ABUSE OF PROCESS IN CROSS-BORDER CASES: MOTI V THE QUEEN

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In a majority of six to one, the High Court in Moti v The Queen concluded that the act of state doctrine does not preclude findings as to the legality of the conduct of a foreign government, where such a finding is determinative of an abuse of process. The decision is a welcome addition to existing international jurisprudence on due process rights in prosecutions of extraterritorial conduct. In turn, it is a reminder that operating extraterritorially does not mean operating without accountability.

I INTRODUCTION

In *Moti v The Queen,*[1] the High Court of Australia considered whether proceedings can be maintained against a person who has not properly been brought within the jurisdiction by regular means, or whether such proceedings are an abuse of process. In so doing, a majority of six to one concluded that the act of state doctrine does not preclude findings as to the legality of the conduct of a foreign government, where those conclusions are a necessary step to determining a question within the competency of the court. This article will conclude the findings of the High Court in *Moti v The Queen* are a welcome addition to jurisprudence on procedural irregularities in the prosecution of transnational crime.

The High Court in *XYZ v Commonwealth*[2] confirmed that the Commonwealth may rely on section 51(xxix) of the Constitution of Australia to assert extraterritorial criminal jurisdiction over Australian citizens. Such assertions are also permitted under international law by virtue of the active nationality principle.[3] However, although useful in fighting transnational crime, assertions of extraterritorial criminal jurisdiction are sometimes overly politicised, and vulnerable to abuses of process.[4] Therefore, the decision in *Moti v The Queen* has implications for the prosecution of offences for conduct occurring extraterritorially, and is a timely reminder for state officials and prosecutors that operating extraterritorially does not mean operating without accountability.

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[1] *Moti v The Queen* (2012) 283 ALR 393.

[2] *XYZ v Commonwealth* (2006) 227 CLR 532

[3] See, for example, Stephen Hall, *Principles of International Law*, (LexisNexis Butterworths, 3rd ed, 2011), 312; and Alejandro Chehtman, *The Philosophical Foundations of Extraterritorial Punishment* (Oxford University Press, 2010), 59.

[4] See generally, Danielle Ireland-Piper, 'Extraterritorial criminal Jurisdiction: Does the Long Arm of the Law Undermine the Rule of Law?' (2012) 13(1) Melbourne Journal of International Law, 122.

II THE HIGH COURT'S FINDINGS IN *MOTI V THE QUEEN*

A Background

Mr Julian Moti, who holds Australian citizenship, was deported from the Solomon Islands in December 2007, and charged under Australian law for child sexual offences.[5] The relevant conduct allegedly occurred in Vanuatu, and at a time when Mr Moti was a resident of Vanuatu. However, the relevant offence provisions under Commonwealth law have extraterritorial reach.[6] Mr Moti was the Attorney-General of the Solomon Islands. Three days before his deportation to Australia, it was officially published in the Solomon Island Gazette that Moti had been removed from appointment as Attorney-General.

In proceedings before the Supreme Court of Queensland, Mr Moti argued the prosecution was an abuse of process and applied for a stay of the indictment presented against him. He argued that his deportation was a disguised extradition and an unlawful removal, and that the investigation was politically motivated. Mr Moti also sought to characterise payments made by the Australian government to witnesses, described by the crown as living expenses, as an abuse of process. Notably, Australia has no coercive powers to compel witnesses from overseas countries to give evidence, so the prosecution relied heavily on the willingness of witnesses.

In deciding the application, Mullins J held there was no basis for the disguised extradition ground because the decision to deport was one for the Solomon Islands as a sovereign nation.[7] The Court then went on to reject all other grounds, except one. The stay of prosecution was granted on the basis that payments made to the witnesses who lived in Vanuatu brought the administration of justice into disrepute.[8] Mullins J found that while there may have been some justification for humanitarian support for the family of the complainant,[9] the payments were of an amount that exceeded merely subsistence support,[10] and constituted 'an affront to the public conscience.'[11]

On appeal to the Supreme Court of Appeal in Queensland, Holmes, Muir and Fraser JJA set aside the stay granted by Mullins J, on the basis that the payments made to witnesses were not illegal, and not intended to procure evidence from the witnesses.[12] Further, Holmes J agreed with Mullins JA that the deportation was not a disguised extradition and therefore, did not amount to an abuse of process.[13] Mr Moti applied for and was granted special leave to appeal to the High Court of Australia.

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5 *R v Moti* [2009] 235 FLR 320.
6 See Division 272 of the Criminal Code (Cth), which replaced the now repealed Part IIIA of the Crimes Act 1914.
7 *R v Moti*, Above n50, 333.
8 Ibid, 347.
9 Ibid, 344-5.
10 Ibid, 345.
11 Ibid, 344.
12 *R v Moti* (2010) 240 CLR 218, 229.
13 Ibid, 233.

Before the High Court, Mr Moti submitted that his deportation from the Solomon Islands was illegal, and therefore, his ensuing prosecution in Australia was an abuse of process. The Commonwealth argued the act of state doctrine precluded the Court from making a finding as to the legality of the deportation. It was also argued for Mr Moti that the Court of Appeal erred in overturning the finding of the primary Judge that the payments to witnesses were an abuse of process. The High Court ultimately rejected this element of the argument.

B The Act of State doctrine

The discussion of the act of state doctrine in *Moti v The Queen* was a necessary precursor to a finding of an abuse of process. To that end, the High Court made reference to the seminal articulation of the act of state doctrine by Fuller CJ in an 1897 decision of the Supreme Court of the United States, *Underhill v Hernandez.*[14] There it was stated:

> Every foreign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgement on the acts of the government of another done with in its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.[15]

In that case, Hernandez, the commander of a revolutionary force in Venezuela committed trespass and other wrongs to Underhill. At the time, Underhill was residing in Bolivar, and Hernandez's forces were recognised by the United States as the government of Venezuela. The Supreme Court of the United States concluded that as the relevant acts of Hernandez were that of the Venezuelan state, it could not properly be the subject of adjudication in the Courts of another state.

The majority in *Moti v The Queen*, consisting of French CJ, and Gummow, Hayne, Crennan, Kiefel, and Bell J parted ways with this doctrine and delivered a joint judgement concluding, '… that the decision of a foreign official is called into question does not of itself prevent the courts from considering the issue.'[16] They agreed with the following assertion by Mann:

> … the Courts are free to consider and pronounce an opinion upon the exercises of sovereign power by a foreign government, if the consideration of those acts of a foreign government only constitutes a preliminary to decision of a question, which in itself is subject to the competency of the Court of law.[17]

The High Court found it was not bound by a 'general and universally applicable rule'[18] as to when it may, or may not, form a view about the lawfulness of conduct occurring outside Australia.[19] However, it did place significant emphasis on the fact that a decision on the conduct of the foreign state was a necessary prerequisite to the more significant decision on the lawfulness of conduct by the

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[14] 168 U.S. 250 (1897).
[15] 168 U.S. 250 (1897), 252.
[16] *Moti v The Queen* (2012) 283 ALR 393, 407 [52].
[17] Ibid, 407 [52].
[18] *Moti v The Queen* (2012) 283 ALR 393, 407 [50].
[19] Ibid, [50].

Australian state. Therefore, it could be that the Court intended to assert this as a necessary precondition, ie, that the conduct of foreign states can *only* be considered where it is necessary to resolve a decision as to the lawfulness of the conduct of *Australian* (and not foreign) officials.

However, to draw this conclusion from the judgment would seem at odds with the unwillingness of the Court to confine itself to a particular test. The Court declared itself to be of the view that issues of act of state are 'better approached at a more particular level of inquiry that the level of generality reflect in the dictum of Fuller CJ [In Underhill v Hernandez].'[20] Nonetheless, limiting the Court's ability to pass judgment on the acts of foreign government to matters of mere preliminary importance does provide some parameters for exercise of the doctrine.

C Abuse of Process

Having determined the act of state doctrine did not preclude it from deciding whether an unlawful deportation had occurred, the Court then turned to whether that unlawful deportation rendered the prosecution an abuse of process. The majority judgment described as a 'well established rule,'[21] the principle in *Williams v Spautz* that:

> Australian superior courts have inherent jurisdiction to stay proceedings which are an abuse of process.[22]

The majority insisted the notion of abuse of process is not confined to narrow or particular categories. Instead, abuse of process should be understood as a 'basic proposition,'[23] that the end does not justify the means. The High Court observed:

> And the use of words like "connivance", "collusion" and "participation" should not be permitted to confine attention in that way. All should be understood as proceeding from recognition of the **basic proposition that the *end* of criminal prosecution does not justify the adoption of any and every *means* for securing the presence of the accused** (emphasis added).[24]

However, the conclusion that the deportation of Moti was not conducted lawfully did not in itself constitute an abuse of process by Australian officials. Rather, the Court held a finding of abuse of process must be determined by reference to three propositions:[25]

1. The trial of an indictable offence must generally be conducted in the presence of the accused;

2. Where Australia seeks the extradition of a person from another country, so as to prosecute that person under Australian law, principles of double jeopardy and speciality ordinarily apply; and

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20 Ibid, 407 [52].
21 Ibid, 407 [50].
22 (1992) 174 CLR 509 at 518.
23 *Moti v The Queen* (2012) 283 ALR 393, 410 [60].
24 Ibid, 410 [60].
25 Ibid, 409 [54]-[57]

3. Public interest dictates that a court of law must ensure its processes are used fairly by state and citizen because a failure to do so will erode public confidence. Public confidence 'refers to the trust reposed constitutionally in the courts to protect the integrity and fairness of their processes.'[26]

In considering the first proposition, the Court observed that Mr Moti was only available in Queensland for charge and trial as a result of his unlawful removal from the Solomon Island.[27] Therefore, determining whether an abuse of process had occurred necessarily required first determining whether Moti's deportation was illegal, and 'why it was illegal'.[28]

As for the second proposition, the Court found it was 'neither necessary nor appropriate'[29] to consider double jeopardy or speciality in this instance. However, the majority judgment suggests that prosecutions under Australian law for conduct occurring extraterritorially should comply with these principles. The obiter remark, 'where the offences with which the appellant was charged were offences that it was alleged he had committed outside Australia, the question of double criminality may have been controversial'[30] is significant. It sends a message to prosecutors that the High Court will not tolerate marked departures from ordinary due process, and fundamental principles of a fair trial.

In moving to the third proposition, the Court found that the notion of abuse of process extends to the use of courts' processes in a way that is inconsistent with these 'fundamental policy considerations.'[31] Therefore, the Court considered whether 'what Australian officials did or did not do'[32] was inconsistent with these principles. In so doing, three findings were pivotal: Australian officials knew that the opinion of the Acting High Commissioner was that Moti's deportation was not lawful; that opinion was right; and, in spite of that opinion being right, Australian officials facilitated the unlawful deportation by providing the travel documents used to effect the unlawful deportation.[33] The Court found:

> The critical observation is that what was done by Australian officials not only facilitated the appellant's deportation, it facilitated his deportation by removal on 27 December 2007 when Australian officials in Honiara believed that this was not lawful and had told Australian officials in Canberra so. It follows that the maintenance of proceedings against the appellant on the indictment preferred against him on 3 November 2008 was an abuse of process of the court, and should have been permanently stayed by the primary judge.[34]

In his dissenting judgement, Heydon J was of the view that an '… accident of evil means should not disrupt the fulfilment of a just end.'[35] This view is consistent with that preferred in United States courts, where the Ker Frisbie doctrine

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26 Ibid, 409 [57].
27 Ibid, 409 [55].
28 Ibid, 410 [58].
29 Ibid, 409 [56].
30 Ibid, 409 [56].
31 Ibid, 409 [57].
32 Ibid, 410 [60].
33 Ibid, 411 [63].
34 Ibid, 412 [65].
35 Ibid, 426 [106].

prevails. In essence, that doctrine provides that illegalities in the extradition process will not bar prosecution in United States Courts. *In Ker v. Illinois,* 119 U.S. 436 (U.S. 1886), the U.S. Supreme Court held that 'such forcible abduction is no sufficient reason why the party should not answer when brought within the jurisdiction of the court which has the right to try him for such an offence, and presents no valid objection to his trial in such court.' This was again upheld in *Frisbie v. Collins*, 342 U.S. 519 (U.S. 1952). The doctrine, although modified over time, is still the applicable law in the United States. For example, in *United States v. Alvarez-Machain*,[36] the Supreme Court effectively upheld the Ker Firsbie doctrine and found that the kidnapping of Dr Alvarez-Machain from Mexico by bounty hunters hired by a US government agency did not preclude his prosecution in the United States.

The doctrine has been subject to criticism.[37] As Jonathon A Bush observed:

> … most media commentary condemned the decision as condoning a lawless policy akin to the practices of terrorist states like Libya and Iran and at odds with the normal of international behaviour.[38]

In addition, speaking of the *Alvarez-Machain* decision, Andrew L Strauss suggests:

> The Court, in its disregard for the international law of jurisdiction, confused the recognized international jurisdictional paradigm. In so doing, the Court failed to provide any semblance of a normative alternative. The Supreme Court's decision suggests jurisdictional nihilism. If used by other nation-states to legitimize engagement in overseas abductions and then applied by other judiciaries to permit jurisdiction over abductees, the decision can only lead to global regulatory confusion.[39]

In addition to the Ker Frisbie doctrine, the majority decision in *Moti v The Queen* can also be contrasted with the decision of Scottish courts involving similar facts. Initially, the accused, Bennett, complained that extradition procedures had been circumvented in breach of South African law. Lord Griffiths held this meant the court did have the power to consider Bennett's claims because:

> The judiciary accept a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law.[40]

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[36] 112 S. Ct. 2188 (1992).

[37] See, for example: Jacques Semmelman, "Due Process, International Law, and Jurisdiction over Criminal Defendants Abducted Extraterritorially: the Ker-Frisbie Doctrine Reexamined" (1992) 30 *Columbia Journal of Transnational Law,* 513; Brian Lichter, "The Offences Clause, Due Process, and the Extraterritorial Reach of Federal Criminal Law in Narco-Terrorism Prosecutions" (2009) 103 *Northwestern University Law Review,* 1929.

[38] Jonathan A Bush, 'How Did We Get Here? Foreign Abduction after Alvarez-Machain', (1993) 45(4) *Stanford Law Review*, 939-983, 941.

[39] Andrew L Strauss, 'A global paradigm shattered: the jurisdictional nihilism of the Supreme Court's abduction decision in *Alvarez-ma chain*', 67 *Temple Law Review*, 1209 1994, 1257.

[40] R v Horseferry Road Magistrates's Court, Ex parte Bennett [1993] 3 All E.R. 138.

However, Bennett was subsequently arrested and transferred to Scotland to face other charges there.[41] He raised the same argument as had succeeded in England, but failed.[42] There, the Court was of the view that United Kingdom officials had merely taken advantage of independent decisions of South Africa, and that subsequent prosecution was not tainted by any lack of due process in the extradition from South Africa.[43]

In that context, the majority view in *Moti v The Queen* is a significant addition to the body of jurisprudence on the importance of due process in matters involving some component of extraterritorial jurisdiction or extraterritorial activity, and on the extent of immunity provided by the act of state doctrine. Not only is the decision significant, it is also welcome. This is because due process rights are essential to public confidence in the judicial system, and are inextricably tied to the basic foundations of the rule of law.

At its simplest, the concept of due process can be understood as one of fairness. In this context, fairness 'is not a state or outcome, but a way or method to reach states or outcomes.'[44] Due process is largely concerned with procedural rights, the purpose of which is to 'put a stop to arbitrariness of the actions of rulers and their agents.'[45] The International Commission of Jurists assert that '[j]udicial oversight of the constitutionality or legality of the acts of the political branches is a requisite of the Rule of Law.'[46] This is particularly the case in the administration of criminal justice because 'such function is of greatest importance when … an individual is deprived of his or her liberty.'[47]

III CONCLUDING THOUGHTS

The decision in *Moti v The Queen* has implications for prosecutors, law enforcement, and other government officials involved in the investigation and prosecution of conduct occurring extraterritorially. For example, the majority stated that where Australia seeks the extradition of a person from another country, so as to prosecute that person under Australian law, principles of double jeopardy will ordinarily apply. This could be interpreted as suggesting that principles of double jeopardy may apply both within, and as between nation states. If so, this is a significant step forward for due process rights. For example, at the international level, Article 14(7) of the *International Covenant on Civil and Political Rights* (*ICCPR*) is limited to multiple prosecutions in one state, and not as between states. This leaves a person accused of a crime for which more than one state asserts jurisdiction, in a no-man's land. Article 20 of the *Rome Statute of the International Criminal Court*[48] does provide some protection against double

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[41] Colin Warbrick, 'Judicial Jurisdiction and Abuse of Process' (2000) 49 *International and Comparative Law Quarterly*, 489, 491.

[42] Ibid.

[43] Ibid.

[44] Larry May, *Global Justice and Due Process* (Cambridge University Press, 2011) 49.

[45] Ibid 50.

[46] International Commission of Jurists, Legal Commentary to the ICJ Geneva Declaration: Upholding the Rule of Law and the Role of Judges and Lawyers in Times of Crisis (International Commission of Jurists, 2011) 7.

[47] Ibid.

[48] Article 20 of the *Rome Statute of the International Criminal Court*, UN Doc A/CONF.183/9* (entered into force 1 July 2002), provides as follows:

jeopardy. However, this protection only applies to persons prosecuted for the crimes of genocide, crimes against humanity, war crimes, and the crime of aggression.[49] Therefore, it is generally not relevant to prosecutions of other kinds of transnational crime such as money laundering, people smuggling, human trafficking, child sex tourism, or cybercrime.

The judgment also reinforces the notion that the act of state doctrine is not an impenetrable shield, and government officials should understand that operating extraterritorially does not mean operating without accountability. Cooperation with foreign officials means the conduct of those officials may come into question in an Australian court.

Ultimately, the decision in *Moti v The Queen* is a welcome one. Regular elections are not by themselves 'determinant of a mature democracy.'[50] Rather, a true democracy holds government officials accountable to the law. This decision indicates that if Australia is to assert jurisdiction extraterritorially, then there are obligations that will attach to that privilege.

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1. Except as provided in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court.
2. No person shall be tried by another court for a crime referred to in article 5 for which that person has already been convicted or acquitted by the Court.
3. No person who has been tried by another court for conduct also proscribed under article 6, 7 or 8 shall be tried by the Court with respect to the same conduct unless the proceedings in the other court: (a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or (b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

[49] See Article 5 of the *Rome Statute of the International Criminal Court,* UN Doc A/CONF.183/9* (entered into force 1 July 2002).

[50] Hung-En Sung, 'Democracy and Criminal Justice in Cross-National Perspective: From Crime Control to Due Process', *The Annals of the American Academy*, AAPSS, 605, May 2006, 312.