in NSW by Freeman DCJ, by operation of s 82 of the SEP Act.

The following day, on 27 February 2013, a Victorian magistrate issued a warrant headed 'Service and Execution of Process Act 1992 Warrant to Remand Person to Another State'. The warrant commanded a named NSW police officer to take the appellant to the Sydney Police Centre in NSW and take him before a magistrate for that state to answer the charges and be further dealt with according to law. This order was made pursuant to s 83(8)(b) of the SEP Act.

The next day, two NSW police officers escorted the appellant to Tullamarine Airport (a 'Commonwealth place', the relevance of which will be seen later), where he was to board a plane to Sydney. At the airport, the appellant tried to escape by running away from the officers. He ran for about 100 metres before he was re-arrested.

On his return to New South Wales he was charged under s 310D of the *Crimes Act 1900* (NSW) (the Crimes Act), being the offence of escaping or attempting to escape from lawful custody.

Although the charge as set out in the Court Attendance Notice was misleading as it conveyed that it relied upon the direct application of s 310D of the Crimes Act, in fact the appellant was charged with an offence pursuant to s 310D of the Crimes Act, applied by virtue of s 89(4) of SEP Act.

First instance

At first instance, the magistrate correctly treated s 310D of the Crimes Act as being applicable by virtue of s 89(4) of SEP Act. However, the magistrate dismissed the charges on the basis that the elements of the s 310D charge could not be made out, namely the appellant was not an 'inmate' (as defined) at the time of the attempted escape.[1]

NSW Supreme Court and Court of Appeal

On appeal to the NSW Supreme Court, Rothman J allowed the DPP's appeal and set aside the order of the magistrate and remitted the hearing of the charge to the Local Court.[2]

His Honour held that s 83(8)(b) of the SEP Act attracted the application of s 89(4), which in turn applied s 310D of the Crimes Act to the appellant's conduct as an offence under federal law. His Honour found that the magistrate had failed to appropriately take into account the effect of the SEP Act on s 310D of the Crimes Act.

The Court of Appeal (Meagher, Hoeben and Leeming JJA) dismissed Mr Mok's appeal.[3] Their Honours found that Rothman J was correct to conclude that the appellant must be taken to have been charged with a federal offence and rejected the common premise that it was a necessary condition of the application of s 310D of the Crimes Act, by operation of s 89(4) of the SEP Act, that the appellant satisfy the definition of 'inmate'.

The Court of Appeal held that the new federal offence created by s 89(4) of the SEP Act, acting upon s 310D of the Crimes Act, applied to all persons being taken to NSW in compliance with an order under s 89(1) of the SEP Act, and the appellant was such a person.

The High Court decision

The High Court (French CJ, Kiefel, Bell, Keane and Gordon JJ) unanimously dismissed Mr Mok's appeal, but three separate reasons for the decision were provided.

Whilst French CJ, Kiefel, Bell and Keane JJ agreed with the Court of Appeal decision, Gordon J disagreed, but nonetheless dismissed the appeal on different grounds.

What is the effect of s 89(4) of the SEP Act?

Section 89(4) of the SEP Act states that:

> (4) The law in force in the place of issue of a warrant, being the law relating to the liability of a person who escapes from lawful custody, applies to a person being taken to the place of issue in compliance with an order mentioned in subsection (1).

The question for the High Court was whether it was necessary to show that the appellant was an 'inmate' (as defined in s 310D of the Crimes Act) for a conviction under the federal offence created by s 89(4) of the SEP Act.

French CJ and Bell J found that there is no reason, in principle, which prevents the Commonwealth from adopting the text of a state law and applying it analogically or modifying it.[4]

Their Honours found that the construction of s 89(4) of the SEP Act does not require a binary choice between picking up s 310D unaltered and picking it up altered so as to eliminate the requirement that the person attempting to escape must be an 'inmate' (as defined). Analogical application does not strictly involve alteration, but rather, it is a way of describing how s 89(4) uses the text of the relevant state law.[5]

On the proper construction of the provision, taking into account the text, context and purpose of s 89(4), their Honours found that a general law prohibiting escape or attempted escape from lawful custody, such as s 310D of the Crimes Act, would answer the requirements of s 89(4).[6]

As such, the Court of Appeal was right in finding that s 89(4) treats the applicable aspects of s 310D as surrogate federal law 'upon the assumption that escape from lawful custody imposed by an order made by a magistrate in another state is not outside their field.'[7]

Kiefel and Keane JJ reinforced the Court of Appeal's finding that, put simply, s 89(4) of the SEP Act applied to the appellant because he was a person being taken to the place of issue of the warrant in compliance with an order made under s 89(1) of the SEP Act.[8] Their Honours agreed with French CJ and Bell J as to the general approach of resolving the question of the application of s 89(4), but found that s 89(4) more directly answers the question of its application.[9] The provision describes the relevant state law in force as a 'law relating to the liability of a person who escapes from lawful custody' and their Honours concluded that those words are referable to a law which makes it an offence to escape from lawful custody, without more.[10] Accordingly, s 89(4) does not pick up the Crimes Act's reference to an 'inmate'.

Gordon J agreed that the appeal should be dismissed but found that, contrary to the conclusion reached by the Court of Appeal, all elements of s 310D(a) of the Crimes Act must be proved.[11] Her Honour reached this conclusion on the basis that, in enacting s 89(4) of the SEP Act, the parliament made a deliberate decision to enact an 'application' provision and it did so for the purpose of creating liability by reference to a state law.[12] Her Honour found that, if s 89(4) applied the state law otherwise than according to its terms, that purpose would be frustrated because it would no longer be applying the chosen state law but rather be creating a new and independent federal offence, the elements of which are unclear.[13]

In this case, her Honour found that the appeal should be dismissed as her Honour was satisfied that the elements of s 310D of the Crimes Act were capable of proof in relation to the appellant.

Does the *Commonwealth Places (Application of Laws) Act 1970* (Cth) apply?

The High Court also considered the submission made by the appellant that if he had committed an offence, it would have been a Commonwealth offence in light of the *Commonwealth Places (Application of Laws) Act 1970* (Cth) (CPAL Act). Section 4(4) of the CPAL Act makes provision for the application of the laws of a state (which have extraterritorial effect) to Commonwealth places. The appellant submitted that the CPAL Act applied the applicable state law (in this case, s 310D of the Crimes Act) without rewriting it. That is to say, by virtue of the CPAL Act, s 310D applies at Tullamarine Airport (a 'Commonwealth place') and he is required to have been an 'inmate' within the meaning of s 310D in order to offend against it.

French CJ and Bell J found that, to the extent that s 310D has extra-territorial operation, that extra-territorial operation did not operate in this case because any such operation was displaced by s 8(4) of the SEP Act, which states that the SEP Act applies to the exclusion of a law of a state.[14] Gordon J came to the same conclusion.[15]

Endnotes

1. *Police v Mok*, Local Court of New South Wales, 1 July 2013, unreported.
2. *Director of Public Prosecutions (NSW) v Yau Ming Mathew Mok* [2014] NSWSC 618.
3. *Mok v Director of Public Prosecutions (DPP) (NSW)* (2015) 90 NSWLR 492; (2015) 320 ALR 584; (2015) 294 FLR 432; [2015] NSWCA 98.
4. At [36].
5. At [37].
6. At [37] and [39].
7. At [42].
8. At [52].
9. At [57].
10. At [58].
11. At [116].
12. At [105].
13. At [105].
14. At [20].
15. At [91].