JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT MISCELLANEOUS APPEAL No. M 1/71

BEFORE: The Hon. Mr. Justice Luckhoo, Presiding.
The Hon. Mr. Justice Fox, J.A.
The Hon. Mr. Justice Smith, J.A.

CLARENCE DUKE McGANN (APPLICANT)

v.

UNITED STATES OF AMERICA (RESPONDENT)

Dr. A. Edwards (by assignment on legal aid certificate), Dr. L. Barnett and Miss P. Broderick for the Applicant.

R.O.C. White, Q.C., Deputy D.P.P. and H. Downer for the Director of Public Prosecutions.

M. Tenn for the Government of the United States of America.

September 10, 20, October 15, 1971

LUCKHOO, J.A:

This is a motion made on behalf of Clarence Duke McGann, by way of appeal from the decision of the Full Court of the Supreme Court of Jamaica refusing the applicant's motion to that court for a writ of habeas corpus ad subjiciendum.

The applicant had been detained in the General Penitentiary pursuant to a committal warrant issued by the resident magistrate for the parish of Kingston awaiting surrender to the Government of the United States of America as a fugitive criminal convicted of the commission of the crimes of robbery with violence and larceny within the jurisdiction of that Government. The applicant moved the Full Court of the Supreme Court for his release on the following five grounds -

(i) that he was not properly identified as being the very person who had committed any extraditable crime in the United States of America;

(ii) that the evidence before the committing magistrate disclosed a parole violation which is not an extradition crime;

(iii) that the evidence before the committing magistrate disclosed that he had another charge pending in the resident magistrate's court for the parish of St. James and that as a result he ought not to be extradited until that

charge had been disposed of;

(iv) that the committing magistrate was wrong in law in ruling that a prima facie case had been made out against him;

(v) that it had not been proved that the offence in respect of which application for extradition had been made was an extradition crime within the Extradition Acts 1870 to 1932 and the relevant Extradition Treaty.

Two of the judges in the Full Court (Rowe and Chambers, JJ.,) held against the applicant while Watkins, Ag.J., would have remitted the matter to the committing magistrate for evidence to be received that the applicant was the real party to be claimed on extradition (ground (i)) and that he had been convicted of an extraditable crime (ground (v)).

In his motion by way of appeal against the decision of the Full Court the applicant desired to contend that the judgment of the majority of the Full Court was in error in respect of both of the matters found in his favour by Watkins, Ag.J., and that all of the judges were in error in holding that certain documents tendered and received in evidence were properly authenticated and admissible.

It is not necessary to state the nature of the evidence adduced before the committing magistrate nor to refer to the findings of the judges in the Full Court for as announced at the conclusion of the hearing before us we were unanimously of the view that no appeal against the judgment of the Full Court in such a matter lies to this Court. We will now proceed to give our reasons for so holding.

The submission made by Dr. Adolph Edwards on behalf of the applicant that this Court has jurisdiction to entertain the applicant's appeal is based on the contention that the proceedings in the Full Court were civil proceedings. By virtue of the combined effect of ss. 9 and 10 (1) (f) (i) of the Judicature (Appellate Jurisdiction) Law, 1962 (No. 15 of 1962) an appeal lies to this Court from a judgment or order of the Supreme Court in civil proceedings where the liberty of the subject is concerned without leave of the Supreme Court or of this Court.

While conceding that the proceedings before the committing magistrate were criminal proceedings Dr. Edwards contended that having regard to the fact that the procedure for the hearing by the Full Court of applications for writs of habeas corpus ad subjiciendum is prescribed

by sections 564 A, 564 K - 564 T of the Judicature (Civil Procedure) Code, Cap. 177 as inserted by s.149 of the Civil Procedure Code (Amendment) Rules, 1960, the proceedings before the Full Court were civil proceedings and that an appeal from the judgment of the Full Court in such proceedings would be cognizable by this Court. These provisions were adapted from those in force in England in 1960 under O.59, rr. 1,2,14 - 25 of the English Rules of the Supreme Court the terms of which were enacted by R.S.C. (Divisional Courts) 1938, the Full Court of the Supreme Court in Jamaica being the counterpart of the Divisional Court of the Queen's Bench Division in England. We do not think that because procedural matters relating to an application are prescribed as part of the Civil Procedure Code it necessarily follows that the proceedings before the court are civil proceedings. In ex. parte Alice Woodhall (1888) 20 Q.B.D. 832, an appeal was brought to the Court of Appeal in England from a decision of the Queen's Bench Division for an order nisi for the issue of a writ of habeas corpus, the applicant having been committed to prison awaiting surrender to the Government of the United States of America as a fugitive criminal accused of having committed forgery in New York. The Court of Appeal held that it had no jurisdiction to hear the appeal as it was from an order of the Divisional Court given in a criminal cause or matter within the meaning of s.47 of the Judicature Act, 1873 and therefore no appeal would lie to the Court of Appeal. In that case Bowen, L.J. (at pp. 838, 839) said -

> "How can the matter be other than criminal from first to last? It is a matter to be dealt with from first to last by persons conversant with criminal law, and competent to decide what is sufficient evidence to justify a committal. The question upon which the application for a writ of habeas corpus depend, are whether or not there was evidence before the magistrate of a crime, which would be a crime according to English law, having been committed in a foreign country, and whether or not that evidence was sufficient to justify him in committing the accused for trial if the crime had been committed in England. These must be questions arising in a criminal matter; and it follows that the judgment given upon the application for a writ of habeas corpus is a judgment in a criminal matter."

The decision of the Court of Appeal in ex. parte Alice Woodhall has been constantly upheld and approved by later courts as was observed by Lord Wright

in Amand v. Home Secretary (1943) A.C. at p. 161 a case decided after the enactment in 1938 of the relevant procedural rules already mentioned. Dr. Edwards has correctly observed that no provision similar to s.47 of the Judicature Act, 1873 appears in the Judicature (Appellate Jurisdiction) Law, 1962 (No. 15 of 1962) and has urged that even though proceedings are in a criminal cause or matter that does not preclude them from being "civil proceedings".

The jurisdiction vested in the Court of Appeal of Jamaica appears at s.8 of the Judicature (Appellate Jurisdiction) Law, 1962, and it is not suggested that jurisdiction to hear and determine the appeal in the instant case is conferred otherwise than by the combined effect of ss. 9 and 10 (1) (f) (i) of that Law. These provisions are substantially those contained in the English Judicature Act, 1873 setting up the Court of Appeal in England save that s.47 of the Act precludes an appeal from a judgment or order of the Supreme Court of Judicature in any criminal cause or matter. The reason for the omission of such a provision in the corresponding Jamaica law is obvious. An appellate criminal jurisdiction in relation to matters tried in the Supreme Court is vested in the Jamaica Court of Appeal comparable with that which was vested in the Court of Criminal Appeal in England and these matters relate to appeals on conviction on indictment. Does the omission of a provision comparable with s.47 of the English Judicature Act, 1873, have the effect of affording a right of appeal to the applicant? We do not think that it does for the reason that the matter remained criminal from first to last (see per Bowen, L.J. in Woodhall's case (1888) 20 Q.B.D. at p. 838) and originally were and remained criminal proceedings. As criminal proceedings they are not appealable under Part IV of Law 15 of 1962 (which relates to appellate criminal jurisdiction in matters from the Supreme Court).

For these reasons we held that this Court had no jurisdiction to entertain the applicant's appeal and consequently ordered that it be struck out.