

MOTI v. THE QUEEN (B19/2011)

Court appealed from: Court of Appeal of the Supreme Court of
Queensland
[2010] QCA 178

Date of judgment: 16 July 2010

Date of grant of special leave: 13 May 2011

This appeal challenges the decision of the Court of Appeal to set aside the order of Mullins J to stay proceedings, as an abuse of process, on an indictment charging the appellant with 7 counts of unlawful sexual intercourse with a person under the age of 16 years, contrary to s50BA of the *Crimes Act* 1914 (Cth). The appellant was at the relevant time an Australian citizen and the offences are alleged to have occurred outside Australia (in Vanuatu and New Caledonia) in 1997.

The appellant had been charged in 1998 in Vanuatu with several offences relating to the same conduct but was ultimately discharged. The appellant later travelled to the Solomon Islands. The Australian High Commissioner to the Solomon Islands urged an investigation by the Australian Federal Police into the Vanuatu charges, on the basis of concern about the appellant's possible appointment as the Attorney-General of the Solomon Islands. In October 2004 the AFP commenced an investigation into possible offences under s50BA of the *Crimes Act*, travelling to Vanuatu to obtain statements from the complainant, her parents and her brother. A warrant for the appellant's arrest and an Interpol notice were issued in August 2006. The appellant was appointed Attorney-General of the Solomon Islands in September 2006, although he lost that office with the change of government in December 2007. On 21 December 2007 the Australian Government issued a further extradition request but on 24 December 2007 the new government of the Solomon Islands made a deportation order against the appellant. He was arrested, escorted onto a flight to Brisbane by Solomon Island officials to whom visas for that purpose were granted, and arrested on arrival by AFP officers.

The complainant had been brought to Brisbane by the AFP in October 2006 and remained for several months for the purpose of giving statements to the AFP and the Commonwealth DPP. During this time she raised concerns about her safety in Vanuatu but the AFP found no evidence of an actual threat and she returned to Vanuatu. On 24 December 2007 the complainant told the AFP that she wanted herself and her family taken to Australia until the end of the appellant's trial or she would withdraw from the case. Her father told the AFP that his business in Vanuatu was adversely affected by the publicity and that the complainant and her family wanted to be taken to Australia and given financial support or the complainant would withdraw from the case. The AFP brought the complainant to Australia and, between February 2008 and November 2009, paid financial support in a monthly allowance in total of \$67,576 to the complainant and \$81,639 to her parents and brother in Vanuatu.

Mullins J found that the purpose of the financial support was to ensure that the complainants and her parents and brother remained willing to give evidence against the appellant. Her Honour concluded that it raised questions about the

integrity of the administration of justice, brought the administration of justice into disrepute and was an affront to public conscience. Her Honour rejected the appellant's argument that the circumstances of the appellant's deportation constituted an abuse of process.

The Court of Appeal unanimously allowed the respondent's appeal and set aside the stay order. Holmes JA gave the principal judgment, with which Muir JA agreed. Fraser JA agreed with the orders of the majority and with the reasoning of Holmes JA on the witness payments point. Unlike Holmes and Muir JJA, Fraser JA would have granted leave to the appellant to file a notice of contention, but agreed with Holmes JA that there was no merit in the proposed grounds, primarily being that the deportation of the appellant was a de facto extradition and of itself constituted an abuse of process. Holmes JA found that the primary judge had erred by failing to recognise that the witness payments were not designed to procure evidence from the witnesses but to ensure their continuing willingness to give evidence. Their statements had been given before the payment of the financial support. Her Honour also held that the primary judge had failed to pay sufficient regard to the fact that although the payments were beyond the applicable guidelines, they were not illegal. On the notice of contention issue, Holmes JA held that because the appeal had been brought under s 669A(1A) of the Criminal Code, which provides for an appeal by the Attorney-General against an order staying proceedings on an indictment, the Court of Appeal was limited to an examination of the primary judge's reasons for granting the stay.

The grant of special leave to appeal was limited to two grounds of appeal. A notice pursuant to s 78B of the *Judiciary Act* 1903 (Cth) has been filed.

The grounds of appeal for which special leave was granted are:

- The Court of Appeal erred in holding that it was not open to the primary judge to exercise her discretion to stay proceedings against the appellant on the basis that payments to prosecution witnesses in the circumstances brought the administration of justice into disrepute;
- The Court of Appeal erred in failing to give effect to the principle established in *R v Horseferry Road Magistrates Court; ex parte Bennett* [1994] 1 AC 42 that the courts should refuse to try an accused who has been brought to the jurisdiction, with the concurrence or connivance of the executive authorities, in disregard of extradition procedures and in breach of his rights under the Deportation Act of the Solomon Islands and in breach of a court order made in the Solomon Islands.