IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN MISCELLANEOUS

IN THE FULL COURT

CLAIM NO. H.C.V. 1700/2005

CORAM: THE HONOURABLE CHIEF JUSTICE
THE HONOURABLE MRS. JUSTICE MARVA McINTOSH
THE HONOURABLE MR. JUSTICE DUKHARAN

IN THE MATTER OF AN APPLICATION BY CARLTON DUNKLEY FOR A WRIT OF HABEAS CORPUS AD SUBJICIENDUM

AND

IN THE MATTER OF THE EXTRADITION ACT

BETWEEN	CARLTON DUNKLEY	CLAIMANT
A N D	THE COMMISSIONER OF CORRECTIONS	1ST DEFENDANT
A N D	THE DIRECTOR OF PUBLIC PROSECUTIONS	2ND DEFENDANT

Patrick Atkinson and Mrs. Sharon Usim for the Claimant.

Miss Analesia Lindsay instructed by the Director of State Proceedings for the 1st Defendant.

Donald Bryan for the 2nd Defendant.

Heard: 29th, 30th May 2006

Dukharan, J

On the 29th and 30th May 2006 we heard an application for a writ of Habeas Corpus. We dismissed the application and we promised to put our reasons in writing and this we now do.

This application was preceded by committal proceedings held before His Honour Mr. Martin Gayle the learned Resident Magistrate of the Corporate Area Criminal Court. The Claimant is wanted to stand trial in the United States of America for conspiracy to import more than 100 kilograms of marijuana and conspiracy to possess with intent to distribute more than 1000 kilograms of marijuana. These proceedings were held pursuant to the Authority to Proceed dated the 1st March 2005 and issued by the Minister of Justice. On the 31st May 2005 the Claimant was ordered committed to custody pending his extradition to the United Stated of America.

The Claimant has moved this court for a Writ of Habeas Corpus to set aside the order of the Resident Magistrate.

The grounds supporting his application are as follows:

(1) The Learned Magistrate in deciding the application for an Order for Extradition erred by relying on sworn statements rather than on testimony as required by the Extradition Act and that this amounts to a violation of the constitutional rights of the Claimant as guaranteed by Section 16 of the Constitution of Jamaica.

(2) That the Learned Resident Magistrate erred in relying on the Affidavits or sworn statements which are not sufficient evidence under this Extradition Act.

(3) The Learned Resident Magistrate relied on statements, which were made after the Indictment against the Claimant was returned, and which has no established nexus to the allegations in the said indictment. There was no evidence before the Learned Resident Magistrate as to the evidence on which the said Indictment was based.

(4) That the Learned Resident Magistrate failed to weigh the statements supplied by the requesting state and did not rule whether there was any evidential value to be placed on any of the said statements.

(5) The Learned Resident Magistrate failed to require the requesting state to provide evidence concerning any plea bargain or plea agreement made with the alleged charged and convicted co-conspirator, Jack Protzman to give his Affidavit, nor was there any evidence that said co-conspirator was sentenced before he gave his affidavit. In the circumstances the Learned Resident Magistrate was not in a position to weigh whether his statement had any evidential value at all.

(6) The documents provided to the court were not properly authenticated and as such the Learned Resident Magistrate erred in relying on any of them.

(7) There was no sufficient evidence before the Learned Resident Magistrate of any conspiracy to import or distribute drugs into the United States involving the Claimant.

Grounds 1 and 2 are similar with ground two being without the constitutional aspect. It was argued by Mr. Atkinson that the evidence on which the warrant of commitment against the Claimant is based consists of Affidavits and not testimony as required by the Extradition Act and therefore the Claimant is being removed from Jamaica outside of the Provisions of the law and is therefore unconstitutional.

The Extradition Act allows for the admissibility of documents in proceedings that fall under that legislation and is governed by Section 14 of the Act which states;

"14 (1) In any proceedings under this act, including proceedings in an application for habeas corpus in respect of a person in custody under this Act.

(a) a document, duly authenticated, which purports to set out testimony given on oath in an approved state shall be admissible as evidence of the matters stated therein;

(b) a document, duly authenticated, which purports to have been received in evidence, or to be a copy of a document so received in any proceedings in an approved state shall be admissible in evidence; and

(c) --- shall be admissible as evidence of the conviction or evidence of the issuance of a warrant for arrest of the accused, as the case may be, and of the other matters stated therein.

(2) A document shall be deemed to be duly authenticated for the purposes of this section.

(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.

(b) In the case of a document which purports to have been received in evidence as referred to in subsection (1) (b) or to be a copy of a document so received, if the document purports to be certified as aforesaid to have been, or to be a true copy of, a document which has been so received; or

---- and in any such case the document is authenticated either by the oath of a witness or by the official

> seal of a minister of the approved state in question.
>
> (3) In this section "oath" includes affirmation or declaration.
>
> (4) Nothing in this section shall prevent the proof of any matter, or the admission in evidence of any document, in accordance with any other law of Jamaica".

The main thrust of Mr. Atkinson's argument is that the documents submitted before the Resident Magistrate are not testimony as referred to in section 14 of the Extradition Act but were affidavits. He has sought to make a distinction between "testimony" and "affidavit evidence".

What then is the definition of "testimony"? In Camden (Marquis) vs. IRC 1914 1KB at pages 647 – 648 Cozen Hardy M. R., stated.

> "It is for the court to interpret the statute as best it may. In so doing the court may no doubt assist themselves in the discharge of their duty by any literal help they can find, including of course the consultation of standard authors and reference to well known and authoritative dictionaries."
> Black Law Dictionary defines "testimony" as "evidence that a competent witness under oath or affirmation gives at trial or in an affidavit or deposition." Likewise the Oxford English Dictionary defines "testimony" as "evidence, proof, evidence given in court, an oral or written statement under oath or affirmation."

The definition of "testimony" was determined by this court on the 28th October 2005 in Hartford Montique v The Commissioner of Corrections and

The Director of Public Prosecutions (unreported) Claim No. HCV 2435/2004. Harris J, (as she then was) said at page 8.

> "It is a cardinal rule of construction of statutory instruments that words should be taken to be used in their plain and ordinary meaning, consequently, recourse is usually had to the use of an authoritative dictionary to aid in the meaning of words in statutes ---
>
> In the view of this court, reference must be made to an authoritative dictionary, in order to discover the meaning of 'testimony' and the New Shorter Oxford English dictionary, to which reference was made during this hearing, is accepted as such an authoritative dictionary for these purposes.
>
> It's primary definition of the word "testimony" is:
>
> Evidence, proof, especially (law) evidence given in court, an oral or written statement under oath or affirmation".
> Clearly, testimony embraces not only evidence, which is given orally under oath, in court, but also that which is given by way of a statement under oath. An affidavit sets out testimony on oath and clearly falls within the purview of such a document as contemplated by Section 14 (1) (a) of the Act. Statements contained in affidavits, if duly authenticated in accordance with section 14 of the Extradition Act rank as testimony and is admissible."

On the constitutional aspect Mr. Atkinson argued that there had been a breach of Section 16 of the constitution, in that the Extradition Act requires testimony and not affidavits.

Section 16 of the Jamaica (Constitutions) Order in Council 1962. Provides:-

> "(1) No person shall be deprived of his freedom of movement, and for the purposes of this section the said freedom means the right to move freely throughout Jamaica, the right to reside in any part of Jamaica, the right to enter Jamaica and immunity from expulsion from Jamaica.
>
> (2) Any restriction on a person's freedom of movement which is involved in his lawful detention shall not be held to be inconsistent with or in contravention of this section.
>
> (3) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provisions:-
>
> (e) For the removal of a person from Jamaica to be tried outside Jamaica for a criminal offence or to undergo imprisonment outside Jamaica in execution of the sentence of a court in respect of a criminal offence of which he has been committed."

The argument that there has been a breach of Section 16 of the constitution is without merit. The constitution makes provisions for the removal of persons outside of the jurisdiction to face trial once the Extradition Act has been followed. It is quite clear therefore that the Affidavit evidence submitted by the requesting state before the Resident Magistrate is in the category of "testimony" and once duly authenticated

satisfies section 14 of the Extradition Act. In those circumstances grounds one and two therefore fail.

In ground 3 the Claimant is claiming that there is no nexus between the conspiracies for which his extradition is requested as stated in the Grand Jury Indictment and the allegation of conspiracies as stated in the subsequent affidavits before the Resident Magistrate. Mr. Atkinson argued that there must be a nexus, which makes it clear that the similar charges in the affidavits are the identical ones in the grand jury Indictment.

Section 10 (5) of the Extradition Act states;

> "Where an authority to proceed has been issued in respect of the person arrested and the court of committal is satisfied, after hearing any evidence tendered in support of the request for the extradition 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, --- the court of committal shall, unless his committal is prohibited by any other provision of this Act, commit him to custody to await his extradition under this Act; but if the court of committal is not so satisfied or if the committal of that person is so prohibited, the court of committal shall discharge him from custody".

It is quite clear that there must be evidence before the Resident Magistrate before a Prima facie case can be made out against a person who is requested to stand trial in a requesting state. What in effect Mr. Atkinson is saying is that the Resident Magistrate ought to look at the evidence presented before the grand jury. This would be asking the Resident Magistrate to question the validity of the grand jury indictment.

The Resident Magistrate has no such jurisdiction. It is the evidence that is presented by way of affidavits or otherwise which caused the Magistrate to make an extradition order. It does not have to be the same evidence that was presented to the grand jury prior to the issue of the grand jury

In Commonwealth of Puerto Rico v Hermandez [1975], SCR Laskin, J. (as he then was) said at page 145 – "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 committal for trial if it had been committed here".

The hearing thus protects the individual in this country from being surrended 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 his hearing is not a trial and no attempt should be made to make it one.

What the magistrate had before him were affidavits of persons who could speak of the Claimant's participation in the conspiracies for which he was accused, that is, the possession, importation and distribution of marijuana into the United States. There was enough evidence for the magistrate to make out a prima facie case against the Claimant.

In my view the magistrate had satisfied the test set out in section 10 (5) of the Extradition Act. In my view there is no merit in this ground and it therefore fails.

With regards to grounds 4 and 5 it was submitted by Mr. Atkinson that an Extradition hearing is similar to a preliminary hearing and the Resident Magistrate's duty is to consider the evidence as a whole and to reject any evidence which he considered worthless. He further added that the Resident Magistrate failed to weigh the statements supplied by the United States and did not rule whether there was any evidential value to be placed on any of the said statements. In addition, he said that the Resident

Magistrate failed to require the requesting state to provide evidence concerning any plea bargain arrangement made with the alleged convicted co-conspirator, Jack Protzman to give his affidavit, nor was there any evidence that the said co-conspirator was sentenced before his affidavit. He said in the absence of this the Resident Magistrate could not say whether his statement had any evidential value at all.

The short answer to ground 4 is that the Resident Magistrate made a committal order based on the affidavit evidence he had before him. This was not a trial and all the Resident Magistrate needed to do was to find that a prima facie case had been made out against the Claimant. Certainly he must have considered the evidential value of the affidavit evidence he had before him before making his committal order for the offences mentioned in the affidavits.

With regards to ground 5 that the Resident Magistrate failed to require the requesting state to provide evidence concerning any plea agreement made with a conspirator is without merit. This is not a matter that an examining magistrate should be concerned about. That is a matter for the trial court. In the case of Desmond Brown v The Director of Public Prosecution and the Director of Correctional Services S.C.C.A. No 91/00 at page 5, Panton, J.A. said:

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

It is quite clear therefore that the Resident Magistrate does not have to be concerned about any plea bargain agreement. Grounds 4 and 5 are without merit and therefore fail.

Mr. Atkinson contended in Ground 6 that the documents provided to the court were not properly authenticated and as such the Resident Magistrate erred in relying on any of them. He said that a proper chain of custody of the documents was not established as the packages were opened by other persons.

The Extradition Act deals with the authentication of documents. Section 14(2)(a) states:

> "A document shall be deemed to be duly authenticated for the purposes of this section –
> (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; and in any such case the document is authenticated either by the oath of a witness or by the official seal of a minister of the approved state in question."

At the committal proceedings bundles of documents were admitted into evidence concerning the request for the extradition of the Claimant. Each bundle was secured by a gold and a red ribbon. The first document in each bundle bears the seal of the Department of State affixed over the gold ribbon and states:

> "I certify that the document hereto annexed is under the seal of the Department of Justice of the United States of America, and that such seal is entitled to full faith and credit. In testimony whereof, I Condoleeza Rice, Secretary of State, have hereunto caused the seal of the department of state to be affixed and my name subscribed by the Assistant Authentication Officer of the said Department, at the city of Washington, in the District of Columbia, this 15 day of February 2005.
>
> (S) Condoleeza Rice
> Secretary of State
>
> By (S) R. D. Hewitt
> Assistant Authentication Officer
> Department of State

The second document bears the seal of the Department of Justice affixed over the red ribbon states:

> "I certify that Thomas G. Snow whose name is signed to the accompanying paper, is now, and was at the time of signing the same, Deputy Director office of International Affairs, Criminal Division, U.S. Department of Justice duly commissioned and qualified.
>
> In witness whereof, I Albert R. Gonzales, Attorney General of the United States have hereunto caused this Seal of the Department of Justice to be affixed and my name to be altered by the Director/Deputy Director, office of International Affairs, Criminal Division, of the said Department on the day and year first above written.
>
> (S) A. Gonzales
> Attorney General
>
> By?
>
> Director/Deputy Director, office of International Affairs, Criminal Division

The third document in the bundle states:

> I, Thomas G. Snow, Deputy Director office of International Affairs, Criminal Division, United States Department of Justice, do hereby certify that attached hereto and prepared in support of the U.S. request for the extradition of Carlton Dunkley, from Jamaica is the original affidavit of Joseph A. Cooley, Assistant United States Attorney for the Southern District of Florida, sworn to on February

11, 2005 before the Honourable Peter R. Palermo, United States Magistrate Judge for the United States District Court for the Southern District of Florida, with supporting documentation.

True copies of the original documents are maintained in the official files of the United States Department of Justice in Washington, D.C.

February 14, 2005

(S) Thomas G. Snow

Thomas G. Snow
Deputy Director
Office of International Affairs
Criminal Division
U.S. Department of Justice

There is also a certification in the affidavit of Joseph Cooley at paragraph 22 where he attaches the affidavit of;

(1) Special Agent Sharon Linfskoog where she summarises the investigation of the Claimant Carlton Dunkley.

(2) Charles Kenneth Wood

(3) Ansel Graham Record

(4) Jack Protzman convicted co-conspirator

(5) Special Agent, Michael Hedrich

The above agents relay Personal knowledge of the Claimant and others involved in the importation of large quantities of marijuana into the

United States. These were all admitted into evidence at the committal proceedings before the magistrate.

The question of authenticity arose in the case of Lester Coke and Richard Morrison v The Superintendent of Prisons and the Attorney General (1991) 28 J.L.R. 365. In the judgment of the Full Court Clarke, J. stated at page 376.

> "I also hold the view that under Section 14, a single official seal of the appropriate minister may authenticate all the documents as a composite bundle to which the seal relates and of which it forms a part. This is in keeping with the purpose and scheme of the section which, as already noted, does not require each affidavit to bear on its face separate certifications, or where applicable, does not require separate oaths of a witness to authenticate each relevant document.
>
> Looking at each bundle in the instant case it is manifest that the seal of the United States Attorney General as well as that of the Secretary of State embraces, and gives authenticity to, with the aid of ribbons emanating beneath the seals and passing through them every document including the affidavits in each bundle."

Likewise in the case of Edwards v.The Director of Public Prosecutions and the Director of Correctional Services [1994 3) J.L.R. 526. In that case Section 14 of the Extradition Act was examined, and the affidavits formed part of the bundle referred to as certified and sealed by the

Department of State of the United States of America. It was held that they were properly authenticated.

It is quite clear that the documents submitted before the magistrate bore the seals of the Attorney General and Secretary of State of the United States of America. This then is sufficient authentication and complies with section 14 of the Extradition Act. The affidavits were sworn before a magistrate in Florida, U.S.A. and were properly admitted by the magistrate.

In my view this ground also fails.

The Claimant has complained in ground 7 that there was no sufficient evidence before the Resident Magistrate of any conspiracy to import or distribute drugs into the United States of America. Mr. Atkinson argued that there were areas of the affidavits which offended the rules of evidence as to hearsay, speculation etc.

The indictment against the Claimant is for the offences of conspiracy to import marijuana into the United States as well as to distribute marijuana. The evidence of conspiracy comes from the affidavit evidence of several persons. The affidavit of Jack Protzman (Exhibit G) clearly states a planned conspiracy between himself and the Claimant to ship a load of approximately 6,000 lbs of marijuana into South Florida.

In paragraph 3 of Protzman's affidavit there is an actual conversation between Protzman, the Claimant and one Denton Hall. They discussed how the marijuana would be packaged and delivered.

In fact one month later over 600 lbs of marijuana was taken by boat off the coast of Jamaica and transported into South Florida.

The affidavit of Michael Hedrick (Exhibit H) where he discussed with Protzman about the meeting he had in Jamaica with the Claimant about the delivery of marijuana into South Florida. There are several other affidavits (exhibited) which speak of persons who had knowledge of the Claimants participation in the conspiracies and agreements to ship marijuana from Jamaica to South Florida.

The Claimant has sought to distance himself from being present in the United States and therefore says he cannot be charged for committing an offence in that country.

The essence of conspiracy is in the agreement. The very plot is the criminal act in itself. It is trite law that any overt acts committed elsewhere in furtherance of the conspiracy is triable in the country where they were intended to result in a crime.

The evidence contained in the affidavit of Jack Protzman shows clearly an agreement, which was in fact carried out. There was clear evidence to ground the indictment for conspiracy, which is extraditable.

The Claimant has also failed on this ground.

For the reasons stated the application was therefore dismissed.