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Report on Habeas Corpus

TO: The Honourable K.M. McCaw, M.L.A.,
Attorney General.

By letter dated 11th March, 1966 you made a reference to this Commission in the following terms:

> "To review submissions by the International Commission of Jurists (as to writs of habeas corpus) and to consider generally the procedures which might be adopted in this State covering applications presently provided for in section 20 of the Supreme Court and Circuit Courts Act, as amended."

The substance of the submission made by the International Commission of Jurists (Australian Section) was that recent amendments of the law might well deprive a judge of the Supreme Court of power to make an order absolute for the issue of a writ of habeas corpus. This Commission is satisfied that the power to make such an order absolute for the issue of a writ of habeas corpus. This Commission is satisfied that the power to make such an order absolute has now been vested exclusively in the Court of Appeal or, during vacation, in a judge of the Court of Appeal.

The International Commission of Jurists (Australian Section) stated that, in its view, "the effectiveness of the writ of habeas corpus, as an essential bastion of personal liberty, should not be diminished" .

There may be such to be said for the view that matters involving the liberty of the subject should be dealt with in the first instance by the highest court in the State, and doubtless this was one factor which induced the introduction of section 20 of the Supreme Court and Circuit Court Act, 1900 - 1965, in its present form, which was made by section 23 of the Law Reform (Miscellaneous Provisions) Act 1965. This provision and section 21F (3)(b) of the Supreme Court and Circuit Court Act, 1900 - 1965, are effective to take away from judges of the Supreme Court the power to make order absolute for the issue of writs of habeas corpus.

However, upon full consideration, this Commission has come to the conclusion that there are good reasons for changing the present position. Among them are the following:-

1. It may be conductive to delay if an application is required to be made to a Court of three judges. A judge sitting alone might well find it desirable to make a final order at night time or during a week-end. There are real problems in assembling a Court of three judges at such times. Unnecessary delays should be eliminated at all costs.

2. The right of a citizen to apply for a writ of habeas corpus to a judge sitting in a circuit town should be preserved.

3. The power to make final orders for the issue of writs of habeas corpus has traditionally been reposed in every judge of the Supreme Court, and there is no good reason for any such judge being deprived of the jurisdiction to exercise such power.

The view which the Commission has formed is in accordance with those expressed by the Chief Justice, the Bar Association of New South Wales, the Law Society of New South Wales, and the International Commission of Jurists (Australian Section).

If the position is to be changed as proposed, there seems to be every reason to remove an anachronism at the same time. For historical reasons, which it is unnecessary to discuss, the law in New South Wales was, until recent amendments, that a person seeking a writ of habeas corpus had the right to go from

judge to judge (in the hope of finding one more merciful than his brethren) and that each judge was required to consider the application without reference to any previous decision. The grant of rights of appeal and, in particular, the provisions of section 73 of the Commonwealth of Australia Constitution which confers jurisdiction in the High Court of Australia to determine appeals from the Supreme Court of any State, renders ineffective any reason which could have ever justified this rule. This has been section 14 of the Administration of Justice Act, 1960, which precludes subsequent applications being made on the same grounds, whether to the same or any other Court or judge unless fresh evidence is adduced in support of the application. This is obviously reasonable and proper and does not appear to require elaboration.

A memorandum discussing the relevant law on the subject (which was circulated to all those interested) is set out in the First Schedule.

This Commission recommends that effect be given to the proposals mentioned above by enacting legislation in the form set out in the Second Schedule hereto. To make the position quite clear, the original provisions of the Common Law Procedure Act, 1899, (which may be thought to have been repealed impliedly by section 20 of the Supreme Court and Circuit Courts Act, 1900 - 1965, as substituted by Act No 32 of 1965) are proposed to be re-enacted, with two additions. One of these additions relates to the removal of the anachronism last abovementioned. The other is to state expressly that applications shall be made under the re-enacted legislation and not otherwise. As a corollary, it seems desirable to state expressly that the jurisdictions which previously appears to have existed to grant an order absolute in the first instance (Halsbury's Law of England 2nd Edn. Vol. 9 p. 725) shall be preserved.

21st September, 1966

J.K. MANNING
CHAIRMAN

R.D. CONACHER
MEMBER

The First Schedule

The Present Law in New South Wales

There has been very considerable difference of opinion over the years as to the extend of the jurisdiction of a judge or the Court to make a rule absolute for the issue of a writ of habeas corpus.

Some doubts existed as to the position before the introduction in England of the Judicature Act, 1873. This Act established the High Court of Justice in England as a single court. Some of the difficulties which arose thereafter were due to the fact that previously four separate courts had exercised jurisdiction in their appropriate spheres in England namely the Court of Chancery, the Court of King's Bench, the Court of Exchequer, and the Court of Common Pleas.

Notwithstanding the divergence in opinions which have been expressed from time to time, the Law in New South Wales was clearly stated by the Supreme Court as long ago as 1895. In that year, a question arose as to the extend of the jurisdiction of the Court and of each judge of the Court (*Ex parte Rowlands* 16 N.S.W.L.R. 239) and in delivering judgement in that case Windeyer J. said (at p. 246):-

> "This is an application for a writ of habeas corpus, and the law has always been that a person seeking this writ may go from court to court or from judge to judge, and that each court or judge must consider the application without reference to any previous decision in the matter."

This statement of the law appears to have stood ever since.

Furthermore, this was substantially in accordance with the views expressed by the Privy Council in *Eleko v Government of Nigeria* ((1928) A.C. 459) . In that case their Lordships were concerned with the duty of a judge of the Supreme Court of Nigeria to whom an application for a writ of habeas corpus was made. It is to be noted that Lord Hailsham L.C. in delivering the judgement of their Lordships made it clear that it had been conceded, during the argument, by the Government of Nigeria that, under the terms of the Habeas Corpus Act, 1979, (which was in force in Nigeria and is still in force in New South Wales) an application for a writ of habeas corpus could be made in vacation to successive judges of the same court. After considering the authorities his Lordship Concluded (at p. 468):-

> " If it be conceded that any judge has jurisdiction to order the writ to issue, then in the view of their Lordships each judge is a tribunal to which application can be made within the meaning of the rule, and every judge must hear the application on the merits. It follows that, although by the Judicature Act the Courts have been combined in the one High Court of Justice, each judge of that Court still has jurisdiction to entertain an application for a writ of habeas corpus in term time or in vacation, and that he is bound to hear and determine such an application on its merits notwithstanding that some other judge has already refused a similar application."

There is no doubt that the views expressed by their Lordships in this case provide powerful confirmation of the statement by Windeyer J. in *Ex parte Rowlands (supra)* and this decision may be taken to lay down the law currently in force in this State.

The Possibility of a Change in the Law

In recent times problems have arisen in England in regard to the manner in which an application for the issue of a writ of habeas corpus should be dealt with. Judgements of high authority throw considerable doubt upon whether what has been said to be the current law in New South Wales is correctly stated.

The position does not appear to have been given detailed consideration by the High Court of Australia and the law may well be open to review in the event of the matter falling for consideration by that Court.

In *In re Hastings ((No 2)* (1959)) 1 Q.B. 358) the whole question of the power of the High Court of Justice and the individual judges of that Court to issue a writ of habeas corpus was fully reviewed and closely examined. The decision was of a Division Court over which Lord Parker C.J. presided. In giving the judgement of the Court, the Lord Chief Justice drew attention to some of the problems which appeared to the Court to give rise to difficulty. His Lordship said (at p. 367):-

> "We think that it is clear that, at any rate since the end of the eighteenth century, an applicant has always had the right to apply successively to every tribunal competent to issue of a writ of habeas corpus. The problem thus involves ascertaining first what tribunals had that power the passing of the Judicature Act, 1973, and, secondly, upon what tribunals that power before the passing of the Judicature Act, 1873, and, secondly, upon what tribunals that power has devolved as a result of that Act and its successors, in particular, the Judicature Act, 1925.
>
> In considering the early history of the matter it is relevant to bear in mind that the common law courts of King's Bench, Common Pleas and Exchequer functioned as court only in term time, and that each of the four legal terms was of brief duration. Consequently, the greater part of the fell during the legal vacations, although the judges of the courts might be sitting under commissions of assize, oyez and terminer and general gaol delivery or hearing cases in Middlesex at nisi prius. Furthermore, each of the common law courts sat in banc and no individual judge of the court had any general power to act for the court. Even a decision at nisi prius only became a judgement of the court upon motion to the court upon the fourth day of the term next following the verdict at nisi prius."

At this point it may be well to pause for a moment and to remember that the Imperial Statute 9 Geo., IV., c. 83 s.3 provides that the Supreme Court of New South Wales shall have the same jurisdiction as his Majesty's Court of King's Bench, Common Pleas and Exchequer at Westminster. Thus the problems being dealt with by his Lordship following upon the passing of the Judicature Act in England are not quite the same as those which obtain in this state.

After an extensive review of the whole of the authorities on the point his Lordship proceeded (at p. 374):-

> "So far we venture to think that the authorities cannot be said to support the principle that except in vacation an applicant could go from judge to judge as opposed to going from court to court. Nor can we trace any single instance in the books of application being made to successive judges of the same court."

Eleko's case (*supra)* was then examined by his Lordship and the Court concluded that an application for a writ of habeas corpus, having once been heard by a Division Court of the Queen's Bench Division will not be heard again by another Divisional Court of the same Division. His Lordship then proceeded (at p. 377):-

> "That is sufficient to dispose of the present case. Although it has been necessary for the purpose of ascertaining the nature of the jurisdiction exercised today by the Divisional Court in matters of habeas corpus to canvass the historical justification for the view expressed by the Judicial Committee in *Eleko's* case, it is not necessary for the decision of the present application for us to express any concluded opinion as to the extent of an applicant's right today to go from judge to judge as distinct from going from Divisional Court to Divisional Court of the Queen's Bench Division. *Eleko's* case has remained unquestioned - except in the Irish case to which we have referred - for 30 years, and there are parallel decisions in Canadian and Australian court. In a matter so important to the liberty of the subject we would not lightly disregard the principles there laid down and their correctness can be left for consideration until a case arises in which they are directly in point.

> We would only repeat, in conclusion, what Lord Goddard has so often said, that there should be an appeal to the House of Lords in criminal matters where the writ of habeas corpus has been refused. This case is just the case in which a ruling by the highest tribunal in the land is required."

A further application was then made by the same applicant to the Chancery Division (*In re Hastings (No 3)* (1959) Ch. 368).This also was an application to a Divisional Court. Vaisey J. after referring to the earlier decision said (at p. 376):-

> " Lord Parker C. J. considered the position as it had been in the past and was in the present. He pointed out that the old practice by which the applicant for a writ of habeas corpus could go from court to court until he got satisfaction quite obviously had been abrogated by the fact that since the year 1873 there had only been one court, so that there could be no question of going from court to court. (Section 3 of the Supreme Court of Judicature Act, 1873, now section 1 of the Supreme Court of Judicature (Consolidation) Act, 1925).
>
> There then came the further question, which Lord Parker C.J. considered, whether in fact the practice of going from judge to judge still subsisted, and there is no doubt that a certain amount of judicial authority would seem to point to the fact that that is still an existing right. Lord Parker C.J. thought that it was not, and he explained the ancient practice by the necessity of finding someone to deal with a case during vacations. In those days a far greater part of the year was taken up by law vacations than it is at present, and when the courts were not sitting in banc if relief was wanted, it was necessary to apply to a judge, because that was the only way of ascertaining the will of the judicature. But Lord Parker thought that, having regard to modern conditions, that right had been practically abrogated."

Harman J. agreed with Vaisey J. and added (at p. 3789):-

> "It is always sad to be stripped of an illusion, but I, like, I expect, most lawyers, have grown up in the belief that in cases of habeas corpus the suppliant could go from judge to judge until he could find one more merciful than his brethren. That illusion was stripped from me when I read the report of the decision in the Queen's Bench Divisional Court last year in this very case. The decision was based upon this, that there never had been such a right. There had been a right to go from court to court; there had bee a right in vacation to go from judge to judge, for the simple reason that the court was not sitting in banc: but there had never been a right in term time to go from one judge to another when the court to which the application should properly be made was available."

The reasons given by the two Divisional Courts in the cases of *In re Hastings (No 2)* and *In re Hastings (No 3) (supra)* are very well reasoned and most powerful. Nevertheless, it is impossible to forecast with accuracy what conclusion would reached either by the Supreme Court of this State or by the High Court of Australia if the matter were re-examined. However, it cannot be denied that there are some grounds for believing that the old cases, which set out the law currently in force in this State, might not be followed.

Legislative Amendments in England

Apart altogether from the law as it has been or may be determined by judicial decision, the legislature has intervened in England and has clarified the doubts which previously existed.

It is not without importance to remember, as Lord Parker pointed out at the conclusion of his judgement in *In re Hastings (No 2) (supra)* that, in his view and in that of other judges, there should be an appeal to the House of Lords in criminal matters where the writ of habeas corpus has been refused. Thus the absence of an appeal to the highest tribunal in the land was an important factor.

Section 14 (2) of the Administration of Justice Act, 1960, provides:-

> "Notwithstanding anything in any enactment or rule of law, where a criminal or civil application for habeas corpus has been made by or in respect of any person, no such application shall again be

> made by or in respect of that person on the same grounds, whether to the same court or judge, unless fresh evidence is adduced in support of the application."

In *Ex parte Schtraks* ((1964) 1 Q.B. 191) Lord Parker C.J. said (at p. 195) after referring to the section above set out:-

> "That subsection, as everyone knows, was introduced into this Act in order to give legislative authority, if that were needed, to the various decisions in In re Hastings, the intention being to make it quite clear that under this Act there should be an appeal both in civil and criminal applications for habeas corpus and that, there being an appeal, it was only right that there should not be an opportunity of going as it was though at one time one could go, from judge to judge and from court to court. The subsection went on to provide that if the evidence were different, then you could make another application."

The fact that the English legislature has so provided may possibly indicate that modern thinking required that the conclusion of the courts which more recently considered these problems should be adopted, and that it has in fact been adopted without any difficulties arising.

It has been pointed out above that in England there was no appeal from a decision of a single judge who refused an application for the issue of a writ. This seems to have been a factor which induced, or at least assisted the conclusion, that an application could go from judge to judge.

It is important to remember that there has always been a right of appeal in New South Wales. The Common Law Procedure Act, 1899, provided that every application for a writ of habeas corpus should be returnable before a judge but section 254 provided that any order made by a judge shall be subject to appeal to the Full Court.

The Supreme Court and Circuit Courts Act, 1901 - 1965, provides (s. 21F (3)) that applications to make absolute an order for the issue of a writ of habeas corpus, shall be heard by the Court of Appeal while section 20 (2) of that Act provides that such applications may, in vacation , be heard and disposed of by a Judge of Appeal, and section 20 (3) provides that any decisions of such a Judge shall be subject to an appeal to the Court of Appeal. These are the provisions which may require reconsideration.

The citizens of this State are in somewhat special position because s.73 of the Commonwealth of Australia Constitution provides that the High Court shall have jurisdiction to hear and determine appeals from all judgments, decrees, orders and sentences of the Supreme Court of any State. In *Attorney-General for the Commonwealth v Ah Sheung* ((1906) 4 CLR 949) the question of the jurisdiction of the High Court to entertain an appeal from the Supreme Court of a State in a cases of habeas corpus was considered and in the judgment of the Court, which read by Griffith C.J., his Honour said (at p.951):-

> "The jurisdiction conferred by the Constitution extends to all decisions of the Supreme Court of the States with such exceptions as may be made by Parliament, and no exception is made by the Judiciary Act in cases of habeas corpus."

Thus, it may fairly be said that amply rights of appeal, have at all times existed in respect of decisions of the Supreme Court of New South Wales in cases of habeas corpus, and it may well be thought that there is now no reason why a citizen should have the right to go from judge to judge and that the law of England which permits appeals from any decision and fresh applications where there is fresh evidence, provides adequate safeguards for each member of the community.

General

The remaining question for determination is whether the right of a single judge of the Supreme Court, to make an order for the issue of a writ of habeas corpus absolute, should be restored.

The Second Schedule

A BILL to regulate the procedure relating to writs of habeas corpus: for this purpose to amend the Common Law Procedure Act, 1899-1965; and for purposes connected therewith.

BE it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled, and by the authority of the same as follows:-

1. (1) This Act may be cited as the Habeas Corpus Act, 1966 — Short title and citation.

(2) The Common Law Procedure Act, 1899-1965, as amended by this Act, may by cited as the Common Law Procedure Act, 1899-1966.

(3) The Supreme Court and Circuit Courts Act, 1900-1965, as amended by this Act, may be cited as the Supreme Court and Circuit Courts Act, 1900-1966.

2. (1) This Act shall commence upon a day to be appointed by the Governor and notified by proclamation published in the Gazette. — Commencement and application.

(2) The amendments made by this Act do not apply to an application made before the commencement of this Act for an order nisi or an order absolute in the first instance for a writ of habeas corpus nor to proceedings under an application so made.

3. The Common Law Procedure Act, 1899-1965, is amended by omitting Part XXII and inserting in lieu thereof the following Part:- — Amendment of Act No.21, 1899.

PART XXII - HABEAS CORPUS

251A. Proceedings for habeas corpus shall be taken in accordance with this Part and not otherwise. — Proceedings - How taken.

252. Every application for an order nisi or an order absolute in the first instance for a writ or habeas corpus shall be made to a Judge. Such application may be made ex parte in the manner prescribed. — Application.

252A. Notwithstanding anything in any enactment or rule of law, where application for an order nisi or an order absolute in the first instance for a writ of habeas corpus has been made by or in respect of any person, no such application shall again be made by or in respect of that person or the same grounds, whether to the same Judge or to any other Judge, unless fresh evidence is adduced in support of the application. — Further application cf 8 & 9 Eliz.II, c.65, s14(2).

253 (1). Every order nisi for a writ of habeas corpus shall be returnable before a Judge sitting in public chambers whether in Term or not unless the Judge considers that it should be returnable before the Court of Appeal. — Return of order nisi.

(2). On the return of such order the Judge or the Court of Appeal may dispose of the case as the circumstances appear to require and may make

such order as to costs as the Judge or the Court of Appeal thinks fit.

254. Any order made by a Judge under section two hundred and fifty-two or two hundred and fifty-three of this Act shall be subject to appeal to the Court of Appeal within the same time and in the same manner as prescribed for motions for new trial.

Appeal.

4. The Supreme Court and Circuit Courts Act, 1900-1065, is amended:-

Amendment of Act No.35, 1900.

(a) (i) by omitting from subsection one of section twenty the words “or for an order for the issues of a writ of habeas corpus”;
(ii) by omitting from subsection two of the same section the words “or to make absolute an order for the issues of a writ of habeas corpus”

Sec.20 (Exercise of powers by single Judge of Judge of Appeal in certain cases).

(b) by omitting paragraph (b) of subsection three of section 21F.

Sec. 21F (Jurisdiction of Court of Appeal).