JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NOS. 79 & 80/93

COR: THE HON MR JUSTICE CAREY J A
THE HON MR JUSTICE FORTE J A
THE HON MR JUSTICE WOLFE J A

BETWEEN	RICHARD DALEY	APPELLANT
A N D	THE SUPERINTENDENT OF PRISONS - GENERAL PENITENTIARY	1ST RESPONDENT
A N D	THE DIRECTOR OF PUBLIC PROSECUTIONS	2ND RESPONDENT

Lord Gifford QC, Patrick Bailey and Maurice Manning for appellant

Lloyd Hibbert, Senior Deputy Director of Public Prosecutions for 2nd respondent and requesting Government

Lackston Robinson for Superintendent of Prisons

16th, 17th January & 6th February 1995

CAREY J A

The United States government has requested the return of a fugitive, this appellant, to face trial on a number of serious criminal charges including murder, kidnapping, and several drug related offences. After his arrest in this country, and a hearing before one of the Resident Magistrates in St Andrew, it was ordered that he be committed to custody to await his extradition. The appellant duly applied for an order for habeas corpus, which hearing took place between 8th and 10th November 1993, and was dismissed. At that hearing the appellant applied to adduce additional evidence from one Dionne Lewis but that application was also dismissed. Both those orders dated the 12th November 1993, of the Full Court of the Supreme Court (Theobalds, Bingham and Langrin JJ) are now the subject of appeals to this Court.

I consider first the motion before the Full Court, that is, to adduce additional evidence of Dionne Lewis by way of an affidavit. Dionne Lewis gave evidence before a judge and jury

at a trial in the Eastern District of Pennsylvania, United States of America against eleven co-defendants of the appellant for murder, kidnapping and conspiracy to distribute cocaine. She made allegations in her depositions which plainly implicated him in the commission of these crimes. In the affidavit which it was then being sought to adduce in evidence before the Full Court, she recanted her earlier allegations against the appellant and deposed that she had lied in her deposition. In that affidavit she also swore as follows at p. 79:

> "... Throughout the preparation of the said affidavit the police representatives dictated the matters they wanted included in the affidavit and whatever they dictated to me I went along with in an effort to have my life sentence reduced and so as to get out of my predicament."

Since she gave evidence against the co-defendants of the appellant, it must be accepted that she was a self confessed perjurer at their trial. There is one other comment which it is pertinent to note and it is this. This additional evidence has only emerged after the Resident Magistrate had committed the appellant to custody to await extradition.

The challenge being mounted in this court to the refusal of the Full Court to allow the adduction of that evidence was on the footing that the evidence was relevant to the issue of "good faith in the interest of justice." That was not the basis of the application in the court below.

Section 11 (3)(c) of the Extradition Act provides as follows:

> "(3) 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—
>
> (c) because the accusation against him is not made in good faith in the interest of justice. ..."

It is right to say that Lord Gifford QC did not seek to controvert the submissions of Mr Hibbert that the arguments on behalf of the appellant in the court below, were directed to

show that in light of the inconsistent affidavit evidence of the witness, the evidence given before the Resident Magistrate would not raise a strong or probable presumption of his guilt. In my judgment, the Full Court properly refused to allow the inconsistent evidence contained in the affidavit, to be admitted, rightly founding itself on **Schtraks v Government of Israel** [1962] 3 All ER 529. In that case Lord Reid at p. 533 said this:

> The accused sought to adduce further evidence before your Lordships in order to show that on the whole material now available it would be improper to commit him. In my judgment, we are not entitled to look at such evidence and we have not done so. Owing to the restricted character of habeas corpus proceedings a court is not concerned with anything that comes to light after committal. This could easily lead to injustice if the accused had no other remedy: there may well be cases where new evidence throws quite a different light on the material orginally before the magistrate: but that is a matter which the Secretary of State is entitled to consider, when deciding whether to grant extradition."

The effect of that dictum is that additional evidence will not be allowed to raise a conflict and show that a case has not been made out.

The question before this court then, is whether the same false witness is capable of providing any evidential material to show that the accusation against the appellant is not made in good faith in the interest of justice. It seems to me to go without saying that since the Extradition Act provides specific restriction limiting the court's power to order extradition viz sections 7 and 11 (3) that it would be necessary to allow evidence relevant to those restrictions to be admitted, and indeed section 11 (4) expressly provides for such a situation. Section 11 (4) states:

> "11 (4) On any such application the Supreme Court may receive additional evidence relevant to the exercise of its jurisdiction under section 7 or under subsection (3) of this section."

That being so, this court is entitled to look at the contents of the affidavit of Dionne Lewis (which is the "additional evidence") albeit tendered for another purpose below in order to answer the question raised in this appeal. As I pointed out earlier in this judgment, the witness is a self confessed perjurer, but that, as it appears to me, is a reflection on the witness' character and not on the bona fides of the requesting state. Prior to her latest affidavit evidence, there would be no ground for suggesting that the evidence she provided to corroborate the charges was other than credible or that the requesting state was acting other than in good faith. What Lord Gifford QC is relying on however to prove bad faith in the United States Government is her statement that she had gone along with whatever was dictated to her by police representatives. It is the allegation that the police authorities were guilty of some opprobrious conduct, which is being made the basis of the application.

There was no suggestion however in the additional evidence of oppressive conduct, or any offer of advantage or promise of any favour on the part of police authorities. The clear basis of bad faith must be that the United States police authorities fabricated a case against the appellant and somehow persuaded her to "go along with it." Since we are well aware that other witnesses have given depositions implicating the appellant, I am not in the least doubt that the material is altogether incapable of proving bad faith on the part of the United States Government. I am fortified in this view as well by her own admission that <u>she</u> lied to implicate the appellant. Such a confession, I would think, is strong evidence of bad faith on her part but hardly supplies by itself, proof of lack of good faith on the part of the United States Government. The court must require at least credible evidence which tends to support whatever statutory restriction is relied on. In the present case, it could scarcely be considered satisfactory merely to produce the bland statement of one solitary witness in a case depending on other witnesses, who said "she went along with matters dictated by police authorities."

The point, I fear, is really hopeless and therefore fails. That disposes of the second appeal (C.A.80/93). It is accordingly dismissed with costs to the respondents to be taxed if not agreed.

With respect to the first appeal, the only point raised was that the Full Court erred in holding that the evidence tendered proved that if extradited, the appellant might be denied a fair trial. This has conveniently been referred to during the arguments as the "fair trial issue."

The Full Court was provided with three affidavits bearing on this issue, of which two were filed on behalf of the appellant and the third by the United States Government. In the affidavit of the appellant himself in support of his application for habeas corpus, he expressed his doubts as to obtaining a fair trial in these words at p. 7:

> 4. That I fear that I will not receive a fair trial in the United States court owing to the prejudice which is present against Black people in general and Jamaicans in particular, and I wish to present new evidence to show the extent of such prejudice in Philadelphia, and the inadequacy of the legal safeguards against such prejudice."

He was relying on a restriction against extradition contained in section 7 (1)(c) of the Extradition Act:

> "7.—(1) A person shall not be extradited under this Act to an approved State or committed to or kept in custody for the purposes of such extradition, if it appears to the Minister, to the court of committal or to the Supreme Court on an application for habeas corpus—
>
> ...
>
> (c) that he might, if extradited, be denied a fair trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality or political opinions;"...

Before giving my own views on the effect of the three affidavits, it is necessary to remind of the test to be satisfied by the appellant on whom the burden lies. Both Bingham and Langrin JJ who wrote judgments, referred to **Fernandez v Government of Singapore & Ors**

[1971] 2 All ER 691 where Lord Diplock expressed his opinion on section 4 (1)(c) of the Fugitive Offenders Act 1967, where the words - "he might, if extradited, be denied a fair trial ... are used. Those words also appear in our section 7 (1)(c). Bingham J in reliance on the law as formulated by Lord Diplock stated the burden cast upon the appellant in these terms at p. 125:

> " In so far as the applicant is contending that he will not recieve a fair trial he needs to show therefore, on the material provided that there are substantial grounds for thinking that there is the likelihood that if he is extradited he will not get a fair trial."

Having analysed the evidence of fact and opinion contained in the three affidavits, he came to the conclusion that the affidavit put forward by the requesting state should be accorded more weight because the deponent had actual familiarity as an attorney who practises in the State of Pennsylvania. Langrin J, like Bingham J, was impressed with the affidavit of Mr Suddath, an Assistant United States Attorney who had prosecuted in the trial against the co-defendants of the appellant. He accepted as well that given the reality of bias in prospective jurors, the United States justice system has adequate measures in place to effect a fair trial viz, change of venue, postponement of the trial to allow adverse publicity to fade in the minds of potential jurors, and of course, judicial questioning of prospective jurors.

Lord Gifford QC contended that the burden cast represented a low threshold of proof and in the light of the two affidavits on his side which on the issue of bias, did not significantly differ from that of the affidavit on the other, the burden had been satisfied. He put it this way in his skeleton arguments - the evidence was contained in affidavits from Miss Elissa Krauss, a social scientist and a jury trial consultant and Mr Kenneth Mogill an attorney at law. Their evidence, he said, established three propositions viz:

> (i) there exists in the State of Pennsylvania an extraordinarily negative image of Jamaicans such that a substantial number of potential jurors would be affected by bias against a Jamaican whom they were empanelled to try;
>
> (ii) there is in the Federal Criminal Courts of the United States a limited amount of questioning of jurors in order to

> avoid bias. Such questioning is carried out by the judge and takes the form of leading questions (closed ended questions in American "legalise");
>
> (iii) leading questions are wholly inadequate as a means of revealing prejudice in a potential juror.

All this leads to the conclusion he argued, that any jury selected to sit in judgment of the appellant would include individuals who are so biased against him that they would not be able to give him a fair trial.

The whole idea of the United States jury selection process appears, to us, who are more familiar with the English system we inherited, a little strange. It seems a great to do. But it is intended to operate in a wholly different social environment. What is important is that citizens of that country are guaranteed due process, a fair trial. The jury selection process is designed to achieve that fair trial so far as is possible. The data provided by Elissa Krauss from media research suggests that a negative image of Jamaicans exists in the area from which potential jurors are likely to be selected. Bias is a spectre that is likely to arise. Insofar as the process to disclose the existence of bias in a juror is concerned, both Elissa Krauss and Kenneth Mogill an attorney with no experience in the State in which this trial will take place, but who provided the second affidavit for the appellant, are more than a little skeptical. Miss Krauss' skepticism is put in this way - (p.60):

> "6. A Jamaican defendant facing trial on serious drug-related offences in United States federal court has no assurance much less guarantee that his right to a fair jury trial will be protected. In fact, in light of the severe limitations placed on voir dire in the federal courts it is likely that individuals will be seated on the jury who are biased against the defendant because of his race and/or his ethnicity and/or the charges against him."

Mr Mogill deposed thus - (p. 76 para. 20):

> "... it is my belief that it is highly likely that any jury selected to sit in judgment of Mr. Daley would include individuals who are so biased against him that they would not be able to give him a fair trial."

and again paragraph 21:

> "... In the absence of rules and practices designed to ensure that the administration of our criminal laws is truly fair, it will not be in cases like the case against Mr. Daley. There is a well polished veneer of fairness but not its substance; the two should never be confused."

For his part, Mr Suddath who provided an affidavit in support of the requesting state, ex facie, seems better qualified to express an opinion for the good reason that he practices in the very court in which the co-defendants were tried and indeed prosecuted. He was involved in the jury selection process for that trial. He deposed to the fact that there were in fact acquittals of some of these co-defendants.

Thus the question to be answered is, did the Full Court err when it concluded that the evidence did not show that the appellant might not get a fair trial or to be more precise, there was no evidence to show that there was a reasonable chance or substantial grounds for thinking or a serious possibility that if the appellant were extradited he would not receive a fair trial. On any fair assessment of the contending affidavits, I am inclined to think that the affidavit of the deponent who speaks from first hand experience is to be preferred to those of persons without such an intimate connection. Jury selection is a legal process. It is the courts that is, the Courts of Appeal in that country who determine the legitimate purpose of the process and define the objectives and scope of that process. Sociologists and legal reformers may inveigh against the limitations of the process and their opinions are undoubtedly entitled to respect. But this court, jealous as it must be, of the rights of its own citizens, must itself examine the process of the requesting country and ensure that it satisfies standards of a fair trial in this country. A fair trial necessarily involves securing that an impartial jury is empanelled. I entirely agree with Langrin J that once it is shown that it would not be impossible to empanel an impartial jury, the application must fail. The affidavit of

Mr Suddath demonstrated that even with a negative image of Jamaicans, it was possible to empanel an impartial jury.

In the result, I cannot agree that the appellant satisfied the test articulated in **Fernandez v Government of Singapore** (supra). In my judgment, the Full Court came to a correct determination on the matter and I would accordingly dismiss the appeal with costs and affirm their order.

FORTE, J.A.:

I have had the opportunity of reading in draft the judgments of Carey, P. (Ag.) and Wolfe, J.A. and agree with the reasons and conclusions therein. Both judgments have so comprehensively dealt with the issues that called for resolution, that there is no purpose in setting out my own reasons coinciding as they do with those expressed in the judgments of my brothers. Perhaps for emphasis I should add, however, that the affidavit of Dionne Lewis sought to be used in evidence to support the allegation of "bad faith" now being made on appeal, does not on the face of it show any "bad faith" in the Requesting State, and accordingly, is worthless for that purpose. In so far as the likelihood of the appellant getting a fair trial in the Requesting State, is concerned, the system set out by Mr. Thomas A. Suddath, Jnr. and which the Full Court with good reason preferred to the allegations of likely bias and insufficient safeguards contained in the affidavits of Elissa Kruass and Kenneth Mogill in support of the respondent, in my view shows that the Requesting State is cognizant of the prejudices and bias that can from time to time exist, and have created safeguards approved by its own Courts of Appeal for the purpose of securing a fair trial for accused persons.

I am in agreement with my brothers and with the Full Court, that the appellant has failed to show that the system in the Requesting State is such that would be likely to deprive him of a fair trial if he is extradited.

I would dismiss the appeal.

WOLFE, J.A.:

On the 12th day of March, 1993, Her Honour Miss Marcia Hughes, Resident Magistrate for the parish of St. Andrew ordered that the appellant be committed to custody to await extradition by the Honourable Minister of National Security and Justice, to the United States of America, for the offence of murder, kidnapping, conspiracy to distribute cocaine, distribution of cocaine and possession of cocaine committed within the jurisdiction of the Eastern District of Pennsylvania.

By Motion dated March 24, 1993, the appellant sought by way of Writ of Habeas Corpus Ad Subjiciendum to quash the order of the learned Resident Magistrate. The Full Court of the Supreme Court (Theobalds, Bingham, Langrin, JJ) dismissed the Motion. That order of the Full Court has given rise to these appeals.

Appeal No. 79/93 seeks an order that the judgment of the Full Court be set aside and that a Writ of Habeas Corpus Ad Subjiciendum be issued. Appeal No. 80/93 seeks an order that the dismissal of an application by the appellant to adduce the further evidence of Dionne Lewis be set aside and "that the matter be remitted to the Full Court for them to receive the said evidence."

Before us two grounds of appeal were argued, viz:

i. that the Full Court erred in law in refusing to admit the further evidence of Dionne Lewis, and

ii. that the Full Court erred in holding that the appellant could obtain a fair trial within the jurisdiction of the Eastern District of Pennsylvania.

Re Further evidence of Dionne Lewis

Dionne Lewis, a girlfriend of the appellant, swore an affidavit in which she implicated the appellant, herself and others. She was actually convicted of murder and sentenced to life imprisonment. By way of plea-bargaining, her sentence was reduced from life imprisonment to a sentence of 6 - 15 years.

Subsequent to being released from prison, she has averred in an affidavit made on September 21, 1993, that her affidavit implicating the appellant was done with a view to reducing her sentence from life imprisonment to a more tolerable one. The appellant sought to have the Full Court admit into evidence this affidavit. This attempt was rejected by the court.

Lord Gifford, Q.C. urged this court to find that the Full Court, in applying the dicta of Lord Reid in **Schtraks and Government of Israel and others** [1964] A.C. 556, when refusing to admit the affidavit evidence, fell into error. For purpose of deciding whether or not Lord Gifford's contention is sound, I set out the dicta:

> "The accused sought to adduce further evidence before your Lordships in order to show that on the whole material now available it would be improper to commit him. In my judgment we are not entitled to look at such evidence and we have not done so. Owing to the restricted character of habeas corpus proceedings a court is not concerned with anything that comes to light after committal. This could easily lead to injustice if the accused had no other remedy: there may well be cases where new evidence throws quite a different light on the material originally before the magistrate. But that is a matter which the Secretary of State is entitled to consider when deciding whether to grant extradition."
>
> [Emphasis supplied]

Relying upon this dicta, the Full Court concluded that the evidence sought to be adduced was a matter for Ministerial consideration in deciding whether or not to order extradition. Counsel for the appellant labelled this approach as misconceived in that the evidence was being adduced to support a statutory ground which is open to the Supreme Court only to determine, namely, that the accusations against the appellant were not made in good faith. Section 11 of the Extradition Act states:

> "11.--(1) Where a person is committed to custody under section 10(5), the court of committal shall inform him in ordinary language of his right to make an application for habeas corpus and shall forthwith give notice of the committal to the Minister.

"...

(3) 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--

...

(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) On any such application the Supreme Court may receive additional evidence relevant to the exercise of its jurisdiction under section 7 or under subsection (3) of this section."

It is clear that section 11(4) does permit the Supreme Court to admit and consider further evidence where it is being alleged that the accusation is not being "made in good faith and in the interest of justice it would, having regard to all the circumstances, be unjust or oppressive to order extradition."

Mr. Hibbert for the second respondent pointed out that the Full Court relied on **Schtrak's** case because at the hearing the appellant did not advance section 11(3)(c) as the basis for seeking to have the evidence of Dionne Lewis adduced. This observation by Mr. Hibbert elicited no demurrer from Lord Gifford, Q.C. In such circumstances, the contention that the Full Court application of the dicta of Lord Reid in **Schtrak's** case (supra) was misconceived is wholly untenable. Section 11(4) of the Extradition Act stipulates the circumstances under which this type of evidence may be admitted. None of the circumstances predicated in sections 7 and 11(3) was advanced in the court below.

In any event, I am of the view that even if the evidence was properly admissible, it could not be used to establish bad faith on the part of the requesting state. For whatever reason Dionne Lewis recanted, this cannot be attributed as bad faith on the part of the requesting state. At the hearing of the application before the Resident Magistrate, Dionne Lewis had not retracted

her earlier statement. The retraction was made on September 21, 1993. The order for committal was made on March 12, 1993. In any event, Dionne Lewis' evidence is not the only evidence on which the requesting state relies to establish its case against the appellant.

This ground, in my view, cannot succeed.

Fair Trial

Section 7(1) enacts as follows:

> "7.--(1) A person shall not be extradited under this Act to an approved State or committed to or kept in custody for the purposes of such extradition, if it appears to the Minister, to the court of committal or to the Supreme Court on an application for habeas corpus--
>
> ...
>
> (c) that he might, if extradited, be denied a fair trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality or political opinions;"

In the attempt to establish that the appellant may be denied a fair trial if extradited, the affidavits of Elissa Krauss, a professional jury trial consultant specializing in applied jury research with a particular focus on problems of bias in jury trials, and Kenneth Mogill, an attorney-at-law since 1971 with practice in Detroit, Michigan, were relied on. In summary the affidavit of Elissa Krauss deals with the public image of Jamaicans in the United States and the selection of a jury. The affiant concluded "that it was unfortunately true that inflammatory publicity identifying Jamaicans as brutal drug traffickers can lead a person who has been exposed to that publicity to conclude without hearing in a case where a Jamaican is accused of serious drug related offenses that the defendant is guilty as charged." Continuing, the affiant says that:

> "A Jamaican defendant facing trial on serious drug-related offenses in the United States federal court has no assurance much less guarantee that

> "his right to a fair jury trial will be protected. In fact, in light of the severe limitations placed on voir dire in the federal courts it is likely that individuals will be seated on the jury who are biased against the defendant because of his race and/or his ethnicity and/or the charges against him."

Kenneth Mogill states:

> "As part of my preparation of this Affidavit I have become aware of the nature of the charges against Richard Daley. I am aware that he is accused of extremely serious offenses allegedly involving drugs and violence. I have also reviewed the Affidavit of Elissa Krauss and its Appendices. Based on my experience practicing criminal defense in state and federal courts in the United States for over twenty years, I am aware of the impact on public opinion of the kind of material compiled in these Appendices. I am also aware of the probable conditions of voir dire at any trial that would be held in the case against Mr. Daley in the Eastern District of Pennsylvania should he be returned to that District. Based on these experiences and this information, it is my belief that it is highly likely that any jury selected to sit in judgment of Mr. Daley would include individuals who are so biased against him that they would not be able to give him a fair trial."

On the other hand, Thomas H. **Suddath**, Jnr., an Assistant United States Attorney assigned to the Criminal Division of the United States Attorney's Office in the Eastern District of Pennsylvania, in an affidavit dated the 12th day of July, 1993, averred that three of Daley's co-defendants, all Jamaicans, charged with participating in drug-related murders were found not guilty at the conclusion of the trial. This, he contends, demonstrates that a jury can decide a case involving Jamaicans accused of violent drug trafficking offenses fairly and impartially.

Suddath further averred that Federal Rule of Criminal Procedure 21(a) allows a defendant to request a transfer of the trial to a different district in order to protect him from unfair prejudice. The rule states as follows:

> "The court upon motion of the defendant shall transfer the proceeding as to that defendant to another district whether or not such district is specified in the defendant's motion if the court is satisfied that there exists in the district where the prosecution is pending so great a prejudice against the defendant that the defendant cannot obtain a fair and impartial trial at any place fixed by law for holding court in that district."

In his affidavit Mr. Sudath also pointed out that in the trial of Daley's co-defendants none of the attorneys who represented them raised any objections to the jury selection process that was used or made any allegation that as Jamaicans they were unlikely to have a fair and impartial trial.

The applicant further complains that the jury selection process is inadequate to unearth any bias which may exist among potential jurors. It is contended that the voir dire examination of potential jurors is conducted by the asking of "close-ended" questions by the trial judge. However, the affidavit of Mr. Sudath reveals that in the Eastern District of Pennsylvania it is the practice for counsel for the Government and the defendant to submit to the trial judge before the commencement of the jury selection proposed questions for the trial judge to ask the potential jurors. These questions are called "Requested questions for Voir Dire."

In **Mu Min v. Virginia** 500 U.S. (1991) the Supreme Court approved the jury selection procedure as being adequate to ensure a fair and impartial trial to a defendant. I entertain no doubt that in deciding whether or not the applicant is likely to obtain a fair and impartial trial it is open to this court to examine all the factors including the decision in **Mu Min's** case (supra) and notwithstanding that decision to decide the contrary. However, I am of the view that this court must proceed with great caution before holding that a decision of a court of superior jurisdiction of a friendly state ought not to be followed.

Let me state that it would be foolhardy to think that there would be no bias existing among potential jurors in the Eastern District of Pennsylvania, especially racial bias, but I am of the view that the procedures which exist within that jurisdiction are adequate to minimize such bias and to ensure that the applicant receives a fair and impartial trial. The finding of the Full Court that the appellant has failed to satisfy them that the appellant cannot obtain a fair and impartial trial, cannot be impeached. This ground, therefore, fails.

I would dismiss the appeal and affirm the order of the court below.

Commonwealth's
(1) Scatterfield v Government of Israel [1962] 3 All ER 801 [1964] A.C. 396
(2) Fernandez v Government of Singapore & Ors [1971] 2 All ER 691
(3) Mu Mun v Virginia 500 U.S. (1991) Supreme Court