In the Supreme Court

Before : Mr. Justice Henry
Mr. Justice Rowe
Mr. Justice Willkie

Suit No. M. 3 of 1976

In the matter of an application for a writ of Habeas Corpus

Orville Winston Cephas — Applicant

And

Commissioner of Police
Attorney General — Respondents

Mr. V. B. Grant, Q.C. and Mr. J. Kirlew, Q. C. — for Applicant

Mr. Patrick Robinson of Attorney General's Department — for Respondents

Messrs. Henderson Downer and Derrick Hew — for D. P. P.

April 9, 1976

Henry, J :

The applicant, Orville Winston Cephas, is a Jamaican. On 30th November, 1975, he was arrested without a warrant at Vernamfield in Clarendon and taken to the Central Police Station in Kingston. At the time of that arrest he was informed that he was wanted in the United States of America on a charge of murder. He states in his affidavit on the 8th January, 1976, that he has been to the United States of America but that he is not involved in any murder there. On 9th December, 1975, an ex parte application for a writ of habeas corpus came before me and I directed that notice of the application be given to the Director of Prisons, the Attorney General and the Commissioner of Police. On the 19th December, 1975, Parnell, J. granted leave to issue the writ and a hearing on the merits was fixed for 30th December.

Corporal Roy Augustus Malcolm in his affidavit of the 23rd January, 1976, states that on the 19th December, 1975, he was informed by the Ministry of External Affairs that the United States Embassy requested that Orville Cephas be arrested on a provisional warrant pursuant to the Extradition Treaty between Jamaica and the United States of America and on that same day Mr. Robert Dianora of the New York City Police identified Orville Cephas to him at the lock-up at Central Police Station as a fugitive wanted for murder in the United States of America.

On 19th December, 1975, a warrant for the arrest of the applicant

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was issued by a Justice of the Peace for Kingston, the particulars of the offence being that "Orville Cephas on the 1st day of June, 1975, being a Jamaican citizen murdered Douglas Slack another Jamaican citizen at the County of Richmond City in New York, U. S. A., contrary to 33 Henry VIII Chapter 23." On the 23rd December, 1975, the applicant was arrested on this warrant by Corporal Malcolm.

On 30th and 31st December, 1975, Parnell J. heard the application for a writ of habeas corpus and at the conclusion of the hearing dismissed the application with costs and discharged the order nisi granted on the 19th December, 1975.

On 5th January, 1976, the applicant applied to a Full Court for a writ of habeas corpus on the ground that his detention is unlawful and that application was heard on the 26th, 27th, 28th, 29th, 30th, 31st January and the 7th February, 1976. On the 7th February, 1976, the Full Court ordered applicant to be released from custody and promised to put their reasons in writing.

At the outset, it was conceded by all the parties concerned that the Full Court has jurisdiction to entertain the application notwithstanding the fact that a single Judge in Court had already dealt with a previous application by the applicant made on similar grounds to those advanced in support of the present application. The basis for this concession is the decision of the Privy Council in Eshugbayi Eleko v. Nigeria Government Officer Administering 1928 A.C. 459. In delivering the judgment of the Court Lord Hailsham had this to say:

> " If it be conceded that any judge has jurisdiction to order the writ to issue, then in the view of their Lordships each judge is a tribunal to which application can be made within the meaning of the rule, and every judge must hear the application on the merits. It follows that although by the Judicature Act the Courts have been combined in the one High Court of Justice each Judge of this Court still has jurisdiction to entertain an application for a writ of habeas corpus in term time or in vacation and that he is bound to hear and determine such an application on its merits notwithstanding that some other judge has already refused a similar application. "

That judgment is binding on this Court because although it was given in a case coming from another territory the issue of law in both cases is the same (Fatuma Binti Mohamed Bin Salim Bakhshuwen v. Mohamed Bin Salim

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Bakhshuwen 1952 A.C. 1). The decision in the Eleko case gives rise to the anomalous situation of one judge of the Supreme Court being required to act as court of appeal from the decision of another judge of the same court and it also makes possible a series of applications to the Court which might cease only when all the judges and all the possible combinations of judges in a Full Court had dealt with the applications. The decision was not followed in England where it was not binding (re Hastings (No. 3) 1959 1 A.E.R. 698) and the position is now regulated there by statute (the Administration of Justice Act, 1960). It is to be hoped that Parliament will see fit to enact similar legislation in Jamaica limiting the applications which may be made but providing for appeals to the Court of Appeal by both parties.

I turn now to the merits of the application itself. It is one of the interesting features of the application that it is not opposed by Mr. Robinson who appears for the respondents. Mr. Robinson's submission in effect is that there is no proper basis for the arrest and detention of the applicant, and he offered well formulated arguments in support of that submission. Opposition to the application comes, however, from Mr. Downer and is based on two main grounds which he argued with force and skill and obviously after considerable research:

1. that the common law power to arrest, detain or bring a fugitive before a magistrate pending a formal request of extradition still exists parallel with the procedure laid down in the Extradition Act;
2. that the Jamaican courts have powers to try a Jamaican citizen who allegedly murders another Jamaican in a foreign land and with a view to such a trial the person charged is liable to arrest and detention by the police with or without a warrant.

On either of these grounds, Mr. Downer submits the applicant has been properly arrested and detained.

I shall deal with the first ground which, in fairness to him, Mr. Downer did not put forward with any show of enthusiasm. Mr. Downer does not and indeed could not assert that on either of the two occasions on which the applicant was arrested that arrest was effected pursuant

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to the United Kingdom Extradition Act 1870. That Act (as modified in its application to Jamaica by the Jamaica Extradition Act) in section 8, clearly prescribes the procedure for the issuing of a warrant for the apprehension of a fugitive criminal. The procedure so prescribed has not so far been followed in this case. The warrant on which the second arrest of the applicant was effected is not in the form prescribed by, and does not purport to be issued under the Extradition Act 1870, and the procedure subsequent to the issue of a provisional warrant under section 8(2) of the Extradition Act 1870 has not been followed. What Mr. Downer submits is that, notwithstanding the provisions of the Extradition Act 1870, as to the arrest of fugitive criminals, there still reposes in the police a power at common law to arrest without a warrant any person believed on reasonable grounds to have committed an extraditable felony in another country. This submission is based on the dictum of Brett L.J. in Reg. v. Weil 1882 Cox Crim. Cases 189 at p. 193:

> " I doubt much whether a policeman is not justified in arresting a man without a warrant on reasonable grounds of suspicion of his having done that which would be a felony if committed in this country. "

That dictum, however, has been criticised and has not been followed in subsequent cases in Australia and England. In Brown v. Lizars 1905 2 C.L.R. 837 the dictum was considered by the High Court of Australia which held that:

> " A reasonable suspicion that a person has in a foreign country or in another part of the British dominions committed an offence which, if committed in Victoria, would be a felony, does not justify a constable in arresting such person in Victoria without a warrant. "

In that case O'Conner, J. said:

> " This authority to arrest without a warrant on suspicion of a felony which would justify an arrest in this state, can have no application where the offence is committed outside this state whether in a foreign country or in some other British possession. There are many cases in which an arrest can be made for an offence committed in another country, but then the ordinary course under the Fugitive Offenders Act or the Extradition Acts must be followed. "

In England in Diamond v. Minter (1941) 1 A. E. R. 390 Cassels, J. in the course of a judgment which dealt with the question in some detail had this to say in conclusion at page 403:

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> " I am unable, therefore, to act upon the dictum of Brett L.J. in R. v. Weil. The Fugitive Offenders Act 1881 has made provisions for the course to be adopted in the arrest of fugitive offenders. Only upon either an endorsed or a provisional warrant can they be lawfully arrested and detained. The whole matter of the arrest of fugitive offenders is, in my view, now regulated by statute. "

These observations related to the Fugitive Offenders Act but the reasoning which led to them applies equally to the Extradition Acts.

Chancellor Kent in re Washburn (4 Johnson's N.Y. Ch. Reps. 106) expressed the view that:

> " Irrespective of all treaties, it was the duty of a state to surrender fugitive criminals. It was the duty of a magistrate, irrespective of legislative provisions upon the subject, to commit the fugitive upon due proof of the commission of crime, so as to afford time to the government to deliver him up or to the foreign government to claim him. If this claim were not made within a reasonable time, the prisoner would be entitled to his discharge on habeas corpus; the judicial power would have fulfilled his duty by affording the opportunity. It did not matter whether the prisoner was a subject of the pursuing government or of that under which he had taken refuge. "

This appears to deal with the "duty" of extradition rather than with the power of arrest without a warrant. If, however, it is intended to convey the existence of such a power Clark on Extradition although referring to the case does not mention it as authority for the proposition that there is any power to arrest without a warrant in the U. S. A. On the other hand Shearer on Extradition in International Law while not referring to the case states at p. 205:

> " It is fairly clear that the laws of the United States of America would not sanction arrest without warrant. "

I respectfully agree with the views expressed in Brown v. Lizars and Diamond v. Minter. It seems to me that the Extradition Act 1870 is clearly intended to cover all aspects of extradition and inasmuch as it contains specific provisions relating to the apprehension of fugitive criminals and the issuing of warrants for that purpose, those provisions must be regarded as having superseded any common law provisions for the apprehension of such persons without a warrant. If it is considered desirable for a police officer to have the power of arrest without a warrant in these cases, then it seems to me that this is a power which must be conferred by Parliament as was done in South Africa (Union of

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South Africa Act No. 56 of 1955 section 22(1)).

I turn now to the second ground on which Mr. Downer seeks to justify the arrest and detention of the applicant. Mr. Downer submits that:

(a) the English Act 33 Henry VIII Cap. 23 is in force in Jamaica;

(b) by virtue of that Act the Jamaican courts have jurisdiction to try a Jamaican citizen who is alleged to have murdered another citizen abroad; and

(c) a police officer is empowered to arrest without warrant a person reasonably suspected of having committed murder (a felony) which is cognizable in a Jamaican court.

The important issue so far as these submissions are concerned is whether the Act 33 Henry VIII Cap. 23 is in force in Jamaica. It is not in dispute that Jamaica is to be regarded as a settled colony for the purpose of determining its colonial status. The dicta of Lord Mansfield in R. v. Vaughn 1769 4 Burn 2500 and Campbell v. Hall 1774 Cowp. 208 and the decision in Stultz v. Wallace Stephens V. 2 p. 1886 and Jacquet v. Edwards V. 1 p. 414 clearly indicate this, notwithstanding the view expressed in Beaumont v. Bennett Stephens V. 1 p. 441.

In Cooper v. Stuart 1889 14 A.C. 286 Lord Watson at page 291 stated:

> " In the case of /a settled/ Colony the Crown may by ordinance, and the Imperial Parliament, or its own legislature when it comes to possess one, may by statute declare what parts of the common and statute law of England shall have effect within its limits. But, when that is not done, the law of England must (subject to well-established exceptions) become from the outset the law of the Colony, and be administered by its tribunals. "

And at p. 293 stated:

> " That case (Jex v. McKinney and others 1889 A.C. 77) differed from the present in this respect, that there the law of England was introduced into the Colony by statute, and not by the silent operation of constitutional principles. "

The first question I have to decide is whether the question of the applicability of the statute 33 Henry VIII Cap. 23 is to be determined by reference to legislation or by "the silent operation of

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constitutional principles." If the ordinary constutitional principles apply, the mere fact that a statute of England was in force at the time of settlement of the colony is prima facie evidence of its applicability, so that although all such statutes do not necessarily apply and, as Lord Blackburn indicates, it is for the colonial judiciary in the first place to determine which are admitted and which rejected, no evidence is required to show that a particular statute was in fact adopted or used in the colony in order to justify the colonial judiciary in deciding that the statute in question has become part of the laws of the colony. That decision may be arrived at merely by examining the statute itself and the relevant circumstances and conditions in the colony. If such an examination leads to the conclusion that the statute can reasonably be applied to the situation and condition of the colony, the court is entitled to make a declaration to that effect although there is no evidence that the statute has in fact been adopted or used. It is on this basis I think that Jacquet v. Edwards Stephens V. 1 p. 48 was decided, the court there having come to the conclusion that the common law of England prevailing in Jamaica did not originate or derive its efficacy from 1 Geo. 2 Cap. 1. It is not necessary for the purpose of this case to consider whether that conclusion is correct. If, on the other hand, the statute law of England is applied to Jamaica by legislation then a court must look at that legislation in order to determine whether a particular statute comes within its ambit and applies to Jamaica. Mr. Downer argued that Jamaica became a settled colony by two co-equal situations in the 1728 Act 1 Geo. II Cap. 1 and in the decisions of the courts and since the Act preceded the decisions the latter had the effect of imposing the "silent constitutional principles" in lieu of the 1728 Act, as the guide to the applicability of English statutes. If this were so, the statutes of England enacted between the time of the settlement and 1728 would by virtue of those principles, not apply except by express provisions in those statutes. Mr. Downer also argued in the alternative that while post-settlement Acts were governed by 1 Geo. II Cap. 1, pre-settlement Acts, once the courts declared Jamaica to be a settled colony, would be governed by the

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"silent constitutional principles." This is an attractive argument, but the relevant provisions of 1 Geo. II Cap. 1 have been re-enacted since that declaration by the courts and must therefore, I think, be regarded as applying to all pre-1728 Acts whether they are pre-settlement or not. I am therefore of the opinion that in order to determine whether a pre-1728 Act of England applies to Jamaica a court must have regard to the regime set up by the 1728 Act. The applicability of the Act 33 Henry VIII Cap. 33 must therefore be determined by reference to section 41 of the Interpretation Act - the present counterpart of section 22 of the 1728 Act 1 Geo. II Cap. 1.

Section 41 is as follows:

> " All such laws and Statutes of England as were, prior to the commencement of 1 George II Cap. 1, esteemed, introduced, used, accepted, or received, as laws in the Island shall continue to be laws in the Island save in so far as any such laws or statutes have been, or may be, repealed or amended by any Act of the Island. "

The relevant portion of section 22 is as follows:

> " and also all such laws and statutes of England as have been at any time esteemed, introduced, used, accepted, or received as laws in this Island shall and are hereby declared to be and continue laws of this his majesty's Island of Jamaica, forever.. "

Mr. Downer argued that in this original form the section permitted the continuous adoption of English statutes so that in 1800 for example, Jamaica could use a statute passed in England in that year and it would by virtue of that use become a law of Jamaica. I do not think that this is so. In my view, the section was intended to deal with the situation as it existed at the time of the enactment. The first part of the section "received and declared to be perpetual" Acts and laws of Jamaica which determined and expired on 1st October, 1724, and then in the second part proceeded to declare what English laws and statutes were "to be and continue" laws of Jamaica. In my view, the laws and statutes which the section contemplated were those in operation at that time. When the section was repealed and replaced in 1845, the new provisions which specified laws and statutes of England at any time before the passing of that Act (1 Geo. II Cap. 1) merely confirmed and did not alter the law as it stood by virtue of

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the 1728 Act.

I have next to determine the meaning and effect of section 41. In doing so I take into account the historical background to the passing of the 1728 Act. The colonists had been for some time agitating for a law which would confirm their claim that English laws applied to them, in effect declare their status as a settled colony and relieve them of the liability to taxation by Royal prerogative without recourse to Parliament. Eventually, a compromise was arrived at and the local assembly approved the Revenue Act (1 Geo. II Cap. 1) in which was included section 22, so that in return for the revenue he obtained the King recognised the status of Jamaica as a settled colony to which the law and statutes of England described in section 22 would thereafter apply.

The Jamaican legislature has treated the year 1728 and the Act 1 Geo. II Cap. 1 as the year and the event which concluded the reception of English laws and statutes into Jamaica by virtue of its colonial status. This cut-off period was beneficial to the settlers in that it extended the application of these laws and statutes beyond the year 1655 and right up to 1728 and at the same time the 1728 Act 1 Geo. II Cap. 1 set certain limitations on the reception of English laws and statutes by enumerating the circumstances in which they were to be applicable to Jamaica. It seems to me that the section contemplates five separate but overlapping conditions for the admission of an English statute as the law of Jamaica.

These are that, prior to 1728:

1. it has been "esteemed" i.e. generally regarded or considered as a law of Jamaica;
2. it has been "introduced" i.e. admitted or adopted in principle although perhaps never actually used as a law of Jamaica;
3. it has been "used" i.e. actually acted upon or utilised, although perhaps only once as a law of Jamaica;
4. it has been "accepted" or recognised by long usage or by a court or by the local legislature as a law of Jamaica;
5. it has been "received" by virtue of being expressed to apply as a law of Jamaica.

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There must, however, be some evidence from which a court can conclude that one or other of these conditions is satisfied before the court can find that a statute of England applies to Jamaica by virtue of the section. The nature and quality of the evidence are matters for the court to determine but evidence there must be. It may be that this is what Bryan Edwards C.J. meant to convey in Magnus v. Sullivan 1 Stephens p. 862 when he said:

> " The Court would not be justified, I consider, in holding that any English statute has been esteemed, etc. as being in force when no trace can be discovered of its ever having been acted on. "

If, however, he was saying that there must be evidence that the disputed statute was actually "used" then I respectfully disagree with that decision.

In R. v. Stephens 1 Stephens p. 862 the court acted on evidence which it considered adequate, although it expressly left undecided the question of whether English Statutes passed prior to the settlement of the Island were in force by virtue of the "silent constitutional principles" and irrespective of the provisions of 1 Geo. II Cap. 1.

In that case the court had to consider whether the English statutes 5 Rich 2 Cap. 7, 15 Rich 2 C. 2 and 8 Hen. 6 C. 9 applied to Jamaica. The Attorney General argued for their applicability on two grounds - firstly that in 1773 the Jamaican legislature had by 14 Geo. III Cap. 17 recognised the statutes as part of the Jamaican law and this raised a presumption that they were so recognised because they had been "esteemed, introduced, used, accepted or received" as laws of Jamaica prior to 1728, and secondly that 1 Geo. II Cap. 1 only applied to English Statutes passed after the settlement of the Island. In addition to evidence as to the terms of the 1773 Act, there was evidence that in 1785 the Supreme Court entertained an action brought on one of the disputed statutes. On that evidence, the court concluded that a presumption was raised that the statutes form part of the laws of Jamaica and considered it unnecessary to deal with the second ground of the Attorney General's argument.

Reference has been made to the case of Greenwood v. Livingston mentioned in Dr. Watkins' unpublished thesis "A History of Legal

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System of Jamaica." Unfortunately neither the judgments nor a report of them is available in Jamaica and it is impossible therefore to express a considered opinion of them. From the excerpts contained in Dr. Watkins' thesis, however, it is apparent that the majority of the court was of the view that some evidence was required to show that the disputed statute came within the ambit of 1 Geo. II Cap. 1, but their decision turned on the question of whether constant recognition of the statute by the Court after 1728 satisfied the terms of 1 Geo. II Cap. 1.

It is not necessary for the purpose of this case to consider whether the conclusions of the court in this regard in both Greenwood v. Livingston and R. v. Stephens were well founded, because although in this case the court is being asked to act on presumptive evidence, that evidence is in respect of the period prior to 1728. Evidence has been adduced as to the respective views of the Attorney General and the Chief Justice in 1827 in answer to the question "To what extent and in what cases are the common law and statute law of England in force in the colony?" These views, however, can be of little assistance as they are in general terms. No evidence has been adduced of the Act 33 Henry VIII Cap. 23 having been at any time "esteemed, introduced, used, accepted, or received" as a law in Jamaica. Reference has been made to the Calendar of State Papers Colonial Series 1132 in the West India Reference Library entries 993 - 995 for the purpose of suggesting that the settlers applied the Acts 27 Henry VIII Cap. 4 and 28 Henry VIII Cap. 15 for the trial of crimes committed by pirates and that by analogy it must be presumed that if the need arose they would similarly have applied the Act 33 Henry VIII Cap. 23. The Acts are similar in that they deal inter alia with murders committed extra territorially, but whereas the earlier Acts deal with offences within the Admiralty jurisdiction (albeit extending to rivers and creeks in foreign territory) the Act 33 Henry VIII Cap. 23 deals with offences committed on foreign soil. I am by no means convinced that by analogy one can arrive at the conclusion that the Act 33 Henry VIII Cap. 23 was in fact (as distinct from would probably have been) regarded as a law of Jamaica. In any event examination of the state papers suggests that

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it was the Lords of Trade and Plantations rather than the settlers (or at any rate their House of Assembly) who were applying the Acts by recommending "that his majesty should command a commission of Oyer and Terminer to be sent out for the trial of this and all other pirates according to the method of law as prescribed in the statutes of Henry VIII." Indeed, the Assembly in Jamaica, although wishing to have English laws applying to them were maintaining that these statutes of Henry VIII were inapplicable to Jamaica. This appears in their address to the Earl of Carlisle in November 1679 in which they state:

> " But as to the obstructing of justice against Brown the pirate, what they did, though not justifiable in the manner was out of an assurance, that we had no law in force then to declare my lord chancellor of England's power and our chancellor, here equal, in granting commissions in pursuance of the statute of Henry the eight, which also his majesty and council preceiving, have in the new body of laws, sent one to supply that want. "

(This being apparently a reference to the law which was eventually passed by the Assembly in 1681 as Cap. VIII "an Act for the restraining and punishing privateers and pirates.") When one remembers that the speaker of the Assembly was Samuel Lang, the Chief Justice who, according to the Earl of Carlisle's letter of 23rd November 1679, had "sufficiently possessed himself of the opinion of the assembly by advising and assisting them in the framing of their address" it seems clear that the assembly did not, on legal advice, consider that the statute of Henry VIII was applicable to Jamaica. Moreover, this view appears to have been shared by the King in council (presumably also on legal advice) since he sumbitted the 1681 Act to the Jamaican Assembly - this being an Act which not only conferred the necessary jurisdiction on the Jamaican supreme court but also validated previous trials pursuant to the statute of Henry VIII. It is true that this validation indicates that in some quarters at least the statute had been regarded as applicable to Jamaica but inasmuch as this view was not upheld by subsequent legislation, it does not seem that it can be relied upon as evidence that the statute was "esteemed, introduced, used, accepted or received" as law in Jamaica. Still less can it be regarded as presumptive evidence of the application of the Act 33 Henry VIII Cap. 23 to Jamaica.

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Indeed, if 33 Henry VIII Cap. 23 had been "used" in Jamaica I would expect to find similar validating legislation in relation to its use. That it was not considered as having been esteemed, introduced, used/accepted or received as a law of Jamaica prior to 1728 and therefore become part of the law of Jamaica would appear to be borne out by the fact that when the consolidating Act of 1864 in relation to offences against the person was being enacted a section corresponding to section 9 of the United Kingdom 1861 Act was not included. I do not consider as satisfactory the explanation that the section was omitted because the English Act 33 Henry VIII Cap. 23 already contained the necessary provisions. The 1864 Act was a consolidating Act, it followed the United Kingdom Act of 1861 closely, it included, as is normal with a consolidating Act, other legislation which was already in the statute books, and I would certainly have expected to see included in it provisions equivalent to section 9 of the United Kingdom Act if the legislature considered then that those provisions properly formed part of the law of Jamaica. The conclusion that the Act 33 Henry VIII Cap. 23 was not regarded as applicable to Jamaica would also appear to be borne out by the apparent total absence of any reference in any document to such application.

I do not consider on the evidence adduced that the English Act 33 Henry VIII Cap. 23 applies to Jamaica. In the absence of specific statutory authority the jurisdiction of the Jamaican courts would not extend to the trial of murder committed abroad and consequently the common law power of arrest for the purpose of bringing an alleged felon before a court for trial would not apply. I have earlier expressed my opinion that any common law power which may have existed to arrest a person alleged to have committed murder abroad has been superseded by the Extradition Acts. For these reasons the arrest and subsequent detention of the applicant could not be justified.

As I stated at the time when the applicant's release was ordered, this decision will not preclude his being arrested on a warrant validly issued under the Extradition Acts if and when extradition proceedings are properly brought against him.

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During the course of the proceedings the Court was asked to express its disapproval of the conduct of the Director of Public Prosecutions in resorting to the Act 33 Henry VIII Cap. 23 as a mere device or subterfuge for detaining the applicant in custody. I can see nothing improper in the Director of Public Prosecutions electing to adopt one of the two courses which in good faith he considered were validly open to him. I do feel, however, that once a request had been made for the issue of a provisional warrant under the Extradition Act, compliance with that request would have put the matter beyond doubt, effected a considerable saving of judicial and legal time and avoided the release of a fugitive criminal from custody as a result of these proceedings.

Rowe, J :

I agree :

Willkie, J :

I agree :