[2012] JMSC Full 2

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE FULL COURT

CLAIM NO. 2011 HCV 06398

COR: Honourable Ms. Justice G Smith
Honourable Mr. Justice B Sykes
Honourable Ms. Justice C Edwards

IN THE MATTER OF THE EXTRADITION ACT

AND

IN THE MATTER OF THE APPLICATION BY VINCENT ASHMAN FOR A WRIT OF HABEAS CORPUS IN RESPECT OF THE ORDER FOR COMMITTAL MADE BY THE RESIDENT MAGISTRATE FOR THE CORPORATE AREA

BETWEEN	**VINCENT ASHMAN**	**APPLICANT**
A N D	**COMMISSIONER OF CORRECTIONAL SERVICES**	**1ST RESPONDENT**
A N D	**DIRECTOR OF PUBLIC PROSECUTIONS**	**2ND RESPONDENT**
A N D	**THE ATTORNEY GENERAL**	**3RD RESPONDENT**

Mr Oswald James and Mr Brian Barnes instructed by Oswald James and Company for the applicant.

Mrs Ann-Marie Feurtado Richards and Mr Adley Duncan instructed by the Director of Public Prosecutions for the second respondent.

Mr. Curtis Cochrane instructed by the Director of State Proceedings for third respondent.

Heard: March 23 and May 28, 2012

EXTRADITION – DISCHARGE DUE TO DELAY IN SURRENDERING FUGITIVE – WHETHER AUTHORITY TO PROCEED REQUIRED TO COMMIT TO AWAIT EXTRADITION WHEN FUGITIVE CONSENTS – EFFECT OF DISCHARGE – WHETHER SECOND REQUEST AFTER DISCHARGE AN ABUSE OF PROCESS – WHETHER EARLIER DISCHARGE A BAR TO EXTRADITION – WHETHER AUTREFOIS AQUIT APPLIES – HABEAS CORPUS APPLICATION – EXTRADITION ACT SS 7, 8, 9, 10, 11, 17 – CONSTITUTION ORDER IN COUNCIL SS 15 & 25 – CHARTER OF RIGHTS ARTICLE 14.

APPLICATION FOR HABEAS CORPUS – APPLICABILITY OF THE CIVIL PROCEDURE RULES TO APPLICATIONS FOR HABEAS CORPUS PURSUANT TO THE EXTRADITION ACT – AFFIDAVIT NOT MADE BY PERSON RESTRAINED – AFFIDAVIT MADE BY ATTORNEY-AT-LAW – NO INDICATION WHY DETAINEE NOT ABLE TO MAKE AFFIDAVIT – WHETHER APPLICATION IN BREACH OF THE RULES – EFFECT OF BREACH – CIVIL PROCEDURE RULES, RULES 2, 26 & 57.

G. SMITH J

[1] I have had the advantage of reading in draft the Judgments of my learned colleagues Sykes J and Edwards J. I am in agreement with their reasonings and conclusions and I have nothing further to add.

SYKES J

[2] This is an application by Mr Vincent Ashman (the fugitive) for a writ of habeas corpus to be issued by this court ordering his release from custody after he was committed to custody pending his extradition to the United Kingdom (UK) following a second request from the United Kingdom Government (UKG).

[3] This application rests on four grounds which are:

1. *the applicant was previously released and an extradition order quashed by the Full Court on April 14, 2011;*
2. *the requesting state failed, refused and neglected to appeal the order of the court to discharge the applicant and to quash the aforesaid extradition order;*

3. *the applicant was rearrested and detained upon a subsequent request for his extradition;*
4. *the Extradition Act does not provide for subsequent arrest and detention of a fugitive after he is discharged by the court for delay of the process*

[4] In the written and oral submissions learned counsel advanced the impossible argument that the doctrine of autrefois acquit applies to this case. Learned counsel persisted in his submission even in the face of the well established authority that the doctrine can only arise if the defendant was acquitted in a previous trial in which he was in danger of a valid conviction (***Richards (Lloydell) v R*** (1992) 41 WIR 263). An extradition hearing, by definition, is not a trial and therefore the concept of autrefois acquit cannot possibly arise. There is no trial and consequently no possibility of a valid conviction or acquittal. This ground fails.

[5] Two of the four grounds can be dealt with summarily at this early stage. In respect of ground two, it is to be observed that no right of appeal is given to the requesting state or the authorities representing them in extradition proceedings in Jamaica. This is so because section 21A of the Judicature (Appellate Jurisdiction) Act confers a right of appeal where the application for the writ of habeas corpus was refused and not where it is granted (***Gibson v Government of the United States of America*** (2007) 70 WIR 34 PC reversing ***Cartwright and Knowles v Government of the United States of America*** (2004) 64 WIR 1 PC interpreting similarly worded provisions from the Commonwealth of the Bahamas). The requesting state has no right of appeal in these circumstances. Consequently, there is no basis for urging this ground.

[6] In respect of ground 4, the statute is silent on the issue of whether there can be resubmission of a previous request for extradition after the fugitive has been discharged either at the hearing, or on an application for a habeas corpus in the Supreme Court. Unless precluded by statute or some other principle of law, there is no rational reason why a second application cannot be made. The issue to my mind is not so much

whether a second application can be made but whether any subsequent application is sustainable in law and fact. There is no basis for a blanket, automatic, inflexible rule. It all depends on the reasons why the first extradition failed. If, for example, the failure was due a technical breach such as failure to submit authenticated documents then, in my view, there is no reason why a second request cannot be made. On the other hand, if the failure occurred because the court said that the allegations do not in law amount to an offence in Jamaica (failure to meet the dual criminality test) and the second extradition is based on the identical facts, then clearly, there would be good ground for a writ of habeas corpus. This may amount to an abuse of process. Ground four therefore fails.

[7] Grounds one and three raise the issue of abuse of process. The more promising submissions of counsel were directed at this issue. In dealing with the abuse of process ground this judgment will set about this task in three parts. The first will summarise the facts leading up to the two extradition hearings. The second will analyse and interpret the relevant statutory provisions of the Extradition Act (the Act). The third part will address the issue of abuse of process in light of facts and interpretation of the legislation.

PART ONE

THE FIRST EXTRADITION HEARING

[8] The events leading to the fugitive's first appearance before the Resident Magistrate's Court for the Corporate Area, sitting as extradition magistrate, began on November 18, 2010 when the UKG submitted a request for the issuing of provisional warrant of arrest for the fugitive. This first request was in respect of the offence of murder alone. A number of other communication followed which culminated in an information being laid and a provisional warrant being issued by Her Honour Mrs Stephanie Jackson-Haisley, one of the Resident Magistrate for the Corporate Area. The warrant was issued on November 24, 2010.

[9] On November 26, 2010, the fugitive was taken before Her Honour Mrs Lorna Shelly-Williams, another Resident Magistrate for the Corporate Area. Mrs Shelly-Williams was sitting as a court of committal under the Act. The fugitive, having been informed of his right to a formal hearing under the Act, indicated that he wished to be extradited immediately and did not want a formal hearing. On the same day, the fugitive signed a document which confirmed what he had orally indicated to the court. The effect of this was that the fugitive consented to be returned to the United Kingdom voluntarily and without a formal hearing.

[10] On December 3, 2010, the Office of the Director of Public Prosecutions (DPP) who represented the requesting state, sent a draft surrender warrant to the Minister with responsibility for Justice (the Minister) for her to sign. A number of other documents accompanied the draft. The surrender warrant would have enabled the fugitive to be removed from Jamaica to the UK.

[11] The Minister took the view that the entire procedure before the two magistrates was incorrect and she would not be signing the surrender warrant. The basis of her refusal was that no extradition, even in the case of a person who signed a document indicating his waiver of a formal hearing after being informed of his right by the magistrate, could validly take place unless she had issued an authority to proceed to the RM. Since there was no authority to proceed issued by her, the Minister, concluded that the fugitive could not be extradited and his consent with full knowledge of his rights was irrelevant. In Mr Cochrane's language 'the Minister is the alpha and the omega' of the extradition process. The authority to proceed is absolutely necessary to begin any kind of process relating to extradition, even if a provisional warrant is issued, and ends with the surrender warrant. The logician would say that the Minister was moving from a universal premise with no known exceptions.

[12] The DPP took a different position. Her view was that once the fugitive indicated that he wanted to go then the Resident Magistrate, sitting as court of committal under the Act and acting under section 17 of the Act has no choice, but to commit him to

prison to await his extradition. There was no need for a formal hearing and consequently no need for an authority to proceed which is only necessary when a formal hearing is to be embarked on. As can be seen, the DPP's major premise is different from that of the Minister. One of the issues in this hearing is whether the major premise of the Minister or the DPP or indeed any of them is correct.

[13] The by-product of this disagreement was that the time within which the fugitive should have been sent to the UK (sixty days) passed without him being extradited. The next step was that the fugitive applied to the Supreme Court for a writ of habeas corpus.

[14] The application came before the Supreme Court on April 14, 2011. On that date, the DPP and the Attorney General indicated that they could not resist the application. The DPP told the court that the time for extraditing the fugitive had passed and there was no valid reason for the delay. The Attorney General indicated that the procedure was a nullity and therefore there was no extradition order to quash. The court granted the writ without any hearing into the merits of the proceedings before the Resident Magistrate.

THE SECOND EXTRADITION HEARING

[15] On the same April 14, 2011, the UKG submitted another request asking for the arrest of the fugitive. This second request was in respect of the same murder as in the first request and a firearm offence that allegedly took place before the murder. This time round the Minister issued her authority to proceed on April 25, 2011. The provisional warrant was issued on April 29, 2011. Eventually, a formal hearing was held on October 12, 2011 before Her Honor Mrs Georgianna Fraser, another Resident Magistrate for the Corporate Area. She was sitting as a committing magistrate under the Act. On October 12, 2100, the fugitive was committed to custody awaiting his extradition. It is this second hearing that has precipitated the current application before this court.

[16] No issue has been taken on whether the authenticated documents submitted by the UKG and admitted into evidence at the hearing disclosed an extraditable offence.

Neither has issue been joined on whether the procedure before the extradition court was according to law. This being so, these issues need not be considered. The sole question for decision is whether this second application for extradition is an abuse of the process of the court and with the consequence that the writ should be issued. The unstated corollary of this is that if the fugitive is successful then this second release would be a bar to any further attempt at extraditing him in relation to the offences what formed the basis for both requests.

PART TWO

THE ACT

[17] The relevant sections are sections 8 (1), (2), 9 (1), (4), 10 (1), (3), (4), (5), 11 and 17.

The significant parts of section 8 (1) and (2) read:

> *(1) Subject to the provisions of this Act relating to provisional warrants, a person shall not be dealt with under this Act except in pursuance of an order of the Minister ("in this Act referred to as an 'authority to proceed") issued in pursuance of a request made to the Minister by or on behalf of an approved State in which the person to be extradited is accused or was convicted.*
>
> *(2) There shall be furnished with any request made for the purposes of this section by or on behalf of any approved State –*
>
> *(a) in the case of a person accused of an offence, a warrant for this arrest issued in that State; or*
>
> *(b) …*
>
> *together with, in each case, the particulars of the person whose extradition is requested, and of the facts upon which and the law under which he is accused … sufficient to justify the issue of a warrant for his arrest under section 9*

Section 9 (1) and (4) states:

(1) A warrant for the arrest of a person accused of an extradition offence, … may be issued

(a) on receipt of an authority to proceed, by a magistrate within the jurisdiction of whom such person is or is believed to be; or

(b) without such an authority, by a magistrate upon information that such person is in Jamaica or is believed to be on his way to Jamaica; so however, that the warrant, if issued under this paragraph shall be provisional only.

(4) Where a provisional warrant is issued, the magistrate by whom it is issued shall forthwith give notice of the issue to the Minister, and transmit to him the information and evidence, or a certified copy of the information and evidence, upon which it was issued; and the Minister may in any case, and shall, if he decides not to issue an authority to proceed in respect of the person to whom the warrant relates, by order cancel the warrant and, if that person has been arrested thereunder, discharge him from custody.

Section 10 (1), (3) and (4) says:

(1) A person arrested in pursuance of a warrant issued under section 9 shall, unless previously discharged under subsection (4) of that section, be brought as soon as practicable before a magistrate (in this Act referred to as "the court of committal") who shall hear the case in the same manner, as nearly as may be, as if he were sitting as an examining justice and as if that person were brought before him charged with an indictable offence committed within his jurisdiction.

(2) …

(3) Where the person arrested is in custody under a provisional warrant and no authority to proceed has been received in respect

of him, the court of committal may, subject to subsection (4), fix a reasonable period (of which the court shall give notice to the Minister) after which he shall be discharged from custody unless an authority to proceeds has been received.

(4) Where an extradition treaty applicable to any request for extradition specifies a period (hereinafter referred to as the treaty period) for the production of documents relevant to an application for extradition, any period fixed pursuant to subsection (3) shall be such as to terminate at the end of the treaty period.

(5) Where an authority to proceed has been issued in respect of the person arrested and the court of committal is satisfied, after hearing any evidence tendered in support of the request for the extradition of that person or on behalf of that person, that the offence to which the authority relates is an extradition offence and is further satisfied that –

(a) where the person is accused of the offence, that the evidence would be sufficient to warrant his trial for that offence if the offence had been committed in Jamaica; or

(b) …

the court of committal shall, unless his committal is prohibited by any other provision of this Act, commit him to custody to await his extradition under this Act; but if the court of committal is not so satisfied or if the committal of that person is so prohibited, the court of committal shall discharge him from custody.

Section 11 is as follows:

(1) Where a person is committed to custody under section 10 (5), the court of committal shall inform him in ordinary language of his right to make an application for habeas corpus and shall forthwith give notice of the committal to the Minister.

(2) A person committed to custody under section 10 (5) shall not be extradited under this Act-

(a) in any case, until the expiration of the period of fifteen days commencing on the day on which the order for his committal is made; and

(b) if an application for habeas corpus is made in his case, so long as proceedings on the application are pending.

(3) On any such application the Supreme Court may, without prejudice to any other power of the Court, order the person committed to be discharged from custody if it appears to the Court that-

(a) by reason of the trivial nature of the offence of which he is accused or convicted; or

(b) by reason of the passage of time since he is alleged to have committed the offence or to have become unlawfully at large, as the case may be; or

(c) because the accusation against him is not made in good faith in the interest of justice,

it would, having regard to all the circumstances, be unjust or oppressive to extradite him.

Section 17 reads:

(1) Where a fugitive arrested pursuant to a warrant under section 9 indicates that he is willing to be extradited he shall be brought before a magistrate who shall inform him of his right to formal extradition proceedings under this Act.

(2) If the fugitive, upon being informed of his right to extradition proceedings, consents in writing to be extradited without such proceedings, the magistrate shall commit him to custody to await his extradition under this Act.

(3) Subject to subsection (4), where a fugitive is committed to custody to await his extradition pursuant to subsection (2), the Minister may, notwithstanding the provisions of section 11, order him to be extradited forthwith to the approved State by which the request for extradition was made.

(4) In making an order under subsection (3) the Minister shall have regard to the provisions of section 7 and to the requirements of section 12 (2), (3), (4) and (5) relating to the making of an order under that section.

THE SUBMISSIONS

[18] Mrs Feurtado-Richards, on behalf of the UKG, submitted that the structure of the Act contemplated two ways in which a fugitive may be extradited. Learned counsel submitted that these two ways were (a) formal extraditions proceedings and (2) informal extradition proceedings. The formal proceedings are governed, it was submitted, by sections 8, 9 and 10. The informal proceedings are governed by section 17.

[19] Mr Cochrane submitted, consistent with the position held by the Minister, that no proceedings for extradition can begin unless the authority to proceed has been issued. By this he meant that even where a provisional warrant under section 9 (1) (b) is issued, the magistrate cannot go any further until the Minister is informed and the authority to proceed is issued. Therefore, the first time the fugitive came before the magistrate on the provisional warrant no further action should have been taken unless the authority to proceed had been issued. Consequently, the consent of the fugitive and his subsequent committal to prison were of no legal effect. The entire proceeding after the provisional warrant was issued was a nullity.

[20] Mr Cochrane's submission is supported, he says, by section 9 (5) which states that where a provision warrant is issued by the magistrate, the Minister must be so advised. The magistrate must also send to the Minister the information and evidence on which the warrant was issued or a certified copy of both the information and evidence.

[21] Unsurprisingly, Mr James found common ground with Mrs Feurtado-Richards on this point.

THE INTERPRETATION AND ANALYSIS OF THE ACT

[22] An examination of the relevant provisions cited above as well as the rest of the Act reveals that there are three ways of executing and concluding an extradition request.

[23] The Act is intended to be quite pragmatic. It seeks to cover just about all situations in which a fugitive may be dealt with under the legislation. The legislation establishes the link between the judicial functions and the ministerial functions. By doing this, the Act recognizes that extradition is a combination of separate but important roles of two branches of government, namely, the judicial branch and the executive branch. The legislative branch has no role to play save to pass the relevant laws to make the extradition process workable.

[24] As stated earlier the legislation makes provision for three ways of starting and concluding an extradition request. The first is where no warrant of any kind has been issued and the Minister on receipt of the request from the requesting state issues the authority to proceed. In this instance the first document issued by the requesting state to start the process is the authority to proceed directed to the Resident Magistrate (RM), who is sitting as a court of committal under the Act. In these circumstances, the RM may issue a warrant for the arrest of the fugitive who is then apprehended on the warrant and brought before the court. Once the Minister issues the authority to proceed and if the RM issues a warrant to arrest the fugitive, then once the fugitive is arrested the process continues. There is no need for a second authority to proceed because the first one issued is sufficient. The RM, sitting as a court of committal under section 10, will conduct a formal extradition hearing which sees witnesses being called and cross examined.

[25] The second circumstance is where no authority to proceed has been issued but the RM has issued a warrant for the arrest of the fugitive. This usually occurs where the RM is approached by the relevant agency in Jamaica to issue a warrant because it may be the case that the circumstances dictate that he should be arrested even though no authority to proceed has yet been issued by the Minister. The warrant issued by the RM in this situation is called is called a provisional warrant. It is provisional because it has been issued before the authority to proceed has not yet been issued by the Minister. When the Minister is notified, he may choose not to issue his authority to proceed and in such instance the Minister has the authority to cancel the warrant and order the release of the fugitive.

[26] The RM may have acted upon information presented to him or her. If the RM acts under section 9 (1) (b) and issues the provisional warrant then he or she must inform the Minister and send to the Minister all the relevant information on which the RM acted. In this situation the Minister decides whether or not to issue the authority to proceed (section 9 (4)). If the Minister decides not to issue the authority to proceed, then the provisional warrant issued by the RM is canceled and the fugitive ordered to be released. It seems that it is this circumstance that led the Minister in this case to take the position that unless an authority to proceed is issued then all proceedings after an arrest on a provisional warrant must necessarily be a nullity. This second method, like the first, leads to a formal extradition hearing before the RM.

[27] The third circumstance occurs where the fugitive has been arrested on a warrant and he indicates that he does not wish a formal extradition hearing. If he elects to forgo formal extradition hearings and he indicates this just after he is arrested or at any time before the formal hearing concludes (assuming that one had begun) then section 17 takes over and governs the procedure from thereon.

[28] In practical terms, then, the Act is saying that the fugitive can elect to have a formal hearing with the calling of witnesses or he may waive that right or decide, after the commencement of the a formal hearing, that he wishes to be surrendered before the

formal hearing is concluded. The Act does not lay down any time frame or the stage of the process when the fugitive can so indicate that he does not want a formal hearing. From this, it seems to me that unless precluded by the statute or some other rule of law, the fugitive has an election that is controlled solely by him. He may elect to have a formal hearing.

[29] How would one know whether he wants a formal hearing? To my mind, this conclusion is made once he does not say he is waiving his right to a formal hearing. To put it another way, the default position is a formal hearing unless the fugitive indicates otherwise. Thus, unless he clearly indicates in writing that he does not want a formal hearing he must be presumed to desire a formal hearing. It's all his choice.

[30] I will now refer to the specific statutory provisions to support the conclusions just stated. Section 8 (1) indicates that no person shall be dealt with under this Act without an authority to proceed being issued by the Minister except in instances where a provisional warrant is issued. This provision is the basis for the conclusion stated earlier that the first way of initiating the execution of an extradition request. Here the Minister issues the authority to proceed. Thereafter the arrest and commencement of the formal hearing proceeds without any further authority to proceed. A warrant issued by the RM after the issuing of an authority to proceed is not a provisional warrant. This warrant issued after the authority to proceed is dealt with in section 9 (1) (a).

[31] It is important to note that section 8 (1) establishes a universal negative with one exception. That exception is restricted to provisional warrants. This exception itself has no restrictions and so forms a full and complete class (persons arrested on provisional warrants) by itself which is carved out of the universal class (persons whose extradition is sought). The exception covers every single provisional warrant. This leads to the second method of executing an extradition request.

[32] The second method of executing requests begins with the issuing of a provisional warrant before an authority to proceed has been issued. The applicable provision here

is section 9 (1) (b). The warrant issued here is called a provisional warrant because the Minister may decide that an authority to proceed is not to issue.

[33] Thus far the proceedings initiated under sections 8 and sections 9 (1) (b) are predicated on the idea that a extradition formal hearing will follow. However, that may not be the case. If this is not the case section 17 takes over.

[34] The third way of dealing with extradition requests is set out in section 17. Section 17 deals with the complete class of warrants including provisional warrants, that is to say, warrants issued under section 9 (1) (a) and (b). Under section 17 a fugitive can indicate, **after arrest**, on a section-9-(1)-(b) warrant (provisional warrant) **and before the authority to proceed has been issued** that he wishes to go to the requesting state without formal extradition proceedings. Once he has so indicated section 17 states what **must** be done. If the fugitive so indicates then he **must** be taken before the RM who **must** explain to him in a language he understands that he has the right to a formal extradition hearing. If, after a full explanation of his right to the formal hearing, he still wishes to go, then section 17 (2) states what **must** happen next. If he consents, in writing, to forgo the formal hearing, the RM **must** commit him to prison to await his extradition. The RM has no discretion in this; it is a legislative directive. The Minister is then told explicitly that, notwithstanding anything said in section 11 of the Act, he or she has the power to extradite the fugitive (section 17 (4)).

[35] Section 11 deals with the right of the fugitive to make an application for a writ of habeas corpus to the Supreme Court, after formal committal proceedings, and if he fails, he can go to the Court of Appeal.

[36] Section 17 (4) is what is called a removal-of-all-doubt provision. It makes it plain that the fact that the fugitive has a right arising from a formal extradition hearing to apply for the writ is not in and of itself a barrier to the Minister surrendering the fugitive to the requesting state. The reason for this provision is to make it plain that since the fugitive has said that he does not wish to go through a formal hearing, then there is no need to

consider section 11 (1) and (2). Section 11 (1) an (2) has become irrelevant because of the fugitive's election. Hence, the Minister is told despite the presence of that right, he or she may still extradite the fugitive once the right to a formal hearing has been waived. The conclusion then is that if it is the case that the fugitive is arrested on a provisional warrant before the authority to proceed has been issued and he says he does not want a formal hearing, then there is no need for the Minister to issue an authority to proceed. The reason is that the authority to proceed is only necessary to commence formal extradition hearings. A formal extradition hearing cannot begin unless and until an authority to proceed has been issued but the same is not true for an informal hearing.

[37] Once the other requirements of section 17 are met the Minister moves on to section 17 (4) and there now, the Minister must take account of the matters stated as well as the other provisions of the Act to which section 17 (4) makes reference in order to decide whether the surrender warrant will be issued.

[38] The consequence of this reasoning so far is that once a provisional warrant is issued there are two possible ways of dealing with the fugitive. He may be subjected to formal proceedings or he may be subjected to extradition without a formal hearing (informal hearing). The fugitive has a vital role to play in determining which way the proceedings go after his arrest. He does this by making an election to go the informal route. If he chooses to go the informal route, then he must be taken before the magistrate who must explain to him his right to a formal hearing. If after the explanation he still wishes to forgo his formal hearing then he signs a document to this effect.

[39] If upon arrest, the fugitive is silent then the assumption must be that he wishes to have a formal hearing. Thus silence from the fugitive equals election for a formal hearing. Election to waive formal procedures means that he wishes an informal procedure.

[40] It should be noted as well that there is nothing in the Act that says that a formal hearing cannot be brought to an end by the fugitive electing to go to the requesting state

before the formal hearing is complete. If he decides to do this, then section 17 steers the process thereafter. This is why I said earlier that section 17 deals with both types of warrants so that even a warrant issued **after** the authority to proceed has been issued (a section-9-(1)-(a) warrant) and formal hearings have commenced with the calling of witnesses, the fugitive can at that relatively late stage say he does not want the formal hearing to be completed because he wishes to be returned immediately.

[41] The internal logic of section 17 makes the point that when the fugitive makes his election for an informal extradition the only thing for the Minister to do is to consider the provisions of sections 7 and 12. There is no need for the Minister to consider section 11 (1) and (2) because the right to make the application would have been explained to the fugitive by the RM. In other words, the Minister is required to act on the basis that the RM has done properly the job of explaining to the fugitive his rights.

[42] Mr Cochrane picked up on the second circumstance to say that section 9 (4) is mandatory. The RM must follow the procedure there. According to learned counsel, the statutory regime makes it plain that once the Minister is informed it is for him or her to decide the next step. He or she must decide whether to issue the authority to proceed. If the decision is that the authority to proceed is not to issue, then the warrant is cancelled and the fugitive must be released. It matters not whether the fugitive has already consented to be extradited. His consent is of no moment. This is not so. The fugitive can determine what happens by making is election to either formal or informal extradition proceedings.

[43] Mr Cochrane sought to say that the reason for insisting that the Minister must issue the authority to proceed is that the RM cannot act on documents that are not authenticated. In my view, this is not supportable. Under an informal extradition the question of whether the documents are authenticated within the meaning of section 14 is irrelevant because authentication goes to admissibility of evidence in a formal extradition hearing and not to whether the request for extradition itself is genuine. These are separate issue although a request for extradition may in fact be supported by

properly authenticated documents but this is not a legal necessity at the request stage. Section 14 does not preclude the requested state from acting on unauthenticated document provided that the request is genuine from the requesting state. This is so because the normal process by which the requested states receives request is by diplomatic channels. The request comes through proper diplomatic channels because by communicating by this process there can be no question that the request originated from a proper source. This is consistent with section 9 (1) (b) and (2) which clearly permits an arrest without any authenticated documents in the section-14 sense. Section 9 (1) (b) and (2) says that without an authority to proceed the magistrate may issue a warrant and the warrant can be issued upon information as would justify the issuing of a warrant of arrest for a person accused of a corresponding offence in Jamaica. There is nothing in the statute that says that the magistrate must have authenticated documents in the section-14 sense before the provisional warrant is issued. This must mean that the magistrate can act on information and issue a provisional warrant other than authenticated documents in the section-14 sense.

[44] Section 9 (4) supports the point and explains why an authority to proceed is not necessary prior to the issuance of a provisional warrant. This subsection says that where the magistrate issues a provisional warrant then he shall immediately inform the Minister and send to him the information and evidence. Evidence, in section 9 (4), is not restricted to authenticated section 14 documents (though that may be the case). Evidence in this context is referring to the material placed before the magistrate that caused him to issue the provisional warrant and not to evidence that would be admissible if formal proceedings were being held.

[45] If one looks back at section 8 (1) and (2), one sees that this provision contemplates what should happen outside of the provisional warrant situation. In this situation, the requesting state sends a request to the requested state. The request is to be accompanied by the information specified in section 8 (2) and by virtue of section 8 (3) the Minister is authorised to issue the authority to proceed. When the authority to proceed is issued to the RM, the warrant may be issued (not must be issued). The

reason for giving a discretion for issuing the warrant is that the statute recognises that it is not in every single instance a warrant is necessary. The fugitive may have heard about the matter and submitted voluntarily to the process and there is no risk of flight.

[46] If the warrant is issued after the authority to proceed has been issued the person is arrested. There is no need for the magistrate to inform the Minister of the fact that the warrant was issued or to send him the basis for issuing the warrant because the Minister having received the request with the relevant particulars would not need to be told what he already knows. It is important to observe that section 8 (1) and (2) does not require that the request contain authenticated documents in the section-14 sense.

[47] What then of section 9 (4) which suggests, on one reading, that an authority to proceed must be issued even if the fugitive consents to forgo formal extradition proceedings? In looking at the statute and giving it a purposive interpretation having regard to the practical nature of the statute, section 9 (4) is seeking to ensure that there is no hiatus in the process. While the defendant is contemplating his next move the statute is pushing the process forward. Section 9 (4) assumes that the fugitive has not decided to forgo formal extradition proceedings. The Minister may decide to cancel the warrant and order his release. If he is released that does not negate his wish to go to the requesting state. He is free to make his own arrangements to get there if he wishes unless he is under a legal disability. The order of the Minister to release him is not a legal disability. All it means is that the requested state is no longer involved to the extent of having either a formal or informal process as contemplated by the statute.

[48] It will be observed from the provisions set out earlier that the Minister has the power to quash the warrant and order the release of the fugitive if no authority to proceed is going to be issued. The purpose of this power is simply to ensure that the fugitive who was arrested on a warrant is released. The power to release the fugitive could just as easily have been given to the magistrate.

[49] By electing to forgo a formal hearing, the fugitive is saying that he is not concerned about the legal sufficiency of the request. He is saying that he does not require the courts to consider the legal issues that may arise. If this is the position of the fugitive, of what value is the insistence on the issuing of the authority to proceed? What purpose is being served? It cannot be said that interest of the fugitive would be undermined if the Minister did not issue the authority to proceed because section 17 (4) requires the Minister to take account of sections 7 and 12 (2), (3), (4) and (5). Section 12 (3) permits the Minister to refuse to issue the surrender warrant if he or she considers that having taken into account the matters under section 11 (3), it would be unjust or oppressive to extradite the fugitive. Section 7 permits the Minister to decline to surrender the fugitive for any of the reasons mentioned there. If the reason for the insistence on the issuing of the authority to proceed in cases where the fugitive has consented to be returned is to protect him from himself, that that concern is more than adequately addressed by section 17 (4).

[50] It is plain to me that section 17 (4) was simply providing, in the statute, a means to have an informal or simplified surrender once the fugitive indicated that he wished to forgo a formal hearing. My conclusion on this is reinforced by the fact that the extradition statutes before this 1989 Act had no provision for informal procedures as stated in the Act. What would happen if the fugitive wanted to go to the requesting state without the formal process, he would simply be held until officials of the requesting state came for him. In instances where the requested and requesting state had a land border, the fugitive would be taken to border and handed over. It simply does not make sense to say that the fugitive can waive his right to a formal hearing and then insist that the Minister must issue an authority to proceed which in turn requires the Minister to make sure that the statutory basis for the issuance of the authority to proceed is met (section 8 (3)). By electing to go the route of an informal hearing, the fugitive is relieving the Minister of the burden of considering whether an extradition order could be made or whether no extradition order could be made which are the requirements to issue an authority to proceed.

[51] Mr Cochrane sought to resist this conclusion by relying on ***Trevor Forbes v The Director of Public Prosecutions and another*** SCCA 9.2004 (unreported) November 3, 2005. Having read the case I am satisfied that it does not make the pronouncement being attribute to it by Mr Cochrane. It does not say that no person can ever be extradited from Jamaica unless an authority to proceed is issued by the Minister. The passages at pages 15 and 16 which say that section 8 provides that a person shall not be dealt with under the Act except when an authority to proceed is issued, and that section 9 (1) (b) permits the magistrate in cases of urgency to issue a provisional warrant before receiving the authority to proceed cannot be relied on for any necessary inference that an extradition can only take place after an authority to proceed has been issued. The Court of Appeal did not even mention section 17 to say nothing of interpreting the section. That case was not one of a fugitive waiving his right to a formal hearing. What has been said about ***Forbes*** applies equally to Mr Cochrane's second authority of ***Herbert Henry and others v The Commissioner of Corrections and another*** SCCA 62 – 67/2009 (unreported) delivered July 4, 2008.

APPLICATION TO CASE

[52] It is too plain, therefore, that section 9 (2) permits an arrest on a warrant issued by the magistrate without an authority to proceed being issued. Mr James did not submit that there was no lawful basis for the issuing of the warrant in the first extradition hearing. The result of this then is that there is no need to examine the legality of the arrest in respect of the first extradition request. Thus since he was lawfully arrested he could be dealt with either under sections 9 or 17. The fugitive, by electing to waive his right to a formal hearing, must be dealt with under section 17.

[53] Once the fugitive makes the election he must be brought before the magistrate (section 17 (1)). This was done. The magistrate is then required to explained to him his rights (section 17 (1)). This was done. If the fugitive insists on waiving his right to a formal hearing he is to sign a document to that effect (section 17 (2)). This was done. After this, the statute says, the fugitive must be committed to prison to await his extradition (section 17 (2)). This was done. The Minister is then required to determine

whether to order the fugitive to be extradited. In making his decision the Minister must consider the matters listed in sections 7 and 12 (section 17 (4)). This was not done because the Minister took the view that in this circumstance, an authority to proceed must be issued.

[54] It follows from what has been said that Mr Cochrane's submission that there were no authenticated documents within the meaning of section 14 before the RM and consequently that omission was fatal despite the consent of the fugitive is not sustainable. There is no need for the RM to have authenticated documents within the meaning of section 14 before a provisional warrant is issued provided that there is material sufficient to justify the issuing of a warrant had he been considering a corresponding offence in Jamaica. There is no rational, policy or legal reason for reading into section 9 the words 'evidence authenticated in accordance with section 14 of this Act.'

[55] The fallacy of the proposition is further demonstrated in this way. Mr Cochrane's submission is predicated on the proposition that section 14 sets out the only means by which evidence can be brought before the extradition magistrate when conducting a formal hearing and seeks to impose that misreading of the provision on the entire statute. Section 14 is simply an enabling provision designed to facilitate proof in a formal extradition hearing without bringing the witnesses from overseas or have them testify before the magistrate by way of video link (**Ramcharan v Commissioner of Correctional Services** (2007) 73 WIR 312, 369 (Harris JA) and **Forbes v DPP** SCCA No 9/2004 (unreported) delivered November 3, 2005 (Smith JA)).

[56] Section 14 (1) states that duly authenticated documents which purport to be what they appear to be shall be 'admissible in evidence … of the matters stated therein.' Section 14 (2) then goes on to say what is meant by a document 'duly authenticated.' Importantly, section 14 (4) states that nothing in section 14 prevents 'proof of any matter, or the admission in evidence of any document, in accordance with any other law of Jamaica.' Obviously, all this means is that viva voce evidence of proof of the

allegations need not be given once duly authenticated documents are presented to the court but it does not mean that viva voce evidence is excluded. It may be used. This means that it is entirely possible that the requesting state may have its proposed witnesses appear before the RM in Jamaica and give viva voce evidence to ground the request. This is yet another reason by evidence in section 9 (4) could not possibly mean duly authenticated documents in the section 14 sense because these documents are simply a means to overcome the logistical problems that may be encountered if it were a strict requirement that viva voce evidence of the actual allegations come directly from percipient witnesses had to be given before the magistrate.

[57] It is therefore incorrect to say that the first extradition hearing before the RM where the fugitive consented was a nullity. Every single step taken by the very learned, knowledgeable and more than able RM (who while at the bar had extensive experience in these matters) was within the letter and spirit of the Act.

[58] The question that may arise is this: if the Minister does not have to issue an authority to proceed before the fugitive can be extradited informally, what happens in instances where the authenticated documents are not before the magistrate and up to the time when the magistrates informs the Minister in accordance with section 9 (4), the authenticated documents are not yet submitted by the requesting stated? The answer is provided by section 10 (3) and (4). Section 10 (3) says that where the person arrested is in custody under a provisional warrant (the warrant issued **before** an authority to proceed has been issued), the RM may fix a reasonable period for the authority to proceed to arrive. The Minister is to be informed of the period and if the authority to proceed is not forthcoming then the fugitive is to be discharged from custody. Section 10 (4) speaks to time periods being established by a treaty if there is one between Jamaica and the requesting state. Where the treaty speaks to a time period for the production of documents then the treaty period is the relevant time period in these circumstances. Not to belabour the point but one cannot help but note that section 10 (4) actually contemplates that the documents relevant to the request may not even be before the RM when the person is in custody pursuant to a provisional warrant under

section 9 (1) during the treaty period. Thus, in instances where the provisional warrant is issued before the duly authenticated documents have arrived, the magistrate acts in accordance with sections 9 (4), 10 (3) and (4), which means that the magistrate:

(a) informs the Minister of the fact of issuing the warrant and the material relied on to issue the warrant;

(b) sets a reasonable time period for the Minister to issue the authority to proceed;

(c) sets the time period specified in the treaty if there is a treaty between Jamaica and the requesting state and the treaty addresses the matter.

[59] Mr Cochrane is correct when he speaks of the alpha and the omega but the difference being that the alpha and the omega is the statute. This leads now to the abuse of process issue.

PART THREE

THE ABUSE OF PROCESS

WHAT IS ABUSE OF PROCESS?

[60] Mr James' fundamental point on this abuse of process issue is that once the Supreme Court ordered the release of the fugitive after the first request then the second request must necessarily be an abuse of process and that the only remedy is to order his release. The upshot of this is that the fugitive cannot ever be extradited in relation to the matters contained in either request. In effect, Mr James is asking for some kind of permanent bar against the extradition of the fugitive for the offences in the first request and presumably, in the second.

[61] The expression abuse of process defies a single comprehensive definition. It is often easier to describe rather than define what is an abuse of process. Despite this difficulty, it is important to give some indication of what is in view when one speaks of abuse of process. From the cases, it seems that an abuse of process arises where the system of justice administered by properly constituted courts are being wrongly used to such an extent that it becomes a misuse, in that the processes are being used for some

purpose for which it was not designed which if unchecked has, or may lead to oppression, unfairness and injustice to a party to the litigation. To grant a stay or the equivalent of a stay, the conduct must be such that it cannot be remedied by any other means but a stay. The misuse of the process may be deliberate and motivated by ulterior purposes such as a deliberate attempt to circumvent a court order. Ultimately, Mr James is seeking from the court something akin to a permanent stay of proceedings regarding the fugitive.

[62] While it is universally agreed that superior courts of record, which have original unlimited civil and criminal jurisdiction, have the power to prevent abuses of their process, there is division over the precise boundaries of this judicial power. Is the power only exercisable in respect of conduct occurring after originating process, whether civil or criminal, if filed or can the power be exercised in respect of conduct occurring before originating process is filed in the court? The difficulty of establishing the boundaries is reflected in the New Zealand case of ***Moevao v Department of Labour*** [1980] 1 NZLR 464 and ***Regina v Horseferry Road Magistrates' Court, Ex parte Bennett*** [1994] 1 AC 42. While the court was unanimous in dismissing the appeal against conviction on the ground of abuse of process, their Lordships' discussion revealed the acute nature of the problem. Richmond P at pp. 470 - 471 held:

> *However it cannot be too much emphasised that the inherent power to stay a prosecution stems from the need of the Court to prevent its own process from being abused. Therefore any exercise of the power must be approached with caution. It must be quite clear that the case is truly one of abuse of process and not merely one involving elements of oppression, illegality or abuse of authority in some way which falls short of establishing that the process of the Court is itself being wrongly made use of.*

[63] Woodhouse J held at page 476:

> *It is essential to keep in mind that it is "the process of law", to use Lord Devlin's phrase [in Connelly v DPP], that is the issue. It is not something limited to the conventional practices or procedures of the Court system. It*

is the function and purpose of the Courts as a separate part of the constitutional machinery that must be protected from abuse rather than the particular processes that are used within the machine. It may be that the shorthand phrase "abuse of process" by itself does not give sufficient emphasis to the principle that in this context the Court must react not so much against an abuse of the procedure that has been built up to enable the determination of a criminal charge as against the much wider and more serious abuse of the criminal jurisdiction in general.

[64] Woodhouse J was in favour of a more extensive meaning of the expression 'abuse of process.' His Lordship was not confining the expression to the actual procedural process or mechanics of the particular court but extending it to misuse of the law itself. On this view, if something very egregious takes place before the matter arrives in court then the court, in certain circumstances would be entitled to take it into account in deciding whether an abuse of the court has taken place.

[65] The third member of the court, Richardson J seemed to favour a broader view but not quite in the same way as envisioned by Woodhouse J. Richardson J said at page 481:

It is not the purpose of the criminal law to punish the guilty at all costs. It is not that that end may justify whatever means may have been adopted. There are two related aspects of the public interest which bear on this. The first is that the public interest in the due administration of justice necessarily extends to ensuring that the Court's processes are used fairly by State and citizen alike. And the due administration of justice is a continuous process, not confined to the determination of the particular case. It follows that in exercising its inherent jurisdiction the Court is protecting its ability to function as a Court of law in the future as in the case before it. This leads on to the second aspect of the public interest which is in the maintenance of public confidence in the administration of justice. It is contrary to the public interest to allow that confidence to be

eroded by a concern that the Court's processes may lend themselves to oppression and injustice.

[66] In light of this difficulty of definition of abuse of process and determining its boundaries the wise words of Richardson J at page 482 should be bourne in mind. His Lordship said:

There is a further constraining consideration. Different persons may well have very different views as to what constitutes an abuse of process in the particular case. In Connelly v Director of Public Prosecutions [1964] AC 1254, 1337; [1964] 2 All ER 401, 432, Lord Hodson said that he would find a discretion to determine whether or not a prosecution should be stopped "immensely difficult to exercise at all, nor should I know how to exercise it judicially". The twin problems of an absence of objectively ascertainable standards and the relative unfamiliarity of the Courts with the weighing of all the considerations which may bear on the exercise of prosecutorial responsibility require the Courts to tread with the utmost circumspection. While the Court must be the master and have the last word, it is only where to countenance the continuation of the prosecution would be contrary to the recognised purposes of the administration of criminal justice that a Court would ever be justified in intervening.

[67] In the ***Horseferry*** case, the House of Lords expressed the view that in the circumstances of that case (where it was suggested that the defendant had been kidnapped in a foreign state and placed before the court) it may be appropriate for the court to take account of egregious conduct of the state before the defendant is placed before the court. Lord Griffiths speaking for the majority at pp 61 – 62 held:

Your Lordships are now invited to extend the concept of abuse of process a stage further. In the present case there is no suggestion that the appellant cannot have a fair trial, nor could it be suggested that it would have been unfair to try him if he had been returned to this country through extradition procedures. If the court is to have the power to interfere with

the prosecution in the present circumstances it must be 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.

My Lords, I have no doubt that the judiciary should accept this responsibility in the field of criminal law. The great growth of administrative law during the latter half of this century has occurred because of the recognition by the judiciary and Parliament alike that it is the function of the High Court to ensure that executive action is exercised responsibly and as Parliament intended. So also should it be in the field of criminal law and if it comes to the attention of the court that there has been a serious abuse of power it should, in my view, express its disapproval by refusing to act upon it.

[68] In my view, in light of what has been said, it is prudent for the courts to insist on evidence of egregious conduct to justify a stay or a remedy akin to a stay. By insisting on this, the subjective element is reduced considerably since different judges may have different views on what is an abuse of process. If courts too readily acceded to stop proceedings because of some perceived injustice then that may quickly degenerate into a situation where the judiciary and not the litigants (executive included) determine which cases are brought. Each person (including private litigants, defendants charged in criminal proceedings, fugitives in extradition matter and the executive) has a right of access to the courts. This is guaranteed by the Constitution.

[69] If Mr James meant that a court should have the power to stop proceedings on the basis that it should not have been brought then I respectfully decline to go this route. If, however, he meant that there is a power in a superior court of record with unlimited original jurisdiction in civil and criminal matters such as the Supreme Court of Jamaica, then he is on much better ground but even then, it is a power that can only be exercised in very exceptional circumstances. To hold otherwise, comes close to usurping the role

of litigants and the executive to place matters before the courts. As Lord Scarman explained, in another context which is applicable here, in ***R v Sang*** [1979] 2 All ER 1222, 1245, the role of the judge is [largely] confined to the forensic process. If I may be permitted to add to Lord Scarman's observations. The judge does not control the executive or litigants. He does not initiate, stifle or control who brings cases before the court. For the time being I am inclined to the view that the court is on much firmer footing if it confines the abuse of process doctrine to conduct after the initiating of originating proceedings. The only time the judge can intervene is if the process of the courts is being used for a thoroughly improper purpose such has harassing another party. There may be evidence that there is no genuine desire to pursue the case to conclusion. The case might be brought to demonstrate raw power as distinct from using the court to determine a legitimate dispute between the parties. If the court intervenes in these circumstances, the intervention is not based on the merits of the case or the judge's subjective view on whether the matter should have been brought but rather on the way in which the litigation is being pursued. Of course, there will be circumstances where the content of the case is important such as instances of res judicata, issue estoppels, autrefois acquit or convict and so on. But instances like these apart, the intervention is based on serious misuse of the court process.

[70] In this particular case, the fugitive is not relying on some egregious conduct by the requesting state or requested state that occurred before he was placed before the court. Thus the wider conception of abuse contemplated by Woodhouse J and ***Horseferry*** need not be considered. The narrower view of Richmond P is what is in view here. I am aware that the ***Moevao*** case involved a criminal prosecution and an extradition request is not a prosecution. However, the general discussion of principle applies to these proceedings.

CAN THE SUPREME COURT ISSUE A WRIT OF HABEAS CORPUS ON THE BASIS OF AN ABUSE OF PROCESS?

[71] It is important to establish the basis upon which an abuse of process issue can be entertained in our constitutional framework. This became important because Mrs

Feurtado-Richards submitted, in effect, that this court could not interfere with the order of the magistrate on the ground of abuse of process. One would have thought that this was a truly bold submission to make in light of what has been said already but the research has shown that it has some pedigree.

[72] Mrs Feurtado-Richards submitted that when one is dealing with an outward extradition, that is the requested state responding to a request made to it, then abuse of process is not a basis to decline to extradite the fugitive. She relied on ***Federal Republic of Germany v Schmidt*** [1994] 3 All ER 65. In that case, the House of Lords held that neither a magistrate nor a High Court judge could entertain an abuse of process application. To this case can be added the following other formidable and weighty judgments of the House of Lords: ***Atkinson v United States of America Government*** [1971] AC 197 and ***R v Governor of Pentonville Prison, Ex p Sinclair*** [1991] 2 AC 64.

[73] ***Atkinson*** and ***Ex Parte Sinclair*** were clear and decisive on the point in England and Wales. However, when the House of Lord decided the case of ***Regina v Horseferry Road Magistrates' Court, Ex parte Bennett*** [1994] 1 AC 42, the debate as to whether magistrates had any inherent power to deal with abuse of process was renewed. It was felt new thinking had emerged since the two earlier cases. The House had held that a magistrate had power to decline to commit a person to custody for extradition on the basis of abuse of process.

[74] The burst of euphoria was short lived. It soon became clear that the House, in extradition matters, was adhering to its position taken before ***Horseferry***. ***Schmidt*** put the matter beyond doubt that the earlier stated position was still the law in England. The House in ***Schmidt*** distinguished ***Horseferry*** on the ground that it did not apply to extradition proceedings and was concerned with the power of English courts to stay domestic proceedings on abuse of process grounds. So much for the position in England and Wales. At this stage is may be said with some justification that there is a strong view that in extradition proceedings there is no power even in a superior court of

record of original and unlimited civil and criminal jurisdiction to entertain an abuse of process argument.

[75] It is important to trace the pathway of Mrs Feurtado-Richard's submission so that the full force of her submissions can be appreciated. The trail ends in section 11 (3) of the Jamaican Act which has been set out above. Section 11 (3) of the Jamaican Act has a particular lineage which it is important to trace. It is necessary to travel across the Atlantic to the shores of the United Kingdom and then go back in time to 1870. Before doing that it is important to point out the following. The Jamaican provision, other than for a few immaterial changes, is identical in wording to section 8 (3) of the Extradition Act, 1967 (UK). Section 8 (3) of the 1967 UK Act was re-enacted in substance as section 11 (3) of the Extradition Act, 1989 (UK). The Jamaican section 11 (3) is modeled closely, if not copied, directly from the 1989 UK statute. The Jamaican Act was passed in 1991.

[76] In understanding the effect of these provisions in the United Kingdom, it is important to summarise what the House of Lords had to say about the law before 1967. In ***Atkinson***, Lord Reid took the view that under the Extradition Act, 1870, the committing magistrates in extradition proceedings had no power to decline to extradite a fugitive because it would be unjust, oppressive or an abuse of process. Once the evidence was sufficient under the statute to justify extradition, the magistrate had to make the committal.

[77] The relevant parts section 10 of the Extradition Act 1870 reads:

> *'if [the magistrate] commits such a criminal to prison, he shall commit him … there to await the warrant of the Secretary of State for his surrender, and* ***he shall forthwith send to the Secretary of State a certificate of committal, and such report upon the case as he may think fi****t' (my emphasis)*

[78] It is important to state his Lordship's reasoning at pp 232 – 233:

I cannot regard this [Connelly v DPP] as any authority for the proposition that magistrates have power to refuse to commit an accused for trial on the ground that it would be unjust or oppressive to require him to be tried. and that proposition has no support in practice or in principle. In my view once a magistrate decides that there is sufficient evidence to justify committal he must commit the accused for trial and there is no provision in the 1870 Act giving a magistrate any wider power in extradition proceedings than he has when he is committing for trial in England.

But that is not the end of the matter. It is now well recognised that the court has power to expand procedure laid down by statute if that is necessary to prevent infringement of natural justice and is not plainly contrary to the intention of Parliament. There can be cases where it would clearly be contrary to natural justice to surrender a man although there is sufficient evidence to justify committal. Extradition may be either because the man is accused of an extradition crime or because he has been convicted in the foreign country of an extradition crime. It is not unknown for convictions to be obtained in a few foreign countries by improper means, and it would be intolerable if a man so convicted had to be surrendered. Parliament can never have so intended when the 1870 Act was passed.

But the Act does provide a safeguard. The Secretary of State always has power to refuse to surrender a man committed to prison by the magistrate. It appears to me that Parliament must have intended the Secretary of State to use that power whenever in his view it would be wrong, unjust or oppressive to surrender the man. Section 10 of the 1870 Act provides that when a magistrate commits a man to prison "he shall forthwith send to a Secretary of State a certificate of the committal, and such report upon the case as he may think fit." So the magistrate will report to the Secretary of State anything which has come to light in the course of proceedings before him showing or alleged to show that it would be in any way

improper to surrender the man. Then the Secretary of State is answerable to Parliament, but not to the courts, for any decision he may make.

If I had thought that Parliament did not intend this safeguard to be used in this way, then I would think it necessary to infer that the magistrate has power to refuse to commit if he finds that it would be contrary to natural justice to surrender the man. But in my judgment Parliament by providing this safeguard has excluded the jurisdiction of the courts.

[79] Lord Reid is not saying that any specific provision in the 1870 Act empowered the Secretary of State with the authority to decline to surrender a fugitive. His Lordship stated that the Secretary always had that power. Implicit in this reasoning is that the power existed before the 1870 Act. The analysis went on to say that the legislature could not have intended that once the case for extradition was made on the evidence that the fugitive was to be extradited even if the evidence was obtained in the foreign country by improper means. The legislature must have intended that there would be safeguards for these situations. As I understand Lord Reid, the safeguard was to be found in the long standing pre-1870 Act power in the Secretary of State not to surrender fugitives. This power was not taken away by the 1870 Act. Since this power was not taken away by the Act then it still subsisted in the Secretary. If it still subsisted in the Secretary then it did not reside in the magistrate. However, his Lordship did note that if that safeguard no longer existed in the Secretary it would have been necessary to imply such a power in the magistrate. Consequently, it was not open to a magistrate to decline to make the committal order even if the extradition offence has been made out on the ground that it would be unjust, oppressive or an abuse of process. This reasoning in respect of magistrates under the 1870 Act and their inability to discharge a fugitive on the bases just mentioned also applied to the High Court under the regime of the 1870 Act.

[80] Lord Reid was strongly influenced in his reasoning and conclusion by the fact that section 10 of the 1870 Act had the words highlighted above. His Lordship stated that the report to the Secretary of State would be expected to highlight any feature

which the extraditing magistrate was concerned about and the Secretary would then take it into account when deciding whether to extradite the person. It was in this manner that the magistrate would communicate any matters which came to his attention that would make it unjust, oppressive or an abuse of process to extradite the fugitive. The other Law Lords expressed concurrence with Lord Reid's reasoning and conclusion.

[81] The next development was the Fugitive Offenders Acts, 1881. The 1881 Act enacted section 10 which reads:

> *Where it is made to appear to a superior court that by reason of the trivial nature of the case, or by reason of the application for the return of a fugitive not being made in good faith in the interests of justice* ***or otherwise****, it would, having regard to the distance, to the facilities for communication, and to all the circumstances of the case, be* ***unjust or oppressive*** *or too severe a punishment to return the fugitive either at all or until the expiration of a certain period, such court may discharge the fugitive, either absolutely or on bail, or order that he shall not be returned until after the expiration of the period named in the order, or may make such other order in the premises as to the court seems just.* (My emphasis)

[82] This provision was significant. It was here that the superior court (not the magistrate) was being invited to consider whether it would be unjust or oppressive to extradite the fugitive. The phrase 'or otherwise' was interpreted to mean that the court had a wide discretion to do what in the circumstances was just (***Reg v Governor of Brixton Prison, Ex parte Naranjan Singh*** [1962] 1 QB 211, 218 - 220). The combined effect of the introduction of these two expressions ('or otherwise' and 'unjust or oppressive') was that the superior court (not the magistrate) was being invited to consider matters that Lord Reid had stated were matters for the Secretary of State. Following from Lord Reid's analysis in ***Atkinson***, the superior court was being given a power it did not have before and that power hitherto resided exclusively within the breast of the Secretary of State.

[83] The next development was the 1967 Act. That statute repealed the 1881 and enacted section 8 (3) which reads:

> *On any such application the High Court or High Court of Justiciary may, without prejudice to any other jurisdiction of the court, order the person committed to be discharged from custody if it appears to the court that - (a) by reason of the trivial nature of the offence of which he is accused or was convicted; or (b) by reason of the passage of time since he is alleged to have committed it or to have become unlawfully at large, as the case may be; or (c) because the accusation against him is not made in good faith in the interests of justice, it would, having regard to all the circumstances, be* ***unjust or oppressive*** *to return him.* (My emphasis)

[84] The omission of the words 'or otherwise' from the 1967 Act was held to mean that the power of the court to discharge persons from custody was restricted to the three situations named in the Act (***Reg v Governor of Pentonville Prison, Ex parte Narang*** [1978] AC 247). Again the power to discharge on the grounds stated in the provision was confined to the superior court. The position regarding magistrates remained the same as it was under the 1870 Act.

[85] The 1967 Act was repealed and replaced with the 1989 Act. Section 8 (3) of the 1967 Act was replaced with section 11 (3) which reads:

> *Without prejudice to any jurisdiction of the High Court apart from this section, the court shall order the applicant's discharge if it appears to the court in relation to the offence, or each of the offences, in respect of which the applicant's return is sought, that - (a) by reason of the trivial nature of the offence; or (b) by reason of the passage of time since he is alleged to have committed it or to have become unlawfully at large, as the case may be; or (c) because the accusation against him is not made in good faith in the interests of justice, it would, having regard to all the circumstances, be* ***unjust or oppressive*** *to return him.* (My emphasis)

[86] Again the jurisdiction to discharge on the basis of it being unjust and oppressive to extradite the fugitive was confined to superior courts. The position regarding magistrates remained unchanged.

[87] In respect of this provision, Lord Ackner stated, obiter, in ***Ex Parte Sinclair***, at pp 80 – 81:

> *By this section a radical alteration has been made by giving to the High Court, in part at least, the same kind of discretion, as to whether or not to discharge an applicant, as the Secretary of State has in deciding whether or not to order a fugitive criminal to be returned to a requesting state. It is the clearest possible recognition by the legislature that hitherto no such discretion existed in the courts and in particular in the magistrate's court.*

[88] In terms of this provision being a radical alteration it should be observed that this is not strictly speaking accurate because, as already noted, section 10 the 1881 Act had extended the power of superior courts. If Lord Ackner's proposition is to stand then it must be altered to say that the text of section 10 of the 1881 Act recognised that before this provision no court (magistrate, high or superior) had any discretion to decline to extradite a fugitive on the basis that to do so would be unjust or oppressive. Needless to say, before 1881 which saw the introduction of the words 'or otherwise' no court had the power to decline to extradite on the basis of abuse of process.

[89] As I understand the development of the law in the UK, the proposition of the House of Lords is that the omission of the words 'or otherwise' from legislation dealing with extradition after 1870 is a strong indication that neither magistrates nor the High Court or indeed any superior court in England Wales has the power to decline extradition on the basis of abuse of process.

[90] This is how the law stood in England right to the 1989 Act. The passage of that Act did not affect the understanding. It was in this state of the law that Jamaica passed its Act in 1991 which mirrored closely the 1989 UK Act. Following from this, the logic of

Mrs Feurtado-Richards' submission is that this understanding was well known when Jamaica enacted the 1991 statute with section 11 (3) and so by enacting that provision excluding the words 'or otherwise' meant that no court in Jamaica has the power to decline extradition on the basis of abuse of process. Learned counsel is therefore implying that that understanding of the law was known to the Jamaican legislature by legislating in the way that it did it was accepting the known position. The courts thus restricted to just the grounds listed in section 11 (3) of the Jamaican Act. This is the ultimate conclusion of Mrs. Feurtado-Richards' submissions.

[91] I have no difficulty with the decisions of the House of Lords as far as they go. All the decisions of the House of Lords on this point were outside of the context of a written constitution with a bill of rights that specifically addressed the issue of deprivation of liberty in an extradition context. The House was considering extradition law in the context of Dicey's doctrine of sovereignty of Parliament. In Jamaica, there is the doctrine of constitutional supremacy and it is the duty of the courts to give effect to constitutional rights even when there is no direct challenge to the constitutionality of any legislation or conduct. From this perspective, the reasoning and conclusion of the House, is not conclusive on the point. It must be observed as well that all these decisions predated the Human Rights Act of 1998 (UK).

[92] Of greater assistance is the case of ***Knowles***, the Judicial Committee of the Privy Council considered the matter of abuse of process in the context of extradition proceedings and a written Constitution. The Board decided that an extradition magistrate did not have jurisdiction to entertain an abuse of process application. The Board also stated that such an application should be heard by the Supreme Court. It must be noted that Lord Bingham who spoke on behalf of the Board did say that these observations were strictly unnecessary for the decision but since full argument was deployed it was felt that an opinion should be offered. Lord Bingham did confess some difficulty on the point. In light of this, it could hardly be said that this case represents the final word or even a definitive word on the issue since it was clearly obiter dictum.

[93] However, despite the fact that ***Knowles'*** contained the obiter dictum, at the very least it would seem that Mrs Feurtado-Richards' position is difficult to sustain where there is a written constitution which gives explicit power to the Supreme Court to consider breaches of the fundamental rights provisions of the constitution. A similar power is not given to magistrates. Thus it may well be the case that magistrates in Jamaica cannot entertain an abuse of process application in extradition proceedings because these courts are created by statute and have no inherent power and so can only exercise such power as is given to them. Also extradition is purely statutory and the power conferred on the magistrates to deal with extradition matter is found solely in the extradition statute. The statute does not give magistrates the power to deal with abuse of process in extradition matter and so I would be prepared to hold that they do not have that power.

[94] It would also appear that the full reasoning of the House of Lords, based on the history of phrase 'or otherwise', excluding abuse of process from being considered by any court involved in extradition does not apply to the Constitution of Jamaica where section 19 of the Charter of Rights and Freedoms give jurisdiction to the Supreme Court to determine whether there have, is or is likely to be a breach of the fundamental rights guaranteed by the Constitution. The fundamental right in view is found in section 14 (I) (i).

[95] Section 14 (I) (i) of Charter of Rights states:

> *No person shall be deprived of his liberty except on reasonable grounds and in accordance with fair procedures established by law in the following circumstances*
>
> *(i) the arrest or detention of a person –*
>
> *(i) …*
>
> *(ii) against whom action is being taken with a view to deportation or extradition or other lawful removal or the taking of proceedings relating thereto.*

[96] The phrase ‘fair procedures established by law’ cannot be restricted to statute law but must include common law principles which, in Jamaica, are the basis of much of our criminal practice and procedure. Abuse of process is known to Jamaican criminal practice and procedure. Remedies have been fashioned to deal with abuses when they occur. Abuse of process principles are designed to see that the court’s processes are used not only for proper purposes but in a proper, fair and balanced manner.

[97] The conclusion then is that this court has the jurisdiction to entertain an abuse of process application in the context of an application for a writ of habeas corpus arising from a committal in extradition proceedings.

THE METHOD OF ADJUDICATING ON AN ABUSE OF PROCESS ISSUE IN EXTRADITION PROCEEDINGS

[98] How does the court deal with an abuse of process submission in the extradition context? I propose to use dictum from Lord Phillips of Worth Matravers CJ in the case of ***Regina (Government of the United States of America) v Bow Street Magistrates' Court*** [2007] 1 WLR 1157 at paragraph [84] as a starting point. His Lordship’s advice was directed to judges sitting as extradition judges who were asked to consider whether an abuse of process had occurred. Lord Phillips spoke in the context of the Extradition Act 2003 (UK). With modification, it can be applied to the Supreme Court. His advice to judges was as follows:

1. *first, when an allegation of abuse of process is made, the judge should insist that the conduct said to amount to an abuse of process should be identified with particularity;*
2. *second, the judge must decide whether such conduct, if established, is capable of amounting to an abuse of process;*
3. *third, the judge must then consider whether there are reasonable grounds for considering whether such conduct has taken place;*
4. *fourth, if the third stage has been met, then the judge should not make an extradition order unless he was satisfied that no such abuse had taken place;*

5. *on a cautionary note, his Lordship indicated that the judge should be alert to the possibility that the allegation of abuse of process may be a delaying tactic and therefore a judge should not engage in the steps indicated unless there is 'reason to believe that an abuse may have taken place.'*

[99] I say modified because the expression abuse of process covers such a wide range of conduct that it cannot be that the only remedy is a complete bar to further proceedings. Some misuses which if unchecked may arise to abuse can be managed by appropriate orders. For example, an order for disclosure in cases where that has not been done may be appropriate. Lord Phillips' advice needs to be modified for a second reason. In the Supreme Court the application is for a writ of habeas corpus. The committal order has already been made by the time the Supreme Court enters the picture. Thus the matter is essentially a sort of review of the magistrate's decision. Another reason is that the Supreme Court, in extradition proceedings, is not ideally suited for detailed factual enquiries which may involve examination of witnesses.

[100] The modification is to add this consideration in place of or in addition to the fourth step above:

> *If the conduct took place, then determine whether that conduct is sufficiently grave that a discharge from custody with the implication being that the fugitive can never be extradited for the offence for which he his extradition was requested.*

[101] This modification is suggested having regard to the fact that abuse of process can take so many forms with the consequence that its impact on proceedings or the rule of law varies and if in the case of domestic trials the remedy of a stay is rarely granted, then the circumstances of granting a stay or something akin to a stay in extradition proceedings must even be rarer. This is so because extradition is a form of mutual legal assistance between friendly states. The executive of both states have agreed to assist each other by surrendering fugitives in each other's countries. The extradition hearing is not a determination of guilt or innocence. It is also in the interest of both states and the

public at large that persons accused of crime, especially very serious crimes, should be brought to justice. The guilty should be convicted and the innocent and those not proven to be guilty acquitted. Extradition is one means of achieving that goal. This objective should not be thwarted unless there are sound legal or policy grounds for so doing.

APPLICATION OF LORD PHILLIPS' MODIFIED STANDARD

WHAT IS THE CONDUCT SAID TO AMOUNT TO AN ABUSE OF PROCESS?

[102] Mr James said that the abuse consisted of rearresting the fugitive a second time, after he was discharged from custody by the Supreme Court, for at least one of the same offences for which has arrested for in the first request. In addition, the state did not oppose his release by the Supreme Court and so must be taken to have accepted that there were no good reasons for him to remain in custody. It was also said that during the time the fugitive was in custody, the absence of proper documentation that would have enabled the Minister to issue the authority to proceed could have been secured and this was not done until the date of the hearing before the Supreme Court. Even then, Mr James went on, the state did not indicate to the court that papers were not at hand and it was asking for some indulgence to have everything in order to facilitate the fugitive's extradition. The delay in extraditing the fugitive was inexcusable. The delay coupled with no adequate reason for the delay, discharge followed by a second request and another committal amounts to an abuse of process.

IS THIS CONDUCT CAPABLE OF AMOUNTING TO AN ABUSE OF PROCESS?

[103] The simple answer is yes. However, delay does not automatically result in a discharge of the fugitive. It depends on the reason for the delay. Mr James relied on ***Prestley Bingham v Commissioner of Corrections and another*** (2007) 74 WIR 345 for the proposition that delay beyond the statutory period in surrendering the fugitive is fatal unless 'sufficient cause is shown' explaining the delay and thereby justifying the detention beyond the statutory period. Learned counsel suggested that the case decided that once there is delay and it cannot be attributed to the fugitive then that without more means that fugitive must be discharged and cannot be the subject of a second request. So much for the legal premise. For his factual premise Mr James'

submission is this: the fugitive consented to be extradited on November 26, 2010. The Minister was informed. The Minister had sixty days to issue her surrender warrant. This she failed to do. The sixty days passed. The habeas corpus application was made. The relevant functionaries of the requested state were aware of the application (DPP and the Director of State Proceeding in the Attorney General's Chambers). On April 14, 2011, the requested state's officials conceded that the order should be made, albeit on different grounds for each concession. The order for release was made without objection. The conclusion is that re-arresting the fugitive in these circumstances is, without more, an abuse of process because no adequate explanation for the delay in surrendering the fugitive was forthcoming. Those seeking to extradite the fugitive were given all opportunity to get it right and having failed to get it right on the first occasion they should not be given a second opportunity. Unless a line is drawn there is the real risk of multiple requests for the same fugitive for the same offences if he successfully fends off previous requests.

[104] In going forward it would be helpful to see how the courts have dealt with post committal delay where the statutory period during which the fugitive can be held has expired. Having examined the cases, the following can be said to be established with a fair degree of certainty:

1. *once a committal order is made or the fugitive has consented to be extradited to the requesting state, the requesting state must act promptly and surrender the fugitive (**Prestley Bingham**);*
2. *if the statutory period during which the fugitive may be held awaiting extradition expires, the court must order his release unless sufficient cause is shown justifying the detention beyond the statutory period. What amounts to sufficient cause is a question of fact and there are no preordained set of facts that may or may not amount to sufficient cause (**Prestley Bingham**; **Re Shuter (No 2)** [1959[3 All ER 481; **R v Brixton Prison (Governor) and Another, ex parte Enahoro** [1963] 2 All ER 477);*

3. *administrative inertia will never amount to sufficient cause justifying detention beyond the statutory period after the committal order is made (**Prestley Bingham**);*
4. *misunderstanding or misconstruction of the law by the requesting or requested state is not a sufficient cause to justify detention beyond the statutory period after the committal order is made (**Re Oskar** The Independent 10 March 1988 CO/190/88);*
5. *it is irrelevant whether the requesting state has acted properly in determining whether there is sufficient case to detain the fugitive beyond the statutory period after the committal order (**Re Oskar**).*

[105] It is not quite clear why a misunderstanding of the law cannot amount to a sufficient cause justifying the continued detention of the fugitive beyond the statutory period. Why should a fugitive benefit from a genuine error of law in circumstances where no prejudice or injustice to the extent that a stay of the prosecution would be justified? Where there is no evidence of a deliberate attempt to manipulate the process of the court or deliberate conduct designed to oppress or treat the defendant unfairly, it seems to me to be too favourable to the fugitive to say that an error of law on the part of either the requested or requesting state means that the defendant must be released, automatically, because the statutory period has passed. It would seem to me then that principle four above should be modified to read: misunderstanding or misconstruction of the law can amount to sufficient reason justifying detention beyond the statutory period provided that the fugitive is not irreparably prejudiced. Where it is alleged that the law was misunderstood or misinterpreted, the court should examine the allegation closely to make sure that it is not disguised administrative inefficiency masquerading as an error of law.

DID THE CONDUCT IN QUESTION TAKE PLACE?

[106] The short answer is yes but the fugitive knew only one part of the story. He was correct in so far as he said that the time for him to be extradited had passed. To my mind that cannot be the end of the matter. In the instant case, the Minister made an

error of law. She honestly believed that an authority to proceed was necessary in every single case of extradition and so did not issue the surrender warrant. If that was her honestly held position, it is difficult to see how she or her representative could attend before the Supreme Court and ask the court not to release the fugitive. It may be said that she could have asked the court to interpret the provisions but again, having concluded that the provisions had only one meaning there would be no need to ask the court to provide an interpretation. The Minister sought and obtained the advice of one of her senior advisors. He told her that her position was correct. There is no suggestion of mala fides in the advice given. There is no evidence that the Minister was seeking to do anything else but to uphold the rule of law. It does seem odd to me that a honest attempt to uphold the law in manner that conferred a benefit on the fugitive can be described as an abuse of process rising to the level where a second request for the fugitive is precluded.

[107] From the material before the court, it is clear that the Minister was insisting on giving the fugitive more procedural protection than the law required in the circumstances. She was insisting on improving his position. The Minister would be nonplussed to learn that her insistence on greater procedural rights for the fugitive amounts to an abuse of process. Most reasonable persons would too.

[108] The fact that the DPP differed from the Minister is neither here nor there because it is the Attorney General, and not the DPP, who is the principal legal advisor to the government. This is not a case of tardiness and apathy. It is important to note that in ***Prestley Bingham*** Cooke JA seemed to have been impressed by the fact that the reasons for the delay did not involve any ‘consideration of the appellant’s interest’ (page 352). In this case the Minister was insisting on what she understood to be proper procedure. There is nothing in the second request to suggest that the DPP, the Minister or any other person in Jamaica involved in this extradition was behaving in a manner to flout the order releasing the fugitive or engaging in the kind of egregious conduct that could be described as using the extradition process to harass or victimize the fugitive.

The evidence is that this is about an honest, good faith attempt to have Jamaica meet its obligation under the extradition arrangements between Jamaica and the UKG.

IS THIS CONDUCT SUCH THAT THIS COURT SHOULD INTERVENE ON THE GROUND OF ABUSE OF PROCESS?

[109] The answer is no. It has not been shown that the subsequent arrest of the fugitive, in the circumstance of this case, rises to the level where this court should order the fugitive be released on the ground of abuse of process. The second request is not precluded by the statute. There is no evidence of a deliberate manipulation of the process to achieve an extradition which would raise eyebrows. There is no evidence that the UKG failed to do what was required of it on a proper interpretation of the statute. The fugitive was arrested in accordance with the law. He was brought before the court in accordance with the law. The RM, the DPP and UKG all acted within the boundaries of the Jamaican Act. The fugitive also acted within the statute. The sticking point arose because of the views of the Minister who was strongly supported by a legal opinion from her senior legal advisors. That position has been fully ventilated before this court and has been found to be unsound.

[110] There is no evidence that the fugitive is raising this abuse of process issue as a delaying tactic to avoid his extradition.

CONCLUSION

[111] An authority to proceed is not necessary in every single case in which extradition is sought by a requesting state. The scheme of the Act establishes three ways of managing extradition requests to Jamaica. The first is where there is a request followed by the issuing of an authority to proceed. The second is by way of a provisional warrant followed by an authority to proceed. The third is by a provisional warrant followed by the fugitive electing to waive his right to a formal extradition hearing.

[112] Where the fugitive is arrested on a provisional warrant and he waives his right to a formal hearing, there is no legal necessity for an authority to proceed. The Minister is only obliged to consider the matters listed in section 17 (4).

[113] What happened in this case does not amount to an abuse of process. The RM had no power to decline to make the order on the ground of abuse of process once the evidence placed before her met the statutory criteria. The power to consider whether there is an abuse of process sufficient to warrant a release from custody resides in the Supreme Court and the Court of Appeal. The latter court being authorised by the statute to exercise the same powers as the Supreme Court on an appeal against a dismissal of an application for a writ of habeas corpus.

[114] When considering an abuse of process, the court may find it useful to employ Lord Phillips' modified analytical method. Applying that method, I find that the conduct alleged does not amount to an abuse of process.

DISPOSITION

[115] There is no abuse of process in the instant case. The application for the writ of habeas corpus ad subjiciendum is refused. No order as to costs.

EDWARDS J

THE FACTS

[116] On the 26th November, 2010 the Applicant, Vincent Ashman, was committed to be extradited to the United Kingdom pursuant to a request from authorities in that country for his extradition to answer charges on an allegations of murder. He was committed to custody to await extradition.

[117] Mr. Ashman was not extradited as prescribed by the Extradition Act (the Act) and on 1st February, 2011 he filed an application pursuant to section 13 of the Act, for an order that he be discharged from custody and that the warrant be quashed. On 14th

April, 2011 by order of the Full Court Mr. Ashman was discharged from detention and the warrant pursuant to which he was detained was quashed.

[118] Mr. Ashman was re-arrested on another extradition warrant following a second request from the United Kingdom. On the 12th October, 2011 after an appearance in the Corporate Area Resident Magistrate's Court, he was again committed to custody to await extradition to the United Kingdom. This second request for his extradition was based on the same allegations of murder contained in the previous request for which he was discharged as well as a new charge of illegal possession of firearm which was alleged to have been committed earlier in time to the murder and was a separate offence.

[119] This unusual state of affairs came about due to what now appears to this court to be a crisis of interpretation of the law between the learned Resident Magistrate, the authorities representing the Requesting State and the Executive in the Requested State. It arose in this way. Based on a request for the extradition of Mr. Ashman by the government of the United Kingdom, a provisional warrant of arrest dated November 24, 2010 was issued for him. He was brought before the learned Resident Magistrate for the Corporate Area where he indicated his willingness to be extradited without a formal hearing, which he is allowed to do by virtue of section 17 of the Act. Thereupon, the Magistrate informed him of his right to a formal extradition proceeding. The applicant upon being so informed waived his rights and consented in writing to be extradited.

[120] The Magistrate, acting under section 17(2) of the Act signed the warrant of committal thereby committing the fugitive to be extradited to the United Kingdom.
All that remained was for the Minister of Justice to order him to be extradited forthwith under and by virtue of section 17(3). However, the Minister of Justice acting on advice from the Attorney General's chambers which opined that the Magistrate ought not to have committed before the authenticated documents were sent and before the authority to proceed was signed, refused to sign an authority to proceed for the fugitive to be extradited.

[121] Meanwhile Mr. Ashman sat in custody awaiting his voluntary extradition to the United Kingdom. On the 3rd of February 2011, after the statutory period (prescribed by section 13(1) (a) of the Act) for his extradition had passed he rightly applied to the Supreme Court for his discharge under section 13 of the Act. At the hearing before the full court on April 14, 2011, the attorneys representing the Requesting State did not seek to resist the application and the court discharged the accused. He was subsequently re-arrested on an extradition warrant for the same offence of murder with an additional offence of illegal possession of firearm unrelated to the murder and earlier in time.

[122] It is as a result of his re-arrest and re-committal that he now applies to this court for discharge.

THE APPLICATION

[123] The applicant applied to this court for the following orders:

1. *That the Order for Extradition made against the Applicant Vincent Ashman in the Resident Magistrate's Court for the Corporate Area on the 12th day of October, 2011 be quashed.*
2. *That the said Vincent Ashman be discharged from custody.*
3. *That the Applicant be admitted to bail pending the final outcome of his application for habeas corpus.*

[124] The grounds on which the applicant sought the orders were as follows:

1) *The said Applicant, Vincent Ashman, was previously released and an extradition order quashed by this Court on 14th April, 2011.*
2) *The requesting State failed, refused and neglected to appeal the order of the Court to discharge the applicant and to quash the aforesaid extradition order.*
3) *Applicant was re-arrested and detained upon a subsequent request for his extradition.*
4) *The Extradition Act does not provide for subsequent arrest and detention of a fugitive after he is discharged by the Court for delay of the process.*

APPLICANT'S SUBMISSIONS

[125] The applicant's submission before this court may be summarized as follows:

1) T*hat the Constitution of Jamaica provides for the protection of fundamental rights and freedoms. One of those rights is the right to personal liberty.*

2) Habeas corpus is the procedure by which the right to personal liberty is protected. Abuse of process in extradition proceedings is capable of rendering the detention of the person whose extradition is sought unlawful.

3) The separation of powers requires the courts and not the executive to rule on the legality of detention. It follows that, under the Constitution of Jamaica, the courts must have jurisdiction to consider abuse of process. The argument for the Applicant on the abuse of process issue can be asserted in the plea of autrefois acquit (otherwise acquitted).

4) Section 14 of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011 provides:

> *"(1) No person shall be deprived of his liberty except on reasonable grounds and in accordance with fair procedures established by law in the following circumstances –*
>
> *…*
>
> *(i) the arrest or detention of a person –*
>
> *…*
>
> *(ii) against whom action is being taken with a view to deportation or extradition or otherwise lawful removal or the taking of proceedings relating thereto."*

(5) The second arrest, committal and detention of Vincent Ashman is not in accordance with fair procedures established by law and is an abuse of the process of the court.

(6) In fact section 13 of the Extradition Act confers express jurisdiction on the courts to consider abuse of process. Section 13 of the Extradition Act required the Full Court to return but one verdict to the challenge of detention pending extradition upon an application for habeas corpus. The Act does not provide for a middle ground or for a provisional verdict: it is either that the

fugitive be discharged from custody and the warrant quashed or the habeas corpus application refused.

(7) The statutory requirement to overcome a delay in prosecuting the extradition, once a committal order is made, is to show "sufficient cause to the contrary". This requirement is a trial of the habeas corpus application on its merit. Its affirmative resolution in favour of the applicant results in the discharge of the fugitive from detention and, additionally, "if a warrant for his extradition has been issued under section 12, quashes that warrant".

(8) The Privy Council was faced with the plea of autrefois acquit in the appeal of Patrick Nasralla in Privy Council Appeal No. 36 of 1965. Mr. Nasralla was tried and acquitted on an indictment charging him with murder but the jury disagreed on the lesser charge of manslaughter for which they did not return a verdict. Mr. Nasralla was thereafter ordered to stand trial on the issue of manslaughter.

(9) By parity of reasoning the fugitive is situated in the same circumstances as an accused man on indictment of a specific charge. The proceeding is clearly a criminal proceeding. The verdict of the Full Court of 14th April, 2011 is therefore a general verdict to which the law as laid down by Hale applies and, accordingly, the reasoning of the Privy Council in the appeal of Patrick Nasralla applies.

PRELIMINARY ISSUE

[126] Before getting into the merits of the claim, I feel it is necessary to deal with an issue raised by the Director of State Proceedings for the consideration of this court. He raised, as a preliminary point, the fact that there was no evidence on affidavit from the applicant himself, he being the person restrained as required by Part 57 of the Civil Procedure Rules. He also pointed out that the affidavit by the Attorney-at-Law on the applicant's behalf did not indicate why the person restrained was not able to make the affidavit. However, upon a query from the Court, the learned Director was unable to say what the legal effect of this omission was.

[127] Part 57, Rule 57.1 of the Civil Procedure Rules 2002 deals with applications for writ of Habeas Corpus. Rule 57.2 indicates that applications for such a writ must be made to the Court and may be made without notice but must be supported by evidence on affidavit. In rule 57.3 it states that such evidence must be given by the person restrained stating how that person is restrained. Rule 57.4 goes on to state that if the person restrained is not able to make the affidavit it may be made by some person on his behalf and must state why the person restrained is not able to make the affidavit. The rule is silent as to the ramifications for failing to comply. Rule 2.2 speaks to the application of the Rules to all civil proceedings including judicial review and applications to the Court under the Constitution under Part 56. Applications for Habeas Corpus are done in civil proceedings.

[128] Counsel for the applicant submitted that his application was pursuant to section 13 of the Act and not under part 57, therefore, rule 57 would not apply. I disagree that this is an application under section 13 of the Act because it is not. The previous application on the first request before the Full Court was such an application, however, this present one is for Habeas Corpus which could be based either on the grounds set out in section 7 or those in section 11. I do agree, however, that the Act provides a statutory regime for the application for Habeas Corpus for fugitives restrained by virtue of the Act. Rule 2.2 (3) indicates proceedings to which the Rules do not apply. Rule 2.2 (3) (c) refers to proceedings in the Court instituted under any enactment where that enactment has its own rules to regulate its proceedings. The Extradition Act does not have any rules to regulate application for Habeas Corpus proceedings.

[129] By virtue of section 11, the person committed to custody under section 10 (5) of the Act has a right to apply for Habeas Corpus. The application for Habeas Corpus is therefore in respect of a person in custody under the Act. The orders under the Act are orders which may be made in Habeas Corpus proceedings. Habeas Corpus can be founded on the common law ground of unlawful detention or on any of the statutory grounds set out in section 7 or 11 of the Act.

[130] The powers of the Court on an application under the Act are set out in the relevant sections. The powers of the Court, upon an application founded on the common law ground of unlawful detention, are set out in rule 57.3 of the CPR. In my view whereas the Act provides for orders which may be made in Habeas Corpus proceedings pursuant to it, it is the Rules which governs the proceedings upon such a writ. It provides the machinery, so to speak, for the making of such applications. The Civil Procedure Rules apply to all applications for Habeas Corpus founded on the common law ground of unlawful detention or on any of the statutory grounds in the Act. A failure to comply with the Rules, therefore, could result in the matter being adjourned for compliance, sanctions or waiver. Rule 26. 3 (1) (a) gives the Court the power to strike out a statement of case or part thereof if there has been a failure to comply with a Rule. Furthermore, Rule 26.4 gives the Court the power to make a unless order, where a party has failed to comply with any Rule in respect of which there was no sanction for non-compliance imposed. Rule 26.9 (2) provides that an error of procedure or failure to comply with a Rule, practice direction or court order does not invalidate any step taken in the proceedings, unless the court so orders. Finally, Rule 26.9 (3) gives the court the power to make an order to put the matter right where there has been a failure to comply with the Rules and it may do so whether or not any party makes an application.

[131] This application came before the Court on several dates and went to case management conference. No point was taken about the failure to comply with the Rules either by the respondents or by the Court. It is thereby, to be taken that those stipulations were waived and the respondent cannot now complain of any breach of the Rules. In any event, at this stage, the question is whether it would be reasonably possible to have a fair hearing, notwithstanding the breach. In this case it has not been shown that it would not be reasonably possible to have a fair hearing, notwithstanding the breach of the Rules. The preliminary point is without merit.

THE ISSUES

[132] This application raised several novel and interesting issues. The substantive issues in my view, includes a determination on:

1. *Whether the Magistrate had jurisdiction to commit the accused in the circumstances that she did;*
2. *Whether Autrefois Acquit is applicable to this case;*
3. *What is the effect of the discharge by the Full Court on the first request;*
4. *Is the second request for extradition an abuse of the Process of the Court?*

THE VALIDITY OF THE COMMITTAL – THE JURISDICTION ISSUE

[133] The legal dispute arose because of the Minister of Justice and Attorney General's interpretation of section 8 of the Act. They contend that under the Act, the authority to proceed is the beginning and the end. According to them no action can be taken against a fugitive pursuant to the Act without the Minister's authority to proceed. The Director of Public Prosecution and the committing Magistrate took the view that no authority to proceed was necessary when a Magistrate, acting under a provisional warrant, commits a fugitive to custody to await extradition upon his written consent given pursuant to section 17 of the Act. Section 8 reads:

> *"8.—(1) Subject to the provisions of this Act relating to provisional warrants, a person shall not be dealt with under this Act except in pursuance of an order of the Minister (in this Act referred to as "authority to proceed") issued in pursuance of a request made to the Minister by or on behalf of an approved State in which the person to be extradited is accused or was convicted.*
>
> *(2) There shall be furnished with any request made for the purposes of this section by or on behalf of any approved State –*
>
> *(a) in the case of a person accused of an offence, a warrant for his arrest issued in that State; or*
>
> *(b) in the case of a person unlawfully at large after conviction of an offence, a certificate of the conviction and sentence in that State and a statement of the part, if any, of that sentence which has been served,*
>
> *together with, in each case, the particulars of the person whose extradition is requested, and of the facts upon which and the law under which he is accused or*

was convicted, and evidence sufficient to justify the issue of a warrant for his arrest under section 9.

(3) On receipt of such a request the Minister may issue an authority to proceed, unless it appears to him that an order for the extradition of the person concerned could not lawfully be made, or would not in fact be made, in accordance with the provisions of this Act."

[134] However, the Magistrate in committing the applicant for extradition acted under section 17 of the Act which reads:

"17.—(1) Where a fugitive arrested pursuant to a warrant under section 9 indicates that he is willing to be extradited he shall be brought before a magistrate who shall inform him of his right to formal extradition proceedings under this Act.

(2) If the fugitive, upon being informed of his right to extradition proceedings, consents in writing to be extradited without such proceedings, the magistrate shall commit him to custody to await his extradition under this Act.

(3) Subject to subsection (4), where a fugitive is committed to custody to await his extradition pursuant to subsection (2), the Minister may, notwithstanding the provisions of section 11, order him to be extradited forthwith to the approved State by which the request for extradition was made.

(4) In making an order under subsection (3) the Minister shall have regard to the provisions of section 7 and to the requirements of section 12 (2), (3), (4) and (5) relating to the making of an order under that section."

[135] If the Director of State Proceedings is correct in his submissions, then what took place at the Magistrate's Court on the 12th October 2011 was invalid. According to him, if that proceeding was a nullity, then there would be no need for the Full Court to quash the warrant of committal and *autrefois* could not avail the applicant. If the first committal was a nullity, the argument went, then the second committal now before this Court, is a valid committal and there would be no abuse in renewing the extradition request.

[136] The Director of Public Prosecutions, on the other hand, acting on behalf of the Government of the United Kingdom took a different approach. On their account the Magistrate was correct to make the order she made in October 2011. They noted that Section 17 of the Act was clear and gave specific powers to the Magistrate acting under a provisional warrant, if the accused consents to forego formal proceedings. They claim that under Section 17, there would be no need for the Minister to issue an authority to proceed.

[137] If the Magistrate required an authority to proceed on October 2011 and thereafter proceeded in its absence, she wrongly assumed a jurisdiction she did not possess. This would result in an incongruity where the a fugitive who had consented to being extradited would now have to apply to the court for a writ of Habeas Corpus claiming that he is unlawfully detained because no authority to proceed had been issued for his extradition.

[138] The Magistrate's actions must be read in the context of her powers under a provisional warrant as provided for in section 9 of the Act. Section 9 states:

> *9.—(1) A warrant for the arrest of a person accused of an extradition offence, or alleged to be unlawfully at large after conviction of such an offence, may be issued –*
>
> *(a) on receipt of an authority to proceed, by a magistrate within the jurisdiction of whom such person is or is believed to be; or*
>
> *(b) without such an authority, by a magistrate upon information that such person is in Jamaica or is believed to be on his way to Jamaica; so, however, that the warrant, if issued under this paragraph, shall be provisional only.*
>
> *(2) A warrant of arrest under this section may be issued upon such information as would, in the opinion of the magistrate, authorize the issue of a warrant for the arrest of a person accused of committing a corresponding offence or, as the case may be, of a person alleged to be*

unlawfully at large after conviction of an offence, within the jurisdiction of the magistrate.

(3) A warrant of arrest issued under this section (whether or not it is a provisional order) may, without an endorsement to that effect, be executed in any part of Jamaica, whether such part is within or outside the jurisdiction of the magistrate by whom it is so issued, and may be so executed by any person to whom it is directed or by any constable.

(4) where a provisional warrant is issued, the magistrate by whom it is issued shall forthwith give notice of the issue to the Minister, and transmit to him the information and evidence, or a certified copy of the information and evidence, upon which it was issued; and the Minister may in any case, and shall, if he decides not to issue an authority to proceed in respect of the person to whom the warrant relates, by order cancel the warrant and, if that person has been arrested there under, discharge him from custody.

(5) Where a warrant is issued under this section for the arrest of a person accused of an offence of stealing or receiving stolen property or any other offence in respect of property the magistrate shall have the same power to issue a warrant to search for the property as if the offence had been committed within his jurisdiction.

[139] Section 2(1) of the Act describes a provisional warrant as a warrant issued under section 9 (1) (b). The issue is whether section 8 creates a total prohibition on any action against a fugitive without an authority to proceed. To compound matters at the time the accused was arrested on the provisional warrant, the authenticated documents had not been received by the Minister. The Minister issues her authority to proceed only on receipt of these documents.

[140] The Director of State Proceedings relied on a statement made by Smith JA in ***Trevor Forbes v The Director of Public Prosecutions & Anor.*** SCCA No. 9 of 2004

(unreported) delivered November 3, 2005 in interpreting s. 8(1). In that case Smith JA said at page 15:

> *"Section 8 of the Act empowers the Minister to issue his "authority to proceed" on the receipt of a request made for the extradition of a fugitive. This section provides that, apart from the issuance of a provisional warrant, a person shall not be dealt with under the Act except in pursuance of the "authority to proceed"."*

[141] The learned appellate justice went on to note, at page 19, that it was the authority to proceed which gave the Magistrate jurisdiction and that the authority to proceed was independent of the provisional warrant. However, these statements have to be understood in the context in which they were made. They were made in the context of a case involving formal proceedings. In such a case a Magistrate before whom a fugitive has been brought on a provisional warrant, has no jurisdiction to conduct a formal hearing into whether or not he should be committed to await his extradition unless an authority to proceed has been issued by the Minister.

[142] Section 8 of the Act is to be read subject to the provisions of the Act relating to provisional warrants. Section 9 contains provisions relating to provisional warrants and therefore by virtue of the exception in section 8, a Magistrate can act by issuing a provisional warrant without an authority to proceed. By virtue of section 9 of the Act, in cases of urgency, a Magistrate may, on application, issue a provisional warrant of arrest pending receipt of the authority to proceed. The application for the provisional arrest ought to state that a request for extradition of the person sought will follow.

[143] The Magistrate is mandated to inform the minister forthwith that a provisional warrant was issued together with the information and evidence upon which it was issued. The Minister, on receipt of this information, by virtue of section 9(4), may cancel the warrant and discharge the accused if he decides not to issue an authority to proceed. Or she may go ahead and issue the authority to proceed whereupon the Magistrate proceeds to conduct the formal extradition hearing.

[144] When an accused is brought before a Magistrate on a warrant which was executed after an authority to proceed was issued he can either have a full hearing after which he is committed and the Minister thereafter signs his extradition warrant or he can consent to forego formal proceedings and the Minister signs his extradition warrant and he is extradited. No issue can arise there.

[145] By virtue of section 10 where a person is arrested on the provisional warrant, if the minister has not cancelled the warrant or discharged him by virtue of section 9(4) he is to be brought before the Magistrate as soon as practicable for his case to be heard. By virtue of section 10 (3) where the person is arrested under a provisional warrant and no authority to proceed has been received with respect to him, the Magistrate may fix a reasonable period and give notice to the Minister, after which the fugitive is to be discharged, if no authority to proceed is received in respect of him. Section 10 states:

> *(1) A person arrested in pursuance of a warrant issued under section 9 shall, unless previously discharged under subsection (4) of that section, be brought as soon as practicable before a magistrate (in this Act referred to as "the court of committal") who shall hear the case in the same manner, as nearly as may be, as if he were sitting as an examining justice and as if that person were brought before him charged with an indictable offence committed within his jurisdiction.*
>
> *(2) For the purposes 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 its jurisdiction.*
>
> *(3) Where the person arrested is in custody under a provisional warrant and no authority to proceed has been received in respect of him, the court of committal may, subject to subsection (4), fix a reasonable period (of which the court shall give notice to the Minister) after which he shall be discharged from custody unless an authority to proceeds has been received.*

(4) Where an extradition treaty applicable to any request for extradition specifies a period (hereinafter referred to as the treaty period) for the production of documents relevant to an application for extradition, any period fixed pursuant to subsection (3) shall be such as to terminate at the end of the treaty period.

(5) Where an authority to proceed has been issued in respect of the person arrested and the court of committal is satisfied, after hearing any evidence tendered in support of the request for the extradition of that person or on behalf of that person, that the offence to which the authority relates is an extradition offence and is further satisfied that –

(a) where the person is accused of the offence, that the evidence would be sufficient to warrant his trial for that offence if the offence had been committed in Jamaica; or

(b) …

the court of committal shall, unless his committal is prohibited by any other provision of this Act, commit him to custody to await his extradition under this Act; but if the court of committal is not so satisfied or if the committal of that person is so prohibited, the court of committal shall discharge him from custody.

[146] What ought to happen when he is brought before the Magistrate on a provisional warrant and waives his right to a formal hearing? Section 17 provides for the accused to waive his right to a formal hearing and to consent to being extradited. So where a fugitive is arrested p ursuant to a provisional warrant under section 9 and upon being brought before the Magistrate he indicates a willingness to be extradited, he is to be informed of his right to a formal hearing under the Act. If he nevertheless consents in writing to be extradited without the formal proceedings, the section mandates the Magistrate to commit him to custody to await his extradition. There is no mention of any need for an authority to proceed and the Magistrate would be acting under a provisional warrant issued under section 9.

[147] So if we consider both circumstances again together we have a clearer picture of the differences in the procedures and requirements under the different sections of the Act. If the fugitive is brought before the Magistrate on a provisional warrant and there is to be a formal hearing the Minister is informed and she issues an authority to proceed. If, after the hearing is held, he is committed the Minister then issues an extradition warrant, after the relevant period. If on the other hand the fugitive is brought before the Magistrate on the provisional warrant and consents to being extradited the Magistrate is mandated to commit him to custody to await his extradition under section 17 of the Act. Where the fugitive is committed to custody to await his extradition by consent, the minister may order him extradited forthwith notwithstanding the provisions of section 11.

[148] Quite frankly, in my view, any other interpretation would defy commonsense. For instance, the Minister issues the authority to proceed after the provisional warrant in order that the Magistrate would have the jurisdiction to conduct a hearing. If there is to be no hearing, It begs the question as to what is an authority to proceed authorizing the Magistrate to do, she having already validly and legally heard from the accused that he waives his right to a formal hearing and having legally and validly secured his written consent under section 17. All the Minister is required by law to do in those circumstances is extradite forthwith or not as she thinks fit. Unless we are saying that when the fugitive is brought before the Magistrate on the provisional warrant she is not entitled to speak with him or deal with him at all until the Minister sends an authority to proceed thereby authorizing her to speak to the fugitive. Given the provisions of section 17 this clearly cannot be so.

[149] Section 17 specifically refers to section 9 and it is under section 9 that provisional warrants are issued. It means therefore, that the exceptions in section 8, includes both provisions in section 9 dealing with provisional warrants and those in section 17 when the fugitive is brought before the Magistrate on a provisional warrant secured by virtue of section 9. Section 17 does not refer to an authority to proceed anywhere in its four subsections. In subsection 2 it says the “Magistrate shall commit him to custody to await his extradition under this Act”. In referring to the Ministers’

actions it states that 'the Minister may, notwithstanding the provisions of section 11, order him to be extradited forthwith to the approved state." The Minister therefore, still retains the discretion whether to order him extradited or not. This is this power which is to be exercised by the Minister after a fugitive's consent under section 17 and not an authority to proceed.

[150] It is clear therefore, that where the fugitive consents to being extradited there is no need for an authority to proceed. The Magistrate commits him to custody and the Minister orders him extradited, having regard to section 7, section 12 (2), (3), (4), and (5). The Minister's power in the case of a fugitive who consents is enlarged, because under section 11 a fugitive shall not be extradited within 15 days of the committal order made by the Magistrate. This gives him time to make any application for Habeas Corpus or otherwise. But where there is written consent, the Minister need not wait and may order him extradited immediately because it is not expected that the fugitive who consents would be applying for any writ of Habeas Corpus. Extradition under section 17 is clearly meant therefore, to be treated differently from the usual situation where there is a formal proceeding.

[151] The Director of State Proceedings seems to have applied an incorrect interpretation to the statements made by the learned judge of Appeal in the case of ***Trevor Forbes***.

[152] Let me state categorically that regardless of the validity of the Magistrate's actions in committing the accused for extradition after he waived the formal hearing, there is no doubt of the validity of the decision of the Full Court to discharge the accused. These are two separate issues. Therefore the effect of the discharge remains the same whether or not the Magistrate's action was valid. However, since the validity of the committal is in question and was extensively argued by both sides, I felt it was necessary to deal with the issue. Having read the Act in its totality, I find I can come to no other conclusion, than that the Magistrate was correct when, acting under a

provisional warrant and with the fugitives written signed consent, she committed to custody to await his extradition pursuant to section 17 of the Act.

AUTREFOIS ACQUIT

[153] It was contended on behalf of the applicant that by virtue of the Full Court's order discharging him the principle of *Autrefois* would avail him. He prayed in aid section 20 subsection (8) of the Jamaican Constitution which, he noted, codified the common law principle of A*utrefois*. Section 20 (8) states in part:

> *No person who shows that he has been tried by any competent court for a criminal offence and either convicted or acquitted shall be tried for that offence or for any other criminal offence of which he could have been convicted at the trial for that offence save upon the order of a superior court made in the course of appeal proceedings relating to the conviction or acquittal; and no person shall be tried for a criminal offence if he shows that he has been pardoned for that offence.*

[154] The applicant had been previously discharged by the Full Court acting pursuant to s. 13 of the Act. Section 13 of the Act states:

> *"13. (1) If any person committed to await his extradition is in custody in Jamaica under this Act after the expiration of the following period, that is to say –*
>
> *(a) in any case, the period of two months commencing with the first day on which, having regard to subsection (2) of section 11, he could have been extradited; or*
>
> *(b) where a warrant for his extradition has been issued under section 12, a period of one month commencing with the day on which that warrant was issued, he may apply to the Supreme Court for his discharge.*
>
> *(2) If upon any such application the Supreme Court is satisfied that reasonable notice of the proposed application has been given to the Minister, he Supreme Court may, unless sufficient cause is shown to the contrary, by order direct the applicant to be discharged from custody and, if a warrant for his extradition has been issued under section 12, quash that warrant.*

[155] The ca**se of *Regina v Manchester City Stipendiary Magistrate, Exparte* Snelson** *[1977] 1 WLR 911* is authority for the proposition that no question of autrefois acquit arises by reason of the earlier discharge of the defendant from committal proceedings for no evidence being offered. Despite the gentle nudging of the court in another direction counsel for the applicant persisted in his submissions that autrefois ought to avail the applicant following upon his discharge for delay. However, I too persist with my view that the question of autrefois does not arise in this situation.

[156] Since extradition matters are determined on a prima facie basis only and the committing Magistrate exercises the same powers as a committing Justice under the Justice of the Peace Jurisdiction Act, then whereas in domestic committals a dismissal for no prima facie case is not an acquittal and is therefore no bar to a subsequent hearing for the same offence, the same standard would apply to extradition proceedings. It is trite that autrefois would not apply in such a case. The request for extradition of a fugitive is usually provisional and there is no bar to a second request if the first is refused. In the same way an accused when discharged after no prima facie case is found may be rearrested if further evidence is found, likewise where a request for extradition is at first denied, the request may be renewed at a later date when the defect in the first request has been remedied. See a similar reasoning by the court in the case of the ***United States of America v Buruji Kashamu*** (7th Cir. 09/01/2011) argued May 2, 2011, at page 3. In that case the United States Court of Appeal, seventh circuit, was considering the English Common Law principles of issue estoppel and res judicata. In Mr. Kashamu's hearings before the English High Court, the Court noted that extradition proceedings do not involve resolution of trial issues. See ***Regina (Kashamu) v Governor of Brixton Prison*** [2002] QB 887.

[157] In this case Mr. Ashman did not face a trial in Jamaica. There was no hearing on or final determination in the case of his charge for murder in the United Kingdom. Autrefois acquit cannot avail him. Whether a claim for abuse of the process of the court would be a separate and independent question for determination.

THE EFFECT OF THE PREVIOUS DISCHARGE BY THE FULL COURT

[158] For the purpose of the issue of *abuse of process* I feel it is necessary to outline the full transcript of what took place at the Full Court. It went like this verbatim:

> ***"Mr. Cochrane:*** *We are not in a position to challenge the application before the Court as the requesting State did not supply the relevant documents required under the Extradition Act and in the circumstance, the Minister of Justice could not issue her authority to proceed.*
>
> ***Marsh, J.:*** *Yes.*
>
> ***Mr. Cochrane:*** *That's it, my Lord.*
>
> ***Mr. Taylor:*** *My Lord, the D.P.P., acting for and behalf of the Government of the United Kingdom, concedes the application made by the applicant, Mr. Ashman, but for a completely different reason than that advised by the Commissioner of Corrections.*
>
> ***Marsh, J.:*** *Maybe you could start again.*
>
> ***Mr. Taylor:*** *We concede to the application, m'Lord, by Mr. Ashman as it is that the relevant authorities in the Ministry of Justice, m'Lord, delayed in dealing with Mr. Ashman's consent and allowed the time to expire and that there is no good and forthcoming reason to justify the delay and expiry of the time. The applicant, m'Lord – m'Lord's, had waived his right to a formal extradition hearing, pursuant to section 17 of the Extradition Act and all the procedures in relation to that, consent had been forwarded for the Honourable Minister's consideration but the time elapsed, m'Lord, and it was never brought to the requesting state that they were required in the event of a Section 17 procedure, that they should forward these documents. It was not brought to our attention but as we say, m'Lord, there is no valid explanation for the delay. We don't believe that we are on strong footing to contest the release of Mr. Ashman and thus we concede.*
>
> ***Marsh, J.:*** *In light of what has been indicated to this Court, by Mr. Cochrane, on behalf of the first Respondent and Mr. Taylor, on behalf of the second Respondent, the only course open to this Court is to grant the order sought by the applicant; that the order for extradition made against him, in the Resident Magistrate's Court for the corporate area of Half Way Tree, on the 26th of*

November, be quashed and that the said Vincent Ashman, be discharged from custody."

[159] I cannot fathom why when the matter came up before the full court, no attempt was made by the respondents to explain the impasse to the Court or why it was thought the desire to uphold Mr. Ashman's legal rights by the Minister was not sufficient reason. Perhaps it was felt that the authority of ***Prestley Bingham v Commissioner of Correctional Services & Anor.*** SCCA No. 91 of 2006 was too huge a hurdle to overcome. But in ***Prestley Bingham*** the delay was not in the fugitive's legal interest, whereas here it was. I will say more about this case later. It is not clear if the explanation would have succeeded but from the transcript it is clear that no effort was made to try. No doubt the respondents felt that if they did or said nothing, then the Full Court hearing would not be a hearing on the merits, as they now submit. Of course it is pure folly to think so.

[160] The section mandates the Court to discharge the fugitive if sufficient cause is not shown why he should remain in custody. This just means the respondents are required to show a good or reasonable or satisfactory explanation for the delay. The respondents did not seek to give any explanation at all but merely conceded and capitulated to the request for discharge. No explanation at all is equally as fatal as an insufficient cause and the discharge of the fugitive by the full court on April 2011 was a valid discharge pursuant to its powers under section 13 of the Act.

[161] The powers of the Supreme Court to discharge from custody under section 13 may be compared to the powers under section 11 and section 7 of the Act. I will first examine the powers under section 11 which states:

(1) Where a person is committed to custody under section 10 (5), the court of committal shall inform him in original language of his right to make an application for habeas corpus and shall forthwith give notice of the committal to the Minister.

(2) A person committed to custody under section 10(5) shall not be extradited under this Act –

(a) in any case, until the expiration of the period of fifteen days commencing on the day on which the order for his committal is made; and

(b) if any application for habeas corpus is made in his case, so long as proceedings on the application are pending.

(3) On any such application the Supreme Court may, without prejudice to any other power of the Court, order the person committed to be discharged from custody if it appears to the Court that –

(a) by reason of the trivial nature of the offence of which he is accused or was convicted; or

(b) by reason of the passage of time since he is alleged to have committed the offence or to have become unlawfully at large, as the case may be; or

(c) because the accusation against him is not made in good faith in the interest of justice,

it would, having regard to all the circumstances, be unjust or oppressive to extradite him.

(4) On any such application the Supreme Court may receive additional evidence relevant to the exercise of its jurisdiction under section 7 or under subsection (3) of this section.

(5) The provisions of subsection (3) shall mutatis mutandis apply in relation to any appeal against the Supreme Court's refusal to grant a writ of habeas corpus.

(6) For the purposes of this section, proceedings on an application for habeas corpus shall be treated as pending until any appeal in those proceedings is disposed of; and an appeal shall be treated as disposed of at the expiration of the time within which the appeal may be brought if the appeal is not brought within that time.

[162] On the other hand section 7 states:

7.-(1) A person shall not be extradited under this Act to an approved State or committed to or kept in custody for the purposes of such extradition, if it appears

to the Minister, to the court of committal, to the Supreme Court on an application for habeas corpus or to the Court of Appeal on an appeal against a refusal to grant a writ of habeas corpus –

(a) that the offence of which that person is accused or was convicted is an offence of a political character; or

(b) that the request for extradition, though purporting to be on account of the extraditable offence, is in fact made for the purposes of prosecuting or punishing him on account of his race, religion, nationality or political opinions; or

(c) that he might, if extradited, be denied a fair trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality or political opinions; or

(d) that the offence of which that person is accused is statute barred in the approved State that has requested his extradition; or

(e) that his extradition is prohibited by any law is force in Jamaica.

(2) A person accused of an offence or alleged to be unlawfully at large after being convicted of an offence shall not be extradited to any approved State, or be committed to or kept in custody for the purposes of his extradition, if it appears to the Minister, to the court of committal, to the Supreme Court on an application for habeas corpus or to the Court of Appeal on an appeal against a refusal to grant a writ of habeas corpus that if charged with that offence in Jamaica he would be entitled to be discharged under any rule of law relating to previous acquittal or conviction.

(3) A person shall not be extradited to an approved State or be committed to or kept in custody for the purposes of such extradition, unless provision is made by the law of that State, or by an arrangement made with that State, for securing that he will not –

(a) be tried or detained with a view or trial for or in respect of any offence committed before his extradition under this Act other than –

(i) the offence in respect of which his extradition is requested;

(ii) any lesser offence proved by the facts proved before a court of committal or, in relation to a fugitive brought before a magistrate pursuant to section 17, any lesser offence disclosed by the facts upon which the request for his extradition is based; or

(iii) any other offence being an extraditable offence in respect of which the Minister consents to his being so dealt with;

(b) without the consent of the Minister, be returned or surrendered to another State or detained with a view to such return or surrender,

unless he had first been restored to Jamaica, or had had an opportunity of leaving the approved State.

(4) Any such arrangement as is mentioned in subsection (3) may be an arrangement made for the particular case or an arrangement of a more general nature; and for the purposes of that subsection a certificate issued by or under the authority of the Minister confirming the existence of an arrangement with any approved State and stating its terms shall be conclusive evidence of the matters contained in the certificate.

(5) The Minister may, in his discretion, refuse to extradite a fugitive on the ground that the fugitive is a citizen of Jamaica, but he shall not refuse to extradite the fugitive on that ground if the fugitive is also a citizen of the approved State that has requested the extradition.

(6) As regards any request by an approved State, the reference in this section to an offence of a political character does not include –

(a) an offence or any attempt to commit an offence which is extraditable pursuant to a multilateral treaty or convention –

(i) to which both Jamaica and the approved State are parties;

(ii) the purpose of which is to prevent or repress a specific category of offences; and

(iii) which imposes on States an obligation either to extradite the person sought or to submit the matter to be competent authorities for decision as to prosecution; or

(b) an offence or an attempt to commit an offence against the law relating to genocide or the aiding, abetting, inciting, counseling or procuring of the offence or a conspiracy by persons to commit the offence.

[163] The issue in this case is whether discharge by the full Court under section 13 is an absolute discharge. I say it cannot be. This is so, because firstly, the accused requested a discharge from custody and a quashing of the extradition warrant and not a discharge from the charges or a decision not to extradite. When a court discharges a fugitive under section 13, it is saying that the further detention under this warrant is unlawful because the time has expired and the detainee is to be released on no sufficient cause being shown why he should be further detained. His discharge is not an indication that he is not to be extradited at all for those charges or that he cannot be re-arrested under a fresh warrant and fresh extradition proceedings undertaken.

[164] The Act itself provides for situations where the extradition of the fugitive is prohibited. Section 7 of the Act entitled "general restrictions on extradition" prescribes the circumstances under which a fugitive shall not be extradited if it appears to the magistrate, Minister, Supreme Court or Court of Appeal that any of the listed factors exist. Section 11 (3) provides for factors which a fugitive may raise on an application to the Supreme court for Habeas corpus to persuade the court that he is not to be extradited because to do so would be unjust or oppressive. None of the factors in section 7 or section 11 include repeat request or earlier discharge from custody.

THE POWER OF THE HIGH COURT TO ENTERTAIN ABUSE OF PROCESS APPLICATIONS IN EXTRADITION PROCEEDINGS

[165] The respondents have argued that the question of abuse is not one for these courts when dealing with outward extradition proceedings. They argue that the question of abuse would be one for the Executive in the person of the Minister of Justice.

[166] The High Court has an inherent jurisdiction to stay or strike out proceedings and to refuse to allow any party to abuse its process. This power is exercised as part of the Court's supervisory jurisdiction to police its own process and prevent abuse. Therefore, the High Court has the power to enquire into the circumstances as to how a person was brought before it and whether there had been an abuse of its process in so doing.

[167] The question that looms large is whether the High Court has such jurisdiction in outward extradition proceedings which are under and by virtue of the Extradition Act. This question was answered in the negative by the House of Lords in the case of the ***Federal Republic of Germany v Schmidt*** *(*1994) 3 All ER 65. In that case the fugitive was sought by the German police for drug offences. He was induced by British Police to enter the United Kingdom by trick. The House of Lords held that any inherent jurisdiction by the High Court to intervene to prevent an abuse of its process applied to domestic trials, not to the outward extradition process which was governed by statute. Any purported evidence of abuse of process in extradition proceedings would be a matter for the Secretary of State.

[168] The issue had been earlier considered in ***Atkinson v United States of America Government*** [1971] AC 197 and ***R v Governor of Pentonville Prison, Ex p Sinclair*** [1991] 2 AC 64. In ***Atkinson***, it was held, by the House that under the United Kingdom's Extradition Act, of 1870, section 10, the court hearing extradition proceedings had no power to decline to extradite because it would be unjust, oppressive or an abuse of process. Once the Magistrate found that sufficient evidence had been presented he had no choice but to commit. The court went on to hold that the statute provided its own safeguard in the form of the Minister of Justice to whom the Magistrate was obliged to report. Upon receipt of such report the Minister may decline to extradite a person so committed for extradition, if, in his opinion, it would be unjust or oppressive to do so.

[169] Under the Fugitive Offenders Act of 1881 power was conferred on the superior courts to discharge a fugitive in certain circumstances. These circumstances included the trivial nature of the case, a finding that the request was not made in good faith in the

interest of justice, or **otherwise** (emphasis mine) which would make it unjust or oppressive or too severe a punishment to extradite the fugitive. The words “or otherwise” was later construed as conferring a wide jurisdiction on the court to do what was just in all the circumstances. See ***Re Naranjan Singh*** [1961] 2 All ER 565. The 1881 Act was replaced by the 1967 Act. In section 8 (3) of that Act, which was the similar provision to section 10 of the 1881 Act, the words “or otherwise” was removed. The House of Lords later interpreted the removal to mean that the powers of the court to discharge a fugitive had, by this omission, been restricted to the categories set out in section 8 (3). The 1989 Act repealed the 1967 Act upon which the Jamaican Act is largely based. In the 1989 Act their section 6 would be our section 7, their sections 7 and 8 would be our section 10 and their section 11 is our section 11 and so on and so forth. Section 11 is in similar terms to section 8 (3) of the 1967 Act.

[170] In the case of ***Ex Parte Sinclair***, Lord Ackner in referring to section 11 (3) of the 1989 UK Act took the view that the section gave powers to the High Court which were similar to those given to the Secretary of State which it hitherto did not have. This power to discharge residing in the High Court jurisdiction was held to be similar to the discretionary power possessed by the Secretary of State in refusing to extradite a fugitive. This case decided therefore, that the High Court had only such discretion as was granted to it under section 11 (3). Thus the reason for the argument by the respondents that there was high authority that no power exists in the High Court to hear applications of abuse of process in outward extradition proceedings.

[171] The House of Lords later decided in the case of ***Regina v Horseferry Road Magistrates' Court, Ex parte Bennett*** [1994] 1 AC 42, that the return of a fugitive to the United kingdom, in disregard for the available extradition procedures and with connivance was an abuse of process into which it had an inherent power to enquire. The House of Lords further held that the High Court had the power in the exercise of its supervisory jurisdiction, to enquire into the circumstances by which a person has been brought into its jurisdiction.

[172] The House in ***Schmidt*** distinguished ***Bennett*** making a distinction between outward bound extradition proceedings and domestic proceedings. While ***Bennet*** would apply to domestic proceedings it did not apply to outward bound extradition proceedings. There is strong persuasive argument therefore, that this court of unlimited jurisdiction does not have the power to police its process to prevent abuse in extradition matters, which is a matter of statute.

[173] Insofar as the English authorities seem to suggest that the High Court's discretionary powers in extradition matters are limited to those three considerations in section 11 (3), I am not so persuaded. The section states that it is without prejudice to any other power of the court. One inherent power of the High Court is to police its processes against abuse and breaches of constitutional and human rights. The limiting effects of section 11 (3) cannot derogate from that power.

[174] Since, according to the respondents arguments, the inherent jurisdiction would be ousted by the statute, then it is important to examine the relevant statutory provisions. So under section 11 the High Court and not the Magistrate's Court may discharge a fugitive on the basis that it would be unjust or oppressive to extradite him, if it considered that the accusation made by the Requesting State was of a trivial nature. It may also do so if the Requesting State had delayed applying for extradition or the request was not made in good faith. A discharge for any of the three reasons would be a bar to any extradition on those charges. The Supreme Court therefore has the power under section 11 to bar the extradition of a fugitive for any of the reasons listed in that section, without prejudice to any other existing power it may have to do so. One of the existing powers the High Court has is the inherent jurisdiction to police its processes and prevent abuse.

[175] I must confess that this same argument was rejected by the House of Lords in ***Schmidt***, which declined to give that interpretation to the words 'without prejudice" in section 11 (3) of the 1989 Act. They took the view that it referred to the other powers in section 6, section 13 and section 16. However, although the Jamaican Act is broadly

based on the UK Act, there are differences, which I hold to be deliberate differences. In section 11 (3) of the UK Act it states “without prejudice to any jurisdiction of the High Court apart from this section”. In light of that the House of Lords interpretation is understandable. However, the wording of section 11 (3) in the Jamaican Act is different. It says that “without prejudice to any other power of the Court”. This difference in my view is instructive and is intended to retain the inherent powers of the Court.

[176] Furthermore, ***Schmidt*** was decided in the absence of a written Constitution. In Jamaica, section 15 of the Constitution Jamaica Order in Council, 1962 speaks to the deprivation of the personal liberty of a person as authorized by law. Included in this is for the purposes of extradition. Section 25 (1) provides that any person who alleges that there was a contravention of the section may apply to the Supreme Court for redress. Subsection (2) provides that the Supreme Court shall have original jurisdiction to hear and determine any application made by any person in pursuance of subsection (1) of that section.

[177] Section 14 (1) of the Charter of Rights provides that the procedures for depriving a person of his liberty must be fair and established by lawful means. Included in that is where action is being taken against a person for extradition. The inevitable corollary to that is that the High Court must have the jurisdiction to entertain abuse of process claims in extradition matters. See the Privy Council decision in ***Knowles v Government of the United States and Another*** (2006) 69 WIR 1 at paragraphs 27-28. In that case the Privy Council was considering the power of the Magistrate to consider abuse of process complaints. Implicit in its findings is the acceptance that whereas the line of authority ousting the jurisdiction of the Magistrate to hear and determine complaints of abuse of process is settled, it accepted that the High Court (certainly that in Bahamas but the reasoning would be no less applicable to Jamaica which has similar constitutional provisions regarding detention for the purposes of extradition) has the power to redress such grievances.

[178] The Board rejected ***Regina (Kashamu) v Governor of Brixton Prison*** in as much as it departed from the settled line of authorities on the basis that it was decided in consideration of article 5 (4) of the European Convention on Human Rights and the Human Rights Act 1998. The Board agreed with the Bahamian authorities that article 19 of their Constitution which refers to detention for the purposes of extradition was not so worded as section 5 (4). Furthermore, they relied on article 28 (3) of the Constitution (which was in essence the same as our section 25, though differently worded) which gave the Supreme Court the power to hear applications on any contravention of those provisions providing for lawful detention.

[179] Borrowing from the argument made before the Board by the Government of the Bahamas, if a person alleges that he is detained pursuant to proceedings which are an abuse, such that he ought to be discharged, his recourse is to the Supreme Court. The Board accepted this argument and found that the Constitution allocated to the Supreme Court and not to the Magistrate, the jurisdiction to redress constitutional grievances. I am therefore, prepared to hold that it is settled law that the Magistrate has no power to refuse to commit on the basis that there was an abuse of process. On the authority of ***Knowles***, I am not so prepared in the case of the Supreme Court.

[180] The application by ***Knowles*** to the Supreme Court of Bahamas in December 2002 was for Habeas Corpus alleging that the second request for his extradition was, amongst other things, an abuse of process. The Supreme Court dismissed his application holding that there was no abuse. His appeal to the Court of Appeal was dismissed, that court also finding that there was no abuse. There was no argument that the Supreme Court had no jurisdiction to hear an application for Habeas Corpus on the grounds of abuse. The Privy Council in agreeing with the Government of Bahamas, in my view finally laid the matter to rest.

[181] The case of ***Schmidt*** should not be followed in the light of our written Constitution and the provisions thereof that give specific jurisdiction to the Supreme Court to hear anyone complaining of a contravention of section 15 of the Constitution.

Furthermore, section 11 (3) specifically states that the powers thereunder are without prejudice to any other powers of the Court. I therefore, hold that the Supreme Court has the power, both by virtue of its inherent jurisdiction to police its own processes and as provided by the Constitution to hear and determine matters of abuse of process in outward extradition cases.

THE QUESTION OF ABUSE OF PROCESS IN THE SECOND REQUEST

[182] It was argued on behalf of the applicant that it was an abuse of process to have re-arrested him on a second request after his discharge. The respondents deny that there was any abuse. They contend that the second request for the fugitive was a full request and that there was an authority to proceed and a full hearing on the matter. The respondents argue that since the Act was silent on the issue of subsequent requests and arrest of the fugitive and as the matter had not been heard on the merits on the first request, there was nothing in law to prevent this course of action.

[183] It is true that the Act is silent on the issue of repeated requests. However, the issue is one of pure commonsense. If a fugitive is discharged on the basis that the authenticated documents are not in order or in proper form at the time of the hearing, then as a matter of course there could be no complaint if the documents are duly properly authenticated and a second request made on those duly authenticated documents. Likewise, if the committing Magistrate hearing the matter determines that there was insufficient evidence to commit the fugitive to await extradition and discharges him, again it does not offend commonsense or due justice if upon receipt of better and further particulars a second request is made.

[184] However, if the refusal to extradite and a discharge of the fugitive is based on the issue of delay in charging him as envisioned under section 7, then a second request might be futile since it might not be possible to cure, for instance, a ten year delay. A second request in those circumstances may well be an abuse of process. So, there are some special circumstances where a discharge of the fugitive might be held to be final and to repeat the request may be viewed as an abuse of process. I have already

referred to those listed under section 11 (3). Then there are those factors in section 7 which, if they exist, might result in an absolute prohibition (or prohibition for the time being). In section 7, neither the Minister, the Magistrate, the Supreme Court nor the Court of Appeal shall order a person extradited once any of those factors are proved to exist.

[185] The abuse complained of in this case is solely that the fugitive having been discharged by the High Court for reason of his non-extradition within the statutory period, ought not now to be facing extradition on the same charges. The claim is that the earlier discharge ought to be a bar to his subsequent arrest and committal. Implicit in that argument was a claim that the earlier discharge was a final order and those circumstances the second request was an abuse of the process of the court. It was further claimed that the failure to provide the Full Court with sufficient reason not to discharge should not be countenanced since the respondents were at liberty to inform the Court of the situation and request time. Failure so to do, it was submitted, was inexcusable; the resulting discharge and subsequent re-committal was therefore an abuse of the process of the court.

[186] This now brings me back to the case of ***Prestley Bingham***. If ***Prestley Bingham*** is authority for saying that when a fugitive is discharged because of a delay in surrendering him after he was committed for that purpose, he cannot thereafter be lawfully re-arrested and extradited, then that is the end of the matter. But ***Prestley Bingham*** is not an authority for such a proposition.

[187] As I have already stated, the application under section 13 is an application for a discharge from custody. The court on such an application may refuse to discharge the fugitive from custody if sufficient cause is shown why he should not be discharged and the warrant quashed. A discharge and quashing of a warrant in those circumstances is not a discharge from the actual charge. Quashing of a warrant is not a quashing of the charge. It simply means the fugitive can no longer lawfully be kept in custody on that warrant or be extradited for the time being. There is no legal barrier preventing the

Requesting State from issuing a second request on the same charge at which time he may lawfully be committed for the purpose of extradition pursuant to that second request.

[188] During the period of his discharge the fugitive would be free to leave the country to another jurisdiction, even one without extradition laws, go about his business and hope no new request comes in. If he goes to another country there is nothing to prevent the Requesting State from seeking to secure his extradition from that country.

[189] The decision of the Court of Appeal in the ***Prestley Bingham*** case confirms that failure to present sufficient cause to the contrary will result in a discharge where there was a statutory delay in surrendering a fugitive committed to custody to await his extradition and that tardiness, dilatoriness and confusion was not sufficient cause. The Court of Appeal unanimously held that delay for want of promptitude and urgency was unreasonable. This was compounded by the fact that the defendant did not contribute to it and it was not triggered by consideration of his interest. The fact that Mr. Bingham was not extradited on a second request is now a matter of discretion and history rather than prohibition.

[190] Therefore, if a discharge under section 13 is not a prohibition from extradition what is to prevent a second request? The only question which would arise would be whether the fugitive ought to be extradited. In such a case factors listed in section 7 and 11 would become relevant, subject to any other powers of the court on a Habeas Corpus application, such as considerations of abuse of process.

[191] In ***Regina v Manchester City Stipendiary Magistrate, Ex parte Snelson*** it was held by Lord Widgery C.J., who, speaking per curium, stated that the divisional court had an inherent jurisdiction to ensure that the use of repeated committal proceedings was not allowed to become vexatious or an abuse of the process of the court. If that point was reached (and it was a matter of degree) then it would be right for the court to step in by prohibition to prevent the repeated use of this procedure. This was said in

reference to domestic committal proceedings. In my view it was no less applicable to outward extradition proceedings. It was also up to the Minister not to issue an authority to proceed and refuse to extradite when faced with repeated extradition request for the same fugitive on the same charges, as he or she thinks just.

[192] It is essential in this discourse that it be clearly understood that the Court does not extradite a fugitive. It is the Executive which extradites a fugitive or not. The Court is merely the conduit through which the process of extradition flows. Whilst it is flowing the Court is duty bound to see to it that the fugitive is treated as required by law and that his legal and constitutional rights are not abrogated, abridged or abused. Part of that policing power is to ensure that no one is held in the custody of the State awaiting a surrender warrant except he be lawfully detained.

[193] Extradition procedure is not a trial. It does not determine innocence or guilt. It is merely a pact between sovereign states that fugitives from justice will not find safe haven in member states. The Privy Council referring to the objective of extradition laws said in ***Knowles*;**

> *"Laws governing extradition seek to reconcile two objectives, both of concern to States recognizing the rule of law. One objective is to give effect to the principle that, in the ordinary way, persons in one State who are credibly accused of committing serious crimes triable in another should be surrendered to that other to answer for their alleged misdeeds. This is a principle which national authorities, including courts, will seek to honour. The second objective is to protect those whose surrender is sought against such surrender in circumstances where they would, putting it very generally, suffer injustice or oppression. States ordinarily seek to provide some safeguards against the surrender of those within their borders in such circumstances"*

[194] The purpose of setting statutory time limits in the Act is to ensure that no citizen of a sovereign country is held in custody for inordinately long periods whilst the

Executive determines whether or not to extradite. If it cannot so determine within the specified time period the citizen is to be released until the authorities are properly prepared. If the law were to be interpreted to mean that matters involving a technical breach of the Act were to not only result in a discharge from custody but also a failure to bring persons accused of crime, especially very serious crimes, to trial then the underlying basis of extradition law would thereby be thwarted. Technical glitches which do not result in prejudice or injustice to the fugitive should not be allowed to thwart the objectives of extradition law.

[195] There is no statutory bar to a second request for extradition of the fugitive where the first failed. Whether the second succeeds will depend on why the first failed, whether that factor can and has been cured and whether there is any prejudice to the accused or abuse of the courts process. In this case there was a failure to surrender the fugitive in the allotted time because of a misunderstanding of the statutory framework and an insistence by the Executive on upholding the said fugitive's perceived legal rights. There is no abuse of process in this case.

CONCLUSION

[196] Whereas the Extradition Act provides for the orders which the Court may make on an application for Habeas Corpus, it is Part 57, Rule 57.2 which circumscribes the procedure for making such applications. Although the application is not in compliance with Rule 57.2 (3) or 57.2 (4), this point having not been taken by the respondents prior to this hearing those stipulations are taken to have been waived. The question for the Court was whether it would be reasonably possible to have a fair hearing despite the breach. Having considered the matter, it had not been shown that a fair hearing was not reasonable possible despite the breach.

[197] The Magistrate in exercising her powers under section 17 of the Act, whilst acting under a provisional warrant issued by virtue of section 9, does not require an authority to proceed. The case of ***Trevor Forbes*** is not authority for anything to the contrary and merely explains the meaning of s. 8 in the context of formal proceedings.

[198] The Supreme Court has the power to hear and determine matters of abuse in outward extradition cases. It is not an abuse of the process of the court to commit the fugitive to custody to await his extradition a second time following his earlier discharge. ***Prestley Bingham*** is not an authority to say that a second request cannot lawfully follow a discharge resulting from a failure to surrender the fugitive within the statutory period. Whether repeated request can amount to an abuse is a question of degree and this case does not fall into the category of the kind that can result in such abuse.

[199] Application for writ of Habeas corpus is denied.