JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 107/96
MISCELLANEOUS 65/95

COR: THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE GORDON, J.A.

BETWEEN	**VIVIAN BLAKE**	**APPELLANT**
AND	**THE DIRECTOR OF PUBLIC PROSECUTIONS**	**1st RESPONDENT**
AND	**THE SUPERINTENDENT OF PRISONS - GENERAL PENITENTIARY**	**2nd RESPONDENT**

Ian Ramsay, Q.C., George Soutar & Carolyn Reid
for the Appellant

Lloyd Hibbert Q.C. Snr. Deputy Director of Public Prosecutions
& Lorna Shelly Crown Counsel for the 1st Respondent

Lackston Robinson Assistant Attorney General &
Aviana Johnson Crown Counsel instructed by the
Director of State Proceedings for the 2nd Respondent

10, 11, 12, 13th 17th and 18th March, and 27th July 1998

FORTE J.A.

By Motion in the Supreme Court which was heard on the 10th and 11th October, 1996 the appellant applied for a writ of habeas corpus to discharge him from custody having been so committed by an order of the learned Resident Magistrate to await his extradition to the United States:

He moved the Court on the following grounds:

> **1.** In relation to the order for his extradition upon the indictment in the Southern District of Florida, the Applicant contends that the accusation against him has not been made in good faith in the interest of justice. The applicant will rely on the evidence that one Richard Morrison who was charged in the same indictment, was extradited from Jamaica at the request of the United States Government, and was then indicted and tried upon a wholly different indictment has not been tried on this indictment.
>
> 2. In relation to the order for his extradition upon the Eastern District of Virginia, the Applicant contends that the learned Resident Magistrate erred in law in accepting into evidence and/or relying upon the Affidavits purportedly made by "John Doe" # 1 and "John Doe" # 2. It is submitted that a Court cannot properly accept the evidence of anonymous deponents who because their identity is withheld cannot be controverted or challenged.

The motion was dismissed on the 11th October, 1996.

On the 22nd October, 1996 the appellant appealed the order of the Supreme Court on the following grounds:-

> "1. The Full Court erred in law in not holding:-
>
> (a) That the accusations against the Appellant in the indictment in the Southern District of Florida were not made in good faith in the interest of justice.
>
> (b) That the learned Resident Magistrate erred by accepting into evidence and /or relying on the Affidavits of "John Doe " # 1 and "John Doe" # 2. "

Then on January 13, 1998 the appellant filed nine (9) supplementary grounds of appeal which counsel sought to argue. Counsel for the first and second respondent opposed the granting of leave to the appellant to argue the supplementary grounds and by a majority of

this court, leave was refused. We then promised to give reasons for the refusal at the time of delivering the judgment of the Court, and this I now do.

REFUSAL OF LEAVE TO ARGUE SUPPLEMENTARY GROUNDS OF APPEAL-REASONS THEREFOR

By Section 63 (I) of the Criminal Justice (Administration) Act 1991 - an application for a writ of Habeas Corpus **SHALL** state **ALL** the grounds upon which it is based (emphasis mine).

Section 63 (2) provides that where an application for a writ has been made, no such application may again be made whether to the same Court or to any other Court, **UNLESS** fresh evidence is adduced in support of the application.

The intention of the section - must be to prevent continuous applications otherwise applicants could withhold separate grounds and come to the court, time and time again on different grounds.

By the Judicature (Appellate Jurisdiction) (Amendment Act) 1991 an appeal lay for the first time to the Court of Appeal in matters of habeas corpus Section 21 (A) (2) gave to the court of Appeal the power to exercise any powers of the court below or to remit the case to that court.

It is mandatory by Section 63 (1) of the Criminal Justice (Administration) Act 1991, that an applicant for writ of habeas corpus must state **ALL** the grounds upon which his application is based; and Section 63 (2) deprives him of any opportunity to apply again - **UNLESS** - he produces fresh evidence.

The appellant in the instant case relied on two grounds only in the High Court which were heretofore referred to.

On appeal, he persisted originally in pursuing the same two complaints, but later sought in the Court of Appeal to introduce nine (9) other grounds.

The respondents objected to leave being granted to allow the appellant to argue on appeal, grounds which were not relied on before the High Court, on the basis that the granting of such leave would allow the respondents to do in the Court of Appeal what was not permissible in the High Court - that is to say it would amount to an infringement of Section 63 (1) and (2)of the Criminal Justice (Administration) Act. Not having stated those additional grounds in the application in the High Court, the appellant could not hereafter file another application for writ of habeas corpus unless based on fresh evidence [Section 63 (2)]. To allow the appellant to argue these nine (9) new grounds would be tantamount to allowing him to bring another application in breach of Section 63 (2). In order to do so the appellant would have had to produce fresh evidence.

In seeking to move the Court to permit the argument on these additional grounds, the appellant produced an affidavit of an Attorney purporting to state the law of the Southern District of Florida, as it would relate to the indictment upon which the learned Resident Magistrate has ordered the extradition of the appellant. In my view such an affidavit would not qualify as fresh evidence as it discloses matters, not of facts, but of law, and would have been available to the appellant at the time of the hearing of his application for the writ of habeas corpus. For this interpretation of the words "fresh evidence", I am supported by the judgment of Gibson J, in the English case of ***Re Tarling*** [1979] 1 All E.R. 981 where in dealing with Section 14 (2) of the English Administration of Justice Act 1960 which is in similar terms to Section 63 (2) of the Jamaican Statute (supra) he said [at p 987]:

> "Secondly, it is also clear to the Court that in Section 14 (2) of the Administration of Justice Act 1960 in the phrase 'no such application shall again be made on the same grounds unless fresh evidence is adduced in support of the application,' the words 'fresh evidence' are used in that meaning which is well

> known and established in such contexts, namely not merely evidence additional to or different from the evidence before the Court on the first occasion, but evidence which the applicant could not have put forward on the first application or which he could not then reasonably be expected to put forward".

It should be noted however, that a major difference between the English Section 14(2) and our Section 63(2) is that whereas the English statute prohibits further applications on the same grounds in the absence of fresh evidence, the Jamaican statute in such circumstances prohibits any further application at all. In Jamaica therefore, no further application, whether on the same grounds or any other ground can be made in the absence of fresh evidence. The object of Sections 63 (1) and (2) must be to provide for one opportunity only, to challenge through the habeas corpus procedure, the decision of the Resident Magistrate to commit the person to prison to await his extradition.

The section however, recognises that where fresh evidence becomes available it may affect the original decision and consequently an applicant is given a further opportunity for the application to be considered on the basis of that fresh evidence.

In the instant case the evidence sought to be adduced was not 'fresh evidence' and consequently, the appellant would have had no basis for bringing a new application before the Court. The new grounds sought to be argued, each refer to nine separate reasons why habeas corpus should issue, and were all matters not raised before the Full Court. In any event, the purported fresh evidence would only be supportive of some of the new grounds by way of legal opinion and not per se evidence that go to the fundaments of the matters therein raised.

In those circumstances, to have permitted new grounds to have been advanced at this stage, would in my view allow the appellant to do through the process of appeal, that

which he was shut out from doing by virtue of Sections 63 (1) and (2) of the relevant Act (supra).

It was for those reasons that I came to the conclusion that the motion for leave to argue those supplementary grounds should be refused.

I turn now to the grounds argued which read as follows:

> "The Full Court erred in law in not holding:-
>
> a) That the accusations against the Appellant in the indictment in the Southern District of Florida were not made in good faith in the interest of justice.
>
> b) That the learned Resident Magistrate erred by accepting into evidence and/or relying on the Affidavits purportedly made by anonymous deponents - 'John Doe' #1 and 'John Doe' # 2.

(1) **GOOD FAITH**

This ground calls in aid Section 11 (3) (c) of the Extradition Act which reads as follows:

> "(3) On any such application [habeas corpus] 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 -
>
> ...,
>
> 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 of oppressive to extradite him".

This allegation must be determined on the presumption that countries that enter into extradition treaties for the return of prisoners or suspects from one country to another, for the purpose either of ensuring the imprisonment of the convicted person, or the trial of the fugitive, do so honourably and with sincere intentions of acting according to the terms of the treaty. Consequently, any such allegation must be put forward on very strong grounds. The

following words of Lord Russell C.J. speaking in relation to a similar ground in ***Re Arton*** [1896] 1Q B 108 although spoken in the last century are as true today as they were then:-

> "It has been pointed out by myself and my learned brothers during the argument that this is in itself a very grave and serious statement to put forward, and one which ought not to be put forward except upon very strong grounds; it conveys a reflection of the gravest possible kind, not only upon the motive and actions of the responsible Government, but also impliedly upon the judicial authorities of a neighbouring, friendly Power": [p 114].

Then in 1993 Ognall J in ***R v Governor of Pentonville Prison exparte Lee*** [1993] 3 All ER 504 at pg. 509 said:

> "It is of course right to observe that the law of extradition proceeds upon the fundamental assumption that the Requesting State is acting in good faith and that the fugitive will receive a fair trial in the courts of the Requesting State. If it were otherwise, one may assume that our government would not bind itself by treaty to such process".

The allegation of bad faith made by the appellant is predicated on the provisions of Section 7(3) of the Extradition Act and Article XIV of the Treaty with the United States Government and certain evidence concerning the extradition of Richard Morrison, which will be dealt with later.

Section 7 (3) (a) of the Act provides:

> "(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 to 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;
>
> ..."

In keeping with the provisions of the Act the treaty with the Government of the United States of America, provides in Article V inter alia as follows:

RULE OF SPECIALTY

1. A person extradited under this treaty may only be detained, tried or punished in the Requesting State, for the offence for which extradition is granted or -

> (a) for a lesser offence proved by the facts before the Court of Court of Committal or in the case of extradition pursuant to Article XV any lesser offence disclosed by the facts upon which the request is based;
>
> (b) for an offence committed after extradition;
>
> (c) for an offence in respect of which the executive authority of the Requested State in accordance with its laws, consents to the person's detention trial or punishment.

In this regard the notice of motion requesting the order for the issue of a writ of habeas corpus sets out fully the ground upon which the appellant relied. It reads as follows:

> "In relation to the order for his extradition upon the indictment in the Southern District of Florida, the Applicant contends that the accusation against him has not been made in good faith in the interest of justice. The Applicant will rely on the evidence that one Richard Morrison who was charged in the same indictment was extradited from Jamaica at the request of the United States Government, and was then indicted and tried upon a wholly different indictment and has not been tried on this indictment".

The evidence relied upon for proof of this allegation rested on the affidavit of Kinley Engvalson a member of the Florida Bar Association who practices as an Attorney in that

state. He attested that he represented Richard Morrison at a trial which took place at Fort Myers, in the United States District Court for the middle District of Florida on Indictment No 89-57-CR FTM -13 (C) charging possession with intent to distribute cocaine. He then further deponed:-

> " 4. That Richard Morrison instructed me that he had not been extradited upon this Indictment, but only upon indictment No. 88.0652 charged in the United States District Court for the Southern District of Florida.
>
> 5. That on April 24, 1992, I raised before the court at Fort Myers my client's belief that he has not been extradited for the Fort Myers case but only for the Southern District Indictment.
>
> 6. That at the said hearing Russell Stoddard, The United States Attorney, represented before the Court that Richard Morrison had been extradited on both the Fort Myers case and the Southern District case.
>
> 7. That Richard Morrison was then sentenced to a term of 24 years of imprisonment in relation to the Fort Myers case.
>
> 8. That I continue to represent Richard Morrison and can say that he has not stood trial with respect to the Southern District Indictment No. 88-0562, which has been dismissed".

Mr. George Soutar of the Jamaica Bar Association also deponed as follows:

> "That Richard Morrison was the subject of extradition proceedings in Jamaica. I was the Attorney-at - law for Richard Morrison throughout those proceedings and am fully acquainted with the facts of his case.
>
> That Richard Morrison appeared before the Resident Magistrate for the parish of Saint Andrew and was remanded in custody to await his extradition on the 19th February, 1991.
>
> That Richard Morrison applied for an order of Habeas Corpus but his application was dismissed and he was duly extradited to the United States of America.
>
> That the only matter for which the extradition of Richard Morrison was ordered was the indictment in the Southern District of Florida in which he was formally indicted with the Applicant. No extradition request relating to the Middle District of Florida was ever put before the Court".

As there was no affidavit filed on behalf of the respondents refuting the allegation in the affidavits of the appellant, the determination of this issue must be decided on the basis that one Richard Morrison who is jointly charged in the Indictment in respect of which the appellant's extradition is being sought was at an earlier time extradited to the United States on that Government's request in respect of a charge in the same indictment. That he was never proceeded against on that indictment but instead was tried and convicted on an indictment for which he was never extradited. The appellant contends that the Requesting State having breached the Specialty Clause of the Treaty in respect of Morrison it should be inferred that the request in respect of the appellant is made in bad faith and for that reason the Supreme Court erred in not issuing a writ of habeas corpus for his release from custody.

Before dealing with this contention, note must be taken of two matters.

1. The affidavit of Engvalson speaks to the fact that Mr. Russell Stoddard , the United States Attorney represented to the Court that Morrison had in fact been extradited for the offence for which he was tried, and

2. Before us Mr. Hibbert, Q.C., Senior Deputy Director of Public Prosecutions, informed us during the course of argument - that there had been in fact, a request for extradition of Morrison in respect of the offence for which he was tried and convicted in the Middle District of Florida. However, the Director of Public Prosecution's office representing the United States Government did not proceed with that request but instead proceeded with the request in respect of the other indictment which had been made at the same time. The warrant upon which Morrison was committed, spoke only to the offence for which he was indicted, but had no information in relation to what District in Florida the offence was committed. He contended that for these reasons it was a reasonable mistake for the United States Government to have made in assuming that both requests had been successfully dealt with.

On the other hand, the appellant contends that this was a deliberate act on the part of the requesting state which demonstrates that that state was not acting in good faith, but

was likely to proceed against the appellant in respect of other charges pending against him in that State in breach of the Specialty Clause in the Treaty and the provision of the Jamaican Statute.

In order to establish this claim, which it is his burden of doing the appellant must show firstly that the request was not made in good faith, and for that reason, it would, having regard to all the circumstances be unjust or oppressive to extradite him. To support this view I need only refer to a short passage in the speech of Lord Fraser of Tullybelton in the House of Lords in the case of ***Reg v Governor of Pentonville, Ex, parte Narang*** [1977] 2 All E.R. 348 which though dealing with the "passage of time" provision is nevertheless of relevance. He stated:

> "In order to entitle the court to order discharge it is not enough for it to appear to the Court that the returning of the fugitive would be unjust or oppressive; the injustice or oppression must arise by reason of the passage of time, that is to say it must be caused by the passage of time. The difficulty is in seeing exactly what effect is to be given to the words 'having regard to all the circumstances' The importance of the provision that regard is to be had to all the circumstances is, in my opinion that it requires the Court to consider all the circumstances of the particular applicant and not to apply the general rule of thumb. But it is only if the passage of time operating in those particular circumstances, would cause injustice or oppression that the condition for the Court to make an order is satisfied. It seems to me that the only circumstances in which passage of time can operate must be circumstances having some connection with the passage of time" [see p.375].

The Court had therefore firstly to determine whether the accusation was made in bad faith, and then considering all the circumstances relating to lack of good faith, determine whether it would be unjust or oppressive to extradite the appellant. The Court below treated this ground (per the judgment of Smith J) as follows:

> "It seems to us that the proof or allegation of a breach of the treaty in respect of Richard Morrison is not and cannot be a sufficient basis for the inference that "the accusation" against the applicant was not made in good faith in the interest of

> justice. It must be borne in mind that this alleged breach took place long after the request for extradition".

and later in his judgment

> "We are clearly of the view that there is not one scintilla of evidence before this court to show that the accusation made against the applicant was not made in good faith in the interest of justice".

I agree that the evidence concerning the treatment of Morrison, is not evidence upon which the Court could have acted, in coming to a conclusion that the accusation made in respect to the appellant, was not made in good faith. The fact that the request was made prior to the trial of Morrison, the possibility of a genuine mistake, the possible consent of the Minister by virtue of Section 7 (3) (iii) of the Act, and as the Court below noted no challenge being made by Morrison on appeal in respect of the alleged breach of the treaty all prohibit any conclusion that it was a deliberate act on the part of the Requesting State to breach the Specialty Clause of the treaty in respect of Morrison. In any event the experience of Morrison, ought to place the Minister on a watchful mode to ensure that such a mistake will not occur in the case of the appellant. The committal as Mr. Hibbert has assured us will now specify the particular indictment for which the extradition order will be made and thereby avoid any mistake in relation to the appellant's case. In all the circumstances, it cannot be said that the request was not made in good faith in the interest of justice and that for that reason it would be unjust and oppressive to extradite the appellant.

This ground therefore fails.

2) John Doe # 1 and # 2

This ground relates to the order for extradition upon an Indictment in the Eastern District of Virginia and contends that the learned Resident Magistrate erred in law in accepting into evidence and/or relying upon the affidavits purportedly made by

'John Doe # 1 and John Doe # 2.' The contention is based on the fact that the witnesses being anonymous, cannot be controverted or challenged.

In order to treat with this issue an examination of the powers and responsibility of the learned Resident Magistrate in extradition committal proceedings is necessary. Section 14 of the Extradition Act provides inter alia:

> "14-(1) In any proceedings under this Act, including proceedings on an application for habeas corpus in respect of a person in custody under this Act -
>
> (a) document, duly authenticated, which purports to set out testimony given on oath in an approved State shall be admissible as evidence of the matters stated therein;
>
> (b) a document, duly authenticated, which purports to have been received in evidence or to be a copy of a document so received in any proceedings in an approved State shall be admissible in evidence;..."

Then at Subsection 2 provides:

> "(2) A document shall be deemed to be duly authenticated for the purposes of this section -
>
> (a) in the case of a document which purports to set out testimony given as referred to in subsection (1) (a), if the document purports to be certified by a judge, magistrate or officer of the Court in or of the approved State in question or an officer of the diplomatic or consular service of the State to be the original document containing or recording that testimony or a true copy of that original document;
>
> (b) in the case of a document which purports to have been received in evidence as referred to in subsection (1) (b) or to be a copy of a document so received, if the document purports to be certified as aforesaid to have been, or to be a true copy of, a document which has been so received; or..."

The offences for which the extradition is sought arise out of fifteen (15) charges returned by the grand jury in the Requesting State, the appellant being the sole defendant.

The evidence relied upon by the Requesting State, in so far as the substantive offences are concerned is contained in two depositions each sworn to before a United States District Court Judge, in the United States District Court in the Eastern District of Virginia. The deponents are John Doe # 1 and # 2.

Both documents are duly authenticated and purport to set out evidence given on oath and on that basis were admissible in evidence in the proceedings before the learned Resident Magistrate by virtue of Section 14 (1) (a) of the Act (supra).

Nevertheless, the appellant contends that the learned Resident Magistrate should not have received it in evidence, and if he did, he ought not to have relied on it. Having done so, the learned Resident Magistrate permitted a breach of the appellant's constitutional right to know who his accusers are and to be able to challenge through cross-examination the allegations made against him. Without knowledge of the identity of his accusers the argument continues, the appellant was severely handicapped in making the challenge.

In support of this proposition Mr. Ramsay for the appellant relied on the provisions of Section 20 (6) (d) of the Jamaica (Constitution) Order an Council, which reads:

> "(6) Every person who is charged with a criminal offence -
>
> ...
>
> (d) shall be afforded facilities to examine in person or by his legal representative the witnesses called by the prosecution before any court and to obtain the attendance of witnesses, subject to the payment of their reasonable expenses, and carry out the examination of such witness to testify on his behalf before the court on the same conditions as those applying to witnesses called by the prosecution ; and
> ...."

The Extradition Act however, contains provisions which are aimed at giving obedience to the provision of the Constitution. In Section 10 (1) it is provided that the Magistrate "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 Subsection (2) provides that the Court of committal shall have as nearly as may be, the like jurisdiction and powers as it would have if it were sitting as an examining justice and the person arrested was charged with an indictable offence committed within its jurisdiction. Then subsection (5) (a)states that where the Court is satisfied inter alia, that the evidence would be sufficient to warrant the fugitive's trial for the offence if the offence had been committed in Jamaica, the Court shall commit him to custody to await his extradition under this Act. There is nothing revealed in the transcript of the proceedings before the learned Resident Magistrate which indicates that any objection was taken to the admission of the deposition of Jon Doe #1 and # 2 or that any application was made for the disclosure of the identities of those two witnesses by the appellant and/or his counsel. Nor was there any application made to the learned Resident Magistrate to have the witnesses attend for cross-examination. In my view there is no provision in the cited sections of the Extradition Act which precludes the appellant and/or his attorney, from exercising any of the options referred to above. Certainly, it was an option for the appellant to have required the attendance of John Doe # 1 and #2, to attend for cross-examination in which event the question of disclosure of their identity would have become an important issue at that stage.

In any event, it is my view that the protection given to the citizen under Section 20 (6) (d) is directed at securing that these facilities must be afforded him/her before any final conclusion of guilt or otherwise can be arrived at.

The subsection is one aspect of the State's obligation to secure for its citizen, the protection of the law, and together with the other subsections of Section 20, ensure that persons charged with criminal offences are treated fairly and justly. A determination of the merits of this ground must therefore be made, against the background of the proceedings in which the matter arose, that is to say, in the context of committal proceedings in respect of a request for extradition as opposed to a trial upon which a final conclusion of guilt or innocence would be necessary.

All the cases cited by Mr. Ramsay, in support of his contention dealt with the non-disclosure of witnesses' identities in the context of trials, except for the case of ***Attorney General v Leveller Magazine Ltd and others*** [1979] 1 All ER 748 in which Lord Diplock approved the action of a Magistrate in committal proceedings in refusing to allow a witness to depose who requested that his name should not be disclosed to anyone. For completion I state his words (see p 748:

> "On the third day, 10th November, counsel for the prosecution made an application that the next witness whom he proposed to call should, for his own security and for reasons of national safety, be referred to as 'Colonel A' and that his name should not be disclosed to anyone. The magistrates, on the advice of their clerk, ruled correctly but with expressed reluctance, that this would not be possible and that although the witness should be referred to as 'Colonel A' his name would have to be written down and disclosed to the court and to the defendants and their counsel." (emphasis added).

The committal proceedings in the case cited above related not to a request for extradition, but , was in the context of ordinary criminal proceedings to determine whether the accused should be committed to stand trial. In the case now under review, the learned Resident Magistrate, was concerned with whether the evidence tendered was sufficient in our jurisdiction to establish the offence for which the appellant was charged in the Requesting State. He would be doing so on the background of the charges returned by the

grand jury in the Requesting State which were based on the depositions of the two witnesses, who on the face of it remained anonymous. There is nothing to suggest however, that in giving their depositions before the United States District Judge that their identities were unknown to the Judge.

The non-disclosure of the names of these witnesses was obviously done with the acquiescence of the United States District Judge before whom they deponed, and no objection having been taken before the learned Resident Magistrate, she was entitled in my view given the reasons for the non-disclosure stated in the depositions, to admit them into evidence, and, having done so she was obliged if they disclosed sufficient evidence to warrant his trial for the offences if they had been committed in Jamaica to commit the appellant given the provision of Section 10 (5) (a) of the Extradition Act.

In ***A.G. v Leveller Magazine Ltd (supra),*** Lord Diplock recognised that in order to serve the ends of justice, which must be the aim of all Courts , it may be necessary sometimes to depart from the general rule. In his speech to the House of Lords at page 749 he stated:-

> "As a general rule the English system of administering justice does require that it be done in public: ***Scott v Scott*** [1913] AC 417, [1911 -13] All ER Rep. If the way that courts behave cannot be hidden from the public ear and eye this provides a safeguard against judicial arbitrariness or idiosyncrasy and maintains the public confidence in the administration of justice. The application of this principle of open justice has two aspects; as respects proceedings in the court itself it requires that they should be held in open court to which the press and public are admitted and that, in criminal cases at any rate, all evidence communicated to the court is communicated publicly. As respects the publication to a wider public of fair and accurate reports of proceedings that have taken place in court the principle requires that nothing should be done to discourage this.
>
> However, since the purpose of the general rule is to serve the ends of justice it may be necessary to depart from it where the nature or circumstances of the particular proceeding are such

> that the application of the general rule in its entirety would frustrate or render impracticable the administration of justice or would damage some other public interest for whose protection Parliament has made some statutory derogation from the rule. Apart from statutory exceptions, however, where a court in the exercise of its inherent power to control the conduct of proceedings before it departs in any way from the general rule, the departure is justified to the extent and to no more than the extent that the court reasonably believes it to be necessary in order to serve the ends of justice".

In ***Reg v Taylor*** [1994] T.L.R 484 in the Court of Appeal of England, in dealing with the issue of identity of accusers Evans L.J. stated :

> "In so far as counsel for the appellant submitted that it was a fundamental right of a defendant to see and know the identity of his accusers, including witnesses for the Crown, which should only be denied in the rare and exceptional circumstances, their Lordships agreed with him" (p 484).

He then opined that the matter was pre-eminently one for the exercise of the judge's discretion and referred to the following factors; relevant to the exercise of the discretions:-

> "1. There must be real grounds for fear of the consequences if the evidence were given and the identity of the witness revealed.
>
> 2. The evidence must be sufficiently relevant and important to make it unfair to make the Crown proceed without it.
>
> 3. The Crown must satisfy the Court that the credit worthiness of the witness had been fully investigated and disclosed.
>
> 4. The Court must be satisfied that there would be no undue prejudice to the accused, although some prejudice was inevitable even if it was only the qualification placed on the right to confront a witness as accuser.
>
> 5. The Court could balance the need for protection of the witness, including the extent of that protection, against unfairness or the appearance of unfairness".

Mr. Ramsay relied heavily on the above dicta. To begin with, however, Evans L.J was speaking to factors which are relevant to the exercise of the judge's discretion in the context of a trial, whereas the matter under review concerns not committal proceedings or a preliminary hearing as we have in this jurisdiction; but committal proceedings for the purpose of extradition which is governed by the statutory provisions of the Extradition Act. The difference is broadly reflected in the fact that the ultimate trial of the appellant if he fails on this appeal, and is eventually extradited at the instance of the Honourable Minister will be governed by the procedures of the Requesting State . In any event, had the learned Resident Magistrate in the instant case been invited to exercise such a discretion, it is my view that given the provisions of the Act he would have had no option but to receive the evidence and based on the content of the depositions before him would have been bound to make the order committing the appellant to custody to await his extradition.

Nevertheless even judged on the basis of the factors outlined by Evans L.J, in my view, the learned Resident Magistrate would of necessity have had to exercise the discretion to forgo the identity of the witnesses in the process of the committal proceedings.

In respect to factor (1) both witnesses deponed to being in fear of bodily injury on the basis of the reputation for violence of the appellant. This allegation of fear must be considered, on the basis of the serious nature of the punishment in the Requesting State for offences of the nature of which the appellant is charged, and the internationally recognised degree of violence that persons concerned with such offences have brought to bear on persons acting against their interest.

As to factor (2) the testimony of both witnesses disclose the whole case for the prosecution in the Requesting State and consequently must be considered so relevant and important so as to make it "unfair to have the prosecution proceed without it".

Factor (3): The learned Resident Magistrate would be, given the fact that the hearing concerns extradition, entitled to come to the conclusion, in the face of no evidence to the contrary, that the credit worthiness of each witness was investigated and disclosed to the United States District Judge before whom they deponed.

Factor (4) There can be no undue prejudice to the :appellant, as at the time of trial the whole question of the disclosure of the witnesses' identity would again have to be reviewed. I will return to this in due course.

Factor (5): The learned Resident Magistrate was not asked to balance the need for protection against fairness or the appearance of fairness, but it is doubtful that in these circumstances where the question of identity of the witness would have to be an issue at trial, the learned Resident Magistrate in committal (extradition) proceedings could rule on such a matter.

Ironically, Mr. Ramsay cited several cases from the United States of America, in support of his arguments on this issue. I say 'ironically' because the Requesting State in this matter coincidentally is the United States of America, and consequently the eventual trial of the appellant will be governed by the rules of procedure in that State.

The first of these cases is ***Smith v Illinois*** 390 U.S. 129 in which the Appellate Court of Illinois First District in its judgment per Stewart J stated at pg 131:

> "In the present case there was not, to be sure, a complete denial of all right of cross-examination. But the petitioner was denied the right to ask the principal prosecution witness either his name or where he lived, although the witness admitted that the name he had first given was false. Yet when the credibility of a witness is in issue, the very starting point in "exposing falsehood and bringing out the truth" through cross-examination must necessarily be to ask the witness who he is and where he lives. The witness' name and address open countless avenues of in-court examination and out-of-court investigation. To forbid this most rudimentary inquiry at the threshold is effectively to emasculate the right of cross examination".

In coming to this conclusion the Court relied on the case of ***Alford v United States,*** 282 U.S. 687. Cases were also cited by the appellant to establish that in the United States a mere allegation of fear is not sufficient to permit non-disclosure of the witness' name and address; but that first an actual not implied threat to the witness or his family must be shown and second the government must disclose to the judge in camera the information sought to be withheld from the accused. (***See Holmes v State*** (559 So. 2 d 933, 1990 Fla 5D CA 933. in which dicta from the case of ***State v Hassburbgher*** 350 S0 2d 1 and ***United States v Palermo*** 410 F 2d 468 were referred to, and relied upon).

These cases demonstrate that the appellant, if extradited will at his trial be given the protection referred to in these cases, and can then argue strongly on the basis of authorities, for the disclosure of the identities of John Doe #1 and # 2.

For these reasons, I would hold that this ground also fails. In the event, I would dismiss the appeal and confirm the order of the Court below.

DOWNER, J.A.

Before Her Honour Miss Marcia Hughes the fugitive Vivian Blake was committed to stand trial in Florida and Virginia Federal District Courts in the United States of America pursuant to the Extradition Act. He had challenged the legality of those committals by way of habeas corpus in the Supreme Court (Smith, Reid, Harris JJ) and being aggrieved by that order which refused the application for the writ he has invoked the jurisdiction of this court.

The preliminary objection raised by the respondent

To appreciate the nature of the objection raised by Mr. Hibbert, Q.C. and ably supported by Mr. Lackston Robinson, the grounds of appeal filed on 22nd October, 1996, must be cited. They read:

> "1. The Full Court erred in law in not holding:-
>
> a) That the accusations against the Appellant in the indictment in the Southern District of Florida were not made in good faith in the interest of justice.
>
> b) That the learned Resident Magistrate erred by accepting into evidence and /or relying on the Affidavits purportedly made by anonymous deponents 'John Doe' # 1 and 'John Doe' # 2.
>
> FURTHER GROUNDS will be advanced after the written judgment of the Full Court is delivered.
> Dated 22nd October, 1996."

It is sufficient at this stage to state that by using "and /or" the pleader was relying both on the conjunctive 'and' the disjunctive 'or'. This point will be developed later when the merits of ground 1 (b) are assessed.

Be it noted that the hearing before the Supreme Court was on 10th and 11th October 1996 and it is clear from the reasons for judgment delivered on February 17th, 1997 and the wording of the initial grounds of appeal that the orders refusing the application for habeas corpus were made on 11th October. The orders were in respect of Warrants of Committals on the Florida and Virginia indictments. Therefore the pleader rightly filed initial grounds on the 22nd day of October 1996 and gave notice that further grounds would be adduced on receipt of the written reasons. This time honoured procedure has never been questioned in this court before. If there are no written reasons it is difficult to understand how the fugitive would be able to challenge the reasoning of the learned judges below. On this basis alone the respondents' argument on the preliminary point ought to have been rejected.

Yet it was in the light of those circumstances that the Director of Public Prosecutions took the unprecedented objection at the outset, that no further grounds ought to be entertained on appeal. By a majority [Forte and Gordon; Downer dissenting JJA] there was a ruling in favour of the respondents. The matter is of fundamental importance to the conduct of the appeals so I must state the reasons for my dissent.

The basis of the objection which was argued with great force by Mr. Hibbert was centred on the grounds of the application in the Supreme Court which were as follows:

> "1. In relation to the order for his extradition upon the indictment in the Southern District of Florida, the Applicant contends that the accusation against him has not been made in good faith in the interest of justice. The Applicant will rely on the evidence that one Richard Morrison who was charged in the same indictment, was extradited from Jamaica at the request of the United States Government, and was then indicted and tried upon a wholly

different charge and has not been tried on this indictment.

2. In relation to the order for his extradition upon the indictment in the Eastern District of Virginia, the Applicant contends that the learned Resident Magistrate erred in law in accepting into evidence and/or relying upon the Affidavits purportedly made by "John Doe" # 1 and "John Doe" # 2. It is submitted that a Court cannot properly accept the evidence of anonymous deponents who because their identity is withheld cannot be controverted or challenged."

Having regard to those grounds in the court below, counsel contended, the grounds of appeal could not go beyond them and that the grounds of appeal must be so confined. Therefore the supplementary grounds could not be entertained according to the argument even if they had merit. So construed the submissions were in the nature of a preliminary point of law.

Appeals in habeas corpus in criminal causes or matters were permitted by an amendment to the Judicature (Appellate Jurisdiction) Act, as a consequence of the decision in **McGhann v. U.S.A.** (1971) 12 J L R 565 or 23 W I R 406 and **Donald Anthony Bevan Thompson v Director of Public Prosecutions and another** unreported Supreme Court Miscellaneous Appeal 1/87. Those decisions ordained that the proceedings were criminal and that there was no statutory provision for such appeals. The amendment pursuant to the Judicature (Appellate Jurisdiction) (Amendment) Act 1991 which permitted appeals reads:

"21A. - (1) An appeal shall lie to the Court -

(a) in any proceedings upon application for a writ of habeas corpus in a criminal cause or matter against the refusal to grant the writ;" [Empsasis supplied]

Be it noted that the right to appeal is accorded to the applicant if there is a refusal to grant the writ. Neither the prosecution nor the goaler can appeal. Furthermore section 21A (2) of the Judicature (Appellate Jurisdiction) Act as amended continues thus:

> "(2) For the purpose of disposing of an appeal under this section the Court may exercise any powers of the court below or remit the case to that court."

This is the statutory way of stating that this court in exercising its powers on appeal does so by way of rehearing and that it is also empowered to remit the case to the court below for a further adjudication. Two important consequences flow from these two provisions. On an appeal since this court has all the powers of the court below, then any point of law that was raised or could have been raised by the appellant can be raised on appeal. Furthermore, Section 21A (2) of the aforesaid Act merely expands the powers of this court already accorded to it in Part 1 of The Criminal Justice (Administration) Act in section 20. That section reads:

> "20. It shall be lawful for the Supreme Court and the Circuit Court, and every Judge thereof, at all times to amend all defects and errors in any proceeding in criminal cases, whether there is anything in writing to amend by or not, and whether the defect or error be that of the party applying to amend or not; and all such amendments may be made upon such terms as to the Court or Judge may seem fit; and all such amendments as may be necessary for the purpose of determining in the existing proceeding the real question in issue shall be so made. This section shall apply to the Court of Appeal and to proceedings in criminal cases on appeal to that Court as it applies to the Supreme Court and to proceedings in criminal cases in that Court."

The comparable provisions for civil proceedings is Section 677, in the Judicature (Civil Procedure Code) Law and Sections 9 and 10 of the Judicature (Appellate Jurisdiction) Act and paragraph 18 of the 1962 Court of Appeal Rules.

There is another fundamental objection to Mr. Hibbert's stance. Certainly it would have been in the interest of justice to permit Mr. Ramsay to argue his grounds and then decide at the conclusion of his submissions whether the grounds ought to have been entertained and further if they had merit. This was the gist of the decision in **I.R.C. v. National Federation of Self-Employed and Small Business Ltd.**[1982]A.C. 617; [1981] 2 W.L.R. 722; 1981 2 All ER 93. It is true that the preliminary issue was whether the applicant in that case had a 'sufficient interest'. The same principle is applicable when by a proposed amendment to the grounds of appeal, an appellant is empowered to argue points of law pertaining to the illegality of his detention. At page 96 of the latter report Lord Wilberforce put it thus:

> "On final appeal to this House, the two sides concurred in stating that the only ground for decision was whether the federation has such sufficient interest.
>
> I think that it is unfortunate that this course has been taken. There may be simple cases in which it can be seen at the earliest stage that the person applying for judicial review has no interest at all, or no sufficient interest to support the application; then it would be quite correct at the threshold to refuse him leave to apply. The right to do so is an important safeguard against the courts being flooded and public bodies harassed by irresponsible applications. But in other cases this will not be so. In these it will be necessary to consider the powers or the duties in law of those against whom the relief is asked, the position of the applicant in relation to those powers or duties and the breach of those said to have been committed. In other words, the question of sufficient interest cannot, in such cases, be considered in the abstract, or as an isolated point: it must be taken

> together with the legal and factual context. The rule requires sufficient interest in the matter to which the application relates. This, in the present case, necessarily involves the whole question of the duties of the Inland Revenue and the breaches or failure of those duties of which the federation complains."

Lord Diplock at page 101 stated:

> "It is my view, very much to be regretted that a case of such importance to the development of English public law under this new procedure should have come before this House in the form that it does as a result of what my noble and learned friend Lord Wilberforce has described as the unfortunate course that was taken in the courts below when, leave to apply for judicial review having been previously granted ex parte, the application itself came on for hearing. This has had the result of deflecting the Divisional Court and the Court of Appeal from giving consideration to the questions (1) what was the public duty of the Board of Inland Revenue of which it was alleged to be in breach and (2) what was the nature of the breaches that were relied on by the federation. Because of this, the judgment of the Court of Appeal against which appeal to your Lordships' House is brought takes the form of an interlocutory judgment declaring that the federation 'have a sufficient interest to apply for Judical Review herein'."

Lord Frazer at page 107 agreed with the judgment of Lord Wilberforce.

Lord Scarman at page 110 put it with great clarity thus:

> "As others of your Lordships have already commented, the decision to take locus standi as a preliminary issue was a mistake and has led to unfortunate results. The matter to which the application relates, namely the legality of the policy decision taken by the Revenue to refrain from collecting tax from the Fleet Street casuals, was never considered by the Divisional Court and was dealt with by concession in the Court of Appeal. Yet there were available at both hearings very full affidavits from which the circumstances in which the policy decision, which is challenged, was taken, and

> the Revenue's explanation, clearly emerge." [Emphasis supplied].

Then Lord Roskill said at page 115:

> "My Lords, Your Lordships' House has often protested about taking of short cuts in legal proceedings, most recently in **Allen v Gulf Oil Refining Ltd** [1981] 1 All ER 353, [1981] 2 WLR 188. The number of cases in which it is legitimate to take such short cuts is small and in my opinion the present was not such a case. Indeed, many of the difficulties which were canvassed at length in arguments before your Lordships' House would have been avoided had this particular short cut not been taken. With profound respect to the Divisional Court, this course was especially inappropriate where the grant or refusal of the remedy sought by way of judicial review is, in the ultimate analysis, discretionary, and the exercise of that discretion and the determination of the sufficiency or otherwise of the applicant's interest will depend not on one single factor (it is not simply a point of law to be determined in the abstract or on assumed facts) but on the due appraisal of many different factors revealed by the evidence produced by the parties, few if any of which will be able to be wholly isolated from the others."

The principles adumbrated above are even more applicable in extradition cases where complex issues of law and fact have to be elucidated to determine the legality of the fugitive's detention.

Significant in this context also was the decision **Council of Civil Service Unions v Minister of The Civil Service** [1984] 1 WLR 1174 or [1984] 3 All ER 935 where the precise ground which succeeded in the House of Lords was not argued in the Court of Appeal. Lord Scarman began his speech thus at page 946:

> "My Lords, I would dismiss this appeal for one reason only. I am satisfied that the respondent has made out a case on the ground of national security. Notwithstanding the criticisms which can be made of the evidence and despite the fact that the point

> was not raised, or, if it was, was not clearly made before the case reached the Court of Appeal."

Then Lord Diplock states the point with clarity. His Lordship said at page 949:

> "The only difficulty which the instant case has presented on the facts as they have been summarised by my noble and learned friend Lord Fraser and expanded in the judgment of Glidewell J has been to identify what is, in my view, the one crucial point of law on which appeals turns. It never was identified or even adumbrated in the respondent's argument at the hearing before Glidewell J and so, excusably, finds no place in what otherwise I regard as an impeccable judgment. The consequence of this omission was that he found in favour of the applicants. Before the Court of Appeal the crucial point was advanced in argument by the Crown in terms that were unnecessary and, in my view, unjustifiably wide. This stance was maintained in the appeal to this House, although, under your Lordships' encouragement, the narrower point of law that was really crucial was developed and relied on by the respondent in the alternative. Once that point has been accurately identified the evidence in the case in my view makes it inevitable that this appeal must be dismissed. I will attempt to state in summary from those principles of public law which lead to this conclusion."

Lord Roskill was equally emphatic in putting this point at pages 954-955:

> "In a judgment which, if I may respectfully say so, I have read and reread with increasing admiration for its thoroughness and clarity, Glidewell J, while in my view correctly rejecting all the other arguments of the appellants, accepted this submission. The Court of Appeal (Lord Lane CJ, Watkins and May LJJ) in a single judgment delivered by the Lord Chief Justice was of a different opinion. But it is right to say that the submission on which counsel for the respondent finally and principally rested was never advanced at all before Glidewell J and though advanced for the first time in the Court of Appeal does not seem to have been advanced even there in entirely the same way as in argument before this House, for it was advanced there on a considerably wider basis than that of which counsel

> for the respondent ultimately came to rest. Counsel for the appellants understandably made skillful forensic play with this failure to advance this crucial submission before the judge. Thus the House has not got the benefit of the views of Glidewell J on what I regard as the crucial issue for the determination of this appeal."

It is in this context that the following passage from the speech of Lord Fraser at page 944 must be understood:

> "I have already explained my reasons for holding that, if no question of national security arose, the decision-making process in this case would have been unfair. The respondent's case is that she deliberately made the decision without prior consultation because prior consultation 'would involve a real risk that it would occasion the very kind of disruption [at GCHQ] which was a threat to national security and which it was intended to avoid' (I have quoted from para 27(I) of the respondent's printed case). Counsel for the appellants conceded that a reasonable minister could reasonably have taken that view, but he argued strongly that the respondent had failed to show that that was in fact the reason for her decision. He supported his argument by saying, as I think was conceded by counsel for the respondent, that the reason given in para 27(I) had not been mentioned to Glidewell J and that it had only emerged before the Court of Appeal. He described it as an 'afterthought' and invited the House to hold that it had not been shown to have been the true reason."

His Lordship then concluded thus at page 945:

> "I am accordingly of opinion that the respondent has shown that her decision was one which not only could reasonably have been based, but was in fact based, on considerations of national security, which outweighed what would otherwise have been the reasonable expectation on the part of the appellants for prior consultation. In deciding that matter I must with respect differ from the decision of Glidewell J but, as I have mentioned, I do so on a point that was not argued to him."

It will be shown in the instant case that with respect to the Virginia indictment, the records reveal that both sides were aware of the identity of the witnesses who gave evidence against the fugitive. Yet the submissions ignored this fact. Then again the records reveal that both witnesses against the fugitive were accomplices, yet the law relating to this issue was never applied to the facts in the submissions of either side. Is this court to ignore these aspects on appeal?

To demonstrate how The House of Lords treats legal points raised for the first time in habeas corpus proceedings **Armah v Government of Ghana** [1968] A.C.192 gives a good illustration concerning the legality of the return to the writ. Lord Pearce said at page 253:

> "So far as the warrant itself speaks it is in an unsatisfactory form. It purports to be made "forasmuch as no sufficient cause has been shown why he should not be returned to Ghana in pursuance of the said Act," which is very different from a finding that there is a strong or probable presumption. But this point was only raised in this House at a late stage and was not relied on greatly by the appellant. In the view I have taken it is unnecessary further to consider the effect of the form of the warrant. I accept the agreed announcement of the magistrate as fairly representing his judgment on the case."

There was a further error in the submission of Mr. Hibbert and it is pertinent to examine Section 63(I) of the Criminal Justice (Administration) (Amendment) Act 1991 as he relied on it to support his submission. It reads:

> "63(1) An application for a writ of habeas corpus shall state all the grounds upon which it is based."

Certainly the application should state all the grounds, but this does not restrict the issues of law that are to be argued in an instance where the legality of the detention is being tested. So grounds of appeal which raise serious issues of law ought

not to be summarily dismissed. Again the provisions of Section 63(1) are not exhaustive. There are provisions in the common law and the Civil Procedure Code which are applicable, so they cannot be ignored on appeal.

As to how the common law on habeas corpus has developed, in extradition cases, **Armah's** case illustrates how the principles of certiorari have been grafted on to habeas corpus. It is a classic example of how the law has been developed by means of legal fictions. At page 234 Lord Reid posed the question thus:

> "How then has it come about that the courts have always held themselves entitled to correct at least some errors in law on the part of magistrates?"

Referring to the origin of the procedure where certiorari was deemed to be part of habeas corpus proceedings Lord Reid at page 234 cited **Bacon's Abridgement** (1768), Vol. 3, p.6, s. v. Habeas Corpus thus:

> " 'If a person be in custody, and also indicted for some offence in the inferior court, there must, beside the habeas corpus to remove the body, be a certiorari to remove the record; for as the certiorari alone removes not the body, so the habeas corpus alone removes not the record itself, but only the prisoner with the cause of his commitment; and therefore, although upon the habeas corpus, and the return thereof, the court can judge of the sufficiency or insufficiency of the return and commitment, and bail or discharge, or remand the prisoner, as the case appears upon the return; yet they cannot upon the bare return of the habeas corpus give any judgment, or proceed upon the record of the indictment, order or judgment, without the record itself be removed by certiorari;...'

That was linked with the case of **In re Tivan, (1864) 5 B. & S. 645; sub nom. In re Tirnan, 12 W.R. 858; sub nom. Ex parte Tirnan, 4 N.R. 225.** where it seems to have been recognised that there ought to have been a certiorari to bring up the depositions but it was agreed to receive the depositions as there had been a certiorari. Later cases seem to have

> proceeded on this basis - no objection being taken to lack of an application for certiorari. If the depositions are part of the record, as they appear to be, then there would be error in law on the face of the record if the depositions were insufficient in law to support the committal."

Lord Pearce summarises the position when he said at page 254:

> "It appears, however, that for at least 100 years the courts have accepted the depositions and decisions in place of a formal return of the writ, in cases where a writ of certiorari would lie, without insisting on an additional writ to bring the depositions before the court."

Lord Upjohn stated the matter broadly thus at page 257:

> "My Lords, I can deal with the first point very shortly. In some of the older cases the power of the superior courts to interfere with the decision of an inferior court by the prerogative writs of certiorari or habeas corpus has been said to depend upon the jurisdiction of the inferior court and that, if that court has jurisdiction, the superior court cannot interfere though of course the inferior court cannot give itself jurisdiction by a wholly unjustifiable finding of fact necessary to confer jurisdiction. This test as interpreted in the latter cases is a sound test. But it can be approached by a rather different line of reasoning for there can be no doubt that the superior courts have always by the exercise of their supervisory powers under the prerogative writs controlled not only questions of jurisdiction in a literal sense, but of law which includes, of course, the question whether there was any evidence sufficient to justify the finding of the inferior court."[Emphasis supplied.]

The telling point made by Mr. Ramsay on behalf of the fugitive was this: If his supplementary grounds pertain to jurisdiction or matters of law as Lord Upjohn stated which can be taken at any stage in the proceedings, on what basis could he be debarred from arguing the supplementary grounds of appeal filed? This aspect will be developed later.

It is also necessary to refer to The Civil Procedure Code to appreciate the law on applications for Habeas Corpus. It is essential to refer to some of these provisions. They will demonstrate the absurdity of contending that a point of law not raised in the Supreme Court cannot be taken on appeal.

> "564K(1) An application for a writ of habeas corpus ad subjiciendum shall be made in the first instance to a Full Court or to a single Judge in Court, except that -
>
> (a) in vacation or at any time when no Judge is sitting in Court it may be made to a Judge sitting otherwise than in Court;
>
> (b) in cases where the application is made on behalf of a child, it shall be made in the first instance to a Judge sitting otherwise than in Court.
>
> (2) The application may be "ex parte" and shall be accompanied by an affidavit by the person restrained showing that it is made at his instance and setting out the nature of the restraint
>
> Provided that where the person restrained is unable owing to a restraint to make the affidavit the application shall be accompanied by an affidavit to the like effect made by some other person which shall state that the person restrained is unable to make the affidavit himself."

Then 564M states:

> "564M(1) The summons or notice of motion aforesaid shall be served on the person against whom the issue of the writ is sought and on such other persons as the Court or Judge may direct, and, unless the Court of Judge otherwise directs, there shall be at least eight clear days between the service of the summons or notice and the date named therein for the hearing of the application.
>
> (2) Every party to the application shall serve on every other party copies of the affidavits which

> he proposes to use at the hearing of the application.
>
> 564N. On the hearing of the application the Court or Judge may, in its or his discretion, order that the person restrained be released, and the order shall be a sufficient warrant to any gaoler, constable or other person for the release of the person under restraint."

This provision obliges one to examine the definition of a motion which is stated thus in **Mosley & Whitely's Law Dictionary** :

> "Motion. An application made to a court or judge viva voce in open court. Its object is to obtain an order or order directing some act to be done in favour of the applicant.
>
> A motion must in general be preceded by notice to any party intended to be affected thereby."

In the light of these provisions any point of law relevant to the evidence adduced in the affidavit may be relied on by the fugitive.

Another important provision refers to the return to the writ. Section 564R reads:

> "564R. (1) The return to the writ shall contain a copy of all the causes of the prisoner's detainer indorsed on or annexed to the writ, and the return may be amended, or another return substituted therefor, by leave of the Court or Judge to whom the writ is returnable.
>
> (2) When a return to the writ is made, the return shall first be read, and motion then made for discharging or remanding the prisoner or amending or quashing the return, and where the prisoner is brought up in accordance with the writ, his counsel shall be heard first, then the counsel for the Crown, and then one counsel for the prisoner in reply."

The effect of Mr. Hibbert's submission was that neither this court on its own motion nor Mr. Ramsay's motion could quash the return to the writ if the issue raised

was not in the notice of motion in the court below. The correct response ought to be that provisions which were meant to accord rights to the fugitive ought not to be construed so as to cut down those rights.

There is yet another aspect to counsel's objection. Section 63(2) of the Criminal Justice (Administration) (Amendment) Act 1991 reads:

> "63(2) Where an application for a writ of habeas corpus in a criminal cause or matter has been made by or in respect of any person, no such application may again be made in that cause or matter by or in respect of that person whether to the same court or to any other court, unless fresh evidence is adduced in support of the application."

The courts in England rejected the assumption in **Eshigbayi Eleko v Nigerian Government Office Administering** [1928] A.C. 459, a case of habeas corpus in civil proceedings that an applicant had a right to go from court to court or from judge to judge in criminal habeas corpus proceedings. This assumption was refuted in **R. v. Hastings** (No.3) [1959] 1 All E.R. 698; [1959] 1 W.L.R. 807; 1959 Ch. 368. Then Parliament confirmed the common law, in Section 14(2) in the Administration of Justice Act 1960 (U.K). There were similar developments in this jurisdiction where the common law position was stated in **Junious Morgan v The Attorney General,** unreported SCCA No. 9/88 delivered December 6, 1988 at pages 38-41. This case went to the Privy Council in P.C. Appeal No. 17 of 1989 and this point was not an issue before their Lordships' Board. It was affirmed in the Criminal Justice (Administration) (Amendment) Act cited above. So that if Mr. Ramsay sought to adduce fresh evidence it could have been considered in a fresh application.

The result of this analysis is that to my mind the submission of counsel for the Crown ought to have been rejected. To conclude counsel for the Director of Public

Prosecution submitted that speed is essential in extradition proceedings. I will let Lord Reid answer him. In **Royal Government of Greece v Governor of Brixton Prison** [1971] A.C. 251 at page 278, His Lordship said:

> "First I mention an argument for the appellant to which I have given no weight. It was said, no doubt truly, that it would impede or delay extradition proceedings if the fugitive criminal were entitled to question the validity of the conviction on the ground that it had been preceded by something which amounted to an infringement of natural justice. But in construing a provision relating to the liberty of the subject I would not attach importance to administrative inconvenience."

It is important to cite the supplementary grounds to show the scope of the submissions which the fugitive is empowered to raise on appeal. It is also essential to refer to them as Mr. Ramsay contended that some went to jurisdiction or raised important matters of law and could have been taken at any stage in the proceedings or by the court itself. Another point to be inferred from Mr. Ramsay's submission was that, because of the statutory provisions in the Extradition Act, and other Acts this court or the court below was bound to take judicial notice of these provisions and give them force and effect. (See Section 21 of the Interpretation Act.)

In setting out the nine grounds which by a majority decision arguments were not permitted, I have not included the particulars which accompany those grounds.

> **"INCORPORATION**
>
> 1. That the Authority to Proceed dated the 16th July, 1992 and purporting to be issued under and by virtue of the Extradition Act 1991, was null and void as the Treaty between the United States of America and Jamaica had not yet been incorporated into Jamaican municipal law in that:
>
> (a) the statutory provisions for incorporation namely, Section 4 of the Extradition Act and the

> Interpretation Act Sections (30) and (31) had not been complied with.
>
> (b) That Section 4 of the Extradition Act provides for Parliamentary affirmative resolutions in respect of the Ministerial Order purporting to incorporate the Treaty into municipal law."

This is certainly a jurisdictional point and was raised and decided on in the first habeas corpus appeal to this court. See **Prince Edwards v Director of Public Prosecutions and another** (unreported) pages 8-10 Supreme Court Civil Appeal 43/94 delivered November 7, 1994. The Jamaica Gazette Extraordinary published February 2, 1995, showed that the requisite affirmative resolutions pursuant to Section 4 of the Extradition Act were made on 11th June, 1991. The decision in **Prince Edwards** was reaffirmed in **Byles v Director of Public Prosecutions** Supreme Court Civil Appeal No. 44 of 96 delivered October 13, 1997. There is no merit in this ground.

"JOINDER OF INDICTMENTS OR OF SEPARATE AND DISCRETE CHARGES

> 2. That the Committing Magistrate erred in hearing and determining prima facie cases in respect of two different sets of charges, engrossed in two separate Indictments, emanating from two different States, one in the East and one in the South of the United States, relating to different offences allegedly committed in different years, with different personnel."

Since there are warrants of commitments in respect of the Virginia Indictment and the Florida indictment, to my mind, if one was bad, and the other good in whole or in part, then the fugitive would still be extradited. Moreover, I can find no provision in Section 64 of the Judicature (Resident Magistrates) Act or in Part II of the Justices of the Peace Jurisdiction Act which would preclude the Resident Magistrate from conducting the committal proceedings in the way she did. **R.v Wilmot** [1933] All E.R.

Rep. 628 cited on behalf of the fugitive deals with a trial on indictment and was not helpful in the different circumstances of this case. I find no merit in this ground.

> **"PROOF OF THE SUBSTANCE**
>
> 3. That the Full Court erred in law in holding that prima facie cases had been made out against the Appellant before the Committing Magistrate in respect of any and/or all the charges relating to the alleged prohibited substances of Ganja and Cocaine."

If this was established, there could have been no proper committal pursuant to those charges and is certainly a point of law or an issue of jurisdiction.

> " **LOCUS OF OFFENCES**
>
> 4. That Count 3 of the Indictment numbered 88-0652 Cr-Gonzalez related, inter alia, to an incident in California and not in Florida from which the Indictment emanated: That accordingly without expert testimony to show that the State of Florida would have jurisdiction over acts committed in California, the learned Magistrate erred in making a Committal order in respect of the said Court and derivatively of Count 4."

As the assumption is that United States law would be the same as ours, this particular ground would require expert evidence before an authorative ruling could be made by this court. It does seem however that the offences are Federal ones cognisable by Federal Courts in Florida. Not surprisingly expert evidence from Mr. David Rowe an Attorney-at-Law of the State of Florida and The District Court of Florida as well as the United States Court of Appeals for the 11th Circuit in Atlanta Georgia giving expert evidence on behalf of the fugitive supports this stance. The point will be developed later.

> **"THE REQUEST**
>
> 5. That the Magistrate erred in over-ruling the objection of Appellant's Counsel as to the non-

> production of the Request basing the Authority to proceed in relation to Indictment numbered 88-0652 Cr-Gonzalez (Florida)."

This was an issue which goes to jurisdiction and there should be a ruling on it which will be provided later. The Resident Magistrate's ruling in accordance with Section 8(1) of The Extradition Act was given during the evidence of Mrs. Deta Cheddar, an officer of the Ministry of Foreign Affairs. Sections 8(1)& (3) suggest that the authority to proceed is the basis of the Resident Magistrate's jurisdiction. But the request is the starting point for extradition proceedings.

> **"RACKETEERING**
>
> 6. That the Committing Magistrate exceeded her jurisdiction in making a Committal order on the Counts of Racketeering since there is no corresponding offence in Jamaica: For reason that: the Magistrate would be entitled if satisfied of the proof of discrete offences valid by Jamaican law, to make a Committal order in those terms; but it is submitted not otherwise."

Here the fugitive has expressly mentioned that he is relying on a jurisdictional point which can be raised at any point during the proceedings. He ought to have been heard on the issue. It must be noted that **Mayor, Aldermen, and Citizens of Norwich v. Norwich Electric Tramways Company Ltd.** [1906] 2 K.B. 119 was cited by Mr. Ramsay on behalf of the fugitive; and this court (Forte J.A. dissenting, Downer and Bingham JJA) cited this and other decisions on this issue in the case of **R v. Icyline Lindsay and Maxine Lindsay** (unreported) R.M.C.A. 11/97 delivered 19th December, 1997. Apart from **R v Monica Stewart** (1971) 17 WIR 381, cited at page 38 in the latter case there are four cases referred at pages 51-52 one from the Court of Appeal two from the House of Lords and one from the Privy Council affirming this position.

Furthermore the face of the Warrant of Committal in respect of Florida Indictment delineates specific offences which are known to the Jamaican legal system. This point will be developed later.

> **"LIMITATION**
>
> 7. That Count two (2) of the Indictment numbered 93-8-N is statute barred in the State of Virginia by reference to the law supplied. (See Affidavit of Laura M. Everhart P. 111)."

This ground was fully argued without a word of protest from the respondents. It was a strange stance having regard to the majority ruling in their favour. In their reply, they did not respond to the submissions made on behalf of the fugitive on this point. The issue will be developed later on the Virginia Indictment as well as on the Florida Indictment which was not raised.

> **"PENALTY**
>
> 8. That in Count (3) of the Indictment numbered 88-0652 Cr-Gonzalez (Florida) the Appellant is charged (as incidents of Racketeering) with Murder and Attempted Murder of a number of individuals. The Exhibit law supplied by the Requesting State sets out the degrees of Murder applicable in the State of California and in Florida; however, the penalty section of both State Codes is omitted."

This ground will be considered in the light of the expert evidence adduced by the fugitive and the United States.

> **"PASSAGE OF TIME**
>
> 9. That the Appellant submits that by reason of the passage of time since the Appellant is alleged to have committed the offences and having regard to all the circumstances it would be unjust and oppressive to extradite the Appellant by virtue of Section 11 (3) of the Extradition Act 1991."

The absurdity of the stance of the respondents is brought out by this ground. Is this court to bypass Section 21 of the Interpretation Act and ignore the force and effect of Section 11(3) of the Extradition Act? Additionally **Union of India v Manohar Lal Narang** [1977] 2 All E.R. 348 and **Re Tarling** [1979] 1 All E.R. 982 were cited on behalf of the fugitive to demonstrate that this was an arguable point. It is against this background that I must now turn to the two original grounds on which submissions were permitted.

Ground 1(b) of The Original Notice of Appeal

It is appropriate to turn to the original grounds filed on 22nd October, 1996, before the reasons for judgment, were delivered. To restate the second ground for ease of reference, which reads:

> **(b)** "That the learned Resident Magistrate erred by accepting into evidence and/or relying on the Affidavits purportedly made by anonymous deponents "John Doe" # 1 and "John Doe" # 2."

This ground relates to the Virginia Indictment and the initial approach must be to analyse it to ascertain its meaning. Then it will be necessary to see if Mr. Ramsay impliedly raised or argued any of his supplementary grounds on this aspect of the case and thereafter it will be necessary to examine the reasons for judgment of the Full Court on this ground to test its correctness.

What is the meaning of "and/or" in the context of this ground? It is a shorthand way of pleading in the alternative. The issues raised concern admissibility and weight to be attached to the relevant evidence. In short the ground is averring that the evidence of the "Does" ought not to have been accepted, but, if that was not correct, then even if it was accepted it ought not to have been relied on to found a prima facie case to warrant committal.

Were the "Does' " identity unknown to the fugitives as was averred?

Michael Campbell was called on behalf of the fugitive at the preliminary examination and under cross-examination by Mr. Hibbert. The following evidence emerged:

> "On the indictment they called me JOHN DOE # 2 A.K.A. Sugar Belly. Yes 'Banana' was referred to as JOHN DOE # 1. I knew somebody called SNOWMAN. He was also charged on the indictment as JOHN DOE #3, but he wasn't there with us. I don't know Chris Bogle."

As for the identity of John Doe # 1 also known as "Banana" the witness said earlier in examination in chief to Lord Gifford Q.C. for the fugitive.

> "I know a man called 'Banana'. He was living in Los Angeles at that time. I knew him well. I knew a man called 'Red Roy'. I don't know Banana's full name. I only call him 'Tony'. I knew 'Red Roy' well from back home. He was in Los Angeles, California at this time I only know him as 'Red Roy."

So the only remaining fact is the surname of Tony. Then the evidence from Gladstone Lawrence for the requisitioning state explains the identity of 'Tony'. The affidavit of Ronald Jones giving evidence on the Florida Indictment reads:

> "2. Before I came to the United States, I knew Vivian Blake, Jim Brown and Tony Bruce in Jamaica.
>
> 5. Members of the Shower Posse purchased marijuana and cocaine in the Miami area. These drugs were brought to various houses in the Miami area, where they would be packed into these houses. I personally saw Vivian Blake and Jim Brown inside these houses. After the suitcases were packed, female couriers were taken to the airport with the suitcases for the purpose of transporting the drugs to other cities. The drugs were sent to New York City, New York; Rochester, New York; Detroit, Michigan, Los Angeles, California and to other locations. Tony Bruce, who

> is Vivian Blake's brother, was responsible for distributing the drugs in New York City.
>
> 12. In New York, I stayed in various apartments that were used by Tony Bruce for the stashing of marijuana and cocaine. The drugs were delivered to the apartment by female couriers from Miami"

Then the evidence of Gladstone Lawrence who also gave evidence on the Florida indictment reads:

> "3. In the early 1980's I was living in the Bronx, New York City, at which time I met Errol Hussing, Tony Bruce and Vivian Blake. It was my understanding that Errol Hussing, Tony Bruce and Vivian Blake are related to each other. I became aware of the fact that they were all in the business of selling marijuana out of various apartments in the Bronx. I began selling pound quantities of marijuana for these individuals out of apartments they operated in the Bronx. While working out of these apartments, I saw females bringing suitcases filled with marijuana to the apartments. In addition to assisting in the sale of marijuana, I also transported marijuana between the various apartments that were used by Errol Hussing, Tony Bruce and Vivian Blake."

Further Everald Ffrench another witness stated:

> "5. In 1982, Vivian Blake, and his brother Tony Bruce were in the business of selling marijuana in the Bronx, New York. Vivian Blake came to me and asked me to work for his marijuana distribution organization, which was known as the Shower Posse. I told him that I would. I went to the airport on numerous occasions and picked up females with suitcases who were arriving from Florida. I would drive these females to various apartments in the Bronx which Vivian Blake and Tony Bruce used for the distribution of marijuana. I frequently went inside these apartments, where I would see Vivian Blake in the presence of marijuana. The suitcases were filled with marijuana."

In this analysis John Doe # 1 and John Doe # 2 were neither anonymous to the fugitive or the prosecuting authority. What is surprising is that neither of the parties embarked on this analysis of the evidence in the court below. In this court the matter was not debated perhaps because one of the attorneys at-law on the record said:

> "16. That if the true identities of the witnesses had been known, I would have been able to make inquiries on the Applicant's behalf and (depending on those inquiries) to have called witnesses before the Resident Magistrate to controvert their evidence."

But John Doe # 2 Michael Campbell was called as a witness before the Resident Magistrate.

To my mind it was open to the Resident Magistrate to admit the evidence by the "Does". It was her committal proceedings pursuant to Section 64 of the Judicature (Resident Magistrates) Act and Part II of the Justices of the Peace Jurisdiction Act and Sections 1 & 2 of The Extradition Act.

I turn to the question as to whether the evidence was sufficient as a matter of law. The kernel of the evidence of Tony Bruce who was John Doe #1 or Sugar Belly was contained in the following paragraphs:

> "3. In the fall of 1987 I was introduced to two Jamaicans by some acquaintances of mine for the purpose of purchasing cocaine. I purchased one-half kilogram of cocaine from them for approximately $14,000.00 Several days later I contacted these Jamaicans in an attempt to set up regular business dealings. They then contacted their employer, Vivian Blake, who I know as "Jamaican Dave." Blake then came to Virginia Beach, Virginia. I met with him and purchased one-half kilogram of cocaine from him for approximately $13,500.00.
>
> 4. Thereafter, I continued to buy cocaine from Blake. I introduced him to friends of mine who were also cocaine dealers, including John Doe # 2.

> John Doe # 2 also purchased cocaine from Blake. I normally purchased one kilogram of cocaine at a time from Blake, but held as much as seven kilograms of cocaine for him at my home until his customers could pick it up."

On this basis John Doe #1 was an accomplice. As for John Doe # 2 he stated that:

> "3. In 1988 I was introduced to Vivian Blake, whom I knew as "Jamaican Dave," by John Doe # 1, at a motel in Virginia Beach, Virginia. At this first meeting Blake offered to supply one kilogram of cocaine each to John Doe # 1 and me. Because I did not know or trust Blake I refused his offer, but John Doe # 1 accepted one kilogram of cocaine from Blake on consignment. I receive nine ounces of that cocaine from John Doe # 1.
>
> 4. Afterwards, I continued to purchase cocaine from John Doe # 1 that he had obtained from Blake. Within a few months I was receiving kilograms of cocaine from John Doe # 1 that he had purchased from Blake.
>
> 5. On several occasions during this time frame I accompanied John Doe # 1 when he delivered $20,000.00 to $25,000.00 to Blake at own house in Virginia Beach, Virginia."

Then John Doe # 2 continued thus:

> "6. In April, 1988, John Doe # 1 was arrested. After the arrest I was contacted by Blake. I advised Blake of the arrest and Blake told me that John Doe # 1 owed him money for cocaine. At that time John Doe # 1 was storing a kilogram of cocaine at the home of a person I know as "Terry." Blake told me to take the cocaine to another individual, which I did. I then purchased one-half kilogram of that cocaine.
>
> 7. Shortly after the arrest of John Doe # 1 Blake left the Tidewater, Virginia area. After John Doe #1's release from jail he contacted Blake and convinced him to return to Virginia and resume selling us cocaine. Thereafter I received a kilogram of cocaine from John Doe # 1 that he had purchased from Blake. About three weeks later I began dealing directly with Blake. Blake would

> contact me on my pager, and I would meet him and/or his workers to obtain cocaine. On the first direct transaction with Blake I met Blake and a person I know only as "Mike," one of Blake's workers, at a town house in Virginia Beach, Virginia. I received a kilogram of cocaine from Blake, for which I later paid approximately $23,000.00 - $24,000.00."

It is instructive to refer to the submissions of Lord Gifford, Q.C., in the Supreme Court to demonstrate how this aspect of the case was conducted both below and in this Court. Smith J, wrote:

> "Lord Gifford submitted:
>
> 1. That the law requires that the evidence albeit written, must be evidence which if given orally in a Preliminary Enquiry would be sufficient to justify a committal for trial. In this regard heresay evidence is no more admissible in an extradition hearing than it would be in a preliminary enquiry. [Emphasis supplied]
>
> 2. That in terms of proof the Requesting State relies only on the evidence of John Doe #1 and John Doe #2.
>
> 3. That anonymous witnesses are not permitted in the Courts of Jamaica. Therefore a Resident Magistrate could not lawfully order the committal of an accused person in Jamaica on the basis of evidence from persons whose identity was not disclosed.
>
> 4. The reason for the unlawfulness of anonymous evidence is that an accused person at a Preliminary Enquiry or trial is entitled to know who are his accusers so that he may refute them if he can.
>
> 5. Where cross-examination is not possible because evidence is being given by affidavit and the witness cannot be compelled to attend, there is all the greater necessity in the interest of justice for the identity of the witness to be disclosed.

> 6. It is a dangerous precedent, which should not be countenanced, to allow a foreign state to obtain extradition of Jamaican citizens on the evidence of anonymous informers"

To my mind taking into account the evidence at the committal proceedings, the fugitive, the court, and the prosecution knew or ought to have known the identity of the "Does". The identity was also known to the Supreme Court. So the elaborate analysis of authorities in the court on the basis that the identity of the"Does"was not known was unnecessary in the circumstances of this case. My conclusion is that the evidence was admissible.

What seems remarkable about Lord Gifford's submission is that there is no mention of accomplice evidence. The learned Magistrate gave no reasons for her decision regarding the basis of her finding that there was sufficient evidence to commit. It is not the usual practice to give reasons for finding a prima facie case in domestic proceedings, but it certainly is the usual practice in this jurisdiction to do so in extradition proceedings. Lord Gifford also appeared at the committal proceedings, so it is a reasonable inference since he did not raise it in the Supreme Court that he did not raise the issue there. The issue was not debated in this court. The modern tendency is to infer that where reasons ought to be delivered and there are none the matter was not considered by the tribunal and in such circumstances a finding that there was a error of law is permissible.

The Supreme Court arrived at the same conclusion as I have that the evidence was admissible albeit through a different route. Smith J, then said

> "But is this conclusive? I think not. Even though the depositions are admissible, the magistrate must be satisfied that the evidence would be sufficient to warrant the applicant's trial for the offence if the offence had been committed in Jamaica. Thus if, for example, the depositions contain only heresay

> evidence or evidence which in law requires corroboration, and there is none, the magistrate would attach no weight to such evidence and would not commit the prisoner. This leads us then to the second question." [Emphasis supplied]

It will be demonstrated that as regards evidence which requires corroboration it seems the learned judge stated the principle somewhat wider than the authorities suggest. Additionally it is significant that he made no mention of the evidence of accomplices although the evidence establishes that both "Does" were accomplices.

The starting point in the learning on this issue is Lord Parker's celebrated Practice Note [1962] 1 All ER 448, which reads:

> "A submission that there is no case to answer may properly be made and upheld: (a) when there has been no evidence to prove an essential element in the alleged offence; (b) when the evidence adduced by the prosecution has been so discredited as a result of cross-examination or is so manifestly unreliable that no reasonable tribunal could safely convict on it.
>
> Apart from these two situations a tribunal should not in general be called on to reach a decision as to conviction or acquittal until the whole of the evidence which either side wishes to tender has been placed before it. If, however, a submission is made that there is no case to answer, the decision should depend not so much on whether the adjudicating tribunal (if compelled to do so) would at that stage convict or acquit but on whether the evidence is such that a reasonable tribunal might convict. If a reasonable tribunal might convict on the evidence so far laid before it, there is a case to answer."

Smith's. J. preferred statement of principle reads thus:

> "However in **Lloyd Brooks v. Director of Public Prosecution.. Privy Council Appeal No. 43 of 1992** their Lordships held that:
>
> Questions of credibility, except in the clearest of cases, do not normally result in a finding that there

> is no prima facie case. They are usually left to be determined at trial."

We have seen that John Doe #1 (Tony Bruce) and John Doe # 2 (Michael Campbell) were accomplices. Therefore it is appropriate to turn to the extradition cases dealing with accomplice evidence, bearing in mind that because of the unreliability of this type of evidence corroboration is required. If there be no corroboration the tribunal should warn itself of the dangers of acting on this type of evidence. However every case has its own particular features which must be taken into account when arriving at a decision.

Armah supra is a good starting point. Lord Reid said at page 235:

> "But whether that is a good explanation or not I am satisfied that the weight of the authorities which I have cited supports the view that the court can and must interfere if there is insufficient evidence to satisfy the relevant test. And in the present case that test is whether a magistrate could reasonably have held that a strong or probable presumption had been made out.
>
> I do not think that the evidence before the magistrate in this case could reasonably be held to satisfy that test for the reasons given by my noble and learned friend Lord Pearce."

Then Lord Pearce observed at page 248.

> "So far as concerns the evidence itself, I share the views expressed by the judges below. Its strength is that it provides a clear direct assertion by Fattal that the Minister asked and received from him a bribe. But the evidence must be considered in toto. And it contains inherent weaknesses which become more apparent the more carefully one probes.
>
> Fattal's evidence is that of an accomplice. That is not in itself a fatal objection. But the courts have always held that it is dangerous to convict on the evidence of an accomplice unless there is corroboration. The circumstances of this case do not exclude the reasons that have led our courts to

> view with suspicion the uncorroborated accomplice. And here there is little or no corroboration."

In continuing his examination His Lordship said:

> "The evidence of Fattal himself is unsatisfactory and presents improbable features."

Stressing the fact that Fattal was an accomplice, His Lordship said:

> "Taking into account the details and discrepancies of Fattal's evidence, the fact that he was an accomplice, that such an allegation is easy to make, and the absence of any adequate corroboration, I would agree with the three learned and experienced judges in the Divisional Court that the evidence here does not raise a strong or probable presumption if one is to give to those words their ordinary meaning."

Lord Upjohn asked at page 257:

> "3. Ought the magistrate's order to be discharged in this case?"

Then he answered it at pages 261-262:

> "So I turn to the third question I have posed, and I shall be very brief. It is a question of mixed fact and law but principally of fact. The relevant facts have been very carefully analysed by my noble and learned friend Lord Pearce in his speech and I agree with his conclusion. Again, I am glad to find strong support for this view in the judgments in the court below."

Here it is prudent to cite Section 43 of the Justices of the Peace Jurisdiction Act. It reads:

> "When all the evidence offered upon the part of the prosecution against the accused party shall have been heard, if the Justice or Justices then present shall be of opinion that it is not sufficient to put such accused party upon his trial for any indictable offence, such Justice or Justices shall forthwith order such accused party, if in custody, to be discharged as to the information then under inquiry; but if, in the opinion of such Justice or Justices,

> such evidence is sufficient to put the accused party upon his trial for an indictable offence, or if the evidence given raise a strong or probable presumption of the guilt of such accused party, then such Justice or Justices shall by his or their warrant (according to Form (26) (a) in the Schedule) commit him to prison to be there safely kept until he shall be thence delivered by due course of law, or admit him to bail as hereinbefore mentioned."

Then Section 10(1) of The Extradition Act states:

> "10.-(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."

Moreover Section 10(5) of The Extradition Act makes it plain which test is to be used. It reads:

> "(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-
>
> > 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
> >
> > where the person is alleged to be unlawfully at large after conviction for the offence, that he has been so convicted and appears to be so at large,
>
> 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."

So the issue of law is whether having regard to the inherent weakness of the evidence of the two accomplices, the test adumbrated in Section 10(5) supra has been satisfied.

The important case of **Alves v Director of Public Prosecutions** [1992] 4 All ER 787 was on the fugitive's list of authorities. Before adverting to the principles laid down in that case, the area dealing with accomplice evidence must be cited. Lord Goff said at page 790:

> "Although Price did not give his evidence on oath (because under Swedish law an accomplice cannot be required to give evidence on oath), he was reminded of his duty to speak the truth when questioned in court, and he declared himself to be aware of his duty of truthfulness. The evidence then given, consisting of both the questions of the prosecutor and Price's answers to those questions, was recorded on tape. A transcript of this evidence in English was available in the present proceedings, running to 21 pages. In his evidence Price described in detail the dealings in cannabis in which he had been involved. Throughout his evidence Price implicated the respondent (whom he identified from a photograph) in those dealings as the man who had informed him of the consignment of cannabis in Sweden, and had asked him and a man named Ryan (who had also been sentenced to seven years' imprisonment) to deliver it to customers in Sweden. Throughout his dealings with the cannabis in Sweden Price was, as he explained, answerable to the respondent; and he described in detail his conversations with the respondent during which he received instructions from him."

In marked contrast the evidence of John Doe #2 states that he is a citizen of the United States. Before the Resident Magistrate he stated that he lived in the United States of America April 18th, 1982, until January 7, 1993 and that he was deported.

The only direct evidence against Blake was as follows:

> "7. About three weeks later I began dealing directly with Blake. Blake would contact me on my pager, and I would meet him and/or his workers to obtain cocaine. On the first direct transaction with Blake I met Blake and a person I know only as "Mike", one of Blake's workers, at a town house in Virginia Beach, Virginia. I received a kilogram of cocaine from Blake, for which I later paid approximately $23,000.00 - $24,000.00."
>
> "9. In August, 1988, I purchased an additional two kilograms of cocaine from Blake. Two to three weeks after this purchase, on August 31, 1988, I was arrested for possession of approximately two ounces of the cocaine I had received from Blake. Approximately a week after my arrest I was contacted by Blake, who told me to be more careful."

The rest of the evidence is hearsay. The only other evidence is that of John Doe #1 (Tony Bruce). After referring to fall of 1987, Bruce continued thus:

> "3. I met with him and purchased one-half kilogram of cocaine from him for approximately $13,500.00.
>
> 4. Thereafter, I continued to buy cocaine from Blake. I introduced him to friends of mine who were also cocaine dealers, including John Doe #2."

Then after recounting that he was arrested in April 1988, Bruce continued thus:

> "7. For a short time after I was arrested, Blake did not come to Virginia. Finally, I and other customers convinced him to return. I began purchasing two kilograms of cocaine from Blake every two to four weeks."

The following passage from **Alves** is of importance and must be cited in full. At page 791 Lord Goff said:

> "Before the Appellate Committee Mr. Nicholls QC submitted, on behalf of the Swedish government, that in committal proceedings in this country the same test is applicable as in the case of a submission by the defendant of no case to answer at the end of the prosecution evidence at his trial. In this connection he relied in particular on the statement of principle by Lord Lane CJ, delivering the judgment of the Court of Appeal in **R v Galbraith** [1981] 2 All ER 1060 at 1062; [1981] 1WLR 1039 at 1042, where he said:
>
> > 'How then should the judge approach a submission of "no case"? (1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case. (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the judge comes to the conclusion that the Crown's evidence, taken at its highest, is such that a jury properly directed could not properly convict on it, it is his duty, on a submission being made, to stop the case. (b) Where however the Crown's evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence on which a jury could properly come to the conclusion that the defandant is guilty, then the judge should allow the matter to be tried by the jury ... There will of course, as always in this branch of the law, be borderline cases. They can safely be left to the discretion of the judge'."

There is no evidence that either the Resident Magistrate or the Supreme Court considered the difficulty adverted to by Lord Lane where the evidence is of a tenuous

character, for example because of inherent weakness or vagueness or because it was inconsistent with other evidence. Be it recalled that was the test carried out by Lord Pearce in **Armah.**

The failure of both courts to consider this aspect was an issue of law and it is open to this court to find that the evidence was vague and ought not to be the basis of committal as was decided.

The other important passage in **Alves** at 793 reads thus:

> "The same approach must apply to the fact that Price was, on the Swedish government's case, an accomplice of the respondent, a matter upon which Mr. Newman also relied. Such a fact cannot ipso facto render Price's evidence worthless, even where, as here, the evidence of the accomplice is uncorroborated (see **Schtraks v Government of Israel** [1962] 3 All ER 529 at 533, [1964] AC 556 at 580 per Lord Reid). This is no doubt a matter which the magistrate should take into account when considering whether a witness's evidence is to be rejected as worthless; and I have no doubt that in the present case the magistrate did take it into account together with the fact that Price had retracted his earlier evidence implicating the respondent, when deciding whether to make an order for committal."

There is no basis in the instant case for being sure that the Resident Magistrate took into account that the evidence relied on was that of accomplices. Again it is open to this court as a matter of law to find that the evidence was tenuous and on that basis find that it was wrong to order committal of the fugitive.

There is a passage delivered by Ognall J in **R v Governor of Pentonville Prison ex parte Lee** [1993] 3 All ER 504 which is useful to demonstrate how a Resident Magistrate ought to treat committal proceedings in extradition cases. It runs thus at page 512:

> "The magistrate gave a carefully reasoned judgment where, in effect, he concluded that although there was no evidence directly linking the applicant with the subsequent ransom demands, his central position in the kidnapping raised a clear prima facie inference that he was a party to it for the purpose which subsequently emerged, namely ransom."

It is this salutary practice which assists Superior Courts of Record to appreciate if the Resident Magistrate has applied the law to the evidence before making a committal. In **ex parte Lee** the accomplice evidence was regarded as sufficient because it was demonstrated that the law was applied. In the instant case there is no evidence that the law was applied. There was not even an awareness that Michael Campbell gave evidence, that he was John Doe #2 and, the implication which arose from that testimony.

The ruling of the Privy Council on reasons
by the Magistrate in extradition cases

After this judgment was prepared and just before delivery I had the opportunity of reading the opinion of Lord Steyn in **Reg. v Government of Switzerland** [1998] 3 W.L.R. 1 at page 9. His Lordship envisaged that in 'extradition proceedings the principle of fairness may in particular circumstances require a magistrate to give reasons'. So it would have been appropriate to consider this aspect of the case especially since the fugitive complained that there was a breach of his constitutional right pursuant to Section 20(1) of the Constitution. This is an issue of utmost importance to the fugitive and the conduct of extradition proceedings in this jurisdiction.

In this regard I think it appropriate to cite the relevant passage in the opinion of Lord Steyn for guidance to Resident Magistrates. It runs thus at page 9:

"Issue 4: The magistrate's reasons

> The magistrate gave detailed reasons on the questions of law canvassed before her. She explained in respect of one charge why she was not satisfied that the evidence placed before her was sufficient. In respect of the other charges, she simply listed the evidence and expressed herself satisfied that the evidence was sufficient to commit the applicant. Counsel for the applicant submitted that the magistrate's decision was unlawful in as much as she failed to give reasons on disputed issues of fact. Counsel acknowledged that there was no authority for the proposition that a magistrate seized with the duty under section 10(5) of the Act of 1994, or a like provision, to decide whether to commit an accused person to custody to await extradition is bound to give reasons for his or her decision."

Turning to the position in England and the Bahamas Lord Steyn said at page 10:

> "The legal position in England and in The Bahamas can be summarised as follows. The law does not at present recognise a general duty to give reasons for an administrative decision: see **Reg. v. Secretary of State for the Home Department, Ex parte Doody** [1994] 1 A.C. 531, 564E, per Lord Mustill. But, as Lord Mustill observed in **Doody's** case, such a duty may in appropriate circumstances be implied. Lord Mustill with the concurrence of the other Law Lords sitting in **Doody's** case expressed agreement with the analyses of the Court of Appeal in **Reg. v. Civil Service Appeal Board, Ex parte Cunningham** [1992] I.C.R. 816 of the factors, which will often be material to such an implication. In the present case the judicial nature of the magistrate's function is a factor that generally speaking tends to support an implied duty to give reasons. But in **Cunningham's** case Lord Donaldson of Lymington M.R. observed, at pp. 825-826:
>
> > 'I accept at once that some judicial decisions do not call for reasons, the commonest and most outstanding being those of magistrates. However, they are distinguishable from

> decisions by the board for two reasons. First, there is a right of appeal to the Crown Court, which hears the matter de novo and customarily does give reasons for its decisions. Second, there is a right to require the magistrate to state a case for the opinion of the High Court on any question of law. This right would enable an aggrieved party to know whether he had grounds for raising any issue which would found an application for judicial review, although his remedy would procedurally be different'."

Then in conclusion His Lordship said:

> "Despite a growing practice in England of stipendiary magistrate to give reasons in extradition proceedings it has not been held that magistrates are under a legal duty to do so. And the legal position in England is perhaps justified by the right of the fugitive to apply for habeas corpus to the Divisional Court if the decision of the stipendiary magistrate goes against him: see section 11 of the Extradition Act 1989. Turning to the position in The Bahamas, a person committed to custody for extradition has under section 11 of the Act of 1994 a right to apply for habeas corpus to the Supreme Court with a further right to appeal to the Court of Appeal if his application for habeas corpus is refused. In these circumstances their Lordships are not prepared to hold that there is a general implied duty upon magistrates to give reasons in respect of all disputed issues of fact and law in extradition proceedings. But their Lordships must enter a cautionary note: it is unnecessary in the present case to consider whether in the great diversity of cases which come before magistrates in extradition proceedings the principle of fairness may in particular circumstances require a magistrate to give reasons. It did not so require in this case. It follows that in the present case the magistrate's failure to give reasons on disputed issues of fact was not unlawful."

In the light of this passage it was open to the fugitive to have contended that habeas corpus should have been issued on the basis that the Constitution had been breached as regards the Virgina warrant.

As habeas corpus proceedings is an aspect of judicial review this point could have been taken at any stage of the proceedings. However without argument I am not prepared to come to a conclusion on the Florida warrant on this aspect of law.

The Limitation point as regards the Virginia Indictment

This ground was fully argued by Mr. Ramsay as regards the Virginia Indictment without any opposition by the respondents. In their response they did not reply to it. It is convenient to set out the ground in full, refer to the statutory provision and the evidence adduced by the United States of America and then examine the relevant indictments to ascertain if the fugitive has made out his case pursuant to Section 7(1) of The Extradition Act that on this aspect of the case he should be released. The ground runs thus:

> **"LIMITATION**
>
> 7. That Count two (2) of the Indictment numbered 93-8-N is statute barred in the State of Virginia by reference to the law supplied. (See Affidavit of Laura M. Everhart P. 111).
>
> That accordingly the rule of double criminality is violated by a committal upon the said count.
>
> And that the learned Full Court erred in upholding the said committal having regard to S. 7 (d) of the Extradition Act 1991."

Here is the relevant part of the expert evidence on the issue by Laura M Everhart Assistant United States Attorney for the Eastern District of Virginia:

"5...

All of the offences charged are felonies under United States law, punishable by more than one year of imprisonment. The statute of limitation as it applies to this case is five years. The charges in this case were lodged on January 20 ,1993, as reflected on the first page of the Indictment. Each charge or count, as reflected by the date on which the offenses were said to be committed has been brought well within the statute of limitations. Once an Indictment has been filed in the Federal District Court, as with these charges against BLAKE, the statute of limitations is tolled and no longer runs. The reason for this is so that a criminal cannot escape justice simply hiding and remaining a fugitive for a long time."

The statutory provision reads:

"LIMITATION

(I) The Attorney General may not under this subsection commence proceeding against an individual after the expiration of the 5-year period beginning on the date on which the individual allegedly violated subsection (a) of this section."

The offending count as charged reads:

"**COUNT TWO**

THE GRAND JURY FURTHER CHARGES THAT;

In or about Fall, 1987, in the Eastern District of Virginia, VIVIAN BLAKE, a/k/a 'Jamaican Dave,' defendant herein, did unlawfully, knowingly and intentionally distribute approximately one-half kilogram of cocaine, a Schedule II narcotic controlled substance.

(In violation of Title 21, United States Code, S 841(a) (1).)"

The relevant section of The Extradition Act reads:

"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 or to the Supreme Court on an application for *habeas corpus* -
>
> . . .
>
> (d) if the offence of which that person is accused is statute barred in the approved State that has requested his extradition;..."

On the above analysis it is clear that the fugitive cannot be extradited in respect of this count on the Virginia Indictment. This Supplementary ground succeeds.

It is now appropriate to turn to ground 3 of the Supplementary ground which render in full:

> **"PROOF OF THE SUBSTANCE**
>
> 3. That the Full Court erred in law in holding that prima facie cases had been made out against the Appellant before the Committing Magistrate in respect of any and/or all the charges relating to the alleged prohibited substances of Ganja and Cocaine In that:-
>
> (a) The Requesting State failed to prove an essential ingredient of the crime alleged as there was absolutely no proof whatever of the nature of the prohibited substances as required by Jamaican law.
>
> (b) That on page 119 of the Record, paragraph 16 of the Affidavit of Laura M. Everhart the Assistant United States Attorney, it is contended that the nature of the substance could be proved by circumstantial evidence, that is by persons who saw it, smelled it, used it, delivered it etc.: And further by chemical analysis of some of the substance that was recovered.
>
> WHEREFORE IT IS SUBMITTED; (i) Circumstantial evidence of the type suggested has never been held to be sufficient in Jamaican law and some kind of scientific analysis whether chemical or

> botanical has always been required upon contest.
>
> (ii) That absolutely no evidence of chemical analysis was submitted with the papers of the Requesting State: And the Court or the forum is not entitled to assume that such evidence exists in the United States though it has not been sent to Jamaica. See **Ex parte Morally 14 JLR P.1."**

The procedure with respect to this ground will be to refer to the warrant of committal and in particular the offences which in this jurisdiction require scientific proof and to the relevant authority in extradition cases. Then there will be reference to that evidence supported by the United States of America. Here is the relevant section of the Virginia Warrant:

> "BE IT REMEMBERED that on this 7th day of July 1995, Vivian Blake is brought before me pursuant to a warrant for his arrest issued under Section 9 of the Extradition Act 1991, on the ground of his being accused of the crimes of (a) conspiracy to distribute and possess with intent to distribute cocaine; (b) Five counts of distributing cocaine (c) Five counts of aiding and abetting the distribution of cocaine (d) Two counts of aiding and abetting interstate travel to promote narcotics trafficking (e) two counts of aiding and abetting the possession with intent to distribute cocaine as charged in indictment Criminal number 93-8-N filed in the United States District Court for the Eastern District of Virginia, Norfolk Division, on the 20th January, 1993, inasmuch as the provisions of Section 10(5) of the Act with regard to his committal have been satisfied."

With respect to the inchoate offence of conspiracy or aiding and abetting it is arguable that Blake's participation can be proved without scientific evidence. However, under the law in this jurisdiction to succeed on charges for distributing cocaine, there must be expert evidence adduced. Those counts are Counts 2 to Counts 6

represented on the warrant at (d) Five Counts of distributing cocaine. Section 2 of The Dangerous Drugs Act reads:

> "2.-(1) In this Act -
>
> "coca leaves" means the leaves of any plant of the genus of the Erythroxylaceae from which cocaine can be extracted either directly or by chemical transformation;

Then Section 4 reads:

> "The Minister may make regulations for controlling or restricting the importation, exportation, transit, production, possession, sale, and distribution, of raw opium or cocoa leaves, and in particular, but without prejudice to the generality of the foregoing power, for prohibiting the production, possession, sale, or distribution, of raw opium or coca leaves except by persons licensed or otherwise authorized in that behalf."

Further Section 8 reads:

> "8. Every person who imports or brings into, or exports from, the Island any drug to which this Part applies except under and in accordance with a licence, and into or from prescribed ports or places, shall be guilty of an offence against this Act."

Then Section 22(7) (b) reads:

> "(7) A person, other than a person lawfully authorized, found in possession of more than -
>
> . . .
>
> (b) one-tenth of an ounce of cocaine;
>
> is deemed to have such drug for the purpose of selling or otherwise dealing therein, unless the contrary is proved by him."

Then the crucial section 27 reads:

> "In any proceedings against any person for an offence against this Act the production of a certificate signed by a Government Chemist or any

> Analyst designated under the provisions of section 17 of the Food and Drugs Act, shall be sufficient evidence of all the facts therein stated, unless the person charged requires that the Government Chemist or any Analyst be summoned as a witness, when in such case the Court shall cause him to attend and give evidence in the same way as any other witness."

Two passages from the affidavit of Laura M. Everhart illustrates the gap in the evidence required in this jurisdiction. The first reads:

> **" SUMMARY OF CASE"**
>
> ...
>
> The United States will prove its case through eyewitness testimony and through the use of physical evidence, such as the cocaine seized from conspirators, and through documentary evidence, such as leases, vehicle and motel rented records, receipts for air travel, and telephone records. Attached to this affidavit as exhibits D and E are the affidavits of two witnesses, John Doe # 1 and John Doe #2. Both of these individuals were directly involved with VIVIAN BLAKE in the cocaine conspiracy described in the indictment."

The other reads:

> "16. In order to prove in court that the substance possessed or distributed was in fact cocaine, the United States may utilize reliable circumstantial evidence. In this case the testimony of 17 persons familiar with cocaine, who saw it, smelled it, and in some instance used it, taken together with the circumstances under which the cocaine was delivered, is evidence of the type acceptable to the United States courts on this issue. In addition, some of the cocaine was seized and evidence of a chemical analysis performed upon it will be presented."

The initial point to make is that the evidence to extradite should be presented to the Resident Magistrate for her to determine if it was sufficient in Jamaican Law to

extradite the fugitive. There is no evidence to connect the "Does" with the exhibits referred to by Laura M. Everhart. Nor was there any evidence before the Resident Magistrate to show from whom the cocaine was seized. Moreover there was no expert evidence to satisfy the court that the cocaine seized was examined by an expert or his evidence forwarded to the Resident Magistrate.

Expert evidence was needed for the five counts referred to in the warrant and it was not produced. In this connection it is appropriate to refer to Section 10(5) of the Extradition Act to demonstrate the error or the illegality on the face of the warrant:

> "(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 -
>
> (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) where the person is alleged to be unlawfully at large after conviction for the offence, that he has been so convicted and appears to be so at large,
>
> 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."

It is convenient to examine the Warrant of Committal on the Florida indictment and subject it to the same analysis with respect to the substantive charges. The counts are numbered in the warrants as follows: (4) Exporting Marijuana (Count 30) and (5)

Exporting Cocaine (Count 31). There being no expert evidence the fugitive cannot be extradited for these offences either. For clarification these two counts must be cited.

COUNT 30

> "In or about April, 1984, in Dade County, in the Southern District of Florida, and elsewhere, the defendants did knowingly and intentionally export from the United States to a place outside thereof, a Schedule I controlled substance, that is at least 50 kilograms of a mixture and substance containing a detectable amount of marijuana; in violation of Title 21, United States Code, Section 953 (c), and Title 18, United States Code, Section 2."

COUNT 31

> "In or about April, 1984, in Dade County, in the Southern District of Florida, and elsewhere, the defendants,
>
> VIVIAN BLAKE
> and
> TREVOR HYATT,
>
> did knowingly and intentionally export from the United States to a place outside thereof, a Schedule II narcotic controlled substance, that is, at (sic) one kilogram of a mixture and substance containing a detectable amount of cocaine and its salt, cocaine hydrochloride; in violation of Title 21, United States Code, Section 953 (a), and Title 18, United States Code, Section 2."

Summary as regards the Virginia Indictment

I would set aside the Warrant of Committal in respect of the Virginia Indictment. The principal reason for so doing is that the evidence of the accomplices John Doe #1 and John Doe #2 was tenuous and so lacking in the particularity in respect of serious offence . The statute of limitation applies to Count 2 of the Indictment as stated in the Supplementary Ground. There was no expert evidence as regard the five counts for

distributing cocaine. In the light of these findings Section 10(5)(a) of the Extradition Act which pertains to the sufficiency of evidence has not been satisfied.

Ground 1(a) of The Original Notice of Appeal

To reiterate for ease of reference ground 1(a) reads:

> "1. The Full Court erred in law in not holding:-
>
> **(a)** That the accusations against the Appellant in the indictment in the Southern District of Florida were not made in good faith in the interest of justice."

The statutory provision is Section 11 and the relevant sub-section reads:

> "11-(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"

Then Section 11(3) reads:

> "(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 -
>
> ...
>
> **(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."

Then Section 11(4) provides a further safeguard. It reads:

> "(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,"

There are amendments in Section 11(5) and (6) which specifically pertain to the powers of this court. So it is appropriate to set them out:

> " (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."

And then Section 11(6) states:

> "(6) For the purpose 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."

The factual basis for this aspect of the case is based on the affidavits of Mr. George Soutar, the fugitive's Attorney-at-Law on the record. The extradition of Richard Morrison (Storyteller) has generated wide publicity and it is on the basis of the trial of Morrison in Florida that the fugitive claims that the request for him has not been made in good faith pursuant to Section 11(3)(c) of the Extradition Act.

So the first issue to be considered is the request and in particular when it was made. The supplementary ground of Appeal reads:

> "**THE REQUEST**
>
> 5. That the Magistrate erred in over-ruling the objection of Appellant's Counsel as to the non-production of the Request basing the Authority to proceed in relation to Indictment numbered 88-0652 Cr-Gonzalez (Florida).
>
> WHEREFORE IT IS SUBMITTED that the Court has jurisdiction to review and control executive action; hence the Magistrate acted outside her jurisdiction thereby rendering the order for Committal null and void: And the Full Court erred in upholding the aforesaid Committal Order."

Here is how the request arose before the Resident Magistrate. It occurred during the evidence in chief of Mrs. Deta Cheddar.

"In my job I am accustomed to seeing in relation to extradition matters, Authorities to proceed issued by the Honourable Minister of National Security and Justice.

(Document handed to witness).

This is an authority to Proceed in respect of the request for extradition of Vivian Blake, signed by the Minister of National Security and Justice. There is also the seal of the Ministry of Justice to indicate its origin..

Tendered for admission as Exhibit 4.
Lord Gifford objects

-authority to proceed must depend upon a request from the foreign state. If the Dep. Director of Public Prosecutions has not proved the request he should not be able to prove the authority as to be valid it must be issued in pursuit of a request.
See S. 8 (1).

Ruling: Document speaks for itself: Court can't go behind issue of document to say whether or not request received by Minister.

Admitted as Exhibit 4."

It is the 'authority to proceed' which is the basis of the Resident Magistrate's jurisdiction. Section 8(1) of the Extradition Act 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."

The request is the necessary pre-requisite for the Minister to issue the authority to proceed and the statutory provision reads:

> "(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."

It does not seem essential for the Resident Magistrate to see the Request at that stage. So the Resident Magistrate's ruling is to be supported. Perhaps it is appropriate to refer to the Authority to Proceed in respect of the Florida Charge.

> "**THE EXTRADITION ACT, 1991**
> **AUTHORITY TO PROCEED**
>
> **TO THE RESIDENT MAGISTRATE FOR THE PARISH OF SAINT ANDREW**
>
> **WHEREAS** a request has been duly made to me, **KEITH D. KNIGHT**, Minister of National Security and Justice, on behalf of the United States of America for the surrender of **VIVIAN BLAKE aka DAVE** accused of the offences of (1) Conspiracy to possess and distribute Cocaine and Marijuana,(2) Conspiracy to conduct and participate in the conduct of the affairs of an enterprise through a pattern of racketeering involving, among other acts the exportation of Cocaine and Marijuana, Murder and attempted Murder and (3) Exporting Cocaine and Marijuana.
>
> **NOW I HEREBY,** by this Order under my hand and seal, signify to you that such request has been made, and require you to issue your Warrant for the apprehension of such fugitive, provided that the conditions of the **Extradition Act, 1991**, relating to the issue of such Warrant, are, in your judgment, complied with.
>
> Given under the hand and seal of the undersigned Minister of National Security and Justice, this 16th day of July, 1992."

There is a similar authority to proceed for the Virginia charge dated 22nd day of April, 1994. In habeas corpus proceedings it is however legitimate to seek to determine if there was a request. So it is appropriate to examine the request to ascertain if its existence can be determined either expressly or by necessary implication.

Here is an extract from a request dated January 19, 1994. It is clear that this note summarises earlier requests and in addition makes new requests:

> "The Embassy of the United States of America presents its compliments to the Ministry of Foreign Affairs and Foreign Trade of the Government of Jamaica and has the honor to refer to the Embassy's note 413 of August 22, 1989, requesting the provisional arrest for the purpose of extradition of Vivian Blake, note 508 of November 13, 1991, requesting the extradition of Vivian Blake, note 148 of April 4, 1990, and the Ministry's note 8/804/71 of December 4, 1989. The Embassy also has the honor to request the provisional arrest for the purpose of extradition of Vivian Blake on additional charges.
>
> According to Director of Public Prosecutions, Vivian Blake was arrested in Kingston January 14, 1994, pursuant to the Embassy's initial extradition request, which was based on charges pending in the Southern District of Florida. The Department of Justice has recently learned of additional charges against Vivian Blake pending in the Eastern District of Virginia."

It is clear from this summary that there was an earlier request pertaining to the Florida charges and this request is reiterated thus:

> "The Embassy also requests that the Jamaican Ministry of National Security and Justice and appropriate law enforcement entities make every effort to have an order to proceed issued and a warrant obtained on these new charges prior to the time that Blake's case on the initial charges is scheduled for a hearing."

Then the request continues:

> "The Embassy wishes to note that the new charges are meant to supplement, not replace, the original charges."

With respect to the Florida charges the following is the Certification:

CERTIFICATION

> "I Drew C. Arena, Director, Office of International Affairs, Criminal Division, United States Department of Justice, do hereby certify that attached hereto and prepared in support of the request for the extradition of Vivian Blake from Jamaica, is the original affidavit of Andrew J. Reich, an Assistant United States Attorney for the Southern District of Florida, sworn to on October 22, 1991, before a United States Magistrate Judge for the Southern District of Florida. I further certify that attached to and included as part of the affidavit prepared by Mr. Reich, are the following exhibits."

There is a similar certification for the Virginia charges by John Harris dated February 25, 1994. In light of the above I can find no merit in this supplementary ground.

Returning to the allegation of bad faith it will be noticed that October 22, 1991 was the date Andrew J. Reich the Assistant United States Attorney swore and deponed before United States Judge for the Southern District of Florida. According to the affidavits of Mr. George Soutar, Richard Morrison was tried and convicted on 24th April, 1992 on an indictment laid in the Middle District of Florida. So that the request for the fugitive was made before the alleged illegal trial of Morrison.

This is supported by Morrison's attorney-at-law in the United States, Mr. Kinley Engvalson. Here are the relevant passages:

> "5. That on April 24, 1992 I raised before the Court at Fort Myers my client's belief that he has not been

> extradited for the Fort Myers case but only for the Southern District Indictment.
>
> 6. That at the said hearing Russell Stoddard, The United States Attorney, represented before the Court that Richard Morrison had been extradited on both the Fort Myers case and the Southern District case.
>
> 7. That Richard Morrison was then sentenced to a term of 24 years of imprisonment in relation to the Fort Myers case.
>
> 8. That I continue to represent Richard Morrison and can say that he has not stood trial with respect to the Southern District Indictment No. 88-0562, which has been dismissed."

This court can take judicial notice that the incident of Richard Morrison's (Storyteller) extradition to the United States has created great controversy in the media. It was alleged that he was extradited before his intended petition for special leave to the Privy Council was lodged in the United Kingdom and to compound it, it was admitted in this court that because of an error he was tried for an offence for which he was not extradited. All this however cannot support an allegation of bad faith on behalf of the United States of America.

There are three admirable statements by Smith, J. which ought to settle this issue. The first runs thus:

> "It seems to us that the proof or allegation of a breach of the treaty in respect of Richard Morrison is not and cannot be a sufficient basis for the inference that "the accusation" against the applicant was not made in good faith in the interest of justice. It must be borne in mind that this alleged breach took place long after the request for extradition.
>
> What the applicant is really saying is that there is a breach in respect of Morrison and consequently there can be no assurance that section 7(3) of the treaty would be a safeguard."

Then he concludes thus:

> "We venture to think that it is not for this court to assume or infer that any foreign government with which the government of this country has diplomatic relations will not honour the treaty. It is our view that any fear that the treaty will not be honoured in respect of the applicant because of the history of Morrison's case must be addressed to the Minister. In this regard S.12 (3) of the Act provides.
>
> > 'The Minister shall not make an order under this section in the case of any person if it appears to the Minister on the grounds mentioned in subsection (3) of section 11, that it would be unjust or oppressive to extradite that person.'
>
> We are clearly of the view that there is not one scintilla of evidence before this court to show that the accusation made against the applicant was not made in good faith in the interest of justice."

There is yet another accurate statement of Smith, J. which must be cited. The learned judge said:

> "We find it rather strange that Mr. Engvalson, the American attorney-at-law who represented Morrison at his trial failed to mention anything about appealing the conviction of Morrison in the Middle District Court of Florida. Surely his trial for offences other than those for which he was extradited would be unlawful."

It is always comforting when a judge in this jurisdiction states the correct principle even though counsel cited no authority to assist him. Here are statements of principle which support the learned judge's statement: Lord Reid in **Atkinson v. U.S.A.** [1971] A.C. 197 at page 231 said:

> "But prison- breaking is not an extradition crime, nor is attempted armed robbery, and article 7 of the Extradition Treaty with the United States of 1931 (Cmd. 4928) provides:

> 'A person surrendered can in no case be kept in custody or be brought to trial in the territories of the High Contracting Party to whom the surrender has been made for any other crime or offence, or on account of any other matters, than those for which the extradition shall have taken place, until he has been restored, or has had an opportunity of returning, to the territories of the High Contracting Party by whom he has been surrendered.'
>
> 'This stipulation does not apply to crimes or offences committed after the extradition.'

This is in line with section 3 (2) of the Extradition Act, 1870. As your Lordships expressed some concern about this, the respondent produced an affidavit of a well-qualified American lawyer to the effect that by Article VI of the Constitution of the United States the judges in every state are bound to act in accordance with treaties made by the United States. So, if the appellant is surrendered, it would be contrary to the law of Louisiana to require the appellant to serve the remainder of his 18 years' sentence until he has had an opportunity of returning to the United Kingdom."

Lord Guest put it this way:

> "He contends that as the State of Louisiana is not a party to the treaty, there is no evidence that according to Louisiana law the appellant shall not, until he has been returned to this country, be detained or tried in the United States of America for any offence committed by him prior to his extradition other than those upon which he has been extradited; and that there is no evidence of any 'arrangement' made between the United Kingdom and the State of Louisiana to that effect. This matter, however, has now been cleared up completely by the affidavit sworn by Mr. Gottesman, a member of the Bar of the State of New York and the United States Federal District Court for the Southern District of New York, and produced for your Lordships without objection by the appellant. The affiant states his opinion that under Article VI of the Constitution of the United States of America the judges of every state are

> bound to act in accordance with the treaties made under the authority of the United States of America." (See p. 245)

Then the expert evidence adduced in this court by the fugitive is revealing. The relevant paragraph reads:

> "15. The Extradition which is statutorily provided for in Florida concerns principally extradition from one State of the United States to another State within the country. However, the case of Moore restated the principle of specialty as enunciated in **United States v Raucher** that:
>
> Under the principle of specialty, as stated in **Raucher**, a person who is brought into the country generally can be tried against her will only for the offense described in the extradition order. **United States v. Raucher,** 119 US 407, 7 S. Ct. 234, 30 L.ED.425, (1886). The fugitive from a foreign country is to go on trial for the crimes or offenses specified in the warrant of extradition of which the fugitive is duly accused. According to the specialty rule, the fugitive may not be arrested or tried for any other offense than that with which he was charged in extradition proceedings until he has been given reasonable time to return to the country from which he was brought. To guarantee limited prosecution by nations seeking extradition of persons from the United States, the United States has guaranteed, pursuant to treaty, that it will honor limitations placed on prosecution in the United States. See **United States v. Cuevas,** (1988, CA9 Cal), 847 F. 2d. 1417, cert. denied 489 US 1012, 103 L. Ed. 185; 109 S. Ct. 1122."

This evidence was contained in an affidavit by Mr. David Rowe. As for his credentials this is how he put it:

> "1. I am an Attorney At Law. I was awarded the degree of Bachelor of Laws, Upper Second Class Honors, of the University of the West Indies, in 1980. I received the Juris Doctor Degree from the University of Miami School of Law on August 12, 1982. On October 26, 1983 I was admitted to practice as an Attorney-at-Law in the State of Florida and on October 26 1993 I was admitted to

> practice as an Attorney-at-Law in the United States District Court as a member of the Trial Bar. On the 19th November 1997 I was admitted as an Attorney and Counselor of the United States Court of Appeals for the Eleventh Circuit in Atlanta, Georgia.
>
> 2. Between 1983 and the present day I have practiced as a member of the Bar of the State of Florida and since 1993 I have practiced as a member of the Trial Bar of the District Court of the Southern District of Florida. I am familiar with the criminal law of the State of Florida and with the criminal law of the District Court of the Southern District of Florida."

As for the relevant ground of appeal it reads:

> **"LOCUS OF OFFENCES**
>
> 4. That Count 3 of the Indictment numbered 88-0652 Cr-Gonzales related, inter alia, to an incident in California and not in Florida from which the Indictment emanated: That accordingly without expert testimony to show that the state of Florida would have jurisdiction over acts committed in California, the learned Magistrate erred in making a Committal order in respect of the said Court and derivatively of Count 4"

The relevant section of Count 3 reads:

> "Murder and attempted murder, in violation of Florida Code Sections 782.04(1), 77.04 (1) and 777.011, New York Penal Code, Section 125.25, and California Penal Code Sections 187, 189 and 31; and Bribery, in violation of New York Penal Code Section 215.00."

There is exhibited in Exhibit 5 and Exhibit 12 the statutory provision for Murder in the State of Florida and California Law. An expert opinion is based on the material tendered to the expert. It would seem that it was the Warrant which was forwarded to Mr. David Rowe and not the complete record of two volumes which was presented to the court. Despite this the following passage in his evidence is instructive:

> "6. The District Courts administer Federal law. The District Courts are vested by 18 U.S.C. # 3231 with original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States. However, the same act or series of acts may constitute an offense equally against the United States and a State, subjecting the guilty party to punishment under the laws of each government and a State is not prevented from prosecuting an accused where the same act constitutes both a federal offense and a State offense. 18 U.S.C. # 3231."

Atkinson v . U. S. A. (supra) indicates that if the allegation of murder emanates from Florida or California and the Unites States of America under the request turns the fugitive over to the appropriate court in the state for trial it would be appropriate for the fugitive to be tried for murder in Florida and California if the evidence warranted committal.

The gist of charges in this case is however in contravention of Federal laws and the proposal is that there will be trials in Federal Courts. The evidence comes from Assistant United States Attorney Andrew J. Reich. The material part of his evidence is as follows:

> " 5. On September 28, 1988, Vivian Blake, along with Lester Coke, Richard Morrison and others, were indicted by a Federal Grand Jury in the Southern District of Florida.
>
> The indictment charges Vivian Blake with sixty (60) violations of law, six (6) of which are the subject of this request for extradition. All of these six (6) violations are offenses committed in connection with trafficking in dangerous drugs and murder."

Then he continues thus:

> " 8. In Count III, Vivian Blake, along with Lester Coke, Richard Morrison and others, is charged with conspiracy to conduct and participate in the conduct of the affairs of an enterprise through a pattern of racketeering involving, among other acts:

a) conspiracy to distribute cocaine and marijuana; b) exportation of marijuana; c) exportation of cocaine; and d) murder and attempted murder, all in violation of Title 18, United States Code, Section 1062 (d). The enterprise was commonly referred to as the "Shower Posse." Vivian Blake was one of the leaders of the Shower Posse. The pattern of racketeering is proved by showing that Blake engaged in at least two (2) acts of racketeering. Among the specific acts of racketeering engaged in by Vivian Blake are:

a) Conspiracy to distribute cocaine and marijuana. (Racketeering Act No. 1)

b) Exportation of marijuana. (Racketeering Act No. 2)

c) Exportation of cocaine. (Racketeering Act No. 3)

RACKETEERING ACT NOS 32-35 (PARAGRAPHS d-g BELOW RELATE TO AN INCIDENT IN MIAMI, FLORIDA, ON NOVEMBER 6, 1984.

d) Murder of Noel McIntosh. (Racketeering Act. No. 32)
e) Attempted murder of Bunny Smith. (Racketeering Act No. 33)

f) Attempted murder of Sandra Bramwell. (Racketeering Act No. 34)

g) Attempted murder of Yvonne Kelly. (racketeering Act No. 35)

RACKETEERING ACTS NOS. 36-41 PARAGRAPHS h-m BELOW RELATE TO AN INCIDENT IN MIAMI, FLORIDA, ON NOVEMBER 30, 1984

h) Murder of Gladstone Brightley. (Racketeering Act No. 36)."

The evidence continues thus:

i) "Murder of Elaine Wooden (Racketeering Act No. 37)

j) Murder of Ginnite Brazil. (Racketeering Act No.38)

k) Murder of Dora Woods. ((Racketeering Act No. 39)

l) Murder of Larry Patterson. (Racketeering Act No. 40)

m) Attempted murder of Tammy Cox. (Racketeering Act No. 41)

...

o) Murder of Jane Doe.(Racketeering Act No. 43)

9. In Count 4, Vivian Blake, along with Lester Coke, Richard Morrison and others, is charged with the substantive violation for the charge contained in Count 3; that is, he is charged with conducting and participating in the conduct of the affairs of an enterprise through a pattern of racketeering involving, among other acts: a) conspiracy to distribute cocaine and marijuana; b) exportation of marijuana; c) exportation of cocaine; and d) murder and attempted murder, all in violation of Title 18, United States Code, Section 1062(c)."

The offences of murder, attempted murder and the inchoate offences of conspiracy against the Dangerous Drugs Act are all offences in Jamaica which correspond to the Federal Crimes. The indictment which is exhibited makes it clear that these charges were in breach of Federal Statute as well as State Laws as outlined above.

As for the problem of venue raised in the Supplementary Ground of Appeal it is cleared up by the expert evidence adduced by the fugitive. The relevant section of the evidence reads:

"19. On the other hand, if Extradition is sought by the United States for Federal offenses, and any of the offenses is a continuing offense, venue may be proper in any district in which it is alleged that the offense commenced or was continued or was

> completed. RICO prosecutions have been used where it is alleged that the racketeering activity occurred in several States. The predicate acts of RICO may occur anywhere in the United States and may be all used to prove the single Count of the indictment."

Paragraph 9 of Mr. David Rowe's evidence is also helpful:

> "9. All the Conspiracies charged in the Warrant are in violation of Federal Statutes. The Sections referred to in the Warrant are penalty sections. The penalty in respect of the enumerated offenses are:
> (1) A fine or a maximum of five (5) years imprisonment or both - 18 U.S.C. # 371;
> (2) A fine or imprisonment for not more than 20 years or both plus forfeiture - 18 U.S.C. ## 1962 and 1963;
> (3) Violent crimes in aid of racketeering activity:
> (a) Whoever, as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value from an enterprise engaged in racketeering activity, or for the purpose of gaining entrance to or maintaining or increasing possession in an enterprise engaged in racketeering activity, murders, kidnaps, maim, assault with a dangerous weapon, commits assault resulting in serious bodily injury upon, or threatens to commit a crime of violence against any individual in violation of the laws of any State or the United States, or attempts or conspires to do so shall be punished -
> (i) For murder, by death or life imprisonment or a fine under this Title or both; ---------- 18 U.S.C. 1959 which has replaced 18 U.S.C. 1952 A and 1952B;"

There is ample evidence of conspiracy to traffic in dangerous drugs and of attempted murder and murders in Florida to justify committal. As for the California murders the following evidence from Barrington Anderson is important:

> "13. In Miami, I saw Vivian Blake on a regular basis inside various drug stash houses that he maintained in Miami.
>
> 14. From my observation of Lester Coke and Vivian Blake in Miami, it was clear that they were in

charge of the drug distribution activities of the Shower Posse.

15. Around the Spring of 1985, Vivian Blake sent me and other members of the Shower Posse to Los Angeles, California, for the purpose of selling cocaine for the organization. The other members who were sent to Los Angeles around this time period were Sugarbelly, Banana, Red Roy and Steady.

16. Sugarbelly went to California before I did. Before Sugarbelly went to California, Blake gave him two guns to take with him. I saw Blake give these guns to Sugarbelly. The guns were a Smith & Wesson 9MM and a Browning 9MM. After I arrived in Los Angeles, Sugarbelly gave me the Smith & Wesson that had been given to him by Blake"

The evidence continues thus:

"17. Female couriers would transport cocaine to Los Angeles from Miami. I and other members of the Shower Posse sold the cocaine out of apartments in Los Angeles. Red Roy was one of the individuals who sold cocaine for Vivian Blake in Los Angeles. I and other members of the Shower Posse would send the money from cocaine sales to Blake in Miami by Western Union."

Then the evidence continues thus:

"19. Stand Steady telephoned Blake in Miami from the house at 104th and Normandy. I was present when Stand Steady spoke to Blake. Stand Steady told Blake about Red Roy stealing the 1/2 kilogram of cocaine. Stand Steady told me that Blake wanted Red Roy to be killed. I got on the telephone with Blake, and he asked me where I stood. Blake also said that I should not return to Miami unless Red Roy is killed.

20. After this telephone call, plans were made to kill Red Roy. On the following day Sammy, Banana and I drove to Red Roy's apartment, which was located near 10th and Vermont. I carried the Smith & Wesson 9mm that I received from Sugarbelly after I arrived in California. Banana had a

> Browning 9mm, which was the other gun that Blake gave to Sugarbelly when he went to California."

The graphic account continues thus:

> "21. When we arrived at Red Roy's apartment, Sammy waited in the car. Banana and I walked to the apartment. The apartment was on the second floor of a two story building.
>
> 22. We knocked on the door to the apartment. Red Roy opened the door and let Banana and me inside. Red Roy's girlfriend was also present in the apartment. Two other black males were also present. We talked for a while. Red Roy started saying things against Blake. I then shot Red Roy while he was in the kitchen. Banana shot Red Roy's girlfriend, who was in the living room. The black males ran away.
>
> 23. After the shooting Banana and I left the apartment and got back into the vehicle that was driven by Sammy. We drove to a hotel in Los Angeles. I telephoned Blake in Miami from the hotel, and told him that Red Roy was dead. I also told Blake about the two other black males who were not killed. Blake told me that they should have been killed also because they are witnesses.
>
> 24. In late 1985 I returned to Miami from Los Angeles. I then went to New York. I stopped working for the Shower Posse in early 1986.
>
> 25. In January 1987, I plead guilty to first degree murder relating to the murders that occurred on September 23, 1985 in Los Angeles. I am now incarcerated and serving a sentence."

On the evidence adduced by the fugitive the plans originated in Florida and was completed in California. The Federal Court in Florida has jurisdiction . On this analysis the ground which reads:

> **"RACKETEERING**
>
> 6. That the Committing Magistrate exceeded her jurisdiction in making a Committal Order of the Counts of racketeering since there is no

corresponding offence in Jamaica: For reason that: the Magistrate would be entitled if satisfied of the proof of discrete offences valid by Jamaican law, to make a Committal Order in those terms; but it is submitted not otherwise.

That therefore the Full Court erred in upholding the aforesaid Committal Order."

fails.

Ground 8 reads:

"PENALTY

8. That in Count (3) of the indictment numbered 88-0652 Cr-Gonzalez (Florida) the Appellant is charged (as incidents of racketeering) with Murder and Attempted Murder of a number of individuals. The Exhibit law supplied by the Requesting State sets out the degrees of Murder applicable in the State of California and in Florida; however, the penalty section of both State Codes is omitted.

WHEREFORE IT IS SUBMITTED (i) that a Committal order cannot properly be made in the absence of applicable law not supplied by the Requesting State: Alternatively (ii) on the or basis that the penalty for Murder as alleged in the evidence is death, then this conflicts with Jamaican law by reason of Sections 2 & 3 of the Offences against the Person Act which makes the offences for which the Appellant is charged, non-capital: (iii) That in the above circumstances Extradition of the Appellant on those charges is (a) prohibited by virtue of Section 7 (e) of the Extradition Act: Alternatively and/or in addition (b) oppressive having regard to Jamaican law and alternatively and/or in addition (c) infringes the fundamental right to life guaranteed by the Constitution."

From the evidence of Mr. David Rowe adduced by the fugitive there is a range of sentences for murder. It is for the fugitive to bring Section 12 (4) to the attention of

the Minister if he has a valid case. The indictments show 12 counts for murder. The relevant section reads:

> "12(4) The Minister may decide to make no order under this section in the case of a person accused or convicted of an extradition offence not punishable with death in Jamaica if that person could be or has been sentenced to death for that offence in the approved State by which the request for his return is made; and for the purposes of this subsection the Minister may take into account any assurance given by the requesting State that the death penalty if imposed, will not be carried out."

> "**PASSAGE OF TIME**

> 9. That the Appellant submits that by reason of the passage of time since the Appellant is alleged to have committed the offences and having regard to all the circumstances it would be unjust and oppressive to extradite the Appellant by virtue of Section 11(3) of the Extradition Act 1991."

Section 11(3) of The Extradition Act is repeated for ease of reference:

> "(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."

The fugitive has been charged with the most serious of crimes. It is not easy to detect organised crime and the witnesses are generally those who have themselves been participants in the activities of the organisation. In some instances in the present case they have been caught, tried and punished. No evidence has been presented on behalf of the fugitive under this ground. So resort has to be to the circumstances of the case. **Union of India v Manohar** [1977] 2 All ER 348 and **Re Tarling** [1979] 1 All ER 981 were on the fugitive's list of authorities. They are of no assistance in this case having regard to the gravity of the offences and the planning and organisation which are alleged in the instant case. So this ground also fails.

The Constitutional challenge

Mr. Ramsay for the fugitive challenged the constitutionality of the Extradition Act as contravening the provisions of Chapter III of the Constitution. It is not surprising that extradition was recognised in Chapter III because prior to the appointed day and for a considerable period thereafter extradition was governed by two Imperial Acts of Parliament. The Extradition Act 1870 and the Fugitive Offenders Act 1881. During these periods it was recognised that extradition was a special branch of criminal law with a large element of international law embodied in treaties between the contracting parties. Two statements of principle are appropriate in these circumstances. The first comes from Lord Morris in **Atkinson v United States of America** [1971] A.C. 197 at 241. It reads:

> "Extradition procedure is something special and it is not precisely comparable with and it cannot be equated with purely domestic procedure. It is procedure relating to "fugitive criminals." They may be persons who have already been convicted or they may be persons who are accused. The procedure is designed to assist foreign states."

The other comes from Ognall J, in **R v Governor of Pentonville Prison, ex parte Lee**[1993] 2 All ER 504 at 509:

> "Kaplan J referred with approval to the majority judgment of the Supreme Court of Canada in **Kinder v Canada (Minister of Justice)** (1991) 84 DLR (4th) 438. In the course of giving that judgment McLachlin J said (at 488):
>
> 'While the extradition process is an important part of our system of criminal justice, it would be wrong to equate it to the criminal trial process. It differs from the criminal process in purpose and procedure and most importantly, in the factors which render it fair. Extradition procedure, unlike the criminal procedure, is founded on the concepts of reciprocity, comity and respect for differences in other jurisdictions.'
>
> Subsequently, in his judgment Kaplan J said (of this and other observations to like effect):
>
> 'This passage is helpful in that it underscores the very special nature of extradition proceedings having its roots in international comity. To supplement the local legislation, which give effect to treaty obligations by imposing doctrines of fairness applicable to domestic proceedings is to run a real risk of interfering with such treaty obligations'."

It is against this background that it is pertinent to examine the preamble in Chapter III and to note that from the outset that there is a recognition that fundamental rights and freedoms must be subject to the rights and freedoms of others and the public interest. Section 13 reads:

> "13. Whereas every person in Jamaica is entitled to the fundamental rights and freedoms of the individual, that is to say, has the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely -

> (a) life, liberty, security of the person, the enjoyment of property and the protection of the law;
>
> (b) freedom of conscience, of expression and of peaceful assembly and association; and
>
> (c) respect for his private and family life,
>
> the subsequent provisions of this Chapter shall have effect for the purpose of affording protection to the aforesaid rights and freedoms, subject to such limitations of that protection as are contained in those provisions being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest."

Another imperative in interpretation of the provision of Chapter III is Section 48 of the Constitution which sets out in ample terms the powers of Parliament . Secion 48 (1) reads:

> "48.-(1) Subject to the provisions of this Constitution, Parliament may make laws for the peace, order and good government of Jamaica."

The laws for the 'peace, order and good government' must include statutory provisions for the extradition of fugitive criminals. Such laws must be capable of implementing the treaty made with foreign powers for controlling crime through international cooperation. It is in this context that the Extradition Act must be considered. So Section 15 of the Constitution reads:

> "15.-(1) No person shall be deprived of his personal liberty save as may in any of the following cases be authorised by law -
> . . .
>
> (j) for the purpose of preventing the unlawful entry of that person into Jamaica, or for the purpose of effecting the expulsion, extradition or other lawful removal of that person from Jamaica or the taking of proceedings relating thereto;..."

So provisions in the Extradition Act for the arrest of fugitive criminals are lawful since Section 9 of the Extradition Act was within the power of Parliament.

Then Section 16 of the Constitution which deals with Protection of freedom of movement reads:

> "16.-(1) No person shall be deprived of his freedom of movement, and for the purposes of this section the said freedom means the right to move freely throughout Jamaica, the right to reside in any part of Jamaica, the right to enter Jamaica and immunity from expulsion from Jamaica.
>
> (2) Any restriction on a person's freedom of movement which is involved in his lawful detention shall not be held to be inconsistent with or in contravention of this section.
>
> (3) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision -
> ...
>
> (e) for the removal of a person from Jamaica to be tried outside Jamaica for a criminal offence or to undergo imprisonment outside Jamaica in execution of the sentence of a court in respect of a criminal offence of which he has been convicted."

Here again are the careful balances which the Constitution recognises in order to give Parliament flexibility in enacting laws for the removal of fugitives to the requesting state for trial or imprisonment.

Additionally, Mr. Ramsay challenged the constitutionality of the Extradition Act on the grounds that the provision for committal proceedings contravened Section 20 of the Constitution. Section 20(1) reads:

> "20.-(1) Whenever any person is charged with a criminal offence he shall, unless the charge is withdrawn, be afforded a fair hearing within a

> reasonable time by an independent and impartial court established by law."

and Section 20(6) reads:

> "(6) Every person who is charged with a criminal offence -
> ...
>
> (d) shall be afforded facilities to examine in person or by his legal representative the witnesses called by the prosecution before any court and to obtain the attendance of witnesses, subject to the payment of their reasonable expenses, and carry out the examination of such witnesses to testify on his behalf before the court on the same conditions as those applying to witnesses called by the prosecution."

The first point to make is that these provisions are designed for domestic proceedings. In committal proceedings in extradition cases most of the evidence is by way of affidavits. This was recognised by Lord Gifford for the fugitive in the Supreme Court. So section 20(6)(d) cannot be applicable in extradition proceedings to the same extent that they are for domestic proceedings.

The test therefore is whether the judicial or legal system gave the fugitive a fair hearing before the courts within the jurisdiction before he is extradited. This is achieved by committal proceedings before a Resident Magistrate and judicial review by way of Habeas Corpus proceedings in the Supreme Court and thereafter on appeal to this Court. Then there are two avenues for a further appeal. Section 110(1) of the Constitution reads:

> "110.-(1) An appeal shall lie from decisions of the Court of Appeal to Her Majesty in Council as of right in the following cases -
> ...
>
> (c) final decisions in any civil, criminal or other proceedings on questions as to the interpretation of this Constitution."

That was the route of **Hinds v The Queen** 13 JLR 262 and **Trevor Stone v The Queen** [1980] 1 WLR 880 or [1980] 3 All ER 148. Then there is provision for petition by way of special leave. Section 110(3) of the Constitution reads:

> "110.-(3) Nothing in this section shall affect any right of Her Majesty to grant special leave to appeal from decisions of the Court of Appeal to Her Majesty in Council in any civil or criminal matter."

So the challenge on this aspect has not been successful.

Conclusion

The fugitive in my view has made out a good case that he ought not to be extradited for the charges embodied in the Virginia Warrant. As for the Florida Warrant he ought to be extradited for murder and attempted murder and also for conspiracy to export marijuana and cocaine in Count 29.

As for costs I would order that the fugitive have one half of his taxed or agreed costs in this court as he has succeeded on the Virginia Indictment.

GORDON, J.A.

At the commencement of these proceedings, Mr. Hibbert, objected in limine to any application being made by Mr. Ramsay for leave to argue supplemental grounds of appeal. He based his objection on the provisions of section 63 (1) of the Criminal Justice Administration Act. This section was introduced by an amending Act, Act 18 of 1991 on August 20, 1991. The section reads:

> "63 (1) An application for a writ of Habeas Corpus shall state all the grounds upon which it is based".

Mr. Hibbert submitted that this provision obliged the applicant for a writ of Habeas Corpus to state all the grounds of his application and binds him to pursue those grounds before the Full Court and, if necessary before the Court of Appeal. The right to appeal was conferred by Section 21 A of the Judicature (Appellate Jurisdication) Act (Act 17 of 1991) which also was promulgated on August 20, 1991. Thus in two (2) enactments the right of appeal in Habeas Corpus matters was given and the applicant was obliged to state fully the grounds he would thereafter be obliged to pursue.

Mr. Ramsay vigorously opposed Mr. Hibbert's objection but to no avail. By a majority we held Mr. Hibbert was correct in his submission. The appellant is obliged by the Act in Habeas Corpus proceedings to rely on the grounds upon which it is based at all levels, before the Full Court and before the Court of Appeal. These proceedings are entirely the creature of statute.

Section 11 (6) of the Extradition Act states:

> "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..."

Appellate proceedings therefore are a continuation of habeas corpus in the appellate court. This section was added to the Act by Act 35 of 1991 and by Act 17 of 1991 of even date. Section 63 (1) of the Criminal Justice Administration Act requires the applicant for a writ of habeas corpus to state all the grounds upon which the application is made.

Section 63 (2) states :

> "63-- (2) Where an application for a writ of habeas corpus in a criminal cause or matter has been made by or in respect of any person, no such application may again be made in that cause or matter be or in respect of that person whether to the same court or any other court unless fresh evidence is adduced in support of the application".

By virtue of Section 63 (supra) proceedings on appeal are a continuation of proceedings in habeas corpus commenced in the court below and are regarded as pending until the appeal is disposed of. An appeal does not qualify as an application made in that cause or matter which would allow for fresh evidence to be adduced.

The grounds of appeal on which Mr. Ramsay submitted are those which supported the application for habeas corpus in the Supreme Court namely:

> **1.** In relation to the order for his extradition upon the indictment in the Southern District of Florida, the Applicant contends that the accusation against him has not been made in good faith in the interest of justice. The applicant will rely on the evidence that one Richard Morrison who was charged in the same indictment, was extradited from Jamaica at the request of the United States Government, and was then indicted and tried upon a wholly different indictment has not been tried on this indictment.
>
> 2. In relation to the order for his extradition upon the Eastern District of Virginia, the Applicant contends that the learned Resident Magistrate erred in law in accepting into evidence and/or relying upon the Affidavits purportedly made by "John Doe" # 1 and "John Doe" # 2. It is submitted that a Court cannot properly accept the

> evidence of anonymous deponents who because their identity is withheld cannot be controverted or challenged.

On Ground 2 Mr. Ramsay submitted that in the proceedings the appellant had the right to cross-examine witnesses called by the prosecution and also to call witnesses on his own behalf. The witnesses called by the requesting state deposed in anonymous names John Doe # 1 and John Doe # 2 and this procedure emasculated the right of the appellant to cross-examine such anonymous witnesses with a view to discrediting them. This procedure he submitted was serious breach of the rights of the appellant guaranteed under Section 20 of the Constitution and the issue should be resolved in favour of the appellant by his release on habeas corpus.

Under Section 10 of the Extradition Act, the magistrate hears the proceedings as an examining magistrate in committal proceedings and by Section 14 of the Act he is empowered to admit evidence on affidavit as depositions. Once he is satisfied that the evidence is sufficient to warrant his trial for that offence had the offence been committed in Jamaica, the resident magistrate can commit the appellant to custody to await his extradition under the Act.

I quote with approval from the judgment of Ognall J in ***R v Governor of Pentonville Prison and Another ex parte Lee, R v Bow Street Metropolitan Stipendiary Magistrate ex parte Lee*** [1993] 3 All E.R 504:

> "It is important to remember that the conduct of extradition proceedings is entirely the creature of statute. This has a number of consequences.
>
> 1) The requesting state must be the sole arbiter of such material as it chooses to place before the court in support of its application and in purported compliance with the relevant domestic extradition legislation. It alone will decide what material in support of its allegations it places before the Secretary and the court under ss 7 and 9 of the 1989 Act. If it furnishes inadequate evidence, then it

takes the risk that its request will be refused". (See p 508).

The resident magistrate being satisfied of the sufficiency of evidence committed the appellant under Section 11 of the Extradition Act.

On the anonymity of the deponents Mr. Ramsay relied on a number of authorities but they all determined that the right of the accused (appellant) to have the witnesses disclosed and subject them to cross-examination is enforced at trial. Foremost among these cases is that of ***Smith v Illinois*** 390 U.S. 129 a decision of the appellate Court of Illinois, First District delivered on January 29, 1968. This is a decision of a State in the United States of America the Requesting State.

On the submission regarding non-production of the witnesses for cross-examination, no request was made for their production hence, there is no support for arguments regarding the denial of a right.

Mr. Ramsay submitted that the appellant should not be extradited because the request was not made in good faith. Lack of good faith he said is supported by the evidence relating to one Richard Morrison who is jointly charged with the appellant on an indictment laid in the Southern District of Florida. Morrison was extradited on this indictment but he was not tried on that indictment. He was tried and convicted and sentenced on an indictment laid in the middle District of Florida on 24th February, 1992. In the light of this evidence provided by affidavits. Mr. Ramsay said that the court no longer had a basis on which to assume good faith as indicated by Lord Reid in ***Royal Government of Greece and Governor of Brixton Prison and another*** [1971] A.C 250.

In response to Mr. Ramsay's submission Mr. Hibbert directed the court's attention to the affidavit of Kinley Engvalson who had conduct of Morrison's defence .

He said:

> "That on April 24, 1992 I raised before the Court at Fort Myers my client's belief that he has not been extradited for the ***Fort Dyers*** case but only for the Southern District Indictment.
>
> That at the said hearing Russell Stoddard, the United States Attorney, represented before the Court that Richard Morrison had been extradited on both the ***Fort Myers*** case and the ***Southern District*** case".

Mr. Hibbert as a Deputy Director of Public Prosecutions had conduct on behalf of the Requesting State of the extradition proceedings in Morrison's case before the Committing Magistrate. He said that two requests for extradition were received one in the Middle District of Florida and the other in the Southern District. The offences were similar. Only one request was dealt with and Morrison was extradited on a warrant issued by the Minister. The extradition warrant then was of a general nature and non-specific. Since the Morrison incident warrants issued by the Minister are now specific indicating the indictment in respect of which the extradition order is made. There is unlikely to be a recurrence of an incident similar to that in Morrison's case.

An accusation of bad faith is grave and although it has been shown that Morrison was tried on a indictment for which he was not extradited that without more is not evidence of bad faith. The documents submitted in support of this application for extradition are in order and even reveal that count two of the Virginia indictment seems to be statute barred, no attempt has been made to mislead the Court, Mr. Hibbert further submitted.

Section 7 (3) of the Extradition Act requires that there shall be prior to the extradition of the prisoner or his committal into custody provision in the law of the Requesting State or an arrangement made with that State that the prisoner shall not be

tried or detained with a view to trial for any offence committed before his extradition under this Act other than:

i) The offence in respect of which extradition was requested;

ii) any lesser offence proved; and

iii) any other offence being an extradition offence in respect of which the Minister consents to his being so dealt with.

Section 7 (4) provides for arrangements to be made generally or for the particular case and a certificate issued by the Minister confirming the existence of the arrangements stating its terms, to be conclusive evidence of the matters contained therein. The Minister may call upon this arrangement as evidence of the comity between the two States in seeking redress for a breach.

In ***R v Governor of Pentonville Prison and Another ex parte Lee,*** (supra) Ognall J said at pg. 509:

> "It is of course right to observe that the law of extradition proceeds upon the fundamental assumption that the requesting state is acting in good faith and that the fugitive will receive a fair trial in the Courts of the requesting state. If it were otherwise, one may assume that our Government would not bind itself by treaty of such a process".

Treaties are arranged by the political directorate and the ultimate decision on extradition rests with the Minister in the exercise of his powers conferred by section 12 of the Extradition Act.

I hold that the appellant has failed in both grounds filed and argued and the reliefs sought are denied.

FORTE J.A.

Appeal dismissed. Order of the Court below affirmed by unanimous decision on the Florida warrant; by a majority on the Virginia warrant. No order as to costs.