NMLS

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE FULL COURT

SUIT M-158 of 2002

BEFORE: THE HON. MR. JUSTICE HORACE MARSH

THE HON. MISS JUSTICE GLORIA SMITH

THE HON. MR. JUSTICE LLOYD HIBBERT

IN THE MATTER OF AN EXTRADITION ORDER IN RESPECT OF DELROY BOYD MADE BY THE RESIDENT MAGISTRATE FOR THE CORPORATE AREA HOLDEN AT HALF-WAY-TREE

A N D

IN THE MATTER OF THE JAMAICA (CONSTITUTION) ORDER IN COUNCIL 1962

BETWEEN	DELROY BOYD	APPLICANT
A N D	THE COMMISSIONER OF CORRECTIONAL SERVICES	1st RESPONDENT
A N D	THE DIRECTOR OF PUBLIC PROSECUTIONS	2ND RESPONDENT

Lord Anthony Gifford, Q.C. and Hugh Thompson instructed by Gifford, Thompson & Bright for the Applicant.

Miss Ingrid Mangatal and Miss Katherine Francis instructed by Director of State Proceedings for the first Respondent.

Mrs. Georgiana Fraser and Herbert McKenzie for the second Respondent.

HEARD: 3rd & 4th FEBRUARY & 11th JUNE 2003

Hibbert, J.

The Applicant was on the 20th November, 2002 committed to custody by His Honour Mr. Martin Gayle, Resident Magistrate for the Corporate Area to await his surrender to the United States of America to stand trial for the offences of (1) Conspiracy to possess with intent to distribute cocaine and marijuana and (2) Conspiracy to import cocaine and marijuana.

The Applicant now seeks the issue of a Writ of Habeas Corpus ad subjiciendum. In his application he relies on the following grounds:

(1) That the Prosecution relied on evidence of accomplices to the effect that they had on divers occasions received cocaine and/or marijuana from the Applicant, which evidence was unsupported by any scientific analysis of the substances.

(2) That the statement in relation to each and every occasion was to the effect that the said accomplices received the said substances in Jamaica and took them (or attempted to take them) to the Bahamas; and there was no evidence of any overt act pursuant to the alleged conspiracy having taken place or having been envisaged in the United States.

(3) That the statement of the accomplice Cambridge that drugs 'would then be transported' from the Bahamas to the United States was not admissible as evidence that the Applicant had agreed to import Drugs into or possess them in the United States; being merely a statement as to the witness speculation.

(4) That the offences alleged were not extradition offences as defined in the Treaty between Jamaica and the United States, since by Article 1 of the said Treaty the offence must either have been committed in the territory of the Requesting State or in the language of section 1 (2) of Article I "with respect to an offence committed outside the territory of the Requesting State, the Requesting State shall grant the extradition, subject to the provisions of this Treaty, if there is jurisdiction under the laws of both States for the punishment of such an offence in corresponding circumstances".

(5) That by reason of the foregoing the learned Resident Magistrate erred in law in holding that there was sufficient evidence on which he could order the extradition of the Applicant.

At the hearing of application these grounds were converted to two main issues.

(1) the issue of territoriality (grounds 2 – 4)

(2) the issue of sufficiency of evidence (ground 1)

Article 1 of the Extradition Treaty entered into between the United States of America and Jamaica provides:

(1) The Contracting Parties agree to extradite to each other, subject to the provisions of this Treaty.

(a) persons whom the competent authorities in the Requesting State have charged with an offence committed within it territory: or

(b) persons who have been convicted in the Requesting State of such and offence and are unlawfully at large.

(2) With respect to an offence committed outside the territory of the Requesting State the Requested State shall grant extradition, subject to the permissions of this Treaty, if there is jurisdiction under the laws of both States for the punishment of such an offence in corresponding circumstances.

An extradition offence is defined by section 5 of the Extradition Act, 1991 subsection 1 of which states:

5 – (1) For the purposes of this Act, any offence of which a person is accused or has been convicted in an approved State is an extradition offence if-

(a)

(b) in the case of an offence against the law of a treaty State-

(i) it is an offence which is provided for by the extradition treaty with that State; and

(ii) the act or omission constituting the offence, or the equivalent act or omission, would constitute an offence against the law of Jamaica if it took place within Jamaica or in the case of and extra-territorial offence, in corresponding circumstances outside Jamaica.

By section 10 (5) of the Act the court of committal can only properly commit the subject of an extradition request to custody to await extradition if it is satisfied inter alia that the offence to which the authority to proceed relates in an extradition offence.

It is obvious that the real question in relation to grounds two (2) to four (4) is:

Do the acts complained of by the Requesting State constitute extradition offences?

In order to address this question we need to look at the evidence relied on by the Requesting State. This is contained primarily in the affidavits of Nehru Newton and Carllan Cambridge.

Newton stated that he is a nephew of Samuel Knowles for whon he worked trafficking narcotics since 1994. Initially he assisted in the transportation of cocaine and marijuana from Jamaica to the Bahamas and later he assisted in the operations of the drug organization. In 1999 the Applicant Delroy Boyd started supplying Knowles with marijuana and later received and stored cocaine for Knowles. He also states that in furtherance of this alliance he met with the applicant in Jamaica on two (2) occasions in 2000 for the purpose of transacting business. He identifies a photograph of the Applicant as the person he knew as Delroy Boyd.

Cambridge, in his affidavit states that he worked for Samuel Knowles in the trafficking of marijuana and cocaine since 1997. He states that in December, 1998 he arrived in Jamaica and met with the Applicant and by arrangement collected 2,800 pounds of marijuana which was transported to the Bahamas. In November, 1999 he again met with the Applicant and collected 2,500 pounds of marijuana for shipment to the Bahamas. In 2000 he again met with the applicant in Jamaica and obtained from him 500 kilograms of cocaine which he took to the Bahamas. He further states that the marijuana and cocaine which was taken to the Bahamas from Jamaica would then be transported

into the United States. He also identified a photograph of the Applicant as the person he met with.

Do these affidavits disclose offences which would be triable in the United States of America and in corresponding circumstances, in Jamaica? A similar situation was dealt with in another extradition case of Liangsiriprasert v. United States Government & Anor. [1990] 2 All ER 866. Lord Griffiths in his judgment at page 873 stated:

> *"There has as yet, however, been no decision in which it has been held that a conspiracy entered into abroad to commit a crime in England is a common law crime triable in English Courts in the absence of any overt act pursuant to the conspiracy taking place in England. There are, however, a number of dicta in judgments and academic commentaries suggesting that it should be so".*

After examining these dicta and commentaries, he concluded at page 878

> *"Unfortunately in this century crime has ceased to be largely local in origin and effect. Crime is now established on an international scale and the common law must face this new reality. Their Lordships can find nothing in precedent, comity or good sense that should inhibit the common law from regarding as justiciable in England inchoate crimes committed abroad which are intended to result in the commission of criminal offences in England. Accordingly, a conspiracy entered into in Thailand with the intention of committing the criminal offence of trafficking in drugs in Hong Kong is justiciable in Hong Kong even if no overt act pursuant to the conspiracy has yet occurred in Hong Kong".*

While accepting that this is a correct statement of the common law, Lord Gifford, Q.C., on behalf of the applicants argued that on the basis of the evidence relied on by the Requesting State, there was no admissible evidence to show that the scope of the arrangement involved the shipment of drugs to the United States of America. Even if the Applicant was shown to have participated in a scheme to ship drugs from Jamaica to the

Bahamas unless it was shown by admissible evidence that the arrangement included shipment to the United States of America then these offences would not be triable in the United Stated of America and would therefore not be extradition offences. He contended that the affiant Newton made no mention of shipment into the United States of America and that the mention of the United States of America in the affidavit of Cambridge was inadmissible. He argues that the words "*The cocaine and marijuana would then be transported into the United States*" were mere speculation on the part of Cambridge. Thus he concluded that the evidence which was placed before the Resident Magistrate fell short of establishing a prima facie case that the Applicant committed extradition offences as defined by section 5 of the Extradition Act. Hence the learned Resident Magistrate breached the provision of section 10 (5) of the Act and erred in committing the Applicant to custody to await his surrender to the United States.

The Respondents replied by seeking to show the nature of the conspiracy and the Applicant's involvement in it. Mrs. Fraser, for the Second Respondent cited a passage from Halsbury's Law of England, 3rd Edition Volume 10, page 327, paragraph 602 which states:-

> "*A criminal enterprise may consist of a continuing act which is done in more places than one or of a series of acts which are done in several places.*"

The House of Lords decision in Director of Public Prosecutions v. Doot, [1973] A.C. 807 was also relied on. At page 823 Viscount Dilhorne cited with approval the direction given to the jury by Coleridge, J in Reg. v. Murphy (1837) 8 C & P 297 where he said:

> "*It is not necessary that it should be proved that the defendants met to concoct this scheme, nor is it necessary that they should have originated it. If a conspiracy be already formed and a person joins it afterwards, he is*

> *equally guilty. You are to say whether, from the acts that have been proved, you are satisfied that these defendants were acting in concert in this matter".*

After examining several authorities Viscount Dilhorne at page 827 said

> *"The conclusion to which I have come after consideration of these authorities and of many others to which the House was referred but to which I do not think it is necessary to refer, is that though the offence of conspiracy is complete when the agreement to do the unlawful act is made and it is not necessary for the prosecution to do more than prove the making of such an agreement, a conspiracy does not end with the making of the agreement. It continues as long as the parties to the agreement intend to carry it out. It may be joined by others, some may leave it."*

Based on these authorities counsel for the Respondents argued that although the Applicant was not s party to the agreement at the time of its origin he later joined and became a co-conspirator. They further argued that the reference to the United States of America in the affidavit of Cambridge is an assertion of fact and not mere speculation, thus showing that the scope of the agreement was ultimately to cause the cocaine and marijuana to enter the United States of America.

From the affidavits of Newton and Cambridge it seems quite clear that they were involved in international narcotics trafficking as integral parts of a criminal organization. From their affidavits there is ample evidence to show that the Applicant subsequently joined this organization. Bearing in mind the duration and nature of Cambridge's involvement it might well be expected that he would have actual knowledge of the scope of the drug operations. Consequently his assertion that the drugs supplied by the Applicant would be shipped to the Bahamas and then transported to the United States of America cannot be, without more, written off as mere speculation, His words when taken

at face value represent an assertion of facts and as such are capable of being accepted by a tribunal of fact.

Under the heading "sufficiency of evidence" Lord Gifford, Q.C., argued that as there was no evidence that the substances which Newton and Cambridge said they transported from Jamaica were ever chemically analysed then there is no acceptable evidence that they received marijuana and cocaine from the Applicant. Hence, he argued, the overt acts cannot support the conspiracy charged in the indictment. He relied on the decision of the Full Court in ex parte Newton Fitzgerald Barnes (unreported), Suit No. M 60/95

Counsel for the Respondents replied by submitting that in a case of conspiracy it was not necessary to prove overt acts as the conspiracy is complete on the making of the agreement. To support this Counsel for the Respondents relied on the decision in Reg. v Aspinall (1876) 2 Q BD 48 where Brett J.A. said at page 58!

> *"Now first the crime of conspiracy is completely committed, if it is committed at all, the moment two or more have agreed that they will do, at once or at some future time, certain things. It is not necessary in order to complete the offence that any one thing be done beyond the agreement."*

This passage was cited with approval by Viscount Dilhorne in Director of Public Prosecutions v. Doot at page 822 of the judgment and who went on to say at page 825:

> *"....it is not necessary for the prosecution to do more than prove the making of such an agreement ...."*

In ex parte Newton Fitzgerald Barnes, the facts of which were similar to the instant case, the learned Judge who wrote the judgment of the Full Court, at page 8 of the judgment said:

> *"There is ample evidence from which a conspiracy could be inferred and from which the applicant could be found as being identified and involved in, albeit not from its inception."*

Having noted the absence of evidence of any scientific analysis of the drugs being trafficked the learned Judge went on to say at page 10 –

> *"The effect of this absence of evidence is that, the 'overt acts' which are ingredients of count one of indictment for conspiracy are not supported because of this deficiency."*

Consequently the application for habeas corpus was granted.

With all due respect, it is my humble opinion that the learned Judge fell into error when he held that the overt acts had to be proven, having previously found that there was sufficient evidence to support the conspiracy. In Director of Public Prosecutions v. Doot Lord Wilberforce at page 818 of the judgment stated:

> *"Often in conspiracy cases the implementing action is itself the only evidence of the conspiracy – this is the doctrine of overt acts"*

Viscount Dilhorne as page 822 said:

> *"A conspiracy is usually proved by proving acts on the part of the accused which lead to the inference that they were acting in concert in pursuance of an agreement to do an unlawful act".*

In my opinion the proof of overt acts is merely to provide a factual basis from which it can be inferred that the accused and others conspired to commit a criminal act. As the authorities have shown a conspiracy can be proved even if no overt acts take place.

In the instant case the evidence of Newton and Cambridge show that the applicant was a part of a scheme in which he agreed to store and supply marijuana and cocaine, and

did supply what they say was marijuana and cocaine. Even if they were all mistaken in their belief that the substances supplied by the Applicant were in fact marijuana and cocaine, the fact of trafficking in what they believed to be marijuana could still provide the evidential basis from which the conspiracy could be inferred.

In conclusion, I find that there was before the Resident Magistrate, sufficient evidence to establish that the offences for which the surrender of the Applicant was sought are extradition offences and further find that a prima facia case was made out against the Applicant. Consequently I would dismiss the application.

Marsh J,

Having had the privilege of reading the judgment of my brother Hibbert J, I am in agreement with his views and find accordingly.

Smith J,

Having had the privilege of reading the judgment of my brother Hibbert J, I am in agreement with his views and find accordingly.