CASE NOTES

CHAPMAN AND OTHERS v. SUTTIE[1]

Constitutional Law—State Firearm Licensing—Freedom of interstate trade, commerce and intercourse

The appellants were at all material times licensed gun dealers resident in Melbourne. They made seven separate sales of firearms without observing the requirements of section 17 (1) (d) and section 24 (1) of the Firearms Act 1958 that firearm certificates should be produced by purchasers. Thirteen informations were exhibited alleging offences on the part of the appellants, four of which informations alleged a breach of section 24 (1) and the rest alleged breaches of section 17 (1) (d). The purchaser in each case was a resident of another State. In each case except one, the firearm had been ordered by the purchaser from his home State by post and the terms of the offer required that it should be forwarded by post or rail to the purchaser in the State where he resided. The appellants, as defendants in the Court of Petty Sessions at Melbourne, had placed reliance upon section 92 of the Constitution, and, for that reason, the Court of Petty Sessions was regarded as exercising Federal jurisdiction under section 39 (2) of the Judiciary Act (Commonwealth) 1903-1960. Thus the appeals were brought direct to the High Court.

The first matter of interest about this case is the High Court's approach to the issue of whether firearms were to be treated as ordinary items of commerce entitled to the freedom stipulated by section 92, or whether their dangerous nature meant firearms were different from other commercial articles and required special measures of control in the interests of public safety. Dixon C.J. mentioned in his opening remarks that there had not been very much judicial consideration of this question.

The only authority referred to by the court on whether firearms are properly to be considered articles of commerce was *Coghlan v. Fleetwood*[2] where Napier C.J. had held that 'such things as pistols, poisons, narcotics or other things which are a menace to the public safety if they come into the hands of the wrong people,'[2a] should not come under the protection of section 92. This decision was referred to only by Menzies J., and then only to differ from it.[3]

No encouragement was given by the court to the suggestion that the solution of the problem might be found by saying that some articles are extra-commercial, but Dixon C.J. pointed out that

> In considering whether compliance would mean an interference with 'freedom' of interstate trade you cannot disregard the fact that we are

[1] (1963) 36 A.L.J.R. 342. High Court of Australia; Dixon C.J., Taylor, Menzies, Windeyer and Owen JJ.
[2] [1951] S.A.S.R. 76. [2a] *Ibid.* 81. [3] (1963) 36 A.L.J.R. 342, 350.

> not concerned with the ordinary course of trade and commerce in commodities where delay and the like may form real impediments.[4]

But this remark was probably intended to draw the distinction between a person or firm most of whose activities are bound up with interstate trade, and the present case where the buyers were engaged in isolated casual transactions. It does not contain much of a suggestion that trade in firearms must be considered separately.

Every other member of the High Court thought that firearms were ordinary trading goods, and perhaps the last word on this aspect could be left to Windeyer J.

> Poisons and drugs are as much subjects of commerce as are pickles and soft drinks. . . .[5]

This appeal so adds to authority, such as *Ferguson v. Stevenson*[6] which concerned kangaroo hides, that there is little hope in arguing before the High Court that a given article is not really a part of trade and commerce because of its inherent nature.

The next matter for consideration was whether the facts of the case actually involved interstate transactions, so that section 92 might have even a potential application. The majority differed from the Chief Justice on this point, and the key to the divergence is probably to be found in different inferences drawn from the facts, Taylor and Owen JJ., holding, with the majority, that interstate commerce *was* involved, observed that delivery to a State other than that in which the contract was made was no different from delivery to the State in which the contract was made from another State. The latter situation was covered by the two price regulation cases of *W. & A. McArthur Ltd v. Queensland*[7] and *Wragg v. New South Wales*.[8] As Menzies J. observed, 'a sale of which it is a term that the goods sold shall be sent to the purchaser interstate is itself interstate trade'.[9] Windeyer J. took it almost for granted that interstate trade was involved where a contract for sale is made in Victoria to be performed by the despatch of the article to the buyer in another State. But the Chief Justice thought that 'technically it was a "sale" in Victoria and the delivery was in Victoria to a carrier'.[10] In the absence of further evidence of the actual contracts in the report, there are two possible explanations of this difference. The first is that the majority thought the terms of the contracts were so drawn that the Melbourne gun dealers took responsibility for safe delivery at the interstate delivery point, while the Chief Justice construed the contracts differently. The second is that there was universal agreement on the construction that there was no such assumption of liability on the part of the gun dealers, and a difference on the law is involved.

The difference would be this: the majority are of the opinion that where the buyer is in one State, the seller in another, and a contract is made which will eventually result in articles of commerce crossing a State

[4] *Ibid.* 345. [5] *Ibid.* 351. [6] (1951) 25 A.L.J.R. 510. [7] (1920) 28 C.L.R. 530.
[8] (1953) 88 C.L.R. 353. [9] (1963) 36 A.L.J.R. 342, 349. [10] *Ibid.* 345.

border then interstate commerce is involved. Against this would be the more analytical approach of the Chief Justice that attention must be centred on legal obligation, and if property passes within the borders of one State then interstate commerce is not involved. It seems most likely that the difference of opinion is one of fact rather than of law, in view of the previous approach of the Chief Justice to this problem.[11] However, if the difference is one of law then it seems more realistic to take notice of the physical movement of goods across interstate borders that is involved in contracts such as this, than to concentrate on the search for where legal obligations end and property passes. The writer's sympathies would be with the majority in such a situation.

Having established that firearms were like any other article of commerce, and also that the appeal involved interstate transactions, the next issue was whether there was a burden on interstate trade in this case. To understand this issue, it is essential to bear in mind the procedure imposed on a person wishing to purchase a firearm. To obtain a firearm certificate he must apply in the prescribed manner to the police and if the relevant police officer is satisfied on various grounds that the applicant needs a firearm and is a suitable person to have one, a licence is granted.

Appeal from a refusal to grant such a licence lies to the Court of Petty Sessions nearest the applicant's residence. Disregarding for the moment the police policy (of which some evidence was given) not to issue firearms licences to residents of other States, the issue was whether such a procedure placed a burden on these seven interstate commercial transactions. Dixon C.J. stressed the importance of concentrating on the particular facts of each case to see whether a burden could be discerned and (except where the statute on its face restrains interstate trade) expressed disapproval of an approach which considers the provisions of the licensing statute as a whole. The Chief Justice said that counsel's proofs did not show in this case that there had been any burden on these interstate transactions. For example, there was no proof that the interstate purchasers could not readily obtain a firearm licence (the implication of the judgment here is that the localizing of the formal procedures and the police policy previously mentioned were not of great importance and could be counteracted by a declaratory judgment of the Supreme Court) or that the purchaser did not in fact possess such a licence. There is perhaps the slightest hint of disapproval of the appellants' counsel's handling of the proofs here, just as there was a more prounounced criticism of the framing of the informations under section 17 (1) (d) by the prosecuting counsel. The Chief Justice's approach to the police policy has its corollary in *Armstrong v. Victoria*[12] where it was held that the benevolent administration of the Transport Regulation Amendment Act (1954) (Victoria) was no criterion for judging its validity. While the Chief Justice's reasons centred on procedural matters the rest of the court examined whether the requirements of the Firearms Act involved a burden on interstate trade.

Taylor and Owen JJ. thought that the express prohibition against sales

[11] See for example *Field Peas Marketing Board (Tas.) v. Clements & Marshall Pty Ltd* (1948) 76 C.L.R. 414. [12] [1955] A.L.R. 628.

of firearms without the production of certificates, must be taken to be an infringement of section 92 unless it appears that there is a right to the grant of a certificate except in circumstances where a refusal would not constitute an impairment of the constitutional freedom. And they ruled that:

> a provision which leaves to the Chief Commissioner of Police in one State and, ultimately, to a court of petty sessions in that State, to say whether or how far a person in another State has a "good reason" or is fit to become the purchaser of a firearm in the course of interstate trade must be regarded as repugnant to s. 92.[13]

Menzies J. found that the principle of the second *Hughes and Vale* case[14] applied and that these sections of the Firearms Act were invalid as an attempt to authorize the licensing of interstate trade at the discretion of an official of a State, because they contravened section 92. The *Hughes and Vale* cases are the subject of a lucid and detailed discussion in an article[15] where the distinction is pointed out between licensing schemes which serve to make trade and commerce as orderly as society requires, and regulations which involve substantial obstructions, hindrances or burdens on interstate trade. Of course the word 'substantial' has enough vagueness about it to make each section 92 case turn on its peculiar facts. It is the importance of particular facts that the case which is being considered here stresses above anything else. Windeyer J. considered that the administrative discretion conferred by the Firearms Act was not unfettered because it was limited by the apparent policy and purpose of the Act. However, he drew from the provisions for appeal to Petty Sessions, the implication that only a Victorian resident can appeal against a refusal to grant a firearm certificate, and concluded that this was such an obstacle as to render the provisions obnoxious to section 92.

The value of this case to a study of Australian constitutional law does not seem to lie in the establishment of any new principles, but rather in that it illustrates how the general tests for section 92 that have already been settled are likely to work out in fact.

The result of the case as the law now stands is that residents of one State may purchase firearms from another State without producing a firearm certificate, if the conditions for obtaining such a certificate are similar enough to those imposed in Victoria. Fears of the apparent danger of such a result are allayed by Menzies J.:

> I would see no objection to a State law requiring the vendor of dangerous articles such as firearms to keep a record and make a return of sales including those in the course of interstate trade. . . .[16]

Thus while it appears from this decision that interstate movements of

[13] (1963) 36 A.L.J.R. 342, 349.
[14] *Hughes and Vale Pty Ltd v. State of New South Wales (No. 2)* (1955) 93 C.L.R. 127.
[15] D. P. Derham, 'The Second Hughes and Vale Case' (1956) 29 *Australian Law Journal* 476.
[16] (1963) 36 A.L.J.R. 342.

firearms cannot be restricted, it lies in the power of either the Commonwealth or the States to keep track of every firearm that crosses a State border, and of the States to control the possession or use of firearms which are not 'in the course of' interstate trade.

C. J. CARR

KHAN v. KHAN[1]

Private International Law—Husband and Wife—Potentially Polygamous Marriage—Divorce Jurisdiction—Maintenance Jurisdiction—Matrimonial Causes Act (Cth) 1959, ss 28, 83, 84, 87

The petitioner in this action was a woman who sought dissolution of her marriage on the ground of adultery, custody of the two children of the marriage, and maintenance. The petitioner had been domiciled in Victoria until 1955, when she went to Pakistan for the purpose of marrying the respondent. The ceremony was performed in a house in Karachi before a Moslem priest and it was assumed, for the purposes of the petition, that the marriage was a lawful one according to Moslem law. A child was born to the parties in 1956. In 1958 the petitioner returned to Australia and in 1960 the respondent followed; both parties were resident and, as was held by Gowans J., domiciled in Australia at the commencement of proceedings. A second child was born in Australia in 1961. Gowans J. found that the respondent had been guilty of adultery in circumstances which would justify dissolution of the marriage were there power to do so. He also found that under Moslem law the marriage was a potentially polygamous one.

His Honour observed that section 28 of the Commonwealth Matrimonial Causes Act 1959 permits petitions for dissolution of marriage to be filed only by a 'party to a marriage'. There was, he said, no reason for not applying the definition of the word 'marriage' which had been formulated in *Hyde v. Hyde and Woodmansee*[2] since that meaning had been applied to the English Acts dealing with petitions for dissolution, nullity and proceedings for maintenance. Thus, on the principle established in *Hyde*, a potentially polygamous marriage, though valid by the *lex loci contractus*, and although both parties were single and competent to contract marriage, would not be recognized 'as a valid marriage in a suit instituted by one of parties for the purpose of enforcing matrimonial duties, or obtaining relief for a breach of matrimonial relations'. The conclusion was, therefore, that a party to a potentially polygamous marriage was not 'a party to a marriage' within section 28 and was unable to petition for divorce in Australia. More specifically, there was no jurisdiction to entertain Mrs Khan's petition for divorce.

This ruling, said Gowans J., did not mean that the children of the union were illegitimate, nor that the marriage was void. 'It merely means

[1] [1963] V.R. 203. Supreme Court of Victoria; Gowans J.

[2] (1866) L.R. 1 P. & D. 130, 133 *per* Lord Penzance. 'I conceive that marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman to the exclusion of all others.'