

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT MISCELLANEOUS APPEAL NO. 9/2004

**BEFORE: THE HON. MR. JUSTICE FORTE, P.
 THE HON. MR. JUSTICE SMITH, J.A.
 THE HON. MR. JUSTICE K. HARRISON, J.A.**

BETWEEN TREVOR FORBES APPELLANT

AND THE DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT

**A N D THE COMMISSIONER OF CORRECTIONAL 2ND RESPONDENT
 SERVICES**

**Frank Phipps QC, and George Soutar for the appellant
Mrs. Georgiana Fraser, for the first respondent
Mesdames Annaliesa Lindsay, Carlene Larmond and Amina Macknoon
for the second respondent**

June 21,22,23,24 and November 3, 2005

FORTE, P:

Having read in draft the judgment of Smith, J.A, I agree with the reasons and conclusions therein and have nothing further to add.

SMITH, J.A:

This is an appeal against an order of the Full Court of the Supreme Court (Wolfe, CJ, Harris and McCalla JJ) dated the 19th December, 2003 dismissing the appellant's motion for a Writ of Habeas Corpus. On the 24th June, 2005, this Court dismissed the appeal and promised to put our

reasons in writing at a later date. The following are my reasons for concurring with the decision to dismiss the appeal.

On the 8th May, 2001, the Embassy of the United States of America requested the provisional arrest of the appellant for the purpose of extradition.

On the 5th June 2001, the appellant, a Jamaican accused of extraditable offences in the United States of America, was arrested in Kingston, Jamaica on a provisional warrant, issued under section 9 of the Extradition Act, 1991 (the Act).

On the 23rd August, 2001 the Minister of National Security and Justice (the Minister) under section 8 of the Act issued his Authority to the Resident Magistrate for the Corporate Area to Proceed in pursuance of the request for the extradition of the appellant.

On the 24th April, 2002 extradition proceedings began before Resident Magistrate, Mr. Martin Gayle.

On the 23rd July, 2002 the learned Resident Magistrate issued his Warrant of Committal committing the appellant into the custody of the second respondent pursuant to the Act.

The appellant on the 5th August, 2002, filed a Notice of Motion in the Supreme Court for the issuance of a Writ of Habeas Corpus on the following grounds:

"1 (a) The charges found by the Grand Jury Indictment were not for offences cognisable in the Courts of Jamaica.

(b) There is a nullity in the Proceedings in the United States of America where more than one conspiracy is charged in the respective counts of the Indictments.

(c) There is no evidence before the Learned Resident Magistrate to prove the existence of the superseding Indictment for which extradition is sought by the United States Government.

2. The document purporting to be the Affidavit of Julie Hackenberry Savell grounding the Application for extradition is incomplete and of no legal effect.

3(a) The alleged prohibited substance referred to in Julie Hackenberry Savell's affidavit as "marihuana" and in the respective counts of the Indictment as "marihuana" is not known to the laws of Jamaica as an offence.

(b) The certificate of the Forensic Chemist referring to "marihuana" has not been connected by evidence to the Affidavit of Julie Hackenberry Savell and itself is not a substance prohibited in Jamaica and subject of a charge cognisable in Jamaica."

Leave was sought and presumably obtained to argue the following supplemental ground:

"The Applicant is being unlawfully detained at the Tower Street Adult Correctional Centre resulting from a Committal Order made on the 23rd day of July, 2002 by a Resident Magistrate who had no jurisdiction to make the Order for Committal."

The Full Court, on the 19th December, 2003, dismissed the appellant's application for a Writ of Habeas Corpus.

Grounds of Appeal

In his Notice of Appeal filed on the 27th January 2004, the appellant specified the following grounds:

- "(a) The Full Court was in error when it found in a unanimous decision that the Authority to Proceed was valid Authority to give the Resident Magistrate jurisdiction to enter on the Proceedings for extradition.
- (b) The Authority to Proceed was based on a Provisional Warrant that contained allegations that the applicant was both an accused person and a convicted person.
- (c) The affidavit in proof of evidence to support the Indictment against the applicant was altered at material areas which alterations were not authenticated and therefore defective, illegal and of no effect.

- (d) There was no proof that the prohibited substance alleged in the Indictment against the applicant was prohibited by Jamaican law."

On the 20th May, 2005 counsel for the appellant filed skeleton arguments. In these arguments the appellant introduced new grounds pursuant to an order of the case management judge. One of which alleges a breach of his constitutional right to protection from expulsion from Jamaica.

When the matter came before the Court counsel for the respondents objected to the introduction of these new grounds. Miss Larmond intimated that she would not strenuously oppose the appellant making submissions on the constitutional ground.

Both Mrs. Fraser and Miss Larmond relied on section 63(1) and (2) of the Criminal Justice (Administration) Act and the decisions of this Court in ***Vivian Blake v The Director of Public Prosecutions and The Superintendent of Prisons*** SCCA No. 107 of 1996 delivered 27th July, 1998 and ***Desmond Brown v The Director Public Prosecutions and The Director of Correctional Services*** SCCA No. 91 of 2000 delivered 2nd of April, 2004.

I think it is fair to say that Mr. Phipps Q.C. did not resist the objection of the respondents as, by virtue of section 63(1) of the Criminal Justice (Administration) Act, an application for Writ of Habeas Corpus must state all the grounds, upon which it is based. And by virtue of section 63(2)

ibidem no further application, whether on the same grounds or any other ground, can be made in the absence of fresh evidence.

In the **Vivian Blake** case (supra) Forte, JA, (as he then was) was of the view that to permit new grounds to be advanced at the appeal stage would be to allow the appellant to do through the process of appeal that which he was shut out from doing by virtue of section 63(1) and (2) of the Criminal Justice (Administration) Act.

In the **Desmond Brown** case (supra) Panton JA, emphasized that "... there can be no hide-and-seek... they are to set out **all** their grounds at that stage. They are not permitted to withhold a ground, and then spring a surprise at a later stage."

Although the constitutional ground was not stated in the Application for the Writ, the Court was of the view, that counsel should be permitted to argue such a ground as ex facie it seeks to question the validity of the Act under which the Proceedings were brought. Consequently, such a ground would constitute a challenge to the jurisdiction of the Resident Magistrate to make the Committal Order. Accordingly, the Court permitted the inclusion of the constitutional ground, but of course, refused the other new ground.

The supplemental constitutional ground which was subsequently filed, reads:

"The Appellant was deprived of his constitutional right to the protection of freedom of movement

and immunity from expulsion from Jamaica guaranteed by section 16 of the Jamaica Constitution. Extradition Act 1991 under which the removal of the appellant from Jamaica is requested for trial outside of Jamaica for a criminal offence is inconsistent with and in contravention of section 16 of the Constitution and is void by virtue of section 2 of the Constitution.

Section 6 of the Jamaica Independence Act restricts Parliament from repealing, amending or modifying 'constitutional provisions' otherwise than in the manner provided in the Constitution."

After obtaining leave to add the above ground, Mr. Phipps Q.C. informed the Court that the appellant had filed in the Supreme Court a challenge to the constitutionality of the Act. He told the Court that one of the compelling reasons for challenging the Act by a separate motion in the Supreme Court was that if the matter was heard on appeal as Habeas Corpus Proceedings the decision of the Court of Appeal would be final. He cited **Dave Grant v. The Director of Correctional Services et al** P.C. Appeal No. 27 of 2004 delivered 14th June, 2004. He therefore applied that the Proceedings before this Court be adjourned pending the outcome of the Proceedings in the Supreme Court "where the appellant would have full rights in pursuing his appeal to the Privy Council." He asked this Court to remit the constitutional point to the Supreme Court for its consideration.

Both Mrs. Fraser and Miss Larmond strenuously opposed this application. They referred to the history of the application for the Writ of

Habeas Corpus and the failure of the appellant to raise the constitutional point before the Full Court, and contended that to adjourn the Proceedings before this Court for reasons advanced by the appellant would be a waste of judicial time. The application was an abuse of the process of the court, they urged, and should be rejected.

The Court was of the view that the reasons advanced by the appellant in support of his application to remit the constitutional point to the Supreme Court were inadequate and ordered that the appeal should Proceed.

Mr. Phipps, Q.C. informed the Court that he would not be pursuing ground (4) in the Notice of Appeal. The appeal, he said, involved three issues namely:

1. The jurisdiction issue
2. The admissibility of evidence issue and
3. The constitutional issue.

The Jurisdiction Issue

The appellant contends that the Resident Magistrate had no jurisdiction to conduct the committal Proceedings because the Authority to Proceed, which gives the Resident Magistrate jurisdiction, incorrectly referred to the appellant as a convicted person.

In order to deal with this contention it is necessary, to reproduce the Provisional Warrant of Arrest and the Minister's Authority to Proceed.

"The Extradition Act, 1991
Provisional Warrant of Arrest

To all and each of the Constables of the
Jamaica Constabulary Force

WHEREAS it has been shown to the undersigned, one of Her Majesty's Resident Magistrates in and for the Corporate Area, that **Trevor O. Forbes aka Travis Forbes** is accused of the extradition offences of (a) **One Count of Conspiracy to Import Marijuana into the United States**, (b) **One Count of Conspiracy to distribute Marijuana** (c) **Two Counts of Importation of Marijuana** subject of an Indictment No. 99-222-Cr-J-21-A filed on August 5, 1999 and Warrant of Arrest issued on August 5, 1999 by Judge Howard T. Snyder of the United States District Court for the Middle District of Florida within the jurisdiction of the United States of America:

AND WHEREAS information has been presented to me which would, in my opinion, authorize the issue of a Warrant of Arrest of a person convicted of committing a corresponding offence within my jurisdiction:

AND WHEREAS there is information that the said **Trevor O. Forbes aka Travis Forbes** is or is believed to be in or on his way to Jamaica.

THIS IS THEREFORE to command you forthwith to arrest the said **Trevor O. Forbes aka Travis Forbes**, and bring him before me or some other Magistrate sitting at this Court to be further dealt with according to law, for which THIS SHALL BE YOUR WARRANT.

GIVEN under my hand and seal at the Resident Magistrate's Court for the Corporate Area this 4th day of June 2001.

Resident Magistrate
For the Corporate Area."

**"THE EXTRADITION ACT, 1991
AUTHORITY TO PROCEED**

To the Resident Magistrate for the **Corporate Area**

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 **Trevor O. Forbes aka Travis Forbes**, who is accused of the extradition offences of **(a) One count of Conspiracy to Import Marijuana into the United States, (b) One count of Conspiracy to distribute Marijuana, (c) Two counts of Importation of Marijuana**, subject of a superseding Indictment #3:99-cr-222(SI)-J-21 HTS dated May 23, 2001, and a Warrant of Arrest dated May 24, 2001 issued by the United States District Court, Middle District of Florida, Jacksonville Division, within the jurisdiction of the United States of America.

NOW I HEREBY, by this Order under my hand and seal, signify to you that such request has been made, and require you to Proceed on the Authority of the Provisional warrant of Arrest provided that the conditions of the Extradition Act, 1991, relating to the issue of such Warrant, are, in your judgment, complied with.

GIVEN UNDER the hand and seal of the undersigned Minister of National Security and Justice this 23rd day of August 2001.

Minister of National Security & Justice"

Now the reasoning behind Mr. Phipps' proposition is this: although the Authority to Proceed states that the appellant "is accused of offences..." it requires the Magistrate to Proceed on the Authority of the Provisional Warrant of Arrest, and in this Warrant the Magistrate declares

that " information has been presented to me which would in my opinion, authorize the issue of a warrant of Arrest of a person convicted of committing a corresponding offence..."

It is the contention of counsel for the appellant that the Authority to Proceed was issued based on the provisional warrant which relates to a person convicted. The appellant is not a convicted person. The jurisdiction of the Magistrate was therefore wrongly assumed and all consequential actions are void and of no effect.

Counsel for the appellant further contends that there is nothing authorizing the Magistrate to issue the Warrant of Committal which relates to the second Indictment dated May 24, 2001. Mr. Phipps Q.C submitted that since the provisional warrant was issued on the basis of the first Indictment dated August 5, 1999 and the Magistrate was directed to Proceed on the Authority of the provisional warrant, it follows that the Magistrate had no jurisdiction to hold committal Proceedings with respect to the second Indictment. This is so, he urged, even though the Authority to Proceed refers to the second Indictment in the preamble. He concluded that where the liberty of the subject is involved there must be strict compliance with the legislation involved.

Mrs. Fraser for the first respondent submitted that the Magistrate had jurisdiction to hold the committal proceedings and that the committal was lawful and valid. It is her contention that the Authority to Proceed,

which gives the Magistrate jurisdiction, does not refer to the appellant as a "convicted person" but, on the contrary, it clearly states that he is "accused" of offences. The provisional warrant also clearly states in the preamble that the appellant is "accused of extradition offences". And, although the provisional warrant does make mention of the words "person convicted", these words do not describe the status of the appellant. She further contends that, even if it could be said that the provisional warrant contains an ambiguity, this would not invalidate the warrant since the Magistrate is empowered by the Act to issue a warrant for the appellant's arrest in any event whether his status was that of an "accused" or "convicted" person. It is also her contention that the Minister's direction to the Magistrate "to Proceed on the Authority of the Provisional Warrant of Arrest" was only referring to the appellant's continued detention by virtue of such warrant.

Counsel for the first respondent referred to the affidavit evidence of Ms. Savell which gives the reason for the presentment of the superseding Indictment referred to in the Authority to Proceed.

Miss Larmond for the second respondent supports the contention of Mrs. Fraser that the Authority to Proceed was valid and that the Magistrate was properly vested with jurisdiction.

In this regard she argues that the important factors are that:

- (i) The Authority to Proceed was issued in respect of the superseding Indictment.
- (ii) The Authority to Proceed described the appellant as an accused and not as a convicted person.
- (iii) The Authority to Proceed is independent of the provisional warrant which ceases to have effect when the Authority to Proceed is issued.
- (iv) The reference to the warrant in the Authority does not keep the warrant alive and does not affect the validity of the Authority. Such reference served the purpose of continuing to secure the arrest of the appellant.
- (v) In any event, even if there was a technical flaw in the manner in which the appellant was brought before the Magistrate, that would not affect the jurisdiction of the Magistrate.

Both counsel for the respondents relied on ***Prince Anthony Edwards v The Director of Public Prosecutions*** [1994] 31JLR 526 and on sections 8 and 9 of the Act.

In my judgment the submissions of the respondents are, in the main, correct. In the first place the provisional warrant (which I have reproduced above) does not refer to or describe the appellant as a convicted person.

In it the Magistrate clearly states that it has been shown to him, that the appellant is accused of extradition offences. In the second paragraph, at which counsel's criticism is aimed, the Magistrate states that "...information has been presented to me which would in my opinion authorize the issue of a Warrant of Arrest of a person convicted of committing a corresponding offence within my jurisdiction."

The second paragraph must be read in the context of the first and in the light of section 9(2) (supra) of the Act and also section 2 of Article X of the Extradition Treaty, to which I will return shortly. When looked at in this context, it becomes crystal clear that the second paragraph of the provisional warrant is not referring to or describing the status of the appellant. On the contrary, it is referring to and describing the cogency or quality of the information presented to the Magistrate.

Undoubtedly what the Magistrate is saying is that if a person were convicted in this jurisdiction of the offences of which the appellant is accused, the information presented to him would, in his opinion, be sufficient to authorize the issue of a warrant of arrest.

It is important to note that there is no complaint that the details that have to be provided (see section 8(2) of the Act) where the request relates to an accused person as distinct from a convicted person, were not furnished with the request for the extradition of the appellant.

To consider the other aspects of Mr. Phipps' submission it is necessary to refer to the relevant statutory provisions.

Section 8 of the Act empowers the Minister to issue his "Authority to Proceed" on the receipt of a request made for the extradition of a fugitive. This section provides that, apart from the issuance of a provisional warrant, a person shall not be dealt with under the Act except in pursuance of the "Authority to Proceed".

The power of the Magistrate to issue a warrant for the purposes of the Act is derived from section 9, which provides:

"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 is believed to be; or

(b) without such an Authority, by a 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.

(2) A warrant of arrest under this section may be issued upon such information 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 or, as the case may be, of a person alleged to be unlawfully at large after conviction of an offence, within the jurisdiction of the Magistrate.

(3) A warrant of arrest issued under the section (whether or not it is a provisional order) may, without an endorsement to that effect, be executed in any part of Jamaica, whether such part is within or outside the jurisdiction of the Magistrate by whom it is so issued, and may be so executed by any person to whom it is directed or by any constable.

(4) Where a provisional warrant is issued, the Magistrate by whom it 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.

(5) Where a warrant is issued under this section for the arrest of a person accused of an offence of stealing or receiving stolen property or any other offence in respect of property the Magistrate shall have the same power to issue a warrant to search for the property as if the offence had been committed within his jurisdiction."

Section 2(1) of the Act states that a "provisional warrant" means a warrant issued under section 9(1)(b).

Thus where the Magistrate has not yet received the Authority to Proceed from the Minister, in case of urgency, he may on application issue a provisional warrant for the arrest of a fugitive. For the Magistrate to issue a provisional warrant the application shall contain:

(a) a description of the person sought;

- (b) the location of that person if known;
- (c) such information as would be necessary to justify the issuance of a warrant of arrest had the offence been committed or the person sought been convicted of an offence within the jurisdiction of the Magistrate;
- (d) a statement that a request for extradition of the person sought will follow. (See section 2 of Article X of the Extradition Treaty between the Governments of Jamaica and the United States of America).

Section 4 of Article X (supra) provides that:

"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."

It is clear as can be that the Minister's indication that a request has been made and his direction to the Magistrate to Proceed on the Authority of the provisional warrant serve to make the detention of the appellant beyond the sixty (60) day period, lawful for the purposes of the committal Proceedings. The warrant is termed 'provisional' because it must be confirmed by the Minister within sixty (60) days from the date of arrest.

If it is not confirmed by the Minister's Authority to Proceed then it becomes inoperative after sixty days and thereafter the continued detention of the fugitive would be unlawful.

It is, therefore, incorrect to say that the Authority to Proceed is "based on the provisional warrant". If anything, it would be the other way around. Indeed, in so far as the Minister's Authority to Proceed is concerned, it is immaterial whether the provisional warrant describes the appellant as an accused or a convicted person. Accordingly, in my view the submission of learned Queen's Counsel on behalf of the appellant, that the Magistrate had no jurisdiction to hold the committal proceedings because the Authority to Proceed was "issued based on a provisional warrant which incorrectly referred to the appellant as a convicted person," is untenable. What is important is that the documents, which were submitted in support of the request, make it clear that the extradition of the appellant is sought on the ground that he is an accused person.

As regards the contention of counsel for the appellant, that the Magistrate had no authority to issue the Warrant of Committal because it relates to the second Indictment dated May 23, 2001, whereas the provisional warrant relates to the first Indictment dated August 5, 1999, I need only add the following to what I have already stated:

- (i) Miss Julie Savell, in her affidavit in support of the Request for the Extradition of the appellant, states that the second Indictment supersedes the first. The difference between them are formal. The superseding Indictment including the requisite statutory language was presented to the Federal Grand Jury.
- (ii) The Authority to Proceed states that the Request is made in respect of offences which are the subject of the superseding Indictment.
- (iii) It is not in dispute that it is the Authority to Proceed which gives the Magistrate jurisdiction.
- (iv) The Authority to Proceed is independent of the Provisional Warrant.

The appellant had failed to show that the Magistrate lacked jurisdiction to hold the committal Proceedings and to issue his warrant of committal.

The Admissibility of the Evidence Issue

Mr. Phipps, Q.C. complains that the affidavit of Mrs. Julie Savell in support of the request for the extradition of the appellant contains material alterations which were not authenticated. He submitted that the alterations ought to have been verified by the person before whom the affidavit was sworn in accordance with the law of Jamaica. He contends that her affidavit evidence is therefore inadmissible. It is his submission

that section 14 of the Act, on which the Full Court relied, provides for two situations –

- (i) the authentication of testimony, that is to say, the evidence relied on for the extradition of the person; and
- (ii) the authentication of the documentation as an executive act.

In the first situation the authentication must be certified by a judicial officer. In the second, the authentication is by the official seal of a minister in the approved State.

The certification of the evidence, he contends, goes to the validity, adequacy and admissibility of the testimony. Section 14, he says, does not make otherwise inadmissible evidence admissible. He cited ***Nadeem Saifi v. The Governor of Brixton Prison & The Union of India*** [2000] EWHC QB 33 .

On the other hand, counsel for the respondents submitted that the document which contained the affidavit evidence of Miss Savell with the alterations, which were all initialed by her, was certified by Lystra Blake, Associate Director, Office of International Affairs Criminal Division.

They pointed out that the affidavit document in question along with all the extradition documents was certified by the Secretary of State to be under the seal of the Department of Justice of the United States of America, and that the documents which were submitted by the

requesting State were in keeping with section 14 of the Act, which governs the admissibility of evidence in Proceedings under the Act.

For the purposes of this appeal the relevant parts of section 14 are subsections (1)(a) and 2(a).

Section 14(1)(a):

"14.—(1) In any Proceedings under this Act, including Proceedings on 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)...
- (c)..."

Subsection (2) (a) provides:

"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) ...
- (c) ..."

Mr. Phipps Q.C. did not suggest that the required documents were not duly authenticated by the Department of State. The bone of his contention, as I understand it, is that the testimony of Miss Savell as

contained in the affidavit document lacked authentication. As such her affidavit does not qualify as evidence and would be inadmissible. Section 14 he submitted, would not save it. He pointed out that, for the content of the affidavit document to be admissible it must conform with the Jamaican law.

The Jamaican law to which he refers is Rule 30.3(4) of the Civil Procedure Rules 2002 or Order 17 Rule 4 of the Resident Magistrate Court Rules to the effect that an affidavit containing alterations may not be used in evidence unless the alterations are initialed by the deponent and the person before whom the affidavit is sworn. The second respondent's answer to this is that the Civil Procedure Rules and the Resident Magistrate's Court Rules are procedural rules. And, whereas the committal Magistrate is required to apply the Jamaican law to extradition proceedings, he is not required to apply Jamaican practices and procedure. Counsel relied on **Walter Byles v The Director of Public Prosecutions and The Director of Correctional Services** [1997] 34 JLR 471. In **Byles** the Court was considering whether or not a jurat was required and not the want of authentication of alterations.

In my view, it is wrong to say that the Civil Procedure Rules and the Resident Magistrate Court Rules do not have the force of law. The simple answer to Mr. Phipps' argument must be that the Civil Procedure Rules and the Magistrates Court Rules apply to civil proceedings and not to

criminal proceedings. And, of course, habeas corpus proceedings are criminal proceedings – see **McGann v U.S.A.** 12 JLR 565.

Section 10 of the Act provides that the Magistrate "shall hear the case in the same manner, as nearly as may be as if he were sitting as an examining justice..." subsection (1). The Magistrate for the purposes of habeas corpus Proceedings has, as nearly as may be, the like jurisdiction and powers as an examining justice – subsection (2). Section 5 of Article VIII of the Treaty provides that statements, depositions and other documents shall be admissible if certified or authenticated in such manner as may be required by the law of the Requested State.

Section 14 of the Act has been described as an enabling provision – see **Saifi v the Governor of Brixton and the Union of India** (supra) at para. 43. It enables the Magistrate to receive a deposition or affidavit in evidence "thus obviating the necessity to call the maker". It does not require that any alternations in an affidavit should be initialed by the person before whom it is sworn in order for it to be admissible.

It provides that in order for a document which purports to contain evidence to be admissible the evidence must be given on oath and the document authenticated. However, such requirements go to the admissibility of the document and not the admissibility of its contents as Mr. Phipps, Q.C. correctly submitted.

The substantive rules of evidence apply to the contents of a document admitted under section 14 – see *Saifi* (supra) which followed *R. v Governor of Pentonville Prison ex parte Kirby* [1979] 1WLR 541 and *R v Governor of Pentonville Prison ex parte Osman* [1990] 1WLR 277.

The fact that the alterations in the affidavit of Miss Savell have been initialed by her but not by the person before whom it was sworn does not in my view, by itself make her evidence inadmissible. It is in my judgment, for the court of committal to decide what weight to attach to such evidence in light of the alterations.

In this regard, as Miss Larmond submitted, the nature of the alterations is important. I agree with Miss Larmond that an examination of Miss Savell's affidavit will show that the alterations are not unduly prejudicial to the appellant. They certainly would not "outrage civilized values". There is no discrepancy between Miss Savell's affidavit, which has been described as the foundation document, and the many documents and affidavits attached.

The Full Court was right in rejecting the complaint of the appellant in this regard .

The Constitutional Issue

The contention of Mr. Phipps Q.C is that the Extradition Act 1991, under which the removal of the appellant from Jamaica is requested for trial outside of Jamaica for a criminal offence, is inconsistent with and in

contravention of section 16 of the Constitution and is void by virtue of section 2 of the Constitution. He further contends that the constitutional provision in section 16 can only be repealed, amended or altered in the manner stipulated in sections 49 and 40. The Extradition Act of 1991, he adds, was not passed by both Houses of Parliament as required by section 50 of the Constitution and as a consequence its inconsistency with section 16 would make it void, illegal and of no effect. It is his contention that for a law passed pursuant to subsection 3(e) of section 16 to have effect it must be passed in the manner prescribed by section 50 of the Constitution.

Section 16 of the Constitution states:

"16-- (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 provision -

(a)...

(b)...

(c)...

(d)...

(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 convicted."

In *Junious Morgan v The Attorney General* [1988] 25 JLR 488, Forte

JA, as he then was, said at page 494:

"Before the coming into effect of the Constitution, the individual already had a right not to be subject to arbitrary arrest or detention, as is now protected in section 15, as also the right to freedom of movement as is now protected in section 16. Nevertheless, the individual was subject to the provisions of the law, which permitted the deprivation of his personal liberty, or which provided for his extradition i.e., his expulsion from Jamaica. In the instant case, the appellant was dealt with by virtue of the provisions of the Extradition Act 1870 which was in force immediately before the Constitution came into effect, and consequently nothing done under the Authority of the law, can be held to be done in contravention of sections 15 and 16."

The above passage of course, relates to statutory provisions which were in force before the Constitution came into force. As regards post Constitution enactments Forte J.A. said:

"Indeed section 15 and section 16, by their own provisions recognize that no future law which deprives an individual of his personal liberty for the purpose of extradition Proceedings (section 15(1)(j) and section 16(3)(e) would be an infringement of the fundamental rights and freedoms of that individual".

It is as clear as can be that by virtue of section 16 (3) (e) "nothing contained in or done under the Authority" of the Extradition Act 1991 shall be held to be inconsistent with or in contravention of section 16(1).

I cannot accept the contention of Mr. Phipps Q.C. that the Extradition Act 1991 modifies section 16 of the Constitution and as such should have been passed as a special legislation in the manner prescribed by sections 49 and 50.

To accept this contention would, in my view, render subsection 3(e) of no effect and therefore completely unnecessary. An examination of sections 13 and 15 will demonstrate that the framers of the Constitution intended to place restrictions on the rights guaranteed in section 16.

Section 13 of the Constitution, which is the preamble to Chapter III which guarantees the fundamental rights and freedoms of the individual, makes it clear that the rights protected are subject to respect for the rights and freedoms of others and for the public interest.

Section 15 of the Constitution provides for the protection from arbitrary arrest or detention. However, this right is limited by subsection 1 (j) which in effect states that an Act of Parliament may authorize the deprivation of personal liberty "for the purpose of effecting the expulsion, extradition or other lawful removal of that person from Jamaica."

The right of freedom of movement, which is protected by section 16(1), is also subject to limitations. One such limitation is enacted by

subsection 3(e) which in effect authorizes Parliament to make provisions for the extradition of a person.

Thus the Extradition Act 1991 does not in anyway alter or modify the restricted constitutional immunity from expulsion as guaranteed by section 16.

Accordingly, I hold that the Extradition Act of 1991 does not contravene and is not inconsistent with any of the provisions of the Constitution.

As I indicated at the outset it was for the above reasons that I concurred with the other members of the Court on June 24, that the appeal should be dismissed and the order of the court below affirmed.

K. HARRISON, J.A.:

I have read the draft reasons of my brother Smith, J.A. and agree with his reasoning and conclusions. I have nothing to add.