JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 43/94

BEFORE: THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE WOLFE, J.A.

BETWEEN	PRINCE ANTHONY EDWARDS	APPLICANT/APPELLANT
A N D	THE DIRECTOR OF PUBLIC PROSECUTIONS	1ST RESPONDENT
A N D	DIRECTOR OF CORRECTIONAL SERVICES	2ND RESPONDENT

Ian Ramsay and Enos Grant for the appellant

Lloyd Hibbert, Senior Deputy Director of Public Prosecutions for the Director of Public Prosecutions.

Lackston Robinson, Assistant Attorney General for the Director of Correctional Services

Nov. 7, 1994

WRIGHT, J.A.:

I have read the judgment of Downer, J.A. and agree with his reasons and conclusion. The order is that the order below is affirmed, habeas corpus is refused and there will be no order for costs.

DOWNER J A

In these proceedings the United States of America seeks the return of the fugitive, Edwards. The Acting Resident Magistrate, Her Honour Miss M.V. Hughes, acceded to the request for the fugitive's return, whereupon, the fugitive sought judicial review of his detention by way of habeas corpus proceedings. The Supreme Court (Zacca, C.J., Patterson, Harrison, J.A.) affirmed the committal order of the Resident Magistrate and as a consequence the fugitive has sought redress in this court. The first respondent is the Director of Public Prosecutions who marshalled the evidence on behalf of the requesting State before the Resident Magistrate. He is so, because these are criminal proceedings, and paragraph 2 Article XVII of the Treaty reads:

> "The Requested State shall also provide for the representation of the requesting State in any proceedings arising in the requested state out of a request for extradition."

The Director of Correctional Services designated by statute as the executive in charge of the Superintendent of the General Penitentiary, and who detains the fugitive, is the second respondent. Mr. Ian Ramsay for the fugitive advanced an original ground of appeal and added five supplementary grounds. Relying on four submissions, he has contended with great force and originality that the writ of habeas corpus should issue to release the fugitive and these submissions require careful examination.

> Was the evidence relied on by the requesting State duly authenticated pursuant to section 14 of the Extradition Act, 1991?

This appeal is permissible by virtue of section 21A(1) of the Judicature (Appellate Jurisdiction) Act. The original ground challenged the validity of the evidence adduced before

the Resident Magistrate on the ground that the documents were not duly authenticated. It was contended that in the absence of proper authentication that there was no admissible evidence adduced in the committal proceedings. Consequently, the warrant of committal, the return to the writ, was invalid and habeas corpus must issue - see **Government of the Federal Republic of Germany v Sotiriadis** (1975) A.C. 1 at 30 per Lord Diplock:

> "The second respect in which the court exercises a wider power in habeas corpus applications brought in extradition cases is not the subject of any express provision in the Act, but is the result of long established practice which was approved by this House in **Reg. v. Governor of Brixton Prison, Ex parte Schtraks** (1964) A.C. 556 and in **Reg. v. Governor of Brixton Prison, Ex parte Armah** (1968) A.C. 192, a case under the Fugitive Offenders Act 1881. Under this practice, the court will entertain the question whether there was any evidence before the magistrate to justify the committal and, if it finds that there was none, will order the prisoner to be discharged. Strictly speaking, to commit a person for trial for an offence when there is no evidence that he committed it is not to act in excess of jurisdiction but to err in law, since it must involve a misunderstanding of the legal nature of the offence. Nevertheless, in extradition cases, the courts have assimilated such an error of law to acting in excess of jurisdiction. Accordingly, your Lordships would be entitled to allow this appeal if you were satisfied that there was no evidence before the magistrate that the respondent had committed either of the offences with which he was charged. But, if there was some evidence, you would not be entitled to substitute your own appreciation of its weight or cogency for that of the magistrate upon whom jurisdiction to determine whether the evidence is sufficient to justify committal is conferred by section 10 of the Act."

Mr. Lackston Robinson's response was that a careful analysis of section 14 of the Extradition Act, 1991 (The Act) and the documentation presented to the Resident Magistrate would show that there was full compliance with the statutory provisions. Section 14(2)(a) of the Act reads as follows:

> "14(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 sub-section (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
>
> (c) in the case of a document which certifies that a person was convicted or that a warrant for his arrest was issued as referred to in subsection (1)(c), if the document purports to be certified as aforesaid,
>
> 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."

On a plain reading of subsection 14(2)(a) of the Act, if the document "purports to be certified" by among others, an officer of the Court then the first hurdle will be cleared. It is therefore necessary to turn to "the document which purports to be testimony given on oath" before the Resident Magistrate. That document contains the crucial testimony of Chameka Childs, Gifford Roy Plummer and Peter Lloyd Atkinson. The testimony of these three deponents purports to be

testimony before officers of the United States District Court for the Northern District of Texas, Dallas Division. In each case the officer is a Notary Public. This appears on the face of the documents, and is further supported by the expert evidence of John P. Lydick, the Federal Prosecutor who states:

> "(a) I have attached to this affidavit a true and accurate copy of the affidavit of Gifford Roy Plummer (Exhibit C,) Chameka Childs (Exhibit D), and Peter Lloyd Atkinson (Exhibit E). Each of these affidavits was sworn to before a notary public duly and legally authorized to administer an oath for this purpose. The affiants are subject to penalty of perjury if the statements are given falsely. I have thoroughly reviewed these affidavits and I attest that the evidence they present indicates that Prince Anthony Edwards is guilty of the offences charged in the Indictment."

Thus the first hurdle has been cleared. The further requirement of the statute is that the certified document is authenticated by the oath of a witness or the official seal of a Minister of the requesting State. These affidavits formed part of the bundle referred to as certified and sealed by Department of State of the United States of America.

It is useful to refer to parts of this document in which this seal of the Department of State is affixed.

> "To all to whom these presents shall come, Greeting:
>
> I Certify That the document hereunto 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, Clifford R. Wharton, Jr., Acting Secretary of State, have hereunto caused the seal of the Department of State to be affixed and my name subscribed by the Authentication Officer of the said Department, at the city of

> Washington, in the District of Columbia, this fourth day of May, 1993.
>
> /s/ Clifford R. Wharton, Jr., Acting Secretary of State
>
> by Annie R. Maddux Authentication Officer, Department of State "

The reference is made to the document hereunto annexed being under the seal of the Department of Justice.But it is clear from the method of sealing that the documents are properly regarded as a document. Here is the wording under the seal of the Department of Justice:

> "To all to whom these presents shall come, Greeting:
>
> I Certify That Mary Ellen Warlow whose name is signed to ... 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, Washington, D.C.
>
> _____duly commissioned and qualified.
>
> ...whereof, I, Janet Reno , Attorney General of the United States have hereunto caused the Seal of the Department of Justice to be affixed and my name to be attested by the Deputy Assistant Attorney General for Administration, of the said Department on the day and year first above written.
>
> /s/ Janet Reno Attorney General
>
> by ... Acting Deputy Assistant Attorney General for Administration "

Once the requisition and the accompanying evidence is examined, it supports the submissions of the respondents. What were the documents under the seal of the Department of Justice referred to by the Secretary of State? That answer is to be found in the Certification of Mary Ellen Warlow,

the Deputy Director, Office of International Affairs, Criminal Division, United States Department of Justice, and for the moment it is pertinent to cite her Certification.

"CERTIFICATION

I, Mary Ellen Warlow, 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 request for the extradition of Prince Anthony Edwards from Jamaica, is the original affidavit of John P. Lydick, an Assistant United States Attorney for the Northern District of Texas, sworn to on April 28, 1993, before a United States District Judge for the Northern District of Texas. I further certify that attached to and included as part of Mr. Lydick's affidavit are the following exhibits:

Exhibit A: A certified true and correct copy of the criminal indictment filed against Prince Anthony Edwards on December 13, 1989, and certified by a Deputy Clerk of the United States District Court for the Northern District of Texas on April 26, 1993; and also included in this exhibit is a certified true and correct copy of the arrest warrant issued for Prince Anthony Edwards on December 14, 1989, by an officer of the United States District Court for the Northern District of Texas, and certified by a Deputy Clerk of the above-named court on April 26, 1993;

Exhibit B: True and correct copies of the statutes relevant to this case;

Exhibit C: The original affidavit of Gifford Roy Plummer, sworn to on April 21, 1993, before Deanna M. Tronetti, a Notary Public for the State of Pennsylvania, and attached to this affidavit is a photograph of a man who Mr. Plummer identified as being Prince Anthony Edwards;

Exhibit D: The original affidavit of Chameka Childs, sworn to on April 16, 1993, before Dee Ann Chambers, a Notary Public for the State of Texas, and attached to this affidavit is a photograph of a man who Chameka Childs identified as being Prince Anthony Edwards;

Exhibit E: The original affidavit of Peter Lloyd Atkinson, sworn to on April 26, 1993, before Teresa L. Miller, a Notary Public for the State of Arizona, and attached to this affidavit is a photograph of a man who Mr. Atkinson identified as being Prince Anthony Edwards.

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

/s/ Mary Ellen Warlow
Deputy Director
Office of International Affairs
Criminal Division
U.S. Department of Justice
Washington, D.C. 20005

Date: 30th April, 1993"

So these documents were certified by a District judge, a notary public, an officer of the court and authenticated by two Ministers of the requesting State, namely, the Attorney General of the Department of Justice and the Secretary of State.

The explanation regarding certification of testimony on oath which satisfied section 14(1)(a) of the Act apply to the warrant of arrest, and the indictment which satisfy section 14 (1)(c)(ii) and 14(1)(b) which cover the warrant and indictment and show that they also have been certified and duly authenticated. On this aspect therefore the fugitive has failed.

Were the provisions of the Treaty incorporated into Municipal Law?

No issue was taken that the proper procedures were followed in the making of the Extradition Treaty between Jamaica and the United States of America. The issue was whether the legislation which incorporated the treaty was completed, having regard to the provisions of the Act. The relevant section 4 reads as follows:

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

The evidence before the Resident Magistrate was that the treaty was ratified on the 17th August, 1984 by the United States of America and on the 31st May, 1991 by Jamaica. The provisions of the Act are applicable to the United States by virtue of section 4(3) of the Act and The Extradition (Foreign States) Order, 1991. The relevant wording published in the **Jamaica Gazette Proclamation, Rules and Regulations** dated June 27, 1991, is as follows:

> "(2) The provisions of the Act shall apply in respect of the foreign State specified in the Schedule hereto.
>
> Schedule
> The United States of America
>
> /s/ R. Carl Rattray
> Minister of Justice
>
> Dated this 11th day of June, 1991"

Then section 4(4) of the Act provides that:

> "(4) An order under this section shall be subject to affirmative resolutions."

Copies of the affirmative resolution were exhibited by the respondents after this court insisted that they be produced. That for the House of Representatives, was affirmed on the 15th of August, 1991 and the resolution was affirmed in the Senate on the 13th September, 1991. It must be pointed out that although challenged, the first respondent did not exhibit the

affirmative resolutions before the Resident Magistrate or in the Supreme Court. Had these resolutions been exhibited, there would have been no contest on this issue. Further, the case which supports the proposition that the resolutions ought to be produced to show that the legislative process was completed was Metcalf v. Cox (1895) A.C. 328. As these resolutions form part of the record of this court there ought to be no issue in future cases concerning the completion of the legislative process as regards the United States of America. There is another necessary comment to be made. The record shows that Mr. Souter who appeared as junior counsel in the committal proceedings swore in his affidavit that he received a copy of the treaty from the Director of Public Prosecutions. This treaty with the resolutions ought to have been published in the Gazette when the resolutions were affirmed in both Houses, but it has not been shown to have been done: see sections 30(2) and 31 of the Interpretation Act as well as section 5 of the Jamaica Gazette Act. Sections 22, 24 and 25 of the Evidence Act provide alternative methods of proof. Had that been done, it is doubtful if it would have been contended on behalf of the fugitive that the treaty was not part of municipal law. Once there was the affirmative resolutions the treaty was enforceable: see R. v. Sheer Metalcraft Ltd. (1954) 1 Q.B. 586.

Did the Resident Magistrate have jurisdiction to commence committal proceedings?

Section 9 of the Act and Article X of the treaty makes provision for the arrest by provisional warrant and commencement of proceedings before the Resident Magistrate. See in re Bluhm (1901) 1 K.B. 764, 769 approved in Sotiriadis at p.37 per Lord Kilbrandon where it was said:

> "In such a case, dealing with the Swiss treaty, it was observed that the object of the time was '... to protect the prisoner against whom a case for committal was not made out from being detained for a

> longer period than two months upon suspicion,...': In re Bluhm (1901) 1 K.B. 764, 769. Although that observation certainly favours the argument presented for the fugitive respondent, it must, in my view, be read subject to the material fact that the issue of the provisional warrant is, in the Swiss treaty, made part of the contractual agreement..."

Then section 9(1) reads in part:

> "9(1)A warrant for the arrest of a person accused of an extradition offence, or alleged to be lawfully at large after conviction of such an offence, may be issued -
>
> (b) without such an authority, by magistrate upon information that such person is in Jamaica or is believed to be on his way to Jamaica; so, however, that the warrant, if issued under this paragraph, shall be provisional only."

In this case a provisional warrant was issued on March 12, 1993 pursuant to section 9(1)(b) of the Act. It was done at the instance of the United States of America. The plain inference is that the Minister decided that proceedings should be commenced as he issued an authority to proceed as he was obliged to do by virtue of section 10 of the Act. It is therefore now useful to cite section 9(4) which provides:

> "9(4) Where a provisional warrant is issued, the magistrate by whom it is issued shall forthwith give notice of the issue to the Minister and transmit to him the information and evidence or a certified copy of the information and evidence, upon which it was issued; and the Minister may in any case, and shall, if he decides not to issue an authority to proceed in respect of the person to whom the warrant relates, by order cancel the warrant and, if that person has been arrested thereunder, discharge him from custody."

It seems that the Resident Magistrate gave notice to the Minister and since the Minister did not cancel the provisional warrant, then he was bound to issue his "order to proceed", which he did on the 2nd of June, 1993. By then the fugitive ought to have been released as sixty (60) days had elapsed since he was arrested on a provisional warrant: c paragraph 4, Article X of the Treaty. To reiterate the provisional warrant was dated 12th March, the Order to Proceed, 2nd June, 1993. If the prosecution was ready with the requisite evidence, then committal proceedings could commence, and they were on the 26th October, 1993.

Section 10 so ordains, and to appreciate its significance it is necessary to cite it in full. The wording is as follows:

> "10(1) A person arrested in pursuance of a warrant issued under section 9 shall, unless previously discharged under subsection (4) of that section, <u>be brought</u> as soon as practicable before a Magistrate (in this Act referred to as "the court of committal") who shall hear the case in the same manner, as nearly as may be, as if he were sitting as an examining justice and as if that person were brought before him charged with an indictable offence committed within his jurisdiction."
>
> [Emphasis supplied]

It is clear that generally the fugitive could be brought either on the provisional warrant <u>or</u> on a fresh warrant based on the requisition to surrender the fugitive. The thrust of Mr. Ramsay's submission on this aspect of the case was that the order to proceed by the Minister was not in compliance with section 9(4) of the Act. So the order must be examined. Here is how it was worded:

"THE EXTRADITION ACT, 1991
AUTHORITY TO PROCEED

To the Resident Magistrate for the Parish of St. Andrew

WHEREAS a request has been duly made to me, Keith D. Knight, Minister of National Security and Justice, on behalf of the United States of America for the surrender of Prince Anthony Edwards a.k.a. "Prince" and "Rainford Owens" accused of (1) Conspiracy to possess with intent to distribute and to distribute cocaine, (2) Aiding and abetting travel in inter-state commerce for the purpose of distributing drug proceeds, (3) Aiding and abetting the possession with intent to distribute cocaine.

NOW I HEREBY, by this Order under my hand and seal signify to you that such request has been made and require you to issue your warrant for the apprehension of such fugitive provided that the conditions of the Extradition Act, 1991, relating to the issue of such Warrant are, in your judgement complied with.

Given under the hand and seal of the undersigned Minister of National Security and Justice this 2nd day of June 1993.

/s/ K. D. Knight
Minister of National
Security and Justice"

[Excess emphasized]

It was contended for the fugitive that on a literal reading of the 'authority to proceed' the Resident Magistrate was directed to issue a warrant of apprehension which demonstrated that the Minister did not apply his mind to the issue. This submission ignored paragraph 4, Article X of the Treaty which stipulated that the fugitive ought to have been released after sixty(60) days if the requisition and supporting documents were not received. So it was necessary for the fugitive to be brought before the

Resident Magistrate. Mr. Lackston Robinson in reply was content to rely on the ruling of the court below. It states:

> "It follows that, seeing that the Minister did not, as a consequence, cancel the provisional warrant, nor order the discharge of the applicant, he was granting his permission to the Resident Magistrate to conduct proceedings for committal."

In so far as this passage suggests that it was unnecessary to examine the validity of the 'order to proceed', it cannot be supported. It was further contended on behalf of the fugitive that the Resident Magistrate failed to grasp the implications of section 10(3) which provides that:

> "(3) Where the person arrested is in custody under a provisional warrant and no authority to proceed has been received in respect of him, the court of committal may, subject to subsection (4), fix a reasonable period (of which the court shall give notice to the Minister) after which he shall be discharged from custody unless an authority to proceed has been received."

It does not seem that the Resident Magistrate applied her mind to this section. In fairness to her she was probably supplied with the Act for the first time when committal proceedings commenced. In such circumstances it would be for the Director of Public Prosecutions to bring this section to her attention.

As to whether on a proper construction of the Minister's order it was a valid 'authority to proceed'- the submission on both sides were based on the assumption that the provisional warrant was not spent. Why did they so assume? For the fugitive it was contended that the treaty was not part of our municipal law. So the provisions in the treaty on provisional warrant were ignored.

On the other hand the respondents did not think it necessary to refer to this aspect of the treaty to support the validity of the committal order. If this assumption was correct, then the excess in the 'authority to proceed', shows that the remaining part is valid within the intendment of section 9(4) of the Act. In relying on severance as a rule of construction to make the Minister's 'authority to proceed' effective, it was appropriate to delete the surplusage and then the document would be a proper 'authority to proceed'. Deletion as emphasized previously would have been appropriate because a provisional warrant was issued and not cancelled. It was on this ground that Mr. Ramsay made his most powerful submission and he was most helpful to the court in citing **R. v. Secretary of State for Transport, ex parte Greater London Council** (1985) 3 All E.R. p. 300. There are two passages which relate to the circumstances of this case. The headnote on page 301 reads:

> "Held - (1) In principle the court could in appropriate proceedings hold to be unlawful part of an administrative order or decision while holding valid the remainder of the order or decision. Administrative orders or decisions to which the principle of severance was applicable included at least delegated legislation and statutory orders, orders under delegated statutory powers, byelaws, resolutions of local authorities, planning consents and statutory demands for information."

The other relevant passage to show the principle of severance in this case occurs on page 314. It reads thus:

> "...'where the good and the bad parts were clearly identifiable and the bad part can be separated from the good and rejected without affecting the validity of the remaining part' (per Stephenson, LJ in **Thames Water Authority v Elmbridge B.C.** (1983) 1 All E.R. 836 at 847, (1983) QB 570 at 585)."

There is an alternative and better basis which is in accordance with the evidence for the 'authority to proceed' to be valid. On this basis no severance is required. Once the 'authority to proceed' was received by the Resident Magistrate, the provisional warrant ceased to have effect, even if it was not spent. Then the Resident Magistrate could have issued a warrant in accordance with section 9(1)(a) of the Act. This explanation is necessary as it is not clear in this case whether the Resident Magistrate relied on the doctrine of severance.

For the better explanation dates are important. The requisition and accompanying documents were received by the Minister of Foreign Affairs around the 7th of May, 1993. The provisional warrant requested by the United States of America received on 12th March, 1993 was given under the hand of the Resident Magistrate 12th March, 1993. Yet, the 'authority to proceed' was not issued until 2nd June, 1993. No explanation was given for the delay, in serving the Minister's 'authority to proceed'. No complaint was made on behalf of the fugitive. To reiterate it does not seem that this issue was raised, perhaps because it was never conceded that the legislative process to admit the treaty in municipal law was completed. On this better explanation, section 9(1)(a) of the Act is relevant, since there was no provisional warrant in force. The section reads:

> "9(1) A warrant for the arrest of a person accused of an extradition offence, or alleged to be unlawfully at large after conviction of such an offence, may be issued -
>
> (a) on receipt of an authority to proceed, by a magistrate within the jurisdiction of whom such person is or believed to be."

It is now appropriate to cite paragraphs 4 and 5 of Article X of the treaty. They read:

> "(4) A person who is provisionally arrested shall be discharged from custody upon the expiration of sixty (60) days from the date of arrest pursuant to the application for provisional arrest if the executive authority of the Requested State has not received the formal request for extradition and the supporting documents required by Article VIII.
>
> (5) The fact that a person is discharged from custody pursuant to paragraph (4) shall not prejudice the extradition of that person if the extradition request and the supporting documents mentioned in Article VIII are delivered at a later date."

The manner by which the fugitive was brought to the Resident Magistrate was not explained by either side. The fugitive could have been in custody on a charge relating to municipal law or the Resident Magistrate could have issued a warrant pursuant to section 9(1)(b) of the Act. More probable, the fugitive was unlawfully detained after sixty (60) days had elapsed since he was in custody on the provisional warrant. If this was the case, there is no procedural difficulty in apprehending a person already in custody: see **R. v. Weil** 9 Q.B.D. 701; see **Ex parte Sotiriadis** (1975) A.C. at p. 36. So it does seem that there was a period when the fugitive might have been under unlawful detention and the effect of **Weil** has been put in argument: '...that detention is equal to arrest' **Ex parte Sotiriadis,** p. 13. Lord Cross confirms this when he said at page 31:

> "...the later arrest which takes place notionally when he is remanded in custody in pursuance of the requisition on the charges therein referred to."

It is likely that there has been a breach and that as a consequence the fugitive was deprived of his liberty for a period. However, this does not go to jurisdiction. As Lord Diplock said in Ex parte Sotiriadis, pp 29-30:

> "Habeas corpus does not provide a remedy by way of appeal from judicial decisions made within jurisdiction. So, as a general rule, upon an application for a writ of habeas corpus to secure release of a prisoner detained pursuant to an order made by a judicial authority as a result of a judicial hearing, the only question for the High Court, and for this House on appeal from the High Court, is whether or not the judicial authority had jurisdiction to make the order for his detention."

There was jurisdiction once there was a valid 'authority to proceed' and the fugitive was before the Resident Magistrate. See section 10(1) of the Act. In Athanassiadis v. Government of Greece (1969) 3 All E.R.293 at p. 297;(1971) A.C. 282. Lord Dilhorne supports this principle, thus:

> "If the appellant was not lawfully in custody after 3rd July, he might have been able to obtain his release before he came before the magistrate in August, but if that were the case, it would not be in my opinion any ground for holding that the warrant of committal issued on 13th August was invalid. After the issue of the warrant, he is not entitled to his release now on the ground that he should have been released before the warrant was issued."

Had the fugitive been discharged from custody after sixty (60) days had elapsed, he could have been rearrested. See paragraph 5 of Article X of the treaty (supra). Equally, if he were in custody, he could be notionally arrested. The upshot of all this is that the Resident Magistrate had the authority to commence committal proceedings in this case on the basis that the 'authority to proceed' was valid.

Was the evidence against the fugitive inadmissible on the basis that it came from <u>those who participated in the alleged crime?</u>

It is instructive to cite the following passage from the testimony of Chameka Childs.

> "5. On approximately December 26, 1988, I was asked to travel by airplane from Dallas to New York, in order to bring cocaine back to Dallas. I was given a suitcase to deliver to New York. I later determined that the suitcase was full of currency. Upon arrival in New York, I was met by 'Prince' and another individual. 'Prince' took possession of the money and later returned with numerous bags of cocaine. Some of the cocaine was 'cooked' into cocaine base and placed in freezer bags. The freezer bags were later packed into a suitcase and contained approximately two (2) kilograms of cocaine. I was given the suitcase and instructed to fly back to Dallas. On approximately December 27, 1988, I returned to Dallas by airplane. I was paid approximately $5,000 for the trip."

Then here is an extract from the evidence of Gifford Roy Plummer:

> "6. After Phillips was shot and killed in December, 1988, PRINCE ANTHONY EDWARDS became a percentage partner in the organization's profits. PRINCE ANTHONY EDWARDS had to be present in New York each time the organization was re-supplied with cocaine. On February 16, 1989, I rememebr PRINCE ANTHONY EDWARDS being present at a residence in Ducanville, Texas, which was used to store cocaine proceeds or drug money. PRINCE ANTHONY EDWARDS packed a suitcase with money and left for New York. Later, PRINCE ANTHONY EDWARDS called from New York and asked me to send the money with a Chameka Childs, a female courier. On the return trip to Dallas, Childs was arrested at the airport and the new supply of cocaine was seized by the police."

The evidence of Peter Lloyd Atkinson is pertinent. In part, it reads:

> "4. In late August or early September, 1988, I was recruited by Phillips and another person to move to Dallas, Texas and work for Phillips there. Approximately thirty days later, I moved to Dallas. Prior to

my moving to Dallas, I was personally aware that Phillips and PRINCE ANTHONY EDWARDS obtained multi-kilogram quantities of cocaine from Columbian National called 'Poppy'. On one occasion, in approximately October, 1988, I was present at PRINCE ANTHONY EDWARDS' residence in Elmont, New York, just after 'Poppy' delivered five kilograms of cocaine to PRINCE ANTHONY EDWARDS and Phillips, I watched PRINCE ANTHONY EDWARDS and Phillips, assisted by other persons, repackage the cocaine into larger plastic bags. The cocaine was being prepared to be taken to Dallas by a female on another occasion, I was present when six (6) kilograms were delivered by 'Poppy's' workers to PRINCE ANTHONY EDWARDS' house. The cocaine was similarly repackaged for transportation to Dallas.

5. After arriving in Dallas, I knew that Phillips and PRINCE ANTHONY EDWARDS were partners in a cocaine distribution operation. I became aware of several cocaine distribution outlets, including 3600 Parnell Street, which were supervised by Phillips and PRINCE ANTHONY EDWARDS. This operation started in October and continued until December, 1988. The operation sold approximately six (6) kilograms of cocaine weekly. The cocaine was brought to Dallas by couriers from New York. The cocaine was then converted into cocaine base or 'crack' and stored in a 'stash house.' When necessary the "crack" would be moved to a 'packaging house', where the cocaine was weighed and repackaged into smaller quantities for resale, from the various outlets. Money generated from sales would be returned to the packaging house, where PRINCE ANTHONY EDWARDS or Phillips would take possession of the currency.

6. In approximately December, 1988, I became a 'percentage' partner with PRINCE ANTHONY EDWARDS and Phillips in the cocaine sales in Dallas. This arrangement continued until December 20, 1988, when Phillips was shot and killed. I, thereafter, quit the partnership with PRINCE ANTHONY EDWARDS and returned to New York."

As regards this evidence the respondents sought to rely on it for the offence of "conspiracy to possess with intent to distribute and to distribute cocaine" against the fugitive. It was submitted by Mr. Ramsay that this offence was committed in September of 1988 and the treaty was not in force until 1991. The fugitive relied on Ex parte Schwartz (1976) 24 WIR at p. 491 where the Supreme Court wrongly held that conspiracy to contravene the Dangerous Drugs Act was not

an extraditable crime under the previous treaty. The treaty had a provision which reads:

> "Crimes or offences or attempted crimes or offences connected with the traffic in dangerous drugs."

The matter was considered in the Bahamas case of U.S. Government v. Bowe (1989) 37 W I R 9 and the fugitive Bowe relied on Ex parte Schwartz. He succeeded in the Court of Appeal there (Henry, P. and Melville; Smith, J.J.A., dissenting). The Privy Council upheld the dissenting judgment of Smith, J.A. and found that Ex parte Schwartz was wrongly decided. The following passage from Government of United States of America v. Bowe (1988) 37 W.I.R. at page 26 tells the story.

> "For the reasons stated their Lordships prefer the dissenting judgment of Smith, J.A., who said (inter alia):
>
> > 'In Re Brisbois, Henderson, C.J. said that this description of offences was 'a very loosely worded phrase and affords a very wide scope indeed' and that 'there could be very little doubt but that the offence of conspiring to import narcotics or dangerous drugs would be included'. As indicated above, Malone, Snr. J. came to the same conclusion. I am afraid that I have not been able to find in the argument even a plausible basis for the contention that the conspiracies of which the appellant is accused are not within the crimes or offences specified in the treaty. It was submitted that Malone, Snr. J. interpreted the treaty and included an offence which was not negotiated or inserted by the parties. The answer to this is that paragraph 24 in the treaty is a description of offences in what Lord Diplock, in Re Nielsen, calls 'general terms and popular language'. If it is said, as it was, that the conspiracies do not fall within this general description then a reason why they do not should be given. None was suggested.'"

The passage must be read against the earlier passage on page 24 of the judgment where Lord Lowry said:

> "The fugitive relied on R.v. Director of Public Prosecutions, ex parte Schwartz

> (1976) 24 W.I.R. 491, a case decided by the Supreme Court of Jamaica in which the arrested person, who had been convicted in the United States of -
>
> 'conspiracy with others to sell and to transport dangerous drugs within the jurisdiction of the United States district court, eastern district of New York'
>
> was committed in extradition proceedings to await her return to the United States. Her application for a writ of habeas corpus was granted on the ground that conspiracy to commit an offfence relating to dangerous drugs was not an extraditable offence."

So the offence of conspiracy to possess with intent to distribute and to distribute cocaine was extraditable under the old treaty which was effective until 13th September, 1991. It was never questioned that it was not extraditable under the present treaty.

It was further contended on behalf of the fugitive that there must be independent evidence of a conspiracy before the evidence of a co-conspirator is admissible. The following passages in R v Governor of Pentoville Prison, Ex parte Osman (D.C.) (1990) 1 W.L.R. 277, were relied on for the proposition. At page 315 Lloyd L J said:

> "Evidence of a fellow conspirator
>
> Next there was an issue as to the admissibility of some of the evidence tendered to prove that Osman was a party to certain of the conspiracies. Mr. Ross-Munro accepted, of course, the general principle that acts or declarations of one conspirator in furtherance of the conspiracy are admissible against a fellow conspirator to prove the nature and scope of the conspiracy. But first there must, he submits, be independent evidence to show that Osman was a party to the conspiracy. Otherwise the argument is circular. The acts and omission of one conspirator are only admissible against the others

> "on the ground that he is their agent. Thus evidence of a conspirator that Osman was a party to a particular conspiracy would not be admissible against Osman, unless that conspirator was in fact Osman's agent."

Further on page 316 the following passage appears:

> "But as we read the judgment at p. 179, Lord Lane was agreeing with the observations in Cross on Evidence, 6th ed. (1985), p 527, that there must always be some evidence other than the hearsay evidence of a fellow conspirator to prove that a particular defendant is party to a conspiracy. Provided there is some other evidence, it does not matter in what order the evidence is adduced."

As the learned Deputy Director of Public Prosecutions submitted the evidence of Childs, Plummer and Atkinson suggested that they were eyewitnesses to the overt acts of the fugitive and it was from such acts that the conspiracy was to be inferred. Moreover, the extracts from the evidence of Childs, Plummer and Atkinson show that these co-conspirators were agents of the fugitive. That was the essential condition for establishing that the fugitive was a party to the conspiracy. Then again that the fact that the witnesses were in prison when they gave their testimony was no disqualification. See Schtraks v Government of Israel (1964) A C 556 at 580, per Lord Reid; page 603 per Lord Evershed; and page 608 per Lord Hodson. So considered their evidence was admissible in the committal proceedings to warrant the extradition of the fugitive.

Was the passage of time since the fugitive committed the offence such that it was unjust or oppressive to extradite him?

Bell v Director of Public Prosecutions of Jamaica and another (1985) 2 All E R page 585 was cited on behalf of the fugitive on this aspect of the case. But Bell was within the jurisdiction and it

was the dilatory tactics of the Public Prosecutor which enabled Bell to succeed in having his proposed trial declared unconstitutional. The period of April 1988 to date of the offence to 12th March, 1993 when the provisional warrant was issued and executed was not a period which would qualify as being unjust or oppressive for an extradition case. In this case the warrant for arrest of the fugitive was issued from the United States District Court on December 14, 1989. The endorsation indicates that the Grand Jury returned a true bill on December 13, 1989, which does not suggest delay by the requesting State. The fugitive states in his affidavit that he returned to Jamaica in December, 1989 although he does not specify which day in December. The important fact is that the fugitive who bears a Social Security No. 124-62-4707 and an Alien Registration No. A-35-596-799 fled from the United States of America in the same month. The evidence against him was secured in April, 1993. It must have taken some time to trace his whereabouts. The request for the fugitive's arrest was made on March 5, 1993. So, there can be no justifiable complaint about delay here. The Supreme Court addressed the matter, thus:

> "It is observed that the offences were alleged to have been committed in 1988, the Grand Jury hearing was held and the warrant of arrest was signed in 1989, and the affidavits of the witnesses sworn to in 1993. In all the circumstances, the period of time since the alleged commission of the offences is not so long, nor does the accusation against the applicant qualify as 'not made in good faith', to impel this Court to hold that it would 'be unjust or oppressive to extradite' the applicant, as contemplated by section 11(3) of the Act.
>
> For the reasons stated above the application for the issue of the writ of habeas corpus should be refused."

The basis of this ruling was that the delay so called could not be a ground in this case for finding that the committal was invalid. Even if it is true that the fugitive may have been unlawfully detained for a period, no complaint was made on that score in these proceedings. The Supreme Court has considerable experience in these matters and it is only since 1991 that appeals are permitted to this court. This is perhaps the first appeal and we have found no good reason to review their findings.

CONCLUSION

It only remains to thank counsel on both sides for their cogent submissions and to say that I agree with the order proposed by Wright , J A.

WOLFE, J.A.:

I agree.