10/96

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 44/96

COR: THE HON. MR. JUSTICE RATTRAY, P.
THE HON. MR. JUSTICE GORDON, J.A.
THE HON. MR. JUSTICE BINGHAM, J.A.

BETWEEN	**WALTER GILBERT BYLES**	**APPLICANT/APPELLANT**
AND	**THE DIRECTOR OF PUBLIC PROSECUTIONS** **DIRECTOR OF CORRECTIONAL SERVICES**	**DEFENDANTS/RESPONDENTS**

Ian Ramsay & Mrs. Jacqueline Samuels-Brown for Appellant

Lloyd Hibbert, Q.C., Miss Vivene Hall & Miss Lorna Shelly for Director of Public Prosecutions

Lackston Robinson of the Attorney-General's Department for Director of Correctional Services

January 13, 14, 15, 16, 17, March 17, 18, 19, 20,
May 26, 27, 28, 29, 30 June 2, 3, 4, 5, 6 &
October 13, 1997

RATTRAY, P.

On January 4, 1994 Assistant Superintendent Louis Burchell of the Jamaica Police Force received a warrant for the arrest of Walter Gilbert Byles issued on the 22nd of December, 1993 under the Extradition Act, which he executed on the 29th of November, 1994.

This warrant had been issued consequent on the Request by the United States Government under the Extradition Treaty between Jamaica and the United States of America and the Extradition Act 1991.

The charges against Walter Gilbert Byles alleged various violations of the Federal Criminal Drug Laws of the United States of America and included one count of conspiracy to import into the U.S.A. marijuana and hashish oil and five counts of the importation along with other persons of marijuana and hashish oil into the U.S.A. from Jamaica.

The allegation was that these criminal acts took place from 1986 through May 1988. A warrant was issued for the arrest of Byles in July 1988 by the Clerk of the United States District Court in the Southern District of Alabama, U.S.A.

Consequent on his arrest Byles was brought before Her Honour Miss Marcia Hughes, Resident Magistrate for St. Andrew, in proceedings for committal as required by the Extradition Act 1991. The Resident Magistrate duly made her Order of Committal and issued her Warrant on the 8th day of December, 1995.

On the 22nd of January 1996, the Full Court of the Supreme Court was moved on behalf of Byles for an Order that a Writ of Habeas Corpus be issued for his release and discharge from custody. After several days of hearing between January 22 and the 26th April, 1996 the Full Court consisting of Theobalds, Clarke and Reid JJ refused the application for habeas corpus on the last mentioned date. The reasons for the refusal were delivered in a written judgment on the 15th of June, 1996. It is this Order refusing habeas corpus which has come before us on appeal.

The correct approach to be taken in extradition hearings was well stated by Lord Bridge of Harwich in Reg. v. Govr. of Ashford, Ex p. Postlethwaite [1988] A.C. 924 at p. 946 as follows:

> "In approaching the main issue two important principles are to be borne in mind. The first is expressed in the well known dictum of Lord Russell of Killowen C.J. in In re Arton (No. 2) [1896] 1 Q.B. 509, 517 where he said:
>
> > 'In my judgment these treaties ought to receive a liberal interpretation, which means no more than that they should receive their true construction according to their language, object, and intent.'

> I also take the judgment in that case as good authority for the proposition that in the application of the principle the court should not, unless constrained by the language used, interpret any extradition treaty in a way which would 'hinder the working and narrow the operation of most salutary international arrangements.' The second principle is that an extradition treaty is 'a contract between two sovereign states and has to be construed as such a contract. It would be a mistake to think that it had to be construed as though it were a domestic statute.' **Reg. v. Governor of Ashford Remand Centre, Ex parte Beese** [1973] 1 W.L.R. 969, 973, per Lord Widgery C.J. In applying this second principle, closely related as it is to the first, it must be remembered that the reciprocal rights and obligations which the high contracting parties confer and accept are intended to serve the purpose of bringing to justice those who are guilty of grave crimes committed in either of the contracting states. To apply to extradition treaties the strict canons appropriate to the construction of domestic legislation would often tend to defeat rather than to serve this purpose."

It is within this framework that I will proceed to deal sequentially with the several grounds of appeal.

It has been submitted that the extradition treaty between Jamaica and the United States of America was "incorporated into municipal law" on the 2nd of February, 1995 being the date of its publication into the Gazette. This being so, it is argued the Act was not in force at the time when the United States of America made its request to the Jamaican Government for the Extradition of Byles nor even in force at the date of Byles' arrest in Jamaica on 29th of November, 1994.

To determine the merit of this submission it is necessary to examine the chronology as it relates to the treaty and to apply the law as laid down in the Extradition Act.

On the 14th June, 1983 an extradition treaty was signed between Jamaica and the United States of America. This treaty was ratified by the relevant Minister on the 21st of May, 1991. Parliament had by then passed the Extradition Act 1991 which received the assent of the Governor-General on the 14th of March 1991 and which

provided that it "shall come into operation on a day to be appointed by the Minister by notice published in the Gazette." The relevant Minister appointed the 8th day of July, 1991, as the day the Act would come into operation. This was done by the Extradition Act 1991 - (Appointed Day) Notice which was published in the Gazette.

Section 4(1) of the Act provided:

> "**4.** (1) Where any extradition treaty has been made with any foreign state, whether before or after the commencement of this Act, the Minister may, by order, declare that the provisions of this Act shall apply in respect of such foreign state, subject to such exceptions, adaptations or modifications, as the Minister, having due regard to the terms of such treaty, may deem expedient to specify in the order for the purposes of implementing such terms."

The United States of America is a foreign state. The Minister duly made the Extradition (Foreign States) Order 1991 which was published in the Gazette on the 27th June 1991 and in respect of which affirmative resolutions were passed by the House of Representatives on the 15th August, 1991 and by the Senate on the 12th September, 1991.

Mr. Ian Ramsay has submitted on behalf of the appellant that the Authority to Proceed issued by the Minister dated 29th November, 1993 which was in respect of the Request by the United States Government for the extradition of Byles and authorised the Resident Magistrate to embark upon the committal proceedings was null and void because the Extradition Act was not yet in force. He maintains that the Extradition (Foreign States) Order 1991 was published before the Act came into operation. He further submitted that the treaty with the United States of America and the affirmative resolutions in both Houses of Parliament having been published in the Jamaica Gazette on the 2nd of February, 1995 the application of the Extradition Act to the United States of America came into force on the day of that publication in the Gazette. This being so he urges that at the date when proceedings were commenced

for extradition to the United States from Jamaica of Walter Byles, the treaty with the United States of America had not yet come into effect.

Mr. Ramsay relies as the foundation for this submission on the provisions of section 31(1) of the Interpretation Act which reads -

> "**31.** (1) All regulations made under any Act or other lawful authority and having legislative effect shall be published in the Gazette and unless it be otherwise provided shall take effect and come into operation as law on the date of such publication."

He further relies on the definition of "regulations" in the interpretation clause of the Act which reads -

> " 'Regulations' includes rules, by-laws, proclamations, orders, schemes, notifications, directions, notices and forms; ..."

It is clear that the treaty is not a regulation as defined in the Interpretation Act nor does it have legislative effect. There is no legal requirement that the notification of the affirmative resolutions by the Legislature should be published in the Gazette for the purposes of giving legal effect to such orders as they affirm. They receive their legal validity by having been passed in both Houses of Parliament. When so published in the Gazette this is done to provide public information on governmental matters, a purpose for which the Jamaica Gazette is very often utilized. Mr. Ramsay referred to the case of **Prince Anthony Edwards vs. Director of Public Prosecutions and Director of Correctional Services** SCCA 43/94 (unreported) delivered 7th November,1994 in which a similar point as to whether the legislative process was completed was taken and in that case the resolution of the House of Representatives and the Senate was produced to the Court of Appeal. Downer J.A. in his judgment stated:

> "As these resolutions form part of the record of this court there ought to be no issue in future cases concerning the completion of the legislative process as regards the United States of America."

The submissions before us on this ground do not bear out the optimism of Downer, J.A. It is left for us now to drive the final nail in the coffin of this submission which as in Prince Edwards' case, must fail.

Mr. Ramsay has further submitted that the committing magistrate acted ultra vires in refusing to receive an unsworn statement from the appellant at the termination of the presentation of the evidence put forward in support of the committal. The provisions of section 10(1) and 10(2) of the Act require the proceedings before the Resident Magistrate to equate as nearly as may be to proceedings before an examining justice, and the court of committal has also "as nearly as may be" the like jurisdiction and powers as if it were sitting as an examining justice, "and the person arrested was charged with an indictable offence committed within its jurisdiction."

Mr. Ramsay submitted that the provisions of section 36 of the Justices of the Peace Jurisdiction Act required the committing magistrate to invite the appellant to state whether he wishes to say anything in answer to the charge and to record such answer as directed in Form 20 of the Act as if he were an examining justice.

The committing Resident Magistrate ruled that the unsworn statement, was not "evidence" as contemplated by section 10(5) of the Extradition Act. That section requires the court of committal to be 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; ...".

It is only if so satisfied, that the court of committal can, after having read over the depositions of the witnesses to the accused, commit that person to custody to await his extradition under the Act. The Full Court of the Supreme Court upheld the

submission of Mr. Hibbert, Q.C. that what is recorded in Form 20 of the Justices of the Peace Jurisdiction Act under the heading Statement of Accused at a preliminary examination as provided by section 36 of the Act may be used only for a trial in Jamaica. I agree with this view particularly as in relation to a foreign jurisdiction it could not be stated that - "whatever you say will be taken down in writing and may be given against you upon your trial." This injunction could only have effect depending upon the laws and procedures relating to trial in the foreign jurisdiction.

The right of an accused person to make an unsworn statement in his defence at his trial in Jamaica is a peculiar hang over from the time when an accused person could not give evidence on his own behalf. It does not constitute the giving of evidence and should not be extended to areas where it has not hitherto been established as being in existence. The nature of extradition proceedings does not accommodate the putting forward of a defence on the facts at the stage of the committal proceedings. This was well stated by LaForest J. in the Supreme Court of Canada delivering the judgment of the Court in **Canada v. Schmidt** [1987] 1 S.C.R. 500 at page 514 as follows:

> "Extradition is the surrender by one state to another, on request, of persons accused or convicted of committing a crime in the state seeking the surrender. This is ordinarily done pursuant to a treaty or other arrangement between these states acting in their sovereign capacity and obviously engages their honour and good faith. A surrender under these treaties is primarily an executive act. ... it is under domestic law in the discretion of the executive to surrender or not to surrender a fugitive requested by another state.
>
> However, as Laskin J. (as he then was) noted in **Commonwealth of Puerto Rico v. Hernandez** [1975] 1 S.C.R. 228 at p. 245 concern for the liberty of the individual has not been overlooked in these rather special proceedings. That is why provision is made in the treaties and in the Extradition Act to ensure that, before the discretion to surrender can be exercised, a judicial hearing must be held for the purpose of determining whether there is such evidence of the crime alleged to have been committed in the foreign country as would, according to the law of Canada,

> justify his or her committal for trial if it had been committed here. If so, the judge commits the fugitive for surrender, and the executive may then exercise its discretion to surrender; if not, he or she is discharged. The hearing is similar to a preliminary hearing, the presiding judge being ordained by s. 13 of the Act (Canada) to hear the case in the same manner,'as nearly as may be', as at a preliminary hearing for a crime committed in this country.
>
> The hearing thus protects the individual in this country from being surrendered for trial for a crime in a foreign country unless prima facie evidence is produced that he or she has done something there that would constitute a crime mentioned in the treaty if committed here. It must be emphasized that this hearing is not a trial and no attempt should be made to make it one. The trial, when held, will be in the foreign country according to its laws for an alleged crime committed there, and it should require no demonstration that such a prosecution is wholly within the competence of that country. A judge at an extradition hearing has no jurisdiction to deal with defences that could be raised at trial unless, of course, the Act or the treaty otherwise provides."

In dealing with the submission by counsel for **Schmidt** that the provision that an extradition hearing should be conducted "as nearly as may be" like a preliminary hearing indicated that Parliament must have intended to import into the extradition hearing some way of presenting defences, the Judge of Appeal continued -

> "That, however, would seem to me to import trial procedures into the hearing, an approach that is out of keeping with extradition law generally. In domestic law, such pleas can be made at trial. In extradition matters, too, these are issues that can be raised at the trial in the foreign country. In my view, the reference to a procedure that is the same 'as nearly as may be' as a preliminary hearing is intended to accommodate the differences between the two types of proceedings, such as, for example, the provisions in the treaty and the Act for presenting evidence by depositions."

Consequently, in my view the committal Magistrate was right in not permitting an unsworn statement to be made by the appellant after the evidence supporting the extradition had been presented and accordingly this ground of appeal therefore fails.

It was further submitted by Mr. Ramsay that the indictment in respect to which the committal was made is not that referred to in the affidavit of Gloria Bedwell but one included by error in the bundle of documents. Gloria Bedwell deponed to being the United States District Attorney in the Southern District of Alabama responsible for the preparation for trial of felony cases involving alleged violations of federal drug laws. She referred to the indictment returned by the grand jury in the Southern District of Alabama which accused Walter Gilbert Byles of various violations of the federal drug laws, and listed in her affidavit the counts of the indictment. The narrative in her affidavit relates to an indictment numbered 89-00089 and lists 6 counts. The indictment annexed to the affidavit and marked exhibit 4 and which is in the bundle of documents is also one of six counts. However it bears the number 91-00054 and the counts therein charged are not those recited in the body of Miss Bedwell's affidavit. The warrant of arrest is marked exhibit 3 and describes the offences only in a general way. The judgment of Clarke J, in the Full Court accepts that there is a discrepancy but agrees with the submission of Mr. Hibbert Q.C. on behalf of the respondents, which submission has been repeated in the Court of Appeal that the error is to be found in the narrative in Miss Bedwell's affidavit as to the number of the indictment and the contents thereof and not in the exhibited indictment.

In committal proceedings for the purpose of extradition, it is necessary for the documents accompanying the request for extradition to disclose clearly the offences in respect of which the provisional arrest is being sought by the Requesting State. This is so because the Treaty itself provides that the extradited person "may only be detained, tried or punished in the Requesting State for the offence of which extradition is granted." (Article XIV(1)). This is buttressed also by the provisions of section 7(3)(a) of the Extradition Act. Furthermore Section 8(2) of the Act requires that along with the request there must be furnished:

> "... the particulars of the person whose extradition is requested, and of the facts upon which and the law under which he is accused or was convicted, and

> evidence sufficient to justify the issue of a warrant for his arrest under section 9."

It is in compliance with this statutory requirement that Miss Bedwell's affidavit details the facts and identifies the indictment by number 89-00089. It is also by virtue of this requirement that the indictment 91-00054 containing details of the offences charged has been submitted among the documents relating to the Request. Since both by virtue of numbering (an identification factor) and content Miss Bedwell's affidavit differs from the indictment submitted with the request, how could the Committing Magistrate determine, as she did that the Committal was properly made on Indictment No. 91-00054 with the charges therein stated, and not on Indictment No. 89-00089 with the charges as detailed by Miss Bedwell in her affidavit?

In my view the two indictments and their contents are irreconcilable. The Committal Magistrate therefore erred in committing Byles "to custody to await his extradition under the Extradition Act for all the offences for which his extradition was sought", which left for speculation the question as to how she determined in the light of the conflict "the offences for which his extradition was sought." It was left to Mr. Hibbert Q.C. to urge before us as he did successfully before the Full Court and which found agreement in the judgment of Clarke J. "that the error is to be found not in the Indictment supplied but in Miss Bedwell's affidavit where she describes another indictment charging the applicant and others. Such a conclusion is in my view highly speculative. On this ground only the appeal would be allowed.

However, I will take the opportunity to examine the other grounds advanced in support of the appeal.

Mr. Ramsay's submission that the indictment 91-0054 is not admissible in evidence as it was not duly authenticated as required by sections 14(1)(a) and 14(1)(b) of the Extradition Act can be dealt with briefly. Section 14(1)(a) of the Act makes admissible in these proceedings:

> "(a) a document, duly authenticated, which purports to set out testimony given on oath in an approved State ...".

Section 14(2)(a) identifies a document to be duly authenticated:

> "(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 that State to be the original document containing or recording that testimony or a true copy of that original document;".

Miss Bedwell's affidavit to which the indictment is exhibited is duly authenticated by being sworn to before a U.S. Magistrate Judge of the Southern District of Alabama. Whether or not there is a jurat is in my view not relevant to the admission of that evidence in extradition proceedings. Although the committal magistrate is required to apply Jamaican Law she was not required to apply Jamaican practice and procedure as well. [See **R . v. Governor of Gloucester Prison, ex parte Miller** (1979) 2 All E.R. 1103]. The requirement of a jurat in our law is a matter of practice and procedure. I find no merit in this ground.

Mr. Ramsay further submitted that there is no "arrangement" between United States of America and Jamaica which would ensure the protection given under section 7 (3) of the Extradition Act to the person being sought to be extradited 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;
> ...".

I agree with Mr. Hibbert, Q.C and the judgment of the Full Court that the provisions of article XIV (1) of the treaty provides such an arrangement. An extradition treaty is indeed an arrangement between states and has been so referred to in the cases.

[See In re Aston No. 21 (1896) 1 Q.B. 509 at 517 quoted with approval in **Belgium v. Poshewaite** (1988) A.C. 924 at 946.]

Was there evidence upon which the committing magistrate could find, contrary to Mr. Ramsay's further submission that the substance alleged to be marijuana was the same as ganja under the Jamaican Criminal Law? In the Dangerous Drugs Act the relevant definition in the interpretation section reads as follows:

> " 'Ganja' includes all parts of the plant known as cannabis sativa from which the resin has not been extracted and includes any resin obtained from that plant, but does not include medicinal preparations made from that plant;..."

The definition of marijuana under the relevant United States law is as follows:

> "Marijuana means all parts of the plant cannabis sativa, whether growing or not; the seeds, thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture or preparation of such plant, its seed or resin ..."

Mr. Ramsay contends that where the chemist Lester in his affidavit identifies the substance as marijuana and the resin as cannabis resin, this is not sufficient to satisfy the definition in Jamaican law. The evidence in the affidavit of Mr. Lester, the chemist is that the green plant material he examined was marijuana, the dark green oily substance was marijuana (hashish) oil, and the greenish brown solid substance was cannabis resin (hashish). The definition in the Jamaican statute - "ganja" is not exhaustive of what in fact ganja "is" or "means". In **R. v. Director of Public Prosecutions et al exparte Newton Fitzgerald Barnes** M60/95 Harrison J, as he then was, in the judgment of the Court stated -

> "The dictionary meaning of ganja, '... A strong preparation of marijuana ...' The New Shorter Oxford English Dictionary Vol. 1, is helpful to identify the substance marijuana, as ganja, as it is known in Jamaica. 'Cannabis' is also defined as 'marijuana' and 'ganja' (see Blackston's New Gould Medical Dictionary, 2nd edtn. One cannot however rely on such texts in Jamaica in order to prove the nature of the substance".

He further continued:

> "A scientific analysis, as distinct from a botanical classification is therefore required in proof of the substance ganja, in the Jamaican court; ..."

I am of the view, unlike Harrison J, that these definitions despite being of a botanical classification are of assistance in determining the nature of marijuana as being ganja. Particularly is this so, when the definition of ganja is one which "includes" and is therefore in my view not exhaustive. The evidence of the chemist Mr. Lester was sufficient to identify the substances which he examined as falling within the definition of ganja under our Dangerous Drugs Act. This ground of appeal must therefore also fail.

It is admitted that the affidavit evidence of Cortina Mattner, the wife of Walter Gilbert Byles, which was part of the bundle of documents sent by the United States authorities supporting the extradition request was wrongly received in evidence by the committing magistrate as this evidence being that of the wife of the person charged would not be admissible in the Jamaican courts by virtue of the provisions of section 4(2) of the Evidence Act. I agree however, with the submission of Mr. Hibbert, Q.C, and the finding of the Full Court that her evidence should be ignored and a determination made as to whether, without it sufficient evidence existed upon which the magistrate could commit. This in my view is the proper approach, and that assessment can be made by the Full Court and the Court of Appeal.

Cortina Mattner Byles did however give evidence before the committing magistrate and apart from detailing the circumstances in which she came to give the affidavit against her husband and reneging on the evidence contained therein, when she was recalled at a later time, she gave evidence with regard to her brother Michael Mattner which evidence has not been rebutted.

In brief her evidence in this regard was that on Monday the 26th of June 1995 during the course of the hearing of the committal proceedings her brother Michael

Mattner landed in Jamaica for the purpose of giving evidence in the proceedings. She saw him at the Montego Bay Airport where she had gone to receive him. He was in police custody. She was not allowed to take him home. He was removed overnight under armed police guard to Kingston. At 34 Duke Street, Kingston she saw him in police custody and amongst those present were the Deputy Commissioner of Police Forbes and one Mr. Crawford a Drug Enforcement Agent from the United States of America. Her brother was taken from Mr. Forbes' office to the Wyndham Hotel where the DEA Officer had his passport and his immigration card and United States currency which he handed to a Jamaican Immigration officer with the words - "This money is for the purchase of Michael Mattner's ticket to Miami." At about 5.00 a.m. next morning they were all taken to the airport where the police bought a ticket to Miami for Michael Mattner. He was then placed on an Air Jamaica flight which took him out of Jamaica. The explanation given to Cortina Byles was that he was in great danger and he was being sent to Miami to have a chat with the DEA.

The only conclusion from this narrative of events is that the Jamaican police in co-operation with the United States Drug Enforcement Agency had taken Michael Mattner in custody on his arrival in Jamaica against his will, kept him in custody and then sent him out of Jamaica on a plane to Miami. The consequence of this action was that he was unable to give evidence in the committal proceedings.

The Full Court's approach was to ask the question, despite what had happened as to whether the committal magistrate was entitled to come to the conclusion she reached on the admissible evidence before her. The Full Court answered in the affirmative on the basis of the affidavit evidence of the accomplice Senter Williams and that of Michael Mattner himself. For this conclusion the court relied upon for support the authority of **Alves vs. Director of Public Prosecutions et al** (1992) 3 All E.R. 787. In that case an accomplice had given evidence against the fugitive while the accomplice was serving a term of imprisonment. This evidence he retracted in

proceedings against the fugitive before the committing magistrate on the ground that the original evidence was given by reason of police pressure against him whilst he was in custody. The magistrate made a committal order which was discharged by the Divisional Court. On appeal, the House of Lords held that despite the retraction the committal magistrate could take into account the evidence originally given by the accomplice against the fugitive if it was found reliable in the determination by the magistrate to make an order for the committal. In my view **Alves** is not an authority supporting the proposition that if the police authorities have ejected from the country someone desirous of giving evidence, even if that evidence would have disavowed his earlier affidavit implicating Byles, the committing magistrate would have of necessity disbelieved the disavowal and therefore would have properly committed. This conclusion would call for a speculation as to what the committing magistrate would do which was a matter for the committing magistrate herself. It could not be made on the speculative basis on which the Full Court sought to make it. The ejection from the jurisdiction of Michael Mattner prevented Walter Byles from placing before the committal magistrate all the evidence on which he could rely to oppose the Committal Order. A Committal Order thus impugned cannot stand.

Mrs. Samuels-Brown submitted that the chain of custody of the exhibited substances was broken within the United States as they passed from one official to another and by way of the post. I will not attempt to improve the analysis made by Clarke J in his judgment at pages 13-15 and for the reasons given therein with which I concur the ground would also fail. However, Mrs. Samuels-Brown further submits that section 8(2) of the Extradition Act requires the United States of America to submit a request to Jamaica which should be accompanied by:

> "... the particulars of the person whose extradition is requested, and of the facts upon which and the law under which he is accused or was convicted, and evidence sufficient to justify the issue of a warrant for his arrest under section 9."

She reasoned that the evidence against Byles was contained in affidavits subsequent in time to the Indictment and therefore would not constitute the facts upon which Byles was accused. Although there was a request made on the 26th of July, 1991 by the Diplomatic note 262, this apparently was not pursued as the evidence of Deta Cheddar Head of the Consular Division of the Ministry of Foreign Affairs of Jamaica, identifies a later Diplomatic note #386 dated 27/9/93 which made the request along with the bundle of documents under seal which was admitted in evidence before the committing magistrate.

The Resident Magistrate's jurisdiction to hold the committal proceedings arises out of the Minister's Authority to Proceed. She must embark upon the proceedings having received that authority. She cannot go behind the authority to determine whether it is properly issued. Her purpose in the committal proceedings was to determine whether there was sufficient evidence on which she could properly commit. This evidence is to be found in the affidavit and such viva voce evidence as was given before her at the hearing on behalf of the person in respect of whom the extradition is sought. The Supreme Court and the Court of Appeal are however, vested in law with authority which goes beyond the establishment of the sufficiency of the evidence and with that I will deal later. The affidavits were forwarded in support of the request and the fact that they post-date the Indictment does not invalidate the evidence in the affidavits which are in respect of incidents which pre-date the Indictment and formed the subject matter of these accusations. Mrs. Samuels-Brown's submissions on this ground would also fail.

The final ground in respect of which the submissions were made by Mr. Ramsay reads as follows:

> "That having regard to the evidence and all the circumstances and the terms of S. 11(3)(b) and (c) of the Statute it would be unjust and/or oppressive to extradite the Applicant/Appellant."

The relevant section of the Extradition Act reads as follows:

> "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) ...
>
> (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."

These provisions had been made applicable mutatis mutandis to the Court of Appeal in respect of an appeal from the Supreme Court on a refusal to grant a writ of habeas corpus, by the provisions of the Extradition (Amendment) Act 1995.

In my view section 3 of the amending Act confers upon the Court of Appeal all the powers of the Supreme Court on any matter coming before it on appeal from the Supreme Court. If it therefore appears to the Court of Appeal that for the reasons stated in Section 11(3) of the Extradition Act that "it would, having regard to all the circumstances, be unjust or oppressive to extradite" Walter Gilbert Byles, the Court of Appeal exercises its own jurisdiction based upon its own view of the circumstances.

With regard to section 11 (1)(b) in order to determine the extent of the delay we have to examine the time period starting from the dates of the alleged commission of the offences, 1986-1988, the issue of the warrant for arrest of Byles in the United States of America on the 7th of July, 1988 and the relevant Request for extradition - Diplomatic note #386 dated 27/9/93 (see evidence of Deta Cheddar Head of the Consular Section of the Ministry of Foreign Affairs and Foreign Trade of Jamaica) and ending with the hearing by the Full Court commencing on the 22nd January, 1996. All this covers a period of between 8 - 10 years.

The affidavit evidence on which the United States of America relies is the evidence of accomplices deponed to in 1992 at a time of their incarceration in prison in

the United States of America in respect of their involvement in the offences for which the applicant is charged. They relate to offences committed, as stated in the Indictment, between 1986 and 1988. The Warrant of Arrest and indeed the Indictment by the Grand Jury could not have been issued on this evidence since the evidence of the accomplices was not then available. It is reasonable to infer from Miss Bedwell's affidavit that there is another Indictment in existence since the content of the Indictment referred to in her affidavit do not equate to the authenticated Indictment 9100054 sent with the bundle of documents. Walter Byles was arrested on the 4th of December, 1994. His affidavit which is unrebutted in this regard, states that between 1988 and 1994 he has worked in Jamaica with Jamaica Tours Limited and also the Urban Development Corporation, his latter activity being in respect of hotel property renovation on well known hotels on the North Coast of Jamaica. In 1994 at the time of his arrest he was Managing Director of the Red Snapper Restaurant in Negril. I agree with the findings of the Full Court that "the evidence does not warrant a finding that the applicant concealed his whereabouts or sought to have evaded arrest in Jamaica."

In **Kakis v. Government of the Republic of Cyprus and others** (1978) 2 All ER 634 Lord Diplock stated at page 638:

> "My Lords, the passage of time to be considered is the time that passed between the date of the offence on 5th April 1973 and the date of the hearing in the Divisional Court on 15th December 1977, for that is the first occasion on which this ground for resisting extradition can be raised by the accused. So one must look at the complete chronology of events that I have summarised above and consider whether the happening of such of those events as would not have happened before the trial of the accused in Cyprus if it had taken place with ordinary promptitude has made it unjust or oppressive that he should be sent back to Cyprus to stand his trial now.
> 'Unjust' I regard as directed primarily to the risk of prejudice to the accused in the conduct of the trial itself, oppressive as directed to hardship to the accused resulting from changes in his circumstances that have occurred during the period to be taken into consideration; but there is room for overlapping, and between them they would cover all cases where to return him would not be fair."

With regard to delay Lord Diplock stated:

> "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. So where the application for discharge under s 8(3) is based on the 'passage of time' under para (b) and not on absence of good faith under para(c), the court is not normally concerned with what could be an invidious task of considering whether mere inaction of the requisitioning government or its prosecuting authorities which resulted in delay was blameworthy or otherwise. Your Lordships have no occasion to do so in the instant case."

Lord Edmund -Davies dissented on this question as to the relevance of where the responsibility lies for the delay. He stated at page 640:

> "In my respectful judgment, on the contrary, the answer to the question of where responsibility lies for the delay may well have a direct bearing on the issues of injustice and oppression. Thus, the fact that the requesting government is shown to have been inexcusably dilatory in taking steps to bring the fugitive to justice may serve to establish both the injustice and the oppressiveness of making an order for his return, whereas the issue might be left in some doubt, if the only known fact related to the extent of the passage of time, and it has been customary in practice to avert to that factor; see for example, **R. v Governor of Pentonville Prison, ex parte Teja** [1971] 2 All ER 11, [1971] 2 QB 274 per Lord Parker CJ and the speeches of this House in **Union of India v Narang** [1977] 2 All ER 348, [1977] 2 WLR 862, 64 Cr. App. Rep 259, DC and HL.."

Lord Keith of Kinkel who gave a dissenting judgment, nevertheless stated at page 643:

> "Other circumstances relevant for consideration are that the appellant has since September 1974 led a settled life in this country with his family and that the nature of the offence with which he is charged is extremely serious."

Lord Scarman at page 644 stated:

> "The oppressiveness in returning him for trial would arise because during the years that have elapsed since the end of July 1974 events have conspired to induce in the appellant a sense of security from prosecution. Yet during these years he has not led the life of a fugitive from justice. On the contrary, he has settled in this country openly and, as it must have appeared to him, with the assent of, or at the very least without objection by, the authorities in Cyprus."

Mr. Byles openly lived and carried on his business in Jamaica. No responsibility for the delay can be laid at his door. Prior to the 1991 Extradition Act there have been legislative provisions in Jamaica under which extradition proceedings could have been brought against criminal fugitives from the United States of America. He is not in the position of someone who is a citizen of the United States of America and having committed a criminal offence has fled that jurisdiction to take refuge in Jamaica.

The foundations of extradition arrangements rest upon the principles of comity and reciprocity. That is the basis upon which nations enter into extradition treaties with each other. Consequently, the evidence would have to be compelling to find an absence of good faith, which I do not. However, 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.

For the reasons stated therefore on the specific grounds indicated I would allow the appeal, set aside the judgment of the Full Court of the Supreme Court, and order the issue of the writ of habeas corpus in respect of the applicant Walter Gilbert Byles.

GORDON, J A

I have had the advantage of reading the judgment of the learned President. I agree that, for the reasons he gives Habeas Corpus should go in respect of the appellant.

BINGHAM, J A

I have taken the benefit of reading in draft the judgment of the learned President. He has there dealt fully with the issues falling for our determination in this appeal. I agree with his reasoning and the conclusion reached on the grounds specified therein that the appeal be allowed, the judgment of the Full Court be set aside and that Habeas Corpus should go to grant the relief sought by the appellant.