JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 91/00

BEFORE: **THE HON. MR. JUSTICE FORTE, P.**
THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MR. JUSTICE PANTON, J.A.

BETWEEN:	**DESMOND BROWN**	**APPELLANT**
AND:	**THE DIRECTOR OF PUBLIC PROSECUTIONS**	**1ST.RESPONDENT**
AND:	**THE DIRECTOR OF CORRECTIONAL SERVICES**	**2ND RESPONDENT**

Patrick Atkinson, Valerie Neita-Robertson and Leroy Equiano for the Appellant

Bryan Sykes , Senior Deputy Director of Public Prosecutions and Jeniece Nelson-Brown for the 1st Respondent

Annaliesa Lindsay and Peter Wilson for the 2nd Respondent instructed by the Director of State Proceedings

March 8, 9, 10 and April 2, 2004

FORTE, P.

Having read in draft the judgment of Panton J.A. I entirely agree and have nothing further to add.

HARRISON, J.A.

I too, have read the judgment of Panton, J.A. in draft, and I agree with the reasons and conclusion therein.

PANTON, J.A.

1. On July 19, 2000, the appellant's motion for an order for the issuance of a writ of habeas corpus was dismissed by the Full Court (Wolfe, C.J., Donald McIntosh, and Dukharan, JJ.) He appealed against this decision on July 31, 2000, filing at that time what the notice of appeal describes as "provisional grounds of appeal":

> (i) The identification of the applicant is inconsistent.
>
> (ii) The lapse of time between the indictment and the steps taken for his extradition was extreme thus making the request oppressive and of bad faith.

2. On January 29, 2004, the appellant filed an application for leave to amend the grounds of appeal to read thus:

> "Having regards (sic) to the evidence and all the circumstances of the case and the terms of section 11(3)(b) and (c) of the Extradition Act of 1991, it would be unjust and/or oppressive to extradite the applicant/appellant".

He also sought leave to adduce further evidence in respect of his domestic life in Jamaica since his return from the United States of America. These applications were successfully resisted by the respondents at the commencement of the hearing in this Court. The reasons for accepting the submissions of the respondents are summarized in paragraphs 3 to 11 hereunder.

3. ***Application to amend the grounds of appeal***

Section 11 (2) of the Extradiction Act reads:

" A person committed to custody... shall not be extradited ...

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

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

Section 11 (3) reads:

"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. The respondents' objection to the amendment proposed by the appellant was based on the provisions of section 63(1) and (2) of the Criminal Justice (Administration) Act which are here set out:

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

(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".

This section was the subject of interpretation by this Court in the case **Vivian Blake v The DPP and The Superintendent of Prisons - General Penitentiary** (SCCA 107/96, judgment (unreported) delivered on July 27, 1998). At page 3 thereof, Forte, J.A. (as he then was) said:

> "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 ...
>
> It is mandatory by section 63(1) ...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".

5. In the instant case, the appellant, in his application to the Full Court, stated the grounds upon which his application was based as follows:

> (a) The credibility of the proposed witnesses against him;
>
> (b) The insufficiency of the evidence of identification submitted with the extradition request; and
>
> (c) The lack of quality in the evidence and all the circumstances making it unjust and/or oppressive to extradite him.

These grounds were stated in an affidavit filed on July 20, 1998, grounding the notice of motion.

6. At the hearing of the application before the Full Court the issue of the credibility of the witnesses was argued on the basis that they were persons who had an interest to serve, having pleaded guilty to criminal offences and having entered into plea bargaining arrangements with the prosecution. This is no longer an issue in the case as it has not formed a part of the grounds of appeal. This is so, no doubt, due to the fact that the appellant and his legal advisers have accepted the position stated by the learned Chief Justice that "the question of interest to serve is a matter of credibility and therefore becomes a matter for the trial court when it comes to assess the credibility of the particular witness or witnesses".

7. The evidence of identification was irrefutable both here and in the Court below. Due to that state of affairs, if the assessment of the Chief Justice is correct, counsel appearing for the appellant sought refuge in section 11 (3)(b) of the Extradition Act. In that respect, the challenge to the extradition of the appellant was confined to the lapse of time since the appellant was alleged to have committed the offences. It was specifically mentioned in the judgment of the Chief Justice that there was no submission that the offences with which the appellant is charged were of a trivial nature or that the accusations were not being made in good faith.

8. Looking therefore at what was said in the affidavit as to the grounds for the application, and considering the submissions made by counsel on behalf of the appellant, it is clear that lack of good faith was not demonstrated as even

being in the thinking of the appellant or his advisers up to the disposal of the matter in the Full Court. The application therefore to argue lack of good faith under the cloak of section 11(3)(c) of the Extradition Act seems to have been an afterthought. Ordinarily, there may be nothing wrong with an afterthought or even with hindsight; however, in the case of an application such as this, there can be no hide-and-seek. The legislation requires the display of frankness and honesty on the part of applicants from the beginning of the proceedings, in that they are to set out **all** their grounds at that stage. They are not permitted to withhold a ground, and then spring a surprise at a later stage.

9. ***Application to adduce further evidence***

In respect of the notice to adduce further evidence, it is not a matter for debate that this procedure is governed by the rules relating to "fresh evidence". That being so, it has to be said at the outset that the details that were being put forward in that wise were all very much available from the time of the arrest of the appellant. The aim at this late stage was to show that the appellant had lived **"an open life"** (his words) since his arrival in Jamaica. It was incumbent on him and his legal representative to put those details before the Full Court. During the hearing before us, vague references were made to the quality of the appellant's representation below. However, on that score, it cannot be denied that the appellant's legal advisers up to the completion of the proceedings before the Full Court were experienced senior attorneys. In the absence of any evidence to the contrary, it ought to be taken that they gave the matter full consideration and

that appropriate advice was given to the appellant, in keeping with the circumstances and facts disclosed by him to them.

10. During the arguments on this aspect of the case, reference was made to a decision of this Court, **Walter Gilbert Byles v. The DPP and the Director of Correctional Services** (Supreme Court Civil Appeal No. 44/96 (unreported) - delivered October 13, 1997). That case was also in relation to a request for the extradition of a Jamaican citizen to face criminal charges in the United States of America. The result of that case was different from the result in the instant matter, in that for three different reasons this Court made an order for the writ of habeas corpus to be issued. Firstly, at page 10 of the reasons for judgment (with which Gordon and Bingham, JJA. agreed) Rattray, P. expressed the view that "the two indictments" on which the appellant had been committed, "and their contents (were) irreconcilable" and "on this ground only the appeal would be allowed". Secondly, the appellant intended to call a witness whom he had summoned from Miami for the purpose of the committal proceedings, but, before that witness could take the witness stand he was ejected from the jurisdiction by the police who had bought a ticket to Miami for him. At page 15 of the reasons for judgment, Rattray, P. said that "a committal order thus impugned cannot stand". Finally, at page 20, Rattray, P. in dealing with the affidavit of the appellant which indicated that he had not concealed his whereabouts or sought to have evaded arrest in Jamaica, said:

> "...the effect of the passage of time would be so

> disruptive to the appellant who has **lived an open and settled life** over those years that in the absence of any contributory factor on his part and of any explanation on the part of the Requesting State, coupled with the extraordinary difficulties of defending serious criminal charges of such staleness and antiquity, I am compelled to the view, having regard to all the circumstances of this particular case that it would be unjust and oppressive to extradite the applicant".

Although the judgment is regarded as unreported, the fact is that having been delivered on October 13, 1997, it would have been published and made available to attorneys-at-law in this jurisdiction from that very day. The senior attorney who was representing the appellant at the time he swore his affidavit on July 20, 1998, that is, nine months later, would have been aware of this judgment and would have advised the appellant thereof, if the instructions she had received indicated that there was a basis for any relief that judgment may have offered the appellant.

11. In any event, the judgment of Rattray, P. is not to be taken as comfort for every fugitive from justice overseas who happens to be living an open and settled life here. As demonstrated above, in the very words used by Rattray, P., the writ of habeas corpus would have been issued for the sole reason of the confusion with the indictments, without more.

12. ***The real ground of appeal - lapse of time***

The complaint placed before us for consideration was that the lapse of time between the indictment and the taking of steps for extradition was extreme thereby making the request for extradition oppressive. The record indicates that

on December 5, 1990, the appellant and others were formally accused by criminal complaint with participating in a narcotics conspiracy from 1979 to 1990 and in related crimes in the United States of America. The related crimes include murder. On June 24, 1991, a federal grand jury sitting in the Eastern District of New York returned a 28-count indictment charging the appellant and thirty-three other persons with offences that included racketeering, murder, conspiring to launder narcotics proceeds, illegal distribution of heroin, cocaine and cocaine base, and conspiracy to do the same. The allegations are that the appellant is a part of a criminal organization known as the "Gullymen Posse" by virtue of the connection of the members to the McGregor Gully area of Kingston, Jamaica. The head of the organization was a Jamaican named Eric Vassell, and the main base of their operations in the United States of America was in the vicinity of Schenectady Avenue and Sterling Place in Brooklyn, New York.

13. The appellant is alleged to have fled the United States since 1990 in an effort to avoid being tried on these charges (see page 24 of the record). When he filed his affidavit in support of his motion for habeas corpus, he did not attempt to refute being branded a fugitive, nor did he say when he had returned to Jamaica. He was arrested here on September 14, 1997, and on July 6, 1998, he was ordered committed for extradition to the United States of America. On July 20, 1998, he filed notice of motion for habeas corpus. It was listed for hearing before the Full Court on October 20, 1998, but was not taken due to the

fact that the appellant was not ready to proceed. Eventually, the motion was re-listed and heard, resulting in its dismissal on July 19,2000.

14. In the arguments before us, Mr. Patrick Atkinson on behalf of the appellant made reference to the judgment of Lord Diplock in the case **Kakis v. Republic of Cyprus** (1978) 2 All ER 634, at page 638f, which indicates that the period for consideration as to the passage of time is that between the date of the offence and the date of the hearing in the Divisional Court. In our situation, the Court would be the Full Court. Reliance was also placed on the following statement of Lord Diplock at page 638 j:

> "As respects delay which is not brought about by the acts of the accused himself, however, the question of where responsibility lies for the delay is not generally relevant. What matters is not so much the cause of such delay as its effect; or, rather, the effects of those events which would not have happened before the trial of the accused if it had taken place with ordinary promptitude".

Mr. Atkinson also said that this Court had accepted the position as to delay as stated in the **Kakis** case in view of the judgment delivered by Rattray, P. in the **Byles** case, which judgment has already been referred to (see paragraphs 10 and 11 above). Byles' case, if one needs to be reminded, was decided primarily on the basis of the confusion with the charges presented by the requesting state. In addition, it should be pointed out, there was evidential material on which Rattray, P.'s opinion was based. There is no such evidence in this case.

15. Mr. Atkinson said that the lapse of time in prosecuting the charges will result in a serious impediment to the defence of the appellant at any trial which recounts events going back as far as 1979. Notwithstanding this submission, he contended that the appellant was under no duty to show that the defence would be impeded by a trial after a long delay. The circumstances, he said, are egregious and the appellant should not be asked to do the impossible task of specifying or particularizing the difficulties he may encounter in defending the charges at this stage. It is to be noted that Mr. Atkinson, though asserting that the case against the appellant is a complex one, conceded, in answer to the Court, that the defence was simple.

Mr. Sykes and Miss Lindsay, for the respondents, were at one in submitting that lapse of time without more is not a basis for granting an application for a writ of habeas corpus. There must be something in the evidence which would suggest or give the impression that there would be unfairness or prejudice. The case, they said, would have to be an extraordinary one for lapse of time by itself to be a factor in deciding whether to extradite. Like the appellant, the respondents have relied on the **Kakis** case as well as on **Union of India v. Narang and Another** (1977) 64 Cr. App. R. 259, both being decisions of the House of Lords.

16. In the **Union of India** case, the Queen's Bench Divisional Court ordered the discharge of the respondent fugitives while holding that by reason of the passage of time it would, having regard to all the circumstances, be unjust or

oppressive to return them to India. The House of Lords, in overturning that decision, held that there was no material before the Divisional Court to lead to the conclusion that as a result of the passage of time since the alleged commission of the offences it would be impossible for the respondents to obtain justice. Viscount Dilhorne said that the proper question to be asked in the case was: has the passage of time been such that it has been made to appear that the fugitives would not get a proper trial ? (page 273). Lord Morris of Borth-Y-Gest, in referring to what one may regard as a statutory caution or requirement that the Court is to have "regard to all the circumstances", said:

> "The circumstances must all relate to the passage of time and relate to the question whether there would be injustice because of the passage of time if an order to return was made. The circumstances will naturally have arisen during the period of the passage of time but not all such circumstances will be relevant. Those in contemplation are primarily the circumstances which have relation to the trial which, after a return, is to take place and to the defence to charges to be made and to the question whether 'by reason of the passage of time' it would be unjust to a person to return him to take his trial": (page 277).

Lord Edmund-Davies, in his speech, recalled the observations of Tucker, L.J. in **Re Henderson, Henderson v. Secretary of State for Home Affairs** (1950) 1 All E.R. 283 at 287B:

> "We do not know nearly enough about the facts of the case to form any opinion as to the nature of the applicant's defence or the extent to which he will be prejudiced in the presentation of it by the delay which has taken place. These are all matters which can - and, no doubt, will - be considered by the tribunal of any civilized country which is dealing with a criminal

> matter. The length of time that has elapsed will, no doubt, be a relevant consideration for this tribunal to consider in weighing the evidence, but there is nothing in the material evidence which would, in my view, show that it is impossible for the applicant to obtain justice".

Lord Fraser, at page 284, added:

> "In order to entitle the Court to order discharge it is not enough for it to appear to the Court that returning 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".

17. In **Kakis v. Republic of Cyprus** the appellant and P were members of politically opposed organizations in Cyprus. P was shot and killed on April 5, 1973. A warrant was issued for the appellant's arrest. He went into hiding for fifteen months, then surfaced in July, 1974, to participate in a coup which ousted the government from office. Two months after, he emigrated to England with the permission of the illegal government. In December, 1974, the former government of Cyprus was reinstated. An amnesty was proclaimed. In January, 1975, the appellant visited Cyprus for two or three weeks with the permission of the government of Cyprus, and then returned to England. In October, 1975, the government decided to prosecute its political opponents for crimes committed before the coup. Eventually, the appellant was arrested in March 1977 and brought before a magistrate. During the extradition proceedings, he gave evidence that if he was tried in Cyprus he would rely on an alibi, supported by

his wife and a witness, A, who had emigrated to England in 1975 but who would not be prepared to return voluntarily to give evidence in Cyprus for fear of ill-treatment by his political opponents. The magistrate committed the appellant to prison to await extradition, and the Divisional Court refused his application for a writ of habeas corpus.

The House of Lords (Lord Keith of Kinkel dissenting), in allowing the appeal, held that having regard to all the circumstances it would be "unjust and oppressive" to return the appellant to Cyprus for trial. It would be unjust because the witness A was no longer available and it would detract from the fairness of the trial if he were deprived of the ability to adduce the evidence of the only independent witness; and oppressive because the appellant had been led to believe that the government had no intention of prosecuting him for the alleged offence.

18. ***Conclusion***

Both cases on which the contending parties in this appeal rely make it clear that there has to be evidence, either before the magistrate making the extradition order or the first instance court hearing the application for the writ of habeas corpus, to substantiate the injustice or oppression alleged, if the passage of time is to be the cause for the release of the fugitive. In addition, the circumstances must indicate that the trial itself may be tainted with unfairness due to the passage of time. In the instant case, there is no evidence of any "circumstances" that even faintly qualify to be viewed in the light discussed in

the decisions of the House of Lords. Instead, we have evidence from the requesting state which suggests that:

(i) the appellant is well known to the potential witnesses;

(ii) the allegations are not related to a single incident but rather to a series of nefarious activities extending over many years; and

(iii) the defence is a simple one challenging the credibility of the witnesses.

The Full Court was clearly right in refusing the application. Accordingly, the appeal should be dismissed.

ORDER

FORTE, P.

Appeal dismissed. Order of the court below affirmed. No order as to costs.