

Judgment Book

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN MISCELLANEOUS

SUIT NO. M 65/90

IN THE FULL COURT

COR: THE HON. MR. JUSTICE CHESTER ORR, J.

THE HON. MR. JUSTICE BINGHAM, J.

THE HON. MR. JUSTICE LANGRIN, J.

BETWEEN	LESTER COKE	APPLICANT
AND	SUPERINTENDENT OF PRISONS GENERAL PENITENTIARY	RESPONDENT
AND	THE HONOURABLE ATTORNEY GENERAL	INTERVENER

Berthan Macaulay Q.C., and George Soutar for the Applicant.

Evan Oniss, Assistant Attorney General, and Bryan Wallace, Assistant Crown Counsel for the Intervener.

Hearing on February 18, 1991

JUDGMENT

BINGHAM J.

This is an unanimous decision of the Court.

The applicant sought by virtue of a Motion dated 24th December 1990 (which may conveniently be referred to as the second Motion) the following reliefs:-

- (1) "An Order that the Applicant LESTER COKE BE RELEASED forthwith by the Superintendent of Prisons, General Penitentiary, Tower Street Kingston, from his custody and/or
- (2) Such other Orders, Writs and Directions, as the Court may consider appropriate for the purpose of enforcing and securing the provisions of section 15(1) and section 16(1) of the Constitution in that the Applicant's fundamental rights contained in these provisions have been and are being contravened in relation to him, in that his present detention by the Superintendent of Prisons at the General Penitentiary, Tower Street, Kingston, Jamaica, does not fall within the exceptions contained in section 15(1) (2) and section 16(1) (e) of the Constitution; pursuant to section 25(1) and section 25(2) of the Constitution, including a Writ of Certiorari, quashing the Warrant of Commitment to the General Penitentiary."

The Grounds upon which these reliefs were based were that:-

- (1) "The Applicant being a Jamaican Citizen and a person within Jamaica is entitled to immunity from expulsion, save in the circumstances mentioned in section 16 (3)(e) and under a law referred to in section 15(1) (i) of the Constitution, could only be remanded to prison pending investigation for an extradition and extraditable crime as a fugitive criminal in proceedings begun upon an Order of the Governor General.
- (2) The power contained in section 7 of the Extradition Act 1870 (U.K.) to require by Order a Magistrate to issue a Warrant for the apprehension of a Fugitive Criminal is vested in the GOVERNOR GENERAL by virtue of section 17 (2) of the Extradition Act 1870 and Article 15 of the Treaty contained in the United States of America (Extradition Order in Council, 1935 (1935 No. 674 - U.K.) and section 4 (2) (a) of the Jamaica (constitution) Order in Council 1962. The Order to proceed, (in the instant case upon which the Learned Resident Magistrate acted in issuing a warrant for the Applicant's apprehension and subsequent remand to prison, by his warrant or Order) was signed by the wrong person, that is the Minister of Justice. The Resident Magistrate therefore unlawfully and unconstitutionally deprived the Applicant of his fundamental rights guaranteed by sections 15(1) and 16(1) of the Constitution, by issuing a warrant of committal against him, and causing the deprivation of his liberty and consequent freedom of movement."

The Original Motion filed in this matter and which bears the date 6th September 1990 had been set down for hearing on 1st October 1990. This sought the following reliefs:-

- (1) "An Order that Applicant BE RELEASED forthwith by the Superintendent of Prison, General Penitentiary, Kingston, from his custody and/or
- (2) An Order that a Writ of Habeas Corpus should issue directed to the Superintendent of Prison, General Penitentiary to have the body of LESTER COKE aforesaid before the said Court at King Street, Kingston, Jamaica, immediately after the receipt of such writ to undergo and receive all and singular such matters and things as the Court shall then and there consider of concerning him in that behalf and BE DISCHARGED from the custody of the Superintendent.

- (2) Such other Orders, Writs and Directions, as the Supreme Court may consider appropriate for the purpose of enforcing and securing the provisions of Section 15 (1) and Section 16(1) of the Constitution in that the Applicant's fundamental rights contained in those provisions have been, and are being contravened in relation to him in that, his present detention by the Superintendent of Prison, the General Penitentiary, Kingston, Jamaica, does not fall within the exceptions contained in Section 15(1) (j) and Sections 16(1) (e) of the Constitution. Pursuant to Section 25 (1) and Section 25 (2) of the Constitution.

On the Grounds the Applicant being a Jamaican citizen and person within Jamaica, entitled to immunity from expulsion, save in the circumstances mentioned in Section 16(3)(e) and under a law referred to in 15 (1)(j) of the Constitution, could only be remanded to prison pending investigation for an extradition and extraditable crime, as a fugitive criminal, in proceedings begun upon an Order of the Governor General.

- (2) The power contained in Section 7 of the Extradition Act 1870 (U.K.), to require by Order, a Magistrate to issue a Warrant for the apprehension of a Fugitive Criminal is vested in GOVERNOR GENERAL by virtue of Section 17(2) of the Extradition Act 1870 and Article 15 of the treaty contained in the United States of America (Extradition Order in Council, 1935 1935 No. 574 - U.K.), and Section 4 (2)(a) of the Jamaica (Constitution) Order in Council 1962. The Order to proceed, (in the instant case upon which the learned trial Magistrate acted in issuing a warrant for the Applicant's apprehension and subsequent remand to prison, by his warrant or order) was signed by the wrong person, that is the Minister of Justice. The Magistrate therefore unlawfully and unconstitutionally deprived the Applicant of his fundamental rights guaranteed by Sections 15(1) and 16(1) of Constitution, by issuing a warrant of committal against him, and causing the deprivation of his liberty and consequent freedom of movement."

The Full Court of the Supreme Court and the Court of Appeal had determined in Thompson vs. D.P.P. S.C. Misc. App. 1/87 the the Full Court was right to refuse to amend the Notice of Motion which sought relief by way of a Writ of Habeas Corpus ad Subjiciendum to enable the applicant in that matter to seek a declaration that his fundamental rights had been, were being or were likely to be contravened in breach of Section 15 of the

Constitution. This decision which was later expressly approved by the Court of Appeal in Junious Morgan vs The Attorney General S.C.C.A. 9/88, and as recently as 20th December 1990 in Derrick Watkis Mitchell vs. United States Government (R vs Keeper of the General Penitentiary Prison ex parte Derrick Watkis Mitchell), an unreported judgment of that Court.

In the light of the above decisions the original Motion in so far as it had sought reliefs along similar lines was not proceeded with. As the present Motion now seeks Constitutional reliefs under sections 15 and 16 of the Constitution which if not successful, would now afford to the Applicant recourse by way of Appeal as of right by virtue of Section 110 (3) of the Constitution to the Court of Appeal and if necessary to Her Majesty in Council the substantive remedy of Habeas Corpus sought in the Original Motion was now omitted. By this device it was envisaged that the Applicant could justifiably circumvent the clear procedural requirement laid down under section 25(2) of the Constitution and by so doing leap-frogging his way over the Resident Magistrate's Court, which has the original jurisdiction to hear and determine such applications under section 10 of the Extradition Act 1870.

This course has before us today been met with a Preliminary Objection based upon section 25(2) of the Constitution and filed by the Attorney General as the intervener in the cause. It may be convenient to set out the particular sub-section relied upon. It states:

25(2) "The Supreme Court shall have original jurisdiction to hear and determine any application made by any person in pursuance of subsection (1) of this section and may make such orders, issue such writs, and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the provisions of the said sections 14 to 24 (inclusive) to the protection of which the person concerned is entitled:

Provided that the Supreme Court shall not exercise its powers under this subsection if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law" (Emphasis supplied)

In the view of the fact that the procedure under section 10 of the Extradition Act if he availed himself of it still remains open to the Applicant, the effect of the purposeful proviso, referred to Supra, therefore operates as

a complete bar to the hearing of the Motion before us.

Having set out the background leading up to the application and before learned Counsel for the Attorney General proceeded to develop his submissions in support of the Preliminary Objection, Mr Macaulay for the applicant intervened and although not conceding that the Preliminary Objection had merit stated that it was the view of the applicant that in the light of the decisions referred to in Ground 3 of the Preliminary Objection this Court would have no alternative but to dismiss the Motion. Ground 3 states:

3. "The Supreme Court is barred from hearing and determining the application and granting the redress - the Writ of Certiorari sought in paragraph 2 of the Motion-since an application under section 25 of the Constitution cannot properly be joined with any other proceedings whatsoever. The cases of Thompson S.C.M.A. 1/87 Junious Morgan S.C.C.A. 9/89 and Derrick Watkis Mitchell S.C.M.A. 3/90 are cited in support of these preliminary objections."

We are, unanimously of the view that in the light of the decisions adverted to in Ground 3, the application before us was without merit and upheld the Preliminary Objection, dismissed the Motion with an order for costs to the respondent, such costs to be agreed or taxed.

Before parting with the matter, it may be useful to refer to the dictum of Wright and Downer J.J.A. in Thompson vs D.P.P. (referred to supra) which we regard as apposite and where they said:

"In the particular circumstances of this case it would mean that the law having specifically provided the effective procedure of habeas corpus to test the legality of committal proceedings, the fugitive could ignore that important protection of the law and resort to the original jurisdiction of the Supreme Court and allege that his fundamental rights have been breached. By such a device the fugitive would be entitled to come to this Court of Appeal to say that his arrest and the committal proceedings were in contravention of his fundamental rights and freedom when he ignored the opportunity to test the constitutionality of the legality of the proceedings in the Supreme Court by way of Habeas Corpus as laid down in the Statute. The advantage sought is that by this method there would be an appeal as of right to this Court and thereafter to Her Majesty in Council."

It is no doubt faced with the futility of this situation presented to the Applicant that leading Counsel for the Applicant capitulated leading to the decision at which we arrived.