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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

HCV D 1655/2004

BETWEEN	ADRIAN ARMSTRONG	APPLICANT
AND	THE DIRECTOR OF PUBLIC PROSECUTIONS	RESPONDENT

Mrs. Jacqueline Samuels-Brown instructed by Mr. C. Sinclair.

Mr. Donald Bryan instructed by Director of Public Prosecution.

Heard: 16th July, 2004 and 29th July, 2004

Sinclair-Haynes, J (Actg.)

On the 19th of June 2004, Mr. Armstrong was arrested on a provisional warrant by a Resident Magistrate as a result of a request for his extradition to the USA. This request was contained in a diplomatic note dated the 24th May 2004. According to the Diplomatic note, Mr. Armstrong is wanted by the US to stand trial on narcotics offences for which he was indicted on the 25th of May 2004 in the US district of Puerto Rico. The indictment charges him with the following:

Count 1:

Knowingly, willfully, intentionally and unlawfully combined conspired confederated agreed together with other persons known and

unknown to import into the United States approximately 2 kilograms of Heroin, a schedule one controlled substance in violation of title 21 United States code, sections 952(a) and 963; and,

Count 2:

Knowingly engaged and attempted to engage in a monetary transaction by, through or to a financial institution, affecting inter state or foreign commerce, in criminally derived property of a value greater than $10,000.00 that is, transfer of US currency, funds, and or monetary instruments in the amount of $10,000, such property having been derived from a specified unlawful activity, that is the drug trafficking of 2 kilograms of heroin, in violation of title 18, United States code, Sections 1957 and 2.

This is according to the Diplomatic Note because the indictment has not been presented.

On the 23rd of June 2004 and on the 1st July 2004 the Applicant appeared in the R.M. Court and an application for bail was on each occasion made and denied.

Mr. Armstrong has deposed in an affidavit dated the 1st July 2004 in response to an application for bail, that the Resident Magistrate stated that the sixty day period which allowed the requesting state to send the documents had not expired. On that basis he refused bail.

In his written reasons the learned R.M stated as follows:

> ***"The court is satisfied that the Diplomatic Note #151 is devoid of any information, see***

> ***Sec. 4 (1) (c) of the Bail Act. However, the note discloses two serious offences. The nature of this type of proceedings in itself along with the nature of the charges and the penalty on conviction. I find that Mr. Armstrong would fail to surrender to custody if bail is granted."***

Mr. Armstrong has now applied to this Court for bail.

Submissions by Mrs. Jacqueline Samuels-Brown on behalf of Mr. Armstrong.

1. The fact that the law provides that the Applicant should be discharged after sixty days if no information is forthcoming is a separate issue and should not affect his entitlement to bail.
2. The Magistrate acknowledges that there is no support for the allegations made in the Diplomatic Note with regards to Sec. 4 (1) (c). This is not a case of insufficiency of information regarding the basis of the charge but a complete absence of information. Under our law and Constitution it is not permissible to charge a person or deprive him of his liberty without any material on which to base the charge. Neither in his reasons nor the arguments put forward has there been any suggestion that there was insufficiency of time to obtain such material. The Diplomatic Note states that the indictment was laid since May 25, 2004.
3. The R.M has not stated why he considers that the nature of the charges and penalty on conviction operate as reasons to deny bail in the instant case. Merely to extract sections from the Act does not *per se* constitute reasons. In this regard the Court is being asked to consider the following:

(i) The two offences clearly arise out of one alleged transaction.

(ii) In our Jurisdiction where there is a specific statutory charge it is not permissible to charge and convict on conspiracy.

(iii) In our Jurisdiction the Applicant would not be sentenced on both charges.

(iv) The Money Laundering Act in Jamaica requires *mens rea* and provides for a fine in lieu of imprisonment.

There is nothing inherent in the nature of the charges which acts as a bar to bail. The Extradition Act provides that bail is applicable to extradition matters. Additionally the Supreme Court has an inherent jurisdiction to grant bail. This jurisdiction extends to extradition matters. She relied on ***R v Spillsbury*** *(1898) 2 Q.B. 615*

4. In these proceedings the Judge sits as a Review Court. The principles applicable to Judicial Review proceedings are therefore applicable to these proceedings. The R.M. disregarded completely a fact which casts doubt on the charges. The Diplomatic Note states that the Applicant is white. The question of the cogency of the identification material and the allegation against him must be treated as unreliable.

5. The written reasons provided by the R.M for his refusal are not as a matter of law proper grounds for refusal to grant bail. As such the Applicant ought to be granted bail.

Submissions by Mr. Bryan

Mr. Bryan, in support of the learned Magistrate submitted that there is no requirement in the Extradition Act for the Magistrate to have the indictment or any statement or anything which would provide further and better particulars. The Diplomatic Note was sufficient material upon which the Magistrate could act in denying bail. The Magistrate has only to consider factors such as the allegation. The principles which govern and guide the Magistrate in extradition matters are special and different for the reason that the suspect is required to be removed from Jamaica to a foreign state. The Magistrate has to be convinced that if bail is granted the Applicant will attend Court.

Although the Magistrate never stated what he meant by the nature of the charges, it is reasonable to infer that he was speaking about the seriousness of the offences which makes the Applicant a flight risk. The possible penalty on summary conviction before a Resident Magistrate is a fine of One Million Dollars or a term of imprisonment up to 5 years or both fine and imprisonment. Upon a conviction in the Circuit Court, to imprisonment of 20 years or both fine and imprisonment. If convicted in the United States he faces imprisonment of more than one year.

He referred to and relied upon the decision of Brooks J, in **Norris Nemhard** in **Suit 2004/HCV 1198** which the only materials before the R.M. were the Diplomatic Note and the affidavit of the officer. Brooks, J. held that despite

the absence of supporting evidence, the learned R.M. could properly take the nature of the proceedings into account when considering whether there were grounds for believing that the Applicant would fail to surrender to custody. The fact that Mr. Armstrong has been referred to as a white male simply means that the authorities do not know who they are looking for. They are the recipients of information and depending on the source he could be referred to as white. That misdescription is therefore not material as they referred to his full name, alias, height, weight, etc.

The fact that another person has been charged in the U.S.A and has been put on bail does not justify him being put on bail. Different circumstances might apply to that co-accused. We have no knowledge as to what that person is indicted for.

In the circumstances the learned Magistrate properly exercised his jurisdiction in refusing to grant bail.

Mrs. Samuels-Brown's response

In response, Mrs. Samuels-Brown submitted that the Nemhard case is distinguishable as the Judge in that case specifically stated that the Applicant was a flight risk. In the instant case, the Magistrate has not said that Mr. Armstrong is a flight risk. Further, she submitted that Brooks, J. in Nemhard's case never knew what information the Magistrate relied on, however, in the instant case the Applicant and his attorney have assisted the Court as to what the Magistrate took into consideration. Additionally it is wrong to draw inferences from the Magistrate unless such inferences are inescapable or plain. She relied

on the case **Glenford Williams vs Regina HCV 0814/2003** in which Brooks held that the R.M. had fallen into error, as there was no evidence before him that the accused was not likely to surrender to bail.

Reasons for Decision

Section 4 (1) of the Bail Act states that where the offence or one of the offences in relation to which the Defendant is charged or convicted is punishable by imprisonment, bail may be denied in the following circumstances

5) The Court, a Justice of the Peace or Police Officer is satisfied that there are substantial grounds for believing that the Defendant if released on bail would -

(i) fail to surrender to custody;

(ii) commit an offence while on bail; or:

(iii) interfere with witnesses or otherwise obstruct the course of justice, whether in relation to him or any other person.

Nature and seriousness of the offence are not grounds.

Section 4 (2) (a) states that the nature and seriousness of the offence are circumstances to be taken into account in determining whether the Defendant will fail to surrender to custody, commit an offence while on bail or interfere with witnesses.

It is clear from the Magistrate's written reasons that he regarded Mr. Armstrong as a flight risk as he stated that Mr. Armstrong would fail to surrender to custody because he is of the view that the offences are serious and

the penalty likely to be imposed. The Magistrate has therefore provided reasons in accordance with the Act.

Whether these proceedings are to be heard as an appeal or judicial review

Sections 9 and 10 of the Bail Act make it quite clear that the matter is to be heard as an appeal. Rule 58(1) of the Civil Procedure Rules states as follows:

"This part deals with applications to the Court to review a decision by a Magistrate about bail"

If the word review ought to be construed as a Judicial Review, the Civil Procedure Rules are subordinate to the Bail Act. The Bail Act takes precedence.

Denial of Bail on the ground that the 60-day period has not expired.

The fact that the law provides for the discharge of the Applicant after 60 days if no information is forthcoming does not affect the Applicant's right to bail. On the contrary it seems to me that the law frowns upon persons being held indefinitely without supporting material hence it provides for the discharge of the person if at the expiration of 60 days no material is forthcoming. It follows that the law recognizes that a Court ought not to incarcerate persons without material beyond a reasonable time within the 60-day period.

Section 4 (1) (c) of the Bail Act gives the Court the right to remand the Defendant in custody "if it is satisfied that it has not been practicable to obtain sufficient information for the purpose of taking the decisions required by this section for want of time since the institution of the proceedings against the Defendant.

To deny bail on the ground of insufficiency of material, the Court must be satisfied that it is not practicable to obtain sufficient information. In this case there is no evidence of the impracticability of obtaining the necessary material. More than a month has elapsed since his arrest. Indeed the Diplomatic Note is dated the 25th May 2004. Certainly, more than adequate time has elapsed. With today's technology it is not difficult to get information quickly. This is the era of the fax machine.

The R.M. cited the seriousness of the offence, the nature of the charges and the penalty on conviction for his refusal to grant bail. In as much as drug related offences are serious and we all have an interest in eradicating this pernicious monster, we must maintain a balance, which ensures that persons are not deprived of their liberty for inordinate periods on mere allegations without more. From the Diplomatic Note it appears that the charges arise out of a transaction, which is an offence contrary to the Money Laundering Act. In Jamaica, the Money Laundering Act requires mens rea.

Section (3) (1c) states:

> ... and the person knows, at the time he engages in the transaction referred to in paragraph (a) or at the time he does any act referred to in paragraph (b) or (c) that the property derived or realized directly, or indirectly, from the commission of a specified offence.

To date there is nothing before the Court to assist in determining whether the allegations are cogent enough to satisfy that standard. In fact, the Diplomatic Note refers to the Applicant as white. A photograph of the Applicant was

produced by Mr. Bryan, at the Court's request. The Applicant is not Caucasian. On the face of it, serious issues of identification arise.

In the absence of the indictment outlining the particulars of conspiracy, all that is before the Court is mere allegation of conspiracy. There is no nexus at this stage between the crime of conspiracy to import heroin in the U.S.A and the Defendant. What is before the Court is an allegation of a monetary transaction in violation of the Money Laundering Act.

Undoubtedly, Section 10 of the Extradition Act confers upon the Resident Magistrate, the power to grant bail in extradition matters. It is worthy of note that even prior to the amendment of the Extradition Act to include the power to grant bail, the Court was possessed of an inherent jurisdiction to do so (**R v Spilby**).

Section 10 of the Extradition Act states as follows:

> "for the purpose of proceedings under this section a Court of Committal shall have as nearly as may be the like jurisdiction and powers including power to remand in custody or to release on bail as it would have if it were sitting as an examining justice and the person arrested were charged with an indictable offence committed within the jurisdiction."

The circumstances of this case, where so long after the Defendant's arrest there is such paucity of material as regards the offences and where the identification of the Defendant is an issue, my own view is that bail would have been readily granted had the Defendant been charged with a similar offence committed within our jurisdiction. I see no reason why these principles should be abrogated merely because this is an extradition matter, when there is no indication from the Crown of any circumstances which should cause the Court to regard the matter differently e.g. the Defendant having absconded bail in the United States.

so stringent as to raise concern as to whether the Defendant will submit to the trial. I do not agree that the penalty which the Defendant faces is of a nature that will necessarily cause him to abscond as in cases of offences where imprisonment is mandatory and for very long periods.

A co-conspirator has been charged in the US and placed on bail. The circumstances of his involvement are unknown. The respective degree of participation has not been revealed. Nevertheless it would appear that the alleged perpetrator in the USA being more proximate to the offence itself may well be the principal in the first degree. The fact that that co-conspirator was granted bail is something the Court ought to take into consideration in considering bail for this Applicant.

> Accordingly, Bail is granted in the sum of Five Million Dollars with one or two sureties.
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> Applicant to report to the Montego Bay Police Station 3 days, Mondays, Wednesdays and Fridays before 9 a.m.
>
> Applicant to surrender travel documents to the registrar of the Supreme Court (Criminal Registry).
>
> Stop order to be placed at all point of entry and exit.