Judgment Book

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 9/88

BEFORE: The Hon. Mr. Justice Forte, J.A.
The Hon. Mr. Justice Downer, J.A.
The Hon. Mr. Justice Gordon, J.A. (Ag.)

BETWEEN	JUNIOUS MORGAN	APPLICANT/APPELLANT
AND	THE ATTORNEY GENERAL	RESPONDENT/RESPONDENT

Ian Ramsay with Enos Grant for Appellant

Patrick Robinson Deputy Solicitor General with Mr. Douglas Leys for the Respondent

October 11, 12, 13, 14, 21 & December 6, 1988

FORTE, J.A.

The appellant is the subject of an Extradition Order made against him on the 4th June, 1987 by His Honour Mr. Karl Harrison, Resident Magistrate for the parish of Kingston at the request of the Government of the United States of America, and by virtue of Section 10 of the Extradition Act 1870. Consequent upon this order, he applied to the Full Court of the Supreme Court for a writ of habeas corpus and on the 9th October, 1987 after a hearing lasting six days, the court dismissed his application to be released from custody. The appellant thereafter filed an originating motion seeking several declarations pursuant to section 25 of the Constitution of Jamaica. At the hearing, the Court upheld a preliminary legal point taken by the respondent i.e. that the proviso to section 25 (2) was applicable to the circumstances of the case and accordingly the Court could not exercise its powers under that section. It is from that decision of the Court, the reasons for which

are set out in the judgment of Zacca C.J. and Bingham J, (Ellis J., concurring), that the appellant has appealed to this Court.

It is convenient to set out hereunder the declarations asked for in the originating motion.

1. A Declaration

(a) that sections 15 and/or 16 of the Constitution and in particular Sections 15 (1) (b), 15 (1) (j) 16 (1) and 16 (3) (e) have been and/or are being contravened in relation to him in that he is being deprived of his personal liberty and/or his freedom of movement and/or his right to reside in Jamaica; and/or his immunity from expulsion from Jamaica; and/or

(b) that the order made by His Honour Mr. Karl Harrison on 4th June, 1987 that the Applicant is proven to be a person convicted of an extraditable crime and that he be committed to the General Penitentiary to await his surrender to the Government of the United States of America contravenes the Applicant's rights under sections 15 and /or 16 of the Constitution as aforesaid; and/or

(c) that the orders made by the Full Court on the 9th October, 1987, dismissing the Applicant's application for an Order of Habeas Corpus Ad Subjiciendum contravenes the Applicant's rights under section 15 and/or 16 of the Constitution; and/or

(d) that the applicant is not a convicted person within the meaning and intendment of section 10 of the Extradition Act 1870 and/or section 15 and/or 16 of the Constitution; and/or

(e) that the Applicant's detention is not in execution of the sentence of a court in respect of a criminal offence of which he has been convicted by any court in Jamaica or elsewhere; and/or

(f) that there was no evidence before His Honour Mr. Karl Harrison that the purpose of the removal of the Applicant from Jamaica is so that he should undergo imprisonment in execution of the sentence of a court in respect of a criminal offence of which he has been convicted within the intendment of Section 10 of the Extradition Act and/or section 15 and/or 16 of the Constitution; and/or

(g) that the said Orders of His Honour Mr. Karl Harrison and the Full Court or either of them are unconstitutional, null, void and of no effect;

The appellant also asked for the following order:

2. An Order

(a) that the applicant be forthwith released from custody; and/or

(b) that the Respondent pays the costs of these proceedings.

And also

3. Such further and other reliefs as to the Honourable Court may seem just.

He then advanced the grounds upon which his application is based. These are "inter alia"

(a) that His Honour Mr. Karl Harrison and/or the Full Court misdirected itself on the true and proper construction of the word 'conviction' and/or 'convicted' as used in the Extradition Act 1870 as part of Jamaican Law; and/or

(b) that section 15 and/or 16 of the Constitution contains clear directions that the word 'conviction and/or 'convicted' as used in the Extradition Act 1870 should be interpreted in the legal sense, that is, to include sentence; and/or

(c) that the Extradition Act 1870 should be interpreted in a manner to make it consistent rather than conflicting with the express words of the Constitution; and/or

(d) that the Extradition Act 1870 as a PENAL STATUTE OUGHT TO BE construed in favour of the citizen, in particular where his liberty is at stake.

It is manifest from the record, therefore that the contravention of his fundamental rights alleged by the appellant has its basis in the interpretations given by the Resident Magistrate and the Full Court to the words 'convicted' and/or 'conviction' as used in the Extradition Act 1870 and whether or not their findings in that regard are in conflict with sections 15 and 16 of the Constitution.

In his affidavit in support of the originating motion, in outlining the history of his case, and setting out the grounds and arguments that were advanced in the Full Court in the habeas corpus proceedings, the appellant makes it quite clear in paragraph 11 (g) (ii) that the meaning of the word "conviction" and/or "convicted" was one of his main contentions before that Court.

The paragraph reads as follows:

Paragraph 11

"That in sum and substance the following grounds were advanced on behalf of your applicant before the Full Court -

(g) (ii) that lastly and in any event the word 'conviction' or 'convicted' in the Extradition Act 1873 bore its primary common law meaning of verdict and sentence."

The appellant also attests to the following in his affidavit:

"That your applicant is informed and verily believes that the Order of the Resident Magistrate Mr. Harrison herein committing him to prison and the Order of the Full Court dismissing his application for Habeas Corpus are wrong."

In brief, the appellant's complaint is that the findings by the Resident Magistrate and the Full Court, that he is a convicted person within the provisions of the Extradition Act 1870 have resulted in a breach of his fundamental rights which are protected in Sections15 and 16 of the Constitution, because the former resulted in the order of extradition, and the latter in a refusal of the writ of habeas corpus to release him from prison.

The rights alleged to be breached are set out in section 15 and section 16.

I first refer to section 15 which reads as follows:

> S. 15 (1) No person shall be deprived of his personal liberty save as may in any of the following cases be authorised by law.

and then the section sets out the cases 'authorised by law', of which the following two are relevant;

> (b) ..... in execution of the sentence or order of a court, whether in Jamaica or elsewhere in respect of a criminal offence of which he has been convicted; or
>
> (j) for the purpose of preventing the unlawful entry of that person into Jamaica, or for the purpose of effecting the expulsion, extradition or other lawful removal of that person from Jamaica or the taking of proceedings relating thereto."

If the appellant's detention came within the two sub-paragraphs (b) and (j) then there could be no breach of section 15.

Any declaration that there was, is, or is likely to be a breach of a fundamental right protected in section 15, cannot be available unless the deprivation of personal liberty was not under circumstances authorised by law as set out in (a) to (k) of section 15.

Section 16 deals with the 'protection of freedom of movement' and for clarity is set out verbatim hereunder in relation to the relevant sections.

> "S. 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."

As in section 15, the protection is in subsection (1) with exceptions provided for in subsections (2) and (3), subsection (2) making an exception where a person is lawfully detained and subsection (3) (e) in the case of extradition.

The contraventions alleged by the appellant, therefore must necessarily relate to rights protected by section 15 (1) not to be deprived of personal liberty and section 16 (1) not to be deprived of freedom of movement including immunity from expulsion from Jamaica.

The appellant moved the Court by virtue of section 25 of the Constitution which is set out hereunder:

"25. (1) Subject to the provisions of subsection (4) of this section, if any person alleges that any of the provisions of sections 14 to 24 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the Supreme Court for redress.

(2) The Supreme Court shall have original jurisdiction to hear and determine any application made by any person in pursuance of sub-section (1) of this section and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the provisions of the said sections 14 to 24 (inclusive) to the protection of which the person concerned is entitled:

Provided that the Supreme Court shall not exercise its powers under this subsection if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law."

At the hearing, counsel for the respondent took a preliminary point based on the proviso to section 25 (2). The Court, upheld the preliminary point which is conveniently summarized in the judgment of Zacca C.J., and is reproduced hereunder:

"In his preliminary objection Mr. Patrick Robinson for the Respondent submitted that the Supreme Court was barred from exercising its powers under section 25 (2) to grant the redress sought by the applicant as a result of the proviso to the section. He further submitted that adequate means of redress have been available to the applicant for the alleged contraventions of the Constitution under the Extradition Act 1870. The right to apply for Habeas Corpus afforded by the Extradition Act and which was in fact utilized by the applicant, albeit unsuccessfully was an adequate means of redress for the contravention alleged by the applicant."

The question that arises in this appeal is whether the acceptance by the Full Court of those submissions was correct. However, it has been conceded by the appellant that if on the face of the records, the Full Court could have come to a finding that the application was without merit i.e., the application was misconceived or that it manifestly appeared that adequate means of redress were available in other law, then there would be no necessity to "hear and determine" the merits of the allegation.

Many interesting and well reasoned arguments were presented by both counsel in this appeal, in relation to whether there exist adequate means of redress for the alleged contravention of sections 15 and 16 of the Constitution.

Before dealing with these, however, this Court, ought to examine the record to determine whether or not the application for the declarations in the originating motion is misconceived i.e. whether or not the allegations, if accepted as factual, could amount to a breach of the appellant's fundamental rights and in particular the protection provided for in sections 15 and 16 of the Constitution. I now do so.

The authority for the order of extradition made against the appellant is the Extradition Act 1870. Section 10 of that Act empowers the Resident Magistrate in the case of a fugitive criminal alleged to have been convicted of an extradition crime, if such evidence is produced, as would, according to the Laws of Jamaica, prove that the prisoner was convicted of such crime, to commit him to prison to await extradition. Section 11 of the Act requires the Resident Magistarte, if he commits a fugitive criminal to prison, to inform him that he will not be surrendered until after the expiration of 15 days, and that he has a right to apply for a writ of Habeas Corpus.

The fugitive therefore has the right to apply within 15 days of the order, for a writ of habeas corpus, seeking his release from custody, and in effect preventing his extradition from the Island.

The Extradition Act of 1870, in force at the coming into effect of the Constitution, has continued to be the legal authority up to the present time for the extradition of fugitives to and from the countries with whom Jamaica has such treaty arrangements.

In those circumstances the applicability of section 26 (8) of the Constitution to this case must be examined.

The section [26 (8)] states:

> "Nothing contained in any law in force immediately before the appointed day shall be held to be inconsistent with any of the provisions of this Chapter; and nothing done under the authority of any such law shall be held to be done in contravention of any of these provisions."

Though exhaustively referred to, in the many Constitutional cases that have been considered in respect of the Constitution of Caribbean countries, the following passage from the dicta of Lord Devlin in D.P.P. v. Nasralla (1967) 3 W.L.R. 13 (at page 18), speaking of the Constitution of Jamaica, is of utmost relevance.

> "Whereas the general rule, as is to be expected in a Constitution and as is here embodied in section 2 is that provisions of the Constitution should prevail over other law, an exception is made in Chapter III. This Chapter as their Lordships have already noted, proceeds upon the presumption that the fundamental rights which it covers are already secured to the people of Jamaica by existing Law. The laws in force are not to be subjected to scrutiny in order to see whether or not they conform to the precise terms of the protective provisions. The object of these provisions is to ensure that no future enactment shall in any matter which the chapter covers derogate from the rights which at the coming into force of the Constitution the individual enjoyed. Accordingly section 26 (8) in Chapter III provides as follows ....."

The statement of Lord Devlin is obviously predicated upon the provisions of section 13 of the Constitution which reads as follows:

"13. Whereas every person in Jamaica is entitled to the fundamental rights and freedoms of the individual, that is to say, has the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely -

(a) life, liberty, security of the person, the enjoyment of property and the protection of the law;

(b) freedom of conscience, of expression and of peaceful assembly and association; and

(c) respect for his private and family life,

the subsequent provisions of this Chapter shall have effect for the purpose of affording protection to the aforesaid rights and freedoms, subject to such limitations of that protection as are contained in those provisions being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest."

The section, in recognizing that the fundamental rights and freedoms covered in Chapter III were rights and freedoms to which the individual was already entitled, also recognized that those rights and freedoms are subject to limitations which are designed to ensure that the enjoyment of these rights and freedoms by any individual does not prejudice the public interest.

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 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 that law, can be held to be done in contravention of sections 15 and 16.

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.

In my view, the contentions advanced in the originating motion and the affidavit in support, are misconceived not only because of the application of section 26 (8) of the Constitution but for other reasons.

The gravamen of the appellant's complaint in the originating motion is in the allegation that the learned Resident Magistrate and the Full Court which heard the habeas corpus proceedings misinterpreted the meaning of the word "conviction" and/or "convicted" and thereby fell into error. To my mind, the interpretation of a word in a statute, is a matter of substantive law, and not a procedural error which affects the fundamental rights of the appellant.

If this be so then the following dicta of Lord Diplock in Maharaj v. Attorney General of Trinidad & Tobago (No. 2) (1978) 2 All E.R. 670 at page 679, so often cited is directly applicable:

> "In the first place, no human right or fundamental freedom recognized by Chapter I of the Constitution is contravened by a judgment or order that is wrong and liable to be set aside on appeal for an error of fact or substantive law, even where the error has resulted in a person serving a sentence of imprisonment. The remedy for errors of these kinds is to appeal to a higher court.
>
> Where there is no higher court to appeal to then none can say that there was error. The fundamental human right is not to a legal system that is infallible but to one that is fair. It is only errors in procedure that are capable of constituting infringements of the rights protected by section 1 (a)

> "and no mere irregularity in procedure is enough, even though it goes to jurisdiction; the error must amount to failure to observe one of the fundamental rules of natural justice."

This dicta related to an alleged infringement of section 1 (a) of the Constitution of Trinidad and Tobago which recognized that the people of that twin-island state had always had and should continue to enjoy the fundamental rights and freedoms as set out hereunder:

> "The rights of the individual to life, liberty, security of the person and enjoyment of property and the right not to be deprived thereof except by due process of law."

Specifically the appellant Maharaj complained that he was deprived of his liberty except by due process of law, because the learned judge convicted him of contempt and committed him to prison without specifying sufficiently the nature of the contempt charged.

Lord Diplock therefore was dealing with a provision which secured Maharaj's right to due process of law which was violated by what was in effect a breach of the rules of natural justice.

In the instant case, neither the originating motion nor the affidavit in support suggests that the appellant was not treated in accordance with the law by virtue of which he was deprived of his liberty. Lord Diplock's speech in so far as it relates to 'errors in substantive law' not amounting to a breach of an individual's constitutional right is therefore, in my opinion applicable to the circumstances of this case.

This view is strengthened by the speech of the same Law Lord in the case of Chokolingo v. Attorney General of Trinidad & Tobago (1981) 1 All E.R. 244 at page 247, where after referring to the passage of his speech in the Maharaj case which is cited above, expanded on that statement thus:

> "The arguments addressed to their Lordships in the instant appeal, however, call for some expansion of that statement. Under a constitution on the Westminister model, like that of Trinidad and Tobago, which is based on the separation of powers, while it is an exercise of the legislative power of the state to make the written law, it is an exercise of the judicial power of the state, and consequently a function of the judiciary alone, to interpret the written law when made and to declare the law where it still remains unwritten, ...
> So when in Chapter I the Constitution of Trinidad and Tobago speaks of 'law' it is speaking of the law of Trinidad and Tobago as interpreted or declared by the judges in the exercise of the judicial power of the state. .....
> It is fundamental to the administration of justice under a constitution which claims to enshrine the rule of law (preamble, paras (d) and (e)) that if between the parties to the litigation the decision of that court is final (either because there is no right of appeal to a higher court or because neither party has availed himself of an existing right of appeal), the relevant law as interpreted by the judge in reaching the court's decision is the 'law' so far as the entitlement of the parties to 'due process of law' under section 1 (a) and the 'protection of law' under section 1 (b) are concerned. Their Lordship repeat what was said in Maharaj v. Attorney General for Trinidad and Tobago (No. 2). The fundamental human right guaranteed by section 1 (a) and (b) and section 2 of the Constitution is not to a legal system which is infallible but to one which is fair."

Although the Constitution of Trinidad and Tobago and that of Jamaica, are designed differently, both secured almost the same fundamental rights and freedoms for their respective peoples. The provision in sections 1 and 2 of the Constitution of Trinidad and Tobago can with few exceptions, be found in the content of Chapter III of the Constitution of Jamaica.

In my view therefore, the learned Resident Magistrate and the Full Court, in exercising their judicial functions came to a finding of substantive law, as to whether the appellant should be extradited - this decision as disclosed in the record dependant upon a legal interpretation as to whether the accused was a convicted person under the Extradition Act.

In those circumstances, and especially having regard to section 26 (8), the conclusions arrived at in both courts cannot be said to be a breach of the appellant's fundamental rights as provided for in sections 15 and 16.

I turn now to the arguments advanced as to whether "adequate means of redress for the contravention alleged are or have been available to the person concerned under other law."

Mr. Ramsay contended that the judges in the Supreme Court, were wrong in upholding the preliminary point and thereby refusing to hear and determine the application. In my view this argument is untenable. The court did hear and determine the matter on the basis of the legal arguments that were presented to it, and did come to the conclusion that the breach of fundamental rights complained of, could find adequate means of redress elsewhere thereby enforcing the Court to follow the strictures of the proviso i.e. not to exercise any of its powers under section 25 (2). In those circumstances, there was no necessity to determine the validity of the allegation - that being assumed for the basis of the arguments on the preliminary point.

The question therefore is whether there is adequate means of redress.

As already stated, and as conceded by counsel in arguments, the remedy of habeas corpus is the redress available to a person who has been unlawfully detained, as a result of an extradition order which is not valid. The lines were drawn as to the adequacy of that remedy, Mr. Ramsay contending that in proof of a breach of his fundamental rights in this action brought by virtue of section 25 of the Constitution, the appellant would be, in addition to being released entitled to compensation for his unlawful detention. In addition, in a Constitutional action, the appellant has a right of appeal. In habeas corpus, he contends, the appellant would not be able to receive compensation, as his detention was a result of a judicial decision for which the judge would not be liable. Nor would the appellant have a right of appeal, either to the Court of Appeal or to the Judicial Committee of the Privy Council.

The question to be resolved is whether the adequacy of the remedy available under other law is to be determined by comparison to the remedies available by virtue of section 25 (2) or the determination ought to be by ascertaining whether the remedy under other law is sufficient to satisfactorily redress the wrong suffered by the individual. In my view, the latter is the correct manner of approach to the question. Lord Diplock in Maharaj v. Attorney General of Trinidad and Tobago (no. 2) (supra) in dealing with the meaning of the word "redress" as used in the Trinidad Constitution said thus:

> "What then is the nature of the 'redress' to which the appellant was entitled? Not being a term of legal art it must be understood as bearing its ordinary meaning which in the Shorter Oxford Dictionary is given as 'Reparation of, satisfaction or compensation for, a wrong sustained or the loss resulting from this.' At the time of the original notice of motion the appellant was still in prison. His right not to be deprived of his liberty except by due process of law was still being contravened, but by the time the case reached the Court of Appeal he had long ago served his seven days and had been released. The contravention was in the past; the only practical form of redress was monetary compensation."

'Redress' therefore could have the form of reparation of, or satisfaction for the wrong sustained, which could be effected by the immediate release of the appellant by way of a writ of habeas corpus. Of significance is that in the Maharaj case, he having already served his sentence, the only redress available to him was monetary compensation for the time already spent in prison. To ask the same question asked by Lord Diplock in Maharaj "what then is the nature of the redress to which the appellant is entitled?" In my view if it were concluded, that the appellant did suffer a breach of his fundamental rights, i.e, deprivation of his liberty, then certainly his immediate release would be sufficient reparation for the wrong suffered. This he could obtain under other law i.e, by writ of habeas corpus. It is of some significance that the appellant in the originating motion does not specifically petition for compensation.

Arguments were presented on both sides in respect to whether or not an appeal by special leave still lies to the Judicial Committee of the Privy Council from the decision of the Full Court on a matter of habeas corpus.

Mr. Ramsay argued strongly that such a process is no longer possible, and Mr. Robinson in reply impliedly conceding, that on an examination of section 110 and 4 (1) of the Constitution it appears that there remain no entitlement in the citizen to petition Her Majesty in respect of decisions not coming from this Court.

Having regard to my conclusion, in respect of the approach to be taken in determining whether adequate remedy exists in other law, I find it unnecessary at this time to express my opinion on that question and will reserve my comments for another time, when it becomes necessary to come to a conclusion on that subject.

In my view, Zacca, C.J. and Bingham J., were correct in upholding the preliminary point. In doing so they were not only paying obedience to the strictures of the proviso to section 25 (2) but also apparently exercising their inherent powers to prevent an abuse of the Court's process.

The appellant had already exercised his right to apply for a writ of habeas corpus which was available to him by virtue of the Extradition Act. There was no complaint in the record of any error in that process which amounted to a breach of natural justice - the only complaint being an alleged error in the Court's interpretation of the statute under which he was being dealt with. Nor was there anything on the record which supported the allegations that his fundamental rights under sections 15 and 16 were, were being, or were likely to be infringed.

The procedure complained of relates to the extradition proceedings which were conducted under the Extradition Act of 1870, an Act which preceded the coming into effect of the Constitution, and to which section 26 (8) of the Constitution applies. In addition the very sections of the Constitution which are alleged to have been breached recognize

(as I stated before) that any law which makes provision for the lawful detention of an individual for the purposes of extradition and anything done under such law, will not be in contravention of these particular protections. The fact that the appellant failed to obtain remedy from the Ful Court on his application for writ of habeas corpus, suggests a finding by that court that he was justly held. The fact that he does not have the right of appeal to the Court of Appeal or to the Judicial Committee of the Privy Council would not in my opinion, affect that conclusion and that is in keeping with the words of Lord Diplock in the Maharaj case that -

> "when there is no higher court to appeal to, then none can say that there was error."

Indeed, having regard to my conclusions that the interpretation of words in a statute is a matter of substantive law, the following dicta of Lord Diplock in Chokolingo v. A.G. Trinidad and Tobago (supra) is also very relevant.

> "Acceptance of the appellant's argument would have the consequence that the judge had made any error of substantive law as to the necessary characteristics of the offence there would be parallel remedies available to him: one appeal to the Court of Appeal, the other by originating application under section 6 (1) of the Constitution to the High Court with further rights of appeal to the Court of Appeal and to the Judicial Committee. These parallel remedies would also be cumulative since the right to apply for redress under section 6 (1) is stated to be 'without prejudice to any other action with respect to the same matter which is lawfully available'. The convicted person having exercised unsuccessfully his right of appeal to a higher court, the Court of Appeal, he could nevertheless launch a collateral attack (it may be years later) in a judgment that the Court of Appeal had upheld by making an application for redress under section 6 (1) to a court of co-ordinate jurisdiction, the High Court to give to Chapter (1) of the Constitution an interpretation which would lead to this result would, in their Lordships' view, be quite irrational and subversive of the rule of law which it is a declared purpose of the Constitution to enshrine."

These words were spoken of the provisions of the Constitution of Trinidad and Tobago, which unlike that of Jamaica has no proviso which qualifies the exercise of the powers of the Court.

In the case of D.P.P. v. Fourtado (1979) 30 W.I.R. 206 where the applicant had obtained a declaration from the Supreme Court against the Director of Public Prosecutions under section 25 of the Constitution, that he ought not to be tried and should be unconditionally discharged by reason of gross, unconscionable and unreasonable delay in breach of section 20 (1) of the Constitution, the Court in allowing the appeal held that where a Resident Magistrate refused or neglected to carry out his statutory functions the proper remedy did not lie in a motion under section 25 of the Constitution but in the invocation of the supervisory jurisdiction of the Supreme Court, by the seeking of the appropriate prerogative orders.

In delivering the judgment of the Court, Kerr J.A., at page 216 referred with approval to the following dicta of Lord Diplock in the case of Harrikissoon (1979) 3 W.L.R. 362 at page 64:

> "The right to apply to the High Court under section 6 of the Constitution for redress when any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action. In an originating application to the High Court under section 6 (1), the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom."

He then considered the effect of that statement on the Jamaican Constitution in which there is the proviso,

> "A fortiori, this is even more pertinent when the Constitution contains a purposeful proviso such as that in the Jamaican Constitution, s. 25 (2). We are of the view that even if there were a contravention of the Constitution, s. 20, adequate means of redress were available to the respondent under other law and consequently the court should not exercise its powers under the constitution, s. 25."

The argument advanced by Counsel for the appellant that the proviso inhibits the exercise of the Court's inherent powers and restricts it to a slavish application of the proviso is in my view untenable. The Court has always had inherent power to prevent abuse of its process, and application of the proviso adds to that inherent power, rather than erodes it. It is true that the dicta in the Trinidad cases decided in the Judicial Committee of the Privy Council, are to be considered on the background that the Constitution of that country has no equivalent restrictions on the exercise of power as is contained in the proviso to section 25 (2). I see no reason to disagree with the assertions of this Court in D.P.P. v. Feurtado (supra) that statements in the cited passage from the Harrikissoon case (supra) and I also add the cited passage from the Chokolingo case (supra) are even more pertinent when the Constitution contains a purposeful proviso as in the Jamaican Constitution section 25 (2).

The question of the Court's powers was also considered by this Court in Donald Anthony Thompson v. The D.P.P. and the Attorney General S.C.M.A. 1/87 dated 13th November, 1987 (unreported). This case had a similar background to the instant case. The appellant Thompson, with an order of extradition under the Fugitive of Offender Act against him, applied to the Full Court of the Supreme Court for an order that he be discharged. During the hearing, Thompson through his counsel applied to the Court to add an application for a Declaration that:

> "the fundamental rights of the applicant to protection from arbitrary arrest or detention guaranteed by section 15 (1) of the Constitution of Jamaica has been, is being and/or is likely to be contravened in relation to the applicant."

The application was refused and Thompson appealed. In delivering the majority judgment of this Court, Downer & Wright JJA (page 16) expressed the view that:

> "existing law provided ample safeguards by the writ of habeas corpus and proceedings pursuant to section 10 under the Fugitive Offender Act."

And again (page 17):

> "Even if the amendment had been granted there was ample power in the Supreme Court to prevent abuse of its process if it was satisfied that a resort to habeas corpus and relief under section 10 of the Fugitive Offender Act were adequate means of redress under other law."

This dicta is in keeping with my own views in relation to the instant case and supports the view that habeas corpus proceedings provides 'ample safeguards', and recognises the inherent power in the Supreme Court to prevent abuse of its process.

For the reasons stated herein I would dismiss the appeal and affirm the judgment of the court below. Costs to the respondent to be agreed or taxed.

DOWNER, J.A.:

The issue to be decided in this appeal from the Supreme Court (Zacca, CJ; Bingham & Ellis, JJ) is whether it was correct in law to have dismissed the appellant's motion on a preliminary objection of law taken by the respondent Attorney General. To understand the issues of law involved it is necessary to summarise the affidavit evidence and refer to the averments in the Originating Notice of Motion. For the determination of the Supreme Court to be correct, the evidence must have been assumed to be true, so that the correct interpretation of the law could properly have disposed of the motion.

The affidavit of Junious Morgan discloses that he was a businessman from Manchester and that he was remanded in custody at the General Penitentiary, pursuant to an Order made on 4th June, 1987, by His Honour Mr. Karl Harrison the Resident Magistrate of Kingston. The order was made pursuant to section 10 of the Extradition Act, 1870.

He recounted that the next stage in these proceedings was his application for a Writ of Habeas Corpus in the Supreme Court, the hearing of which lasted some four days in September and October, 1987, and that the application was refused. In explaining how these proceedings were commenced, Morgan stated that the Government of the United States requested his extradition and that the allegation against him was that he was convicted in absentia in the United States District Court of Southern Mississippi for the offence of possession with intent to distribute approximately 453 pounds of marijuana and he admits that he fled from the United States.

In recalling the proceedings before the Resident Magistrate, he pointed out that submissions were made challenging his committal and stressed that he was 'convicted' in his absence and that no sentence was imposed on him. Then he stated that basis of his complaint which alleged that his fundamental rights was breached. It reads thus:

> "That your Applicant is informed and verily believe that the Order of the Resident Magistrate Mr. Harrison herein committing him to prison, and the Order of the Full Court dismissing his application for Habeas Corpus are wrong: And that as a result thereof your Applicant is unlawfully detained, his freedom of movement restricted, his right to reside in Jamaica abrogated and

> "his immunity from expulsion from Jamaica taken away: That your Applicant says that accordingly his rights under Sections 15, 16 and 25 of the Constitution have been and are being contravened in relation to him."

It is pertinent to pause at this point to state that the applicant is asserting that the Orders of the Resident Magistrate and the Full Court of the Supreme Court in the Habeas Corpus proceedings were wrong and that it is because of these errors that there has been a breach of his fundamental rights under Sections 15 and 16 of the Constitution. Nowhere does he state that there were any submissions made on his behalf before the Full Court of the Supreme Court challenging the constitutionality of the Extradition Act or that there were breaches of his fundamental rights and freedoms. Also significant was the fact that the substance of his prayer was that he be released from custody.

It is of significance that it was after the dismissal of his application in the Habeas Corpus proceedings that he invoked the jurisdiction of the Supreme Court pursuant to section 25 of the Constitution. In that motion he sought a Declaration which had six subheads. Firstly, he sought declarations that section 15(1)(b)(j) and 16(1)(3)(e) had been or were being contravened in relation to him as he was deprived of his right to reside in Jamaica. Secondly, that the Order made by the Resident Magistrate committing him to await his surrender to the United States of America was in contravention of sections 15 and 16 of the Constitution. Thirdly, that the order made by the Supreme Court in Habeas Corpus proceedings contravened sections 15 and 16 of the Constitution. Fourthly, that the applicant was not a convicted person within the meaning of the Extradition Act, 1870 and sections 15 and 16 of the Constitution. Fifthly, that the applicant's detention was not in execution of a sentence in respect of a criminal offence of which he could have been convicted by any court in Jamaica or elsewhere. Sixthly, that there was no evidence on which to base his committal and seventhly, he reiterated that the Magistrate's order as well as the Order of the Full Court were null and void.

It is necessary to comment on the declaration sought and the grounds for seeking them. Then the averments in the Notice of Motion as well as the affidavit evidence must be considered so as to determine whether the Supreme Court was correct to have dismissed the motion on a preliminary objection in law.

As for the first declaration sought it is necessary to refer to section 15(1)(b)(j) of the Constitution. That section reads:

> "15(1) No person shall be deprived of his personal liberty save as may in any of the following cases be authorised by law -
>
> (a) .....
>
> (b) in execution of the sentence or order of a court, whether in Jamaica or elsewhere, in respect of a criminal offence of which he has been convicted; or
>
> .....
>
> (j) for the purpose of preventing the unlawful entry of that person into Jamaica, or for the purpose of effecting the expulsion, extradition or other lawful removal of that person from Jamaica or the taking of proceedings relating thereto;"

The significance of this section in Chapter III of the Constitution which is captioned Fundamental Rights & Freedoms is appreciated by referring to section 13 of the Constitution which is the preamble. This preamble makes it explicit that the rights protected are subject to limitations so that others can enjoy these rights and that the public interest will also be vindicated. This is the essence of constitutionalism - limited government as unrestricted rights lead to anarchy and unrestricted power to tyranny. Here are the exact words of section 13 -

> "Whereas every person in Jamaica is entitled to the fundamental rights and freedoms of the individual, that is to say, has the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely -
>
> (a) life, liberty, security of the person, the enjoyment of property and the protection of the law;
>
> (b) freedom of conscience, of expression and of peaceful assembly and association; and
>
> (c) respect for his private and family life,
>
> the subsequent provisions of this Chapter shall have effect for the purposes of affording protection to the aforesaid rights and freedoms, subject to such limitations of that protection as are contained in those provisions being

" limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest."

It is against this background that the allegation that section 15(1)(b) & (j) has been and is being contravened is to be examined. Be it noted that the side note reads "Protection from arbitrary arrest or detention". On the basis of the affidavit and the allegation in the Notice of Motion it is clear that the applicant was deprived of his liberty on the "order of a court" in Jamaica and elsewhere in respect of a criminal offence of which he has been convicted.

Section 15 of the Constitution recognises that extradition existed in the laws of Jamaica before the Constitution and it is being sanctioned for the future. The right to be protected from arrest or detention or extradition from Jamaica must be balanced against the treaty obligations of the state which is an aspect of the public interest. So the order of a court outside Jamaica as well as the sentence of the court is a valid foundation to surrender a person in Jamaica provided it is authorised by law. Conviction, therefore, covers either situations - in execution of a sentence or order of a court. This is evidenced by the expressed provisions of section 15(1)(b) &(j).

How then can the Orders of the Resident Magistrate or the Full Court of the Supreme Court to extradite the applicant be said to breach his rights when the orders of the two courts in question were made pursuant to the Extradition Act? This act was designed to prevent arbitrary arrest as well as to comply with the claims of the foreign state which requested his return. Further, how can such an allegation stand in face of the admission that the Writ of Habeas Corpus was resorted to as that is the classic means of challenging arbitrary arrest and illegal detention?

These were obvious conclusions the Supreme Court was entitled to make in respect of the first three declarations as regards breaches of section 15(1)(b) & (j) of the Constitution. As for the other three breaches of this section of the Constitution the significance of 'conviction' within the intendment of 15(1)(b) has already been noticed and the applicant has stated that he was convicted in Southern Mississippi District Court. The avermont that there was no evidence before the learned Resident Magistrate on which to commit him, was an iss

was raised in the Habeas Corpus proceedings. Here is how the matter was raised at paragraph 11(e) of his affidavit -

> "11. That in sum and substance the following Grounds and arguments were advanced on behalf of your Applicant before the Full Court.
>
> (a) .....
>
> (e) That the evidence (of Applicant and the Requesting State) disclosed prejudice and breaches of Jamaican standards of fair trial in respect of the Applicant as a black man being tried in the State of Mississippi: Further that the Indictment was procured from the Grand Jury by wholly inadmissible evidence, that is, hearsay: That it was submitted that for that reason alone the proceedings were wholly null and void, and the 'conviction' was not a true conviction."

As this matter was raised and determined by the Full Court of the Supreme Court, the only complaint is that the court was in error in finding against the appellant and for that error, if it existed, there was a further appeal available to the Privy Council. In any event, it was not a breach of a Fundamental Right and Freedom. Similar principles apply to the complaint that the Resident Magistrate's Order was null and void. It could have been challenged on Habeas Corpus proceedings and the contention that the Order of the Supreme Court was null and void could have been appealed to the Privy Council on the ground that there was a miscarriage of justice. Neither of these are breaches of Fundamental Rights protected by section 15 of the Constitution.

It is now time to turn to the allegations in respect of breaches of section 16(1)(3)(e) of the Constitution. The relevant section reads as follows:

> "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.
>
> .....
>
> 16(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 -
>
> .....

> " (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."

Once again when the declarations sought are examined against these provisions it is patent that extradition is a recognised limitation to freedom of movement and that if a person is removed from Jamaica to be tried outside Jamaica or to undergo imprisonment outside Jamaica for an offence for which he has been convicted then this would not be a contravention of section 16 of the Constitution.

The significance of section 26(8) of the Constitution

The main thrust of Mr. Ramsay's submission was that the Supreme Court ought to have heard his application on the merits of the case before dismissing the applicant's motion. The gist of this preliminary objection on a point of law is that as the facts are assumed to be true, then the points of law in issue can dispose of the case. Take this case where section 26(8) of Chapter III of the Constitution is applicable. Bingham J, with whom Ellis J agreed, adverted to this in connection with the Extradition Act, 1870 but did not develop this theme. It is imperative to set out section 26(8) in order to examine its scope and effect in these proceedings. It reads:

> "26(8) Nothing contained in any law in force immediately before the appointed day shall be held to be inconsistent with any of the provisions of this Chapter; and nothing done under the authority of any such law shall be held to be done in contravention of any of these provisions."

The significant complaint of the applicant is that the judicial proceedings in the Resident Magistrate's Court and in the Full Court and the Orders made in these courts contravened his constitutional rights in sections 15(1)(b) and 16(1)(e) of the Constitution. But the Extradition Act cannot be held to be inconsistent with the constitution as "nothing done under the authority of any such law" shall be held to be unconstitutional.

There are authorities of the highest order which approve of such an approach and the first of them is D.P.P. v. Nasralla [1967] 2 A.C. 238 and 10 J.L.R. 1. At page 247 of the first report Lord Devlin said:

> "This chapter, as their Lordships have already noted, proceeds upon the presumption that the fundamental rights which it covers are already secured to the people of Jamaica by existing law. The laws in force are not to be subjected to scrutiny in order to see whether or not they conform to the precise terms of the protective provisions. The object of these provisions is to ensure that no future enactment shall in any matter which the chapter covers derogate from the rights which at the coming into force of the Constitution the individual enjoyed."

In the light of this, sections 15 and 16 of the Constitution which are alleged to be contravened were entrenched to ensure that future laws are in confirmity with the constitution but laws prior to the appointed day 1962 and as the Extradition Act and acts "done under the authority of such laws" are not to be held in contravention of the constitution. Other important cases reiterate this theme. For instance Lord Diplock after referring to Nasralla said in de Freitas v Benny [1975] 27 W.I.R. 318 at 320:

> "Section 3 debars the individual from asserting that anything done to him that is authorised by a law in force immediately before 31st August, 1962, abrogates, abridges or infringes any of the rights or freedoms recognised and declared in section 1 or particularised in section 2."

Further on page 321 Lord Diplock approved of the decision of the Court of Appeal in Trinidad that the point failed in limine. He said:

> "Their Lordships agree with the Court of Appeal that this contention fails in limine. Sentence of death for murder, as Their Lordships have already pointed out, is mandatory under the Offences Against the Person Act which was in force at the commencement of the Constitution."

Lord Diplock reiterated this stance in Maharaj v The Attorney General No. 2 [1978] 30 W.I.R. 310 at 317. He said:

> "What confines s 2 to future laws is that it is made subject to the provisions of s 3. In view of the broadth of language used in s 1 to describe the fundamental rights and freedoms, detailed examination of all the laws in force in Trinidad and Tobago at the time the Constitution came into effect (including the common law so far as it had not been superseded by written law) might have revealed provisions which (it could plausibly be argued) contravened one or other of the rights or freedoms recognised and declared by s 1. Section 3 eliminates the possibility of any argument on these lines."

Another instance of the same approach is Baker v The Queen (1976) A.C.774 or 13 J.L.R. 169 at 176.

It must be reiterated that the preliminary objection in law taken by the respondent that the seven declarations ought to have been refused was on the basis of the averments in the Originating Motion and the affidavit of the applicant, and so presented, the Supreme Court was entitled to rely on section 26(8) of the Constitution to determine that the Extradition Act was immune from scrutiny if it were alleged that the lawful arrest, detention and extradition from Jamaica were breaches of section 15 of the Constitution. Moreover extradition of the applicant 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 cannot be scrutinised on the ground that it was in contravention of section 16 of the Constitution, since such extradition was done under the authority of a pre-existing law. I would, therefore, uphold the preliminary objection in law on this basis.

The reliance on the Proviso to section 25(2) of the Constitution

If it could be said that recourse to section 26(8) of the Constitution was only implicit in the judgments of the Court below then there can be no doubt that the principal basis of the judgment of Zacca, CJ who wrote the leading judgment was the application of the proviso to section 25(2) of the Constitution. It is, therefore, obligatory to set out that section in full.

> "25(1) Subject to the provisions of subsection (4) of this section, if any person alleges that any of the provisions of sections 14 to 24 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the Supreme Court for redress.
>
> (2) The Supreme Court shall have original jurisdiction to hear and determine any application made by any person in pursuance of subsection (1) of this section and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the provisions of the said sections 14 to 24 (inclusive) to the protection of which the person concerned is entitled:
>
> Provided that the Supreme Court shall not exercise its powers under this subsection if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law.

" (3) Any person aggrieved by any determination of the Supreme Court under this section may appeal therefrom to the Court of Appeal."

The side note is entitled "Enforcement of protective provisions" and the framers of the Constitution recognised that the best safeguard for fundamental rights was to give the applicant unimpeded access to the Supreme Court and further rights of appeal to the Court of Appeal and thereafter to Her Majesty in Council. But although there is unrestricted access to the Supreme Court the framers of the Constitution recognised that the powers of the Supreme Court exercising its original jurisdiction must not be exercised if there was adequate means of redress under other law. Since on the appointed day when the Constitution came into effect there would be no new laws yet enacted by Parliament or declared by the Courts then the corpus of pre-existing laws were assumed to conform with Chapter III relating to fundamental rights. In any event they were not to be scrutinised to see if they breached the provisions of Chapter III. When adequate means of redress are to be found in pre-existing laws then there is an intimate connection between the mandatory terms of the proviso to section 25(2) of the Constitution and the mandatory order in section 26(8) stipulating that pre-existing laws are not to be examined to determine if by chance they offend the provisions of Chapter III. This theme is implicit in the judgments of Zacca, CJ and Bingham, J in the Supreme Court and it was on that basis that they determined that the Writ of Habeas Corpus could never be found to be inadequate in this case.

It is to be noted that section 97(1) established the Supreme Court and it is appropriate to cite this section -

"97(1) There shall be a Supreme Court for Jamaica which shall have such jurisdiction and powers as may be conferred upon it by this Constitution or any other law.

(2) .....

(3) .....

(4) The Supreme Court shall be a superior court of record and, save as otherwise provided by Parliament, shall have all the powers of such a court."

The Court, therefore, has all the powers conferred on it by Acts of Parliament e.g. the Civil Procedure Code and the powers inherent in a Court of Record. It can prevent abuse of its process, or it can stay actions under its inherent and statutory powers. It is the judges of that Court who have the initial

responsibility of construing the Constitution. It is commonplace that judges must hear before they determine but they can determine by hearing a preliminary objection in law and then determine not to exercise their powers to make order for enforcing or securing sections 15 and 16 of the Constitution. This is where the proviso to section 25(2) comes into play. It is, therefore, against this background that the validity of the order of the Supreme Court must be determined.

By adverting to and interpreting the relevant law at the outset of those proceedings, the Supreme Court could find that adequate means of redress for the contravention alleged are or have been available to the person concerned under other laws. This was the kernel of Mr. Robinson's submissions. It is again necessary to stress that the substance of the applicant's allegation is firstly that he has been deprived of his liberty by extradition proceedings and an order in the Resident Magistrate's Court and by Habeas Corpus proceedings and an order in the Full Court and secondly that his freedom of movement in Jamaica is restricted because he is to be surrendered for sentencing to a District Court in the U.S.A. But both in his affidavit and the averments in his Motion he has stated that his being in custody was after extensive hearings before the Resident Magistrate and the Supreme Court under provision of the Extradition Act, 1870. The purpose of enshrining sections 15 and 16 in Chapter III is to make it necessary for future laws dealing with extradition to provide means whereby when an applicant is arrested, the law provides him with a fair hearing before he is extradited. It was on this basis that the respondent satisfied the Supreme Court exercising its original jurisdiction that the proviso ought to be applied as adequate means are and have been available under other laws.

In this context it is necessary to point out that both before the Resident Magistrate and in the Habeas Corpus proceedings it was open to the applicant to take and argue the alleged breaches of the Constitution. Mr. Ramsay submitted that had he done so he would not have had the opportunity to invoke the jurisdiction of this Court because of the authority of McGhann v United States Government [1971] 12 J.L.R. 565, 18 W.I.R. 58 which was followed in Donald Anthony Bevan Thompson v D.P.P. and another, unreported Supreme Court Miscellaneous Appeal 1/87.

Both counsel expressed doubts as to whether there was an appeal to the Privy Council directly from the Supreme Court. The matter was adverted to in Thompson at page 12, and Exparte Donald Grant Suit M. 59 of 1979 cited as example where there was an application for special leave although this was refused. It is, therefore, necessary to set out the basis for a further appeal in this case.

Section 110 of the Constitution recognised the existence of the Privy Council and provides a basis of appeal from the Court of Appeal to that Court. The statutory basis of the jurisdiction of the Privy Council, however, are two Imperial Acts The Judicial Committee Act 1833 and The Judicial Committee Act 1844. Section 3 of the 1833 Act emphatically states all appeals or complaints in nature of appeals may be brought before Her Majesty in Council from an order of any court or judge. Section 1 of the 1844 Act is in wider terms as it specifically states that all appeals were admissible from any court although such a court was not a court of errors or court of appeal. This means of invoking the jurisdiction of the Privy Council is not unknown in Jamaica see Attorney General of Jamaica v John Manderson (1846) 6 Moo. P.C. 239.

But it was submitted by the respondent that the saving clause in section 110(3) of the Constitution restricted appeals to the Privy Council to those emanating from the Court of Appeal. The short answer to that is that section 110(3) preserves the right to petition from decision of the Court of Appeal and it leaves untouched the jurisdiction of the Privy Council to hear appeals from other courts. To appreciate the force of this it is best to set out section 110(3) in full -

> "110(3) Nothing in this section shall affect any right of Her Majesty to grant special leave to appeal from decisions of the Court of Appeal to Her Majesty in Council in any civil or criminal matter."

It may also be necessary to add that the two Imperial Acts are part of the laws of Jamaica because section 4(1) of the Order in Council preserves them as existing laws.

So concerned were those who framed the constitution to preserve existing laws that section 26(9) of Chapter III also preserved laws which were adapted or modified to conform with the Order in Council and the reproduction

of existing laws in consolidated or revised legislation."

Similar submissions against jurisdiction for a further appeal to the Privy Council were rejected in Ibralebbe v The Queen (1964) A.C. 900 (Ceylon) and Maharaj v Attorney General (No. 1) (1976) 29 W.I.R. (Trinidad). The further argument that the Privy Council will not hear an extradition case by way of special leave may be answered by citing Attorney General of Hong Kong v Kwak-A-Sing (1873-74) 5 L.R. P.C. 179. So quite apart from the means of redress to challenge the arrest and extradition, there are still means of appeal which so far have been ignored. Here it should be noted that important points on the interpretation of the Constitution have been taken in ordinary criminal proceedings, see Hinds v The Queen [1975] 24 W.I.R. 326 and that the Privy Council has granted special leave to appeal in at least four cases since 1962 on constitutional points namely, King v Queen [1969] A.C. 304; McBean v The Queen [1977] A.C. 537; Baker v The Queen 13 J.L.R. 170 and Robinson v The Queen [1985] A.C. 956. Another observation that is perhaps appropriate is that both the applications in Habeas Corpus and the Constitutional motions could have been set down at the same time and heard one after the other so that if there were a further appeal from one or both courts, the Privy Council, in any event, could examine the constitutionality and merits at the same time.

Why was the Supreme Court given the mandatory powers under the proviso not to exercise its powers if it was satisfied that adequate means of redress are available under other laws? It was an acknowledgement of the active role that Parliament and the Judiciary would continue to play in developing the law by legislation, on the one hand and on the other by interpretation and the application of common law principles, in accordance with the provisions enshrined in Chapter III of the Constitution. Implicit in this acknowledgement is the separation of legislative from judicial powers which is one of the foundations of constitutional government. It is only when there has been a failure to apply or develop adequate means of redress that the Supreme Court would exercise its powers pursuant to section 25 of the Constitution. This principle of construction is well known in American Constitutional law and it is that the resort to the constitution is a last resort if there are other laws which are adequate to provide a remedy.

Lord Diplock developed this principle in three cases from Trinidad. Maharaj v. No. 2 was the starting point. At page 321 of [1978] 30 W.I.R.,Lord Diplock said:

> "It is true that instead of, or even as well as, pursuing the ordinary course of appealing directly to an appellate court, a party to legal proceedings who alleges that a fundamental rule of natural justice has been infringed in the course of the determination of his case, could in theory seek collateral relief in an application to the High Court under s 6(1), with a further right of appeal to the Court of Appeal under s 6(4). The High Court, however, has ample powers, both inherent and under s 6(2), to prevent its process being misused in this way; for example, it could stay the proceedings under s 6(1) until an appeal against the judgment or order complained of had been disposed of."

His most authoritative statement, however, appear in Chokolingo v The Attorney General of Trinidad [1981] 1 All E.R. 244. In that case the applicant, after pleading guilty, ignored the appellate process and sought redress for breaches of his constitutional rights. The clear statement of the Privy Council was that if the judiciary were to interpret the constitution in the manner sought by the appellant it would be irrational and subversive of the rule of law. It is necessary to refer to the whole passage. It reads at page 248:

> "Acceptance of the appellant's argument would have the consequence that in every criminal case in which a person who had been convicted alleged that the judge had made any error of substantive law as to the necessary characteristics of the offence there would be parallel remedies available to him: one by appeal to the Court of Appeal, the other by originating application under s 6(1) of the Constitution to the High Court with further rights of appeal to the Court of Appeal and to the Judicial Committee. These parallel remedies would be also cumulative since the right to apply for redress under s 6(1) is stated to be 'without prejudice to any other action with respect to the same matter which is lawfully available'. The convicted person having exercised unsuccessfully his right of appeal to a higher court, the Court of Appeal, he could nevertheless launch a collateral attack (it may be years later) on a judgment that the Court of Appeal had upheld, by making an application for redress under s 6(1) to a court of co-ordinate jurisdiction, the High Court. To give to Chapter I of the Constitution an interpretation which would lead to this result would, in their Lordships' view, be quite irrational and subversive of the rule of law which it is a declared purpose of the Constitution to enshrine."

This canon of construction has been recognised and acted upon in Jamaica in Dennis McMorris v Calvin Benjamin and The Attorney General unreported

Supreme Court M. 53 of 1978 where the Supreme Court on its own motion took the point in Ilmine, D.P.P. v. Feurtado [1979) 30 W.I.R. and Thompson (supra). In Feurtado, Kerr JA said at p. 216:

> "In that regard, the following observations of Lord Diplock in Harrikissoon v Attorney-General of Trinidad and Tobago (4) ([1979] 3 WLR at p 64) are indicative of the approach the court should adopt to applications of this nature, namely:
>
> > 'The notion that whenever there is a failure by any organ of government or a public authority or public officer to comply with the law this necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals by Chapter I of the Constitution is fallacious. The right to apply to the High Court under s 6 of the Constitution for redress when any human right or fundamental freedom is or is likely to be contravened, is an important safeguard to those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action.'
>
> A fortiori, this is even more pertinent when the Constitution contains a purposeful proviso such as that in the Jamaican Constitution, s 25(2). We are of the view that even if there were a contravention of the Constitution, s 20, adequate means of redress were available to the respondent under other law and consequently the court should not exercise its powers under the Constitution, s 25."

A recent authority to support this construction of the proviso is Erland Blomquist v. Attorney General for Dominica, unreported P.C. 58 of 85 delivered on 3rd March 1977 at pp. 4-5.

It is in the light of these principles that we must examine the basis of Mr. Ramsay's contention that this application is similar to Maharaj No. 2. In that case the contravention alleged was that the trial judge failed to inform the applicant of the specific nature of the contempt for which he was charged. He was found guilty and imprisoned, and on appeal to the Privy Council in Maharaj No. 1 the conviction was set aside. Here it should be noted that although section 92(3) of the Trinidad 1962 Constitution is similar to 110(3) of the Jamaican Constitution, Maharaj did not refrain from invoking the jurisdiction of the Privy Council. At the same time he launched collateral proceedings in the High Court for breaches of his constitutional rights. Some of the allegations in his notice of motion were found to be misconceived, but there was one of

substance and it is instructive to see how Lord Diplock describes it. Page 316 of [1978] 30 W.I.R. In Maharaj No. 2 reads thus:

> "Nevertheless, on the face of it, the claim for redress for an alleged contravention of his constitutional rights under s 1(a) of the Constitution fell within the original jurisdiction of the High Court under s 6(2). The claim does not involve any appeal either on fact or on substantive law from the decision of Maharaj that the appellant, on 17th April 1975, was guilty of conduct that amounted to a contempt of court. What it does involve is an enquiry into whether the procedure adopted by the judge before committing the appellant to prison for contempt contravened a right, to which the appellant was entitled under s 1(a), not to be deprived of his liberty except by due process of law."

What does section 1 of that Constitution say -

> (1) It is hereby recognised and declared that in Trinidad and Tobago there have existed and shall continue to exist without discrimination by reason of race, origin, colour, religion or sex, the following human rights and fundamental freedoms, namely -
>
> (a) the right of the individual to life, liberty, security of person and enjoyment of property, and the right not to be deprived thereof except by due process of law.

It should be noted that before the constitution it would have been unlawful to have committed Maharaj for contempt without informing him of the nature of the charge, but the only redress was an appeal. After the constitution there is a new remedy in public law which empowered an applicant to complain of a breach of his constitutional right and to be accorded a remedy by the courts. Further by section 6(1) of the Constitution an original jurisdiction was conferred on the Supreme Court to adjudicate on such a matter in addition to any other right of action that the applicant may have.

Special emphasis should be placed on the words "and the right not to be deprived thereof except by due process of law". It confines the complaint to breaches of fundamental justice and recognise that Courts err and therefore, a system of appeals are part of the Constitution. Moreover, by making the High Court a superior court of record (Section 74) and endowing it with the plenitude of powers of the High Court before the Constitution, the High Court also has the supervisory jurisdiction over inferior tribunals.

It is in the light of all this that Lord Diplock was at pains in Maharaj No. 2 to set out the scope and limits of new remedy. At page 321 he said:

> "In the first place, no human right or fundamental freedom recognised by Chapter I of the Constitution is contravened by a judgment or order that is wrong and liable to be set aside on appeal for an error of fact or substantive law, even where the error has resulted in a person's serving a sentence of imprisonment. The remedy for errors of these kinds is to appeal to a higher court. When there is no higher court to appeal to then none can say that there was error. The fundamental human right is not to a legal system that is infallible but to one that is fair. It is only errors in procedure that are capable of constituting infringements of the rights protected by s 1(a), and no mere irregularity in procedure is enough, even though it goes to jurisdiction; the error must amount to a failure to observe one of the fundamental rules of natural justice. Their Lordships do not believe that this can be anything but a very rare event."

Additionally to emphasise how rare these instances were, further on the page he said:

> "In the third place, even a failure by a judge to observe one of the fundamental rules of natural justice does not bring the case within s 6 unless it has resulted, is resulting or is likely to result, in a person being deprived of life, liberty, security of the person or enjoyment of property. It is only in the case of imprisonment or corporal punishment undergone before an appeal can be heard that the consequences of the judgment or order cannot be put right on an appeal to an appellate court."

What was before the Supreme Court in this instance? The substance of the applicant's claim in his notice of motion was that there were breaches of his constitutional rights in respect of section 15(1)(b)(j) and 16(1)(3)(a) of the Constitution. So far as the complaints relate to section 15, the Constitution precludes deprivation of liberty by way of sentence or order of a court in Jamaica or elsewhere save as may be authorised by law. Also precluded is extradition save as may be authorised by law.

On the face of the motion and on his affidavit it was manifest to the Supreme Court that adequate means of redress were and had been available to the applicant under other law. The applicant was committed by a Resident Magistrate and had recourse to Habeas Corpus proceedings in the Supreme Court. That he refused to take his constitutional points in the Habeas Corpus proceedings or refused to institute proceedings for special leave to Privy Council does not

make those means of redress inadequate. Moreover, there was no demonstration in this court either in the record or in submissions that any procedural errors by the Resident Magistrate or the Supreme Court in the Habeas Corpus proceedings were capable of contravening section 15(1)(b)(j) of the Constitution. If any such allegation were expressed in the record, this Court as a court of rehearing, could have heard and determined the matter.

A similar analysis applies to the alleged breach of section 16(1)(e) pertaining to freedom of movement and extradition to serve a sentence of imprisonment. It is true that by section 16(1) no person is to be expelled from Jamaica, but,to reiterate, section 16(3)(e) states:

> "16(1) .....
>
> (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) .....
>
> (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."

The applicant refers the proceedings pursuant to the Extradition Act, 1870. This is a pre-existing law with safeguards which include a resort to Habeas Corpus proceedings and a further appeal by way of special leave to the Privy Council and these are certainly adequate means of redress. These provisions in the Constitution permit Parliament to repeal and reinstitute Extradition Acts which cannot be challenged on the ground that an applicant is deprived of his freedom because he is being extradited under the authority of a valid law. Nowhere was there any attempt made to demonstrate either in the record or by submissions how the proceedings in this case were capable of contravening section 16(1)(3)(e) of the Constitution.

There is another aspect to the Motion before the Supreme Court. The pleaded reliefs are to be released from custody and for costs which are the traditional remedies associated with habeas corpus. It is true that on appeal

for the first time, there is a claim for compensation but if the preliminary objection is upheld this issue does not arise. Compensation flows after a breach has been established. In this Court it has not been established that the allegations are capable of contravening sections 15 and 16 of the Constitution.

The Supreme Court also had to consider the grounds stated in the motion and it is interesting to rehearse them to determine the substance of the complaint. Bearing in mind that the submissions below were on a preliminary objection then it was manifest that if the application of the proviso could determine the outcome of the case it was legitimate to examine those grounds with care, as indeed the Court did. There are four grounds - firstly "that the Resident Magistrate misdirected himself on the meaning of 'conviction and 'convicted' in the Extradition Act of 1870"; secondly,"that sections 15 and 16 of the Constitution give clear direction that conviction should be interpreted in its primary sense of verdict together with sentence"; thirdly, "that the Extradition Act ought to be construed to harmonise with the Constitution"; and fourthly, "that as the Extradition Act was a penal statute it should be construed in favour of the citizen where his liberty is at stake".

So far as the first and second grounds were concerned they involve interpretation of the Extradition Act which provides the adequate means of redress under other law and the same principle applies to the third and fourth grounds. The application of the proviso was, therefore, appropriate at the commencement of the proceedings.

Specifically the second ground purports to deal with the interpretation of 'convicted' and 'conviction' in sections 15 and 16 of the Constitution and the plain reading of those sections has already been adverted to earlier, and in any event section 26(8) of the Constitution debars scrutinising the Extradition Act to see if it conforms with sections 15 and 16 of the Constitution. The view expressed in the Court below at page 18 of the record by Bingham, J, that this was partly an attempt to re-argue the claim for Habeas Corpus was well founded. Curiously enough, this oddity i.e. to re-argue the application for Habeas Corpus appears to be permissible in limited circumstances but it must be before the Supreme Court (See R v Commissioner of Police & others Exparte Orville Cephas No. 2 (1977) 15 J.L.R. 3 or 24 W.I.R. 500). It is necessary to examine the circumstances of Cephas No. 2 as a dictum in that case suggests that this appellant could be reheard in Habeas Corpus proceedings.

This was a case where the initial application was before a vacation judge Parnell, J. See R v Commissioner of Police and another Exparte Orvillo Cephas No. 1 [1976] 24 W.I.R. 402. Thereafter there was an application to the Full Court (Henry, Rowe, Wilkie, JJ) in Exparte Orvillo Cephas No. 2. There is no doubt that it was correct to rule in those circumstances that a rehearing was permitted, where in the first instance the application was to a vacation judge who is a judge of the Supreme Court, and then to the Full Court which does not sit in vacation. The Full Court, of course, represents the Supreme Court. However, in Cephas No. 2 the Court went further to suggest that on the basis of a concession to which I was a party as counsel that because the decision of Eshugbayi Eleko v Government of Nigeria (1928) A.C. 459 was binding on the Supreme Court, then it makes possible a series of application to the Court which might cease only when all the judges and all the possible combinations of judges in a Full Court had dealt with the application. It appears that the Court seemed to be attracted to Re Hastings No.2 [1959] 1All E.R. 698, but thought that that desirable situation where there can be only one application to the Divisional Court could only be achieved by legislation. In fairness to Mr. Ramsay who developed all his submissions with his customary skill, he thought the dictum in Cephas No. 2 was wider than necessary for the actual decision, which it must be emphasised was to rehear the initial application being made before a vacation judge. After all, an applicant is entitled by sections 564A and 564K of the Civil Procedure Code to have a decision by the Full Court as such a decision is the equivalent of all the judges in the Supreme Court.

It is against this background that the facts of Eleko must be examined. Firstly, it does not seem that the detention in that case was in a criminal cause or matter. Here is how Lord Hailsham stated the relevant part of the legislation at page 462 of Eleko (1928) A.C. 459 at 462-463 -

> "By the Deposed Chiefs' Removal Ordinance of 1917, as amended in 1925, it was provided that: 'When a native chief or a native holding any office under a native administration or by virtue of any native law or custom has been deposed or removed from his office by or with the sanction of the Governor.... the Governor may: (a) If native law and custom shall require that such deposed chief or native shall leave the area over which he exercised jurisdiction or influence by virtue of his chieftancy or office.... by an Order under his hand

" 'direct that such chief or native shall within such time as shall be specified in the Order leave the area over which he had exercised jurisdiction or influence, and such other part of Nigeria adjacent thereto as may be specified in the Order, and that he shall not return to such area or part without the consent of the Governor.' '(2.) Any deposed chief or native who shall refuse or neglect to leave such area or part of Nigeria as aforesaid as directed by the Governor....shall be liable to imprisonment for six months, and the Governor may by writing under his hand and seal order such deposed chief or native to be deported, either forthwith or on the expiration of any term of imprisonment to which he may have been sentenced as aforesaid, to such part of Nigeria as the Governor may by such Order direct.'

On August 6, 1925, the acting Governor purported to make an order under the said Ordinance in the following terms: 'Whereas Eshugbayi, a native chief holding the office of Eleko in the Colony, has with my sanction been deposed and removed from his office, and whereas native law and custom requires that the said Eshugbayi shall leave the area over which he exercised influence by virtue of his office: Now therefore I do hereby direct that the said Eshugbayi shall leave the said Colony and the Province of Abeokuta and Ondo within twenty-four hours of the service of this Order, and that he shall not return to any of the said areas without my consent.'

On August 8, 1925, the acting Governor made a further order reciting the order of August 6, reciting that the appellant had refused or neglected to comply with it, and ordering that the appellant should be deported forthwith to Oyo in the Province of Oyo."

That the deportation and detention were civil was further inferred by the fact that there was a motion to set aside the order and stay of execution on it. Further, after the motion of Habeas Corpus was dismissed, there was another motion by the applicant seeking a declaration that the order of the Governor was void and an injunction to restrain the defendants taking any step under the order. The action was dismissed for being frivolous and vexatious. The situation very much resembles Cox v Hakes 15 App. Cox 506, where the imprisonment was not the result of criminal proceedings.

It was after this protracted litigation that there was another application for Habeas Corpus initially before the Chief Justice (Acting) who dismissed it and then on the same issues before Tew, J who dismissed it on the ground that the matter had already been disposed of and that order was uphold on appeal. Then there was a further appeal to the Privy Council on the issue as to whether there should have been a rehearing of the motion before the Supreme Court and the

matter was decided in favour of the appellants.

In the light of this, how can it be said that the law in Nigeria was the same as in Jamaica? Firstly, Cephas No. 1 and No. 2 were extradition cases which were criminal proceedings and no appeal is permitted to the Court of Appeal. Elcko was in a civil matter and an appeal did lie to the Full Court of the Supreme Court. It is clear from the account given that a single judge of the Supreme Court in Nigeria heard motions for Habeas Corpus while in Jamaica a single judge may hear an application in vacation, but it is the Full Court which must hear such applications in term time.

The dictum at page 468 by Lord Hailsham cited at 502 of Cephas No. 2 reads:

> "If it be conceded that any judge has jurisdiction to order the writ to issue, then in the view of their Lordships each judge is a tribunal to which application can be made within the meaning of the rule, and every judge must hear the application on the merits. It follows that although by the Judicature Act the Courts have been combined in the one High Court of Justice each Judge of this Court still has jurisdiction to entertain an application for a writ of habeas corpus in term time or in vacation and that he is bound to hear and determine such an application on its merits notwithstanding that some other judge has already refused a similar application."

was binding in Nigeria, but is not part of the common law of Jamaica. The passage, in Lord Hailsham's opinion, shows he is referring to a common law jurisdiction where a single judge has power to issue the writ of Habeas Corpus either in term time or vacation. The position in Jamaica pursuant to the provisions of the Civil Procedure Code is different, as previously explained.

The Supreme Court ought to be hesitant to apply a principle which it describes at 502 of Cephas No. 2 as giving 'rise to an anomolous situation' especially when it suggests that the decision in Re Hastings No. 2 is to be preferred. There is no need for legislation on this aspect, when the common law, as expounded in Re Hastings No. 2 [1958] 3 All E.R. 625 and Re Hastings No. 3 [1958] 3 All E.R. 625, provide a satisfactory solution.

To my mind, if an applicant after a hearing on a motion for Habeas Corpus has been refused by the Full Court, the Supreme Court is entitled on principle and authority not to re-hear the motion. Additionally, in this case, the Supreme Court was also correct to have dismissed the appellant's motion in limine by relying on the proviso to section 25(2) of the Constitution.

Conclusion

The allegation that there were breaches of fundamental rights provisions of the Constitution is always an important issue. It should be emphasised, therefore, that a determination of the matter on a preliminary objection is not meant to deny the applicant of a hearing on the merits. What it does entail, is an interpretation of sections 15, 16, 25(2) and 26(8) of the Constitution against the background of the averments in the Notice of Motion on the assumption that the affidavit evidence was true. In this case the cogently argued submissions in law by both counsel were heard over four days in the Supreme Court and five days in the Court of Appeal. Nonetheless, after giving careful consideration to the law I find the determination of the Supreme Court, which dismissed the motion on a preliminary objection was well-founded. The order below must, therefore, be affirmed and the appellant must pay the costs of this appeal which is to be taxed or agreed.

GORDON, J.A. (Ag.):

I have read the judgments of Forte and Downer, JJA, and agree with the conclusions arrived at and the reasons given; I will make a brief comment.

The proviso to section 25(2) of the Jamaica Constitution reads:

> "The Supreme Court shall not exercise its powers under this subsection if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law."

Mr. Ramsay contended that the word "adequate" in this proviso means "equal" or "to be fully sufficient". He submitted that the means of redress available under the Extradition Act, viz. release of the applicant from custody by virtue of Habeas Corpus proceedings, were not equal to those available in proceedings for redress before the Constitutional Court. In the latter proceedings there can be given, in addition to the release from detention, declarations and/or compensation.

Mr. Robinson submitted that the word "adequate" as used means "proportionate to the requirements, sufficient to meet the alleged contravention". The means of redress provided under other law must be sufficient for the alleged contravention.

The industry of counsel did not reveal any case in which the word "adequate" had been judicially construed, resort must, therefore, be had to the dictionary. The word "adequate" is derived from latin ad aequus "to equal". It is admitted that the Constitution provided a new bundle of remedies hitherto unavailable under other law. In construing the proviso the rule of construction "verba intelligenda sunt ut res magis valeat quam pereat" must be applied. The construction placed on the words must not lead to an absurdity. The new remedies provided by the constitution had no equal in any other law, therefore, to hold that "adequate" means "equal" would lead to an absurdity not intended by the framers of the Constitution.

In Webster New Collegiate Dictionary "adequate" means "sufficient for a specific requirement, barely sufficient" or "satisfactory".

The Oxford English Dictionary meaning; "commensurate in fitness equal or amounting to what is required, fully sufficient, suitable or filling".

I hold that the meaning to be given to the word "adequate" is not that propounded by Mr. Ramsay.

The redress sought in Habeas Corpus proceedings under the Extradition Act is the release of the applicant. The redress sought in the proceedings before the Supreme Court is primarily the release of the applicant from custody.

The Supreme Court was right in deciding the preliminary point in the respondent's favour because the remedy of Habeas Corpus was an adequate means of redress under other law and that other law, the Extradition Act, 1870, by virtue of section 26(8) of the Constitution cannot offend the provisions of Chapter III which entrenches fundamental rights and freedoms.