IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

MISCELLANEOUS

SUIT NO. 2004 HCV 1055

CORAM: THE HONOURABLE CHIEF JUSTICE
THE HONOURABLE MR. JUSTICE MARSH
THE HONOURABLE MR. JUSTICE DUKHARAN

IN THE MATTER of an Application by **SHERVIN EMMANUEL** for a Writ of Habeas Corpus Ad Subjiciendum

AND

IN THE MATTER of The Extradition Act

BETWEEN	**SHERVIN EMMANUEL**	**APPLICANT**
AND	**THE COMMISSIONER OF CORRECTIONS**	**1ST RESPONDENT**
AND	**THE DIRECTOR OF PUBLIC PROSECUTIONS**	**2ND DEFENDANT**

Frank Phipps Q.C., Wentworth Charles and Miss Kathyrn Phipps for the Applicant

Miss Annaliesa Lindsay and Miss Carlene Larmond for the 1st Respondent

Mrs. Georgiana Fraser for the 2nd Respondent

HEARD: June 28, 29, 30 and October 19, 2004

WOLFE, C.J.

On the 10th day of April 2004 the learned Resident Magistrate of the Corporate Area Criminal Court issued a warrant of committal for the applicant to be extradited to the United States of America to stand trial on an indictment in respect of extraditable offences committed by the applicant whilst he resided in the United States.

The applicant now moves this court for a Writ of Habeas Corpus to set aside the order of the Resident Magistrate.

The grounds supporting the application are –

(i) That the learned Resident Magistrate in committing the applicant to be extradited relied on evidence contained in Affidavit of Ivan Musgrove dated the 23rd day of January 2004 which said affidavit was not considered as evidence at the hearing of the grand jury.

(ii) That the learned Resident Magistrate considered inadmissible evidence when he relied on the statement by Thyrone Turnquest that "the voice of the tape recording was that of EMMANUEL", when neither evidence of the tape recording itself nor a transcript thereof was provided in evidence at the hearing. Alternatively, it is submitted

that the failure of the learned Trial Judge to exclude the evidence of the content of the telephone and the tape recording impeded the court's general jurisdiction to achieve fairness, particularly, as to how the said Tape Recordings had come into the possession of the Crown and that the said tape recorded evidence was not probative and its inadmissibility resulted in a miscarriage of justice.

(iii) That the Acts complained of by the requesting state did not constitute an extradition offence as the "Overt Acts" related to the Jurisdiction of Jamaica and the Bahamas, and all other evidence to the contrary was inadmissible.

(iv) That the allegation related to five (5) counts contained in the indictment relates to the offence of aiding and abetting and there is no extra territorial Jurisdiction for this offence.

(v) That there was no proof of the identification of the person alleged to have committed the offences in the application before the Court

(vi) That the learned Resident Magistrate had no jurisdiction in law to consider charges which did not allege offence against the laws of Jamaica.

In the presentation of the arguments for the applicant, Phipps Q.C. categorized the abovementioned grounds into three categories viz.

(a) Incompetent evidence

(b) Improper procedure

(c) Lack of jurisdiction

A brief summary of the allegations giving rise to the charges preferred is in my view helpful in considering the arguments of the applicant.

Austin Knowles was the head of an organization of smugglers in the Bahamas that smuggled cocaine through the Bahamas into the United States. Shervin Emmanuel was a member of this organization and his role was to procure cocaine from the open seas and transport it into the Bahamas where he stored it until it was time to smuggle the cocaine into the United States. He was also responsible for transporting cocaine from the southern region of the Bahamas to the northern region where it would be loaded into vessels and taken into the United States of America.

A. INCOMPETENT EVIDENCE –

In this regard the applicant contends that –

(a) there were no overt acts of aiding and abetting within the United States and therefore there was no evidence that the applicant had committed any offence within the jurisdiction of the United States;

(b) that the learned Resident Magistrate in making the committal order acted upon hearsay evidence;

(c) that there was no evidence before the committal court upon which it could properly be held that the applicant had knowledge of the cocaine being transported into the United States.

Phipps Q.C. submitted that there was no evidence in any of the affidavits which was capable of proving that the applicant was in anyway involved in conduct referable to the jurisdiction of the courts of the United States of America. He said that the evidence presented could only indicate that the applicant was a supplier of cocaine from Jamaica to the Bahamas without knowledge of any other ultimate destination.

It was further urged that the charges in Counts 2,3, 4 and 5 of the indictment were based on activities allegedly committed in Jamaica and

therefore not extraditable. A charge of aiding and abetting, Phipps Q.C. contends, is only justiciable in the jurisdiction where the act took place and must be distinguished from a charge of conspiracy where the overt acts committed abroad are justiciable in the jurisdiction where they were intended to result in a crime.

There can be no doubt that the principle enunciated by counsel for the applicant was sound law, however the position has changed and the courts are following a much more liberal approach.

In Re ***Al-Fawwaz*** [2001] UK HL 69, a decision of the House of Lords in an extradition case, Lord Slynn of Hadley said at paragraph 37:

> "When the 1870 Act was passed crimes were no doubt largely committed in the territory of the state trying the alleged criminal but that fact does not, and should not, mean that reference to the jurisdiction is to be so limited. It does not as a matter of the ordinary meaning of the words used. It should not because in present conditions it would make it impossible to extradite for some of the most serious crimes now committed globally or at any rate across frontiers. Drug smuggling, money laundering, the abduction of children, acts of terrorism, would to a considerable extent be excluded from the extradition process. It is essential that that process should be available to them. To ignore modern methods of communication and travel as aids to criminal activities is unreal. It is no less unreal to ignore the fact that there are now many crimes where states assert extraterritorial jurisdiction, often as a result of international conventions".

In support of the above dictum Lord Slynn cited with approval the dictum of Lord Bridge of Harwick in ***R v Governor of Ashford Remand Centre, Ex p Postlethwaite [1988] AC 924, 947:***

> "I also take the judgment in that case [re Aston (No.2) [1896] QB 509, 517] as good authority for the proposition that in the application of the principle the Court should not, unless constrained by the language used, interpret any extradition treaty in a way which would hinder the working and narrow the operation of most salutary international agreements. The second principle is that an extradition treaty is a contract between two sovereign states and has to be construed as such a contract. It would be a mistake to think that it had to be construed as though it were a domestic statute: R v Governor of Ashford Remand Centre, Ex p Beese [1973] 1 WLR 969. 973, per Lord Widgery C.J. In applying this second principle, closely related as it is to the first, it must be remembered that the reciprocal rights and obligations which the high contracting parties confer and accept are intended to serve the purpose of bringing to justice those who are guilty of grave crimes committed in either of the contracting states. To apply to extradition treaties the strict canons appropriate to the construction of domestic legislation would often tend to defeat rather than to serve this purpose".

Finally I refer to the dictum of Lord Griffiths in ***Liangsiriprasert v Government of the United States of America [1991] 1 A.C. 225, 251:***

> "Unfortunately in this century crime has ceased to be largely local in origin and effect. Crime is now

> established on an international scale and the common law must face this new reality. Their Lordships can find nothing in precedent, comity or good sense that should inhibit the common law from regarding as justiciable in England inchoate crimes committed abroad which are intended to result in the commission of criminal offences in England".

It must be noted that although the ***Al-Fawwaz*** case was concerned with a conspiracy their Lordships' observations were not confined specifically to crimes of conspiracy.

The applicant next complained that the Magistrate acted on hearsay evidence in coming to his decision.

The complaint is that there was no evidence before the Resident Magistrate of the alleged telephone conversation since neither the tapes, the transcript of the tapes, nor the telephone records were ever tendered in evidence.

I do not agree with counsel's submission.

The affidavit of Ian Musgrove contains damning evidence against the applicant. I bear in mind the fact that Musgrove is a co-accused who pleaded guilty to three counts of the indictment, in particular count 1 which alleges that Shervin Emmanuel and Ivan Musgrove et al "did knowingly and intentionally combine, conspire, confederate and agree with each other and

with other persons unknown to the grand jury to import into the United States from a place outside thereof a controlled substance etc."

Wayne Woodside whose affidavit was before the Resident Magistrate states that as a Sergeant of Police with the Royal Bahamas Police Force he monitored and recorded authorized wire intercepts between the applicant and other co-accused. Sergeant Woodside knew all these men before and had spoken to them on several occasions and was accustomed to their voices.

These are the tape recordings which Sergeant Thyrone Turnquest listened to in the presence of Sergeant Wayne Woodside.

How can it be said that the evidence is hearsay? The purpose of Turnquest's evidence was to identify the voices recorded on the tapes.

The contention that there was no evidence to show that the applicant had knowledge of the cocaine being transported into the United States is, to say the least, a bold submission.

The affidavit of Ian Musgrove contains unequivocal evidence which, if believed, makes it clear beyond reasonable doubt that the applicant had knowledge that the cocaine was being transported into the United States of America.

For the foregoing reasons I hold that the ground based on incompetent evidence fails.

B. IMPROPER PROCEDURE

In dealing with this ground there are three complaints:

(i) the evidence produced at the committal proceedings was inadmissible because the affidavits relied upon in proof of the allegations against the applicant are all dated subsequent to the verdict of the grand jury;

(ii) there is no proper identification of the applicant as the person referred to in the affidavits and named in the indictment of the grand jury.

(iii) the offences charged in the authenticated documents are not offences known to the laws of Jamaica.

(i) Section 8(2) of the Extradition Act states:

> "There shall be furnished with any request made for the purpose of this section by or on behalf of any approved state -
>
> (a) in the case of a person accused of an offence, a warrant for his arrest issued in that state -
> (b) .....
>
> together with, in each case, the particulars of the person whose extradition is requested, and of the facts upon which and the law under which he is accused or was convicted, and evidence sufficient to justify the issue of a warrant for his arrest under section 9.

Section 8(2) does not stipulate that the facts relied upon and the evidence to justify the issue of a warrant under section 9 must exclusively be the allegations presented before the grand jury.

The requirement is that the information presented before the committing Resident Magistrate must be such as would in the opinion of the Magistrate, authorize the issue of a warrant for the arrest of a person accused of committing a corresponding offence, within the jurisdiction of the Magistrate.

See section 9(2)

It is my view that the applicant's reliance on section 14(2)(a) is wholly misplaced. All section 14(2)(a) does is to stipulate the format of the documents referred to in sections 14(1)(a) and 14(1)(b).

(ii) The submission that there is no proper identification of the applicant flies in the face of the evidence.

Musgrove in his affidavit identifies the photograph of the applicant. Detective Corporal Casper Brown at the time of apprehending the applicant was armed with a photograph of the applicant which he showed to him and which he admitted was his photograph. This photograph was exhibited before the Magistrate.

Sergeant Thyrone Turnquest of the Royal Bahamas Police Force also identified a photograph of the applicant, which was exhibited before the Magistrate.

The photograph which Detective Corporal Brown showed to the applicant and which the applicant had admitted was a photograph of him was tendered in evidence at the committal hearing.

As was pointed out by Miss Lindsay for the first respondent the circumstances of this identification are not dissimilar to those in the case of Rory Gordon v The Director of Public Prosecutions and the Director of Correctional Services SCCA 63/97, (unreported)

In that case Rattray P said –

> "The committing Resident Magistrate had before her the photograph identified by Miss King as being that of the perpetrator of the offences against her. She also had the photograph in the possession of Deputy Superintendent Lewis Burchell shown to the appellant by him and which the appellant identified as a photograph of himself. There is also the fact that the appellant identified his name as being Rory Gordon. This was prima facie evidence on which the committing magistrate could and did conclude that the Rory Gordon before her and indeed viewed by her was in fact the same Rory Gordon the subject of the extradition request."

Similarly the committing magistrate in this case had before him the photograph identified by Ian Musgrove as that of the applicant who was

involved along with him in the importation of cocaine into the United States. He also had before him the photograph which was in the possession of Detective Corporal Brown which was shown to the applicant and which he admitted was a photograph of himself. The applicant also admitted to Detective Corporal Brown that his name was Shervin Emmanuel.

Like Rattray P. I am satisfied that this was prima facie evidence on which the committing Magistrate could and did conclude that the Shervin Emmanuel before him and viewed by him was in fact the same Shervin Emmanuel the subject of the extradition request.

(iii) The submission is that, the offences charged in the authenticated documents are not offences known to the laws of Jamaica.

What are the offences mentioned in the authenticated documents?

The offences mentioned in the authenticated documents including the indictment preferred by the grand jury go beyond the "Importation of drugs into the U.S.A."

Count one of the indictment charges that the parties -

> "did knowingly and intentionally combine, conspire, confederate and agree with each other and with other persons unknown to the grand jury to import into the United States from a place outside thereof a controlled substance, that is, at least five (5) kilograms of a detectable amount of cocaine."

All the counts of the indictment are similarly worded.

It cannot be successfully argued that the importation of cocaine is not an offence cognizable by the Court of Jamaica.

This ground alleging Improper Procedure also fails.

C. LACK OF JURISDICTION

The submission on behalf of the applicant is that the learned Resident Magistrate failed to demonstrate that in arriving at his decision he considered Jamaican Law. Further the authority to proceed and the Provisional Warrant made no reference to Jamaican Law in general terms.

These failings Counsel contends ousted the jurisdiction of the Court.

Counsel placed reliance upon Sections 5(1)(b) and 10(1) of the Extradition Act.

Section 5(1)(b) states:-

> "For the purposes of this Act, any offence of which a person is accused or has been convicted in an approved state is an extradition offence; if
>
> (b) in the case of an offence against the law of a treaty state -
>
> (i) it is an offence which is provided for by the extradition treaty with that state; and
>
> (ii) the act or omission constituting the offence, or the equivalent act or omission, would constitute

> an offence against the law of Jamaica if it took place within Jamaica or, in the case of an extra-territorial offence, in corresponding circumstances outside Jamaica."

The purpose of section 5(1)(b) is to define what is an extraditable offence. The applicant has not said that the offence is not an extraditable offence The complaint is that the Resident Magistrate has not demonstrated that he gave consideration to whether or not the offence was extraditable pursuant to section 5(1)(b)(i) and (ii).

Short of the Resident Magistrate saying I have considered the provisions of section 5 (1)(b)(i) and (ii), how would he have demonstrated that he gave consideration to section 5(1)b(i) and (ii)?

My considered view is that the real question is whether the offence is an extraditable offence. The Magistrate was of that view, evidenced by the order he made. Nothing has been advanced to lead this court to hold otherwise.

Section 10(i) states:-

> "A person arrested in pursuance of a warrant issued under section 9 shall, unless previously discharged under subsection (4) of that section, be brought 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 a indictable offence committed within his jurisdiction".

This section sets out the procedure to be applied by the Magistrate in determining whether or not to make a committal order.

Counsel for the applicant has failed to point out anything done by the magistrate which is contrary to the provisions of the section. He who alleges must prove.

It is for the applicant to identify what it is the Magistrate did which offends the provisions of the section.

This ground also fails.

For the reasons stated I would dismiss the application.

MARSH J.

Having read the judgment of the learned Chief Justice and for the reasons stated, I too would dismiss the Application.

DUKHARAN J.

Having read the judgment of the learned Chief Justice and for the reasons stated I too would dismiss the application.

WOLFE, C.J.

The Application is hereby dismissed.