N THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE FULL COURT

SUIT NO. HCV 1954 OF 2005

CORAM: **THE HONOURABLE CHIEF JUSTICE**
THE HONOURABLE MRS. JUSTICE MARVA MCINTOSH
THE HONOURABLE MR. JUSTICE HIBBERT

IN THE MATTER of an application by NORRIS NEMBHARD for a Writ of Habeas Corpus Ad Subjiciendum

AND

IN THE MATTER of the Extradition Act

BETWEEN	**NORRIS NEMBHARD**	**CLAIMANT**
AND	**THE COMMISSIONER OF CORRECTIONAL SERVICES**	**1ST RESPONDENT**
AND	**THE DIRECTOR OF PUBLIC PROSECUTIONS**	**2ND RESPONDENT**

SUIT NO. HCV 1965 OF 2005

AND

IN THE MATTER of an application by VIVIAN DALLY for a Writ of Habeas Corpus Ad Subjiciendum

AND

IN THE MATTER of the Extradition Act

BETWEEN	**VIVIAN DALLY**	**CLAIMANT**
AND	**THE COMMISSIONER OF CORRECTIONS**	**1ST RESPONDENT**
AND	**THE DIRECTOR OF PUBLIC PROSECUTIONS**	**2ND DEFENDANT**

SUIT NO. HCV 1966 OF 2005

AND

IN THE MATTER of an application by **HERBERT HENRY** for a Writ of Habeas Corpus Ad Subjiciendum

AND

IN THE MATTER of the Extradition Act

BETWEEN	**HERBERT HENRY**	**CLAIMANT**
AND	**THE COMMISSIONER OF CORRECTIONS**	**1ST RESPONDENT**
AND	**THE DIRECTOR OF PUBLIC PROSECUTIONS**	**2ND DEFENDANT**

SUIT NO. HCV 1972 OF 2005

IN THE MATTER of an application by **ROBROY WILLIAMS** FOR A Writ of Habeas Corpus Ad Subjiciendum

AND

IN THE MATTER of the Extradition Act

BETWEEN	**ROBROY WILLIAMS**	**CLAIMANT**
AND	**THE COMMISSIONER OF CORRECTIONAL SERVICES**	**1ST RESPONDENT**
AND	**THE DIRECTOR OF PUBLIC PROSECUTIONS**	**2ND DEFENDANT**

SUIT NO. HCV 2039 OF 2005

AND

IN THE MATER of an application by **GLENFORD WILLIAMS** for a Writ of Habeas Corpus Ad Subjiciendum

AND

IN THE MATTER of the Extradition Act

BETWEEN	**GLENFORD WILLIAMS**	**CLAIMANT**
AND	**THE COMMISSIONER OF CORRECTIONAL SERVICES**	**1ST RESPONDENT**
AND	**THE DIRECTOR OF PUBLIC PROSECUTIONS**	**2ND RESPONDENT**

SUIT NO. HCV 2040 OF 2005

AND

IN THE MATTER an application by **LUIS MIGUEL AVILA ARIAS** for a Writ of Habeas Corpus Ad Subjiciendum

AND

IN THE MATTER of the Extradition Act

BETWEEN	**LUIS MIGUEL AVILA ARIAS**	**CLAIMANT**
AND	**THE COMMISSIONER OF CORRECTIONS**	**1ST RESPONDENT**
AND	**THE DIRECTOR OF PUBLIC PROSECUTIONS**	**2ND RESPONDENT**

Frank Phipps Q.C., Wentworth Charles and Miss Kathryn Phipps for Norris Nembhard

Patrick Atkinson and Mrs. Sharon Usim for Vivian Dally

Patrick Bailey and Mrs. Valerie Neita Robertson for Herbert Henry

Keith D. Knight Q.C., Miss Norma Linton Q.C., Miss Saverna Chambers and Miss Akilah Anderson for Robroy Williams

Keith D. Knight Q.C., Roy Fairclough and Miss Akilah Anderson for Glenford Williams

Miss Jacqueline Cummings and Aon Stewart for Luis Arias

Curtis Cochran, Miss Julie Thompson and Miss Amena Maknoon for 1st Respondent

Mrs. Stephanie Haisley for 2nd Respondent

HEARD: February 12, 13, March 19, 20, 21, 23, 26, 27 and June 15, 2007

WOLFE C.J.

On the 30th June, 2005 His Honour Mr. Martin Gayle, presiding in the Corporate Area Resident Magistrates Court, ordered that all the claimants, herein be committed to custody to await their extradition to the United States of America.

The Learned Resident Magistrate in so doing was exercising his jurisdiction pursuant to the Extradition Act of 1991, a request having been made by the Government of the United States of America to the Minister of Foreign

Affairs. Authority to Proceed was duly issued by the Honourable Minister of Justice pursuant to section 8 (1) of the Extradition Act.

The claimants having been committed to await extradition have exercised the right given to each of them by section 11 (1) of the Extradition Act. viz: to seek an Order of habeas corpus to be discharged from custody.

RE NORRIS NEMBHARD

BACKGROUND

In April 2004 the Embassy of the United States of America, Kingston, Jamaica by a Diplomatic Note to the Ministry of Foreign Affairs requested the provisional arrest of Nembhard who was wanted for trial on narcotic offences the subject of a Grand Jury indictment of March 2004 in the United States District Court for the Middle District of Florida for conspiring and agreeing with eight (8) other persons to distribute cocaine and marijuana knowing and intended that such substance would be unlawfully imported into the United States or into waters within a distance of twelve miles of the coast of the United States.

Phipps Q.C. on behalf of Nembhard advanced the following Grounds:

1. Irregular Procedure

Relying upon section 7 (1) and (5) of the Extradition Act he observed that the Minister was not seized of designation in that the indictment was unsigned and undated and therefore amounted to a piece of paper without any legal significance and therefore there was no basis for the Authority to Proceed which was issued by the Minister.

He further urged that the Warrant of Arrest issued in the United States was defective and incompetent for committal proceedings in that it was not signed by the Clerk of Courts as required.

With reference to the submissions made re the indictment, suffice it to say, there is no requirement in the Extradition Treaty or Act for the indictment to be produced along with the request.

So defects in the indictment, if defects there be, are of absolutely no consequence and do not affect the validity of the proceedings.

In respect of the submission re the warrant not being signed by the Clerk of Courts, it is to be observed that the warrant was signed by the Deputy Clerk of Courts and that paragraph 12 of the affidavit of Pamela Cothran Marsh, an Assistant United States Attorney in the organized Crime and Drug Enforcement Task Force section states that the Deputy Clerk of Courts is empowered to execute attestation to arrest warrants.

For the reasons stated above I hold that this ground alleging Irregular Procedure is entirely without merit and must fail.

GROUND 2

Insufficient evidence

The charge is one of conspiracy. Conspiracy to distribute cocaine and marijuana in the United States.

"The crime of conspiracy requires an agreement between two or more persons to commit an unlawful act with the intention of carrying it out. It is the

intention to carry out the crime that constitutes the necessary mens rea for the offence."

See ***Yip Chin-Cheung v R 99 Cr. App. 406 P.C***. It must also be stated that it is not always necessary to show that all conspirators must intend to play an active part in the agreed course of conduct. A person who organizes a crime and employs others to carry it out is equally guilty of conspiracy whether or not the organizer intends to play some active part in it thereafter. See ***R v Siracusa 90 Cr. App R. 340 at p. 349 per O'Connor LJ.***

It is conceded that all the persons whose testimony implicated Nembhard are accomplices.

The affidavit of John Pablo Garcia Washington states that on two occasions between March and June 2000 he was engaged in smuggling bales of cocaine from Columbia to Jamaica and that the cocaine was delivered to Nembhard.

Alexander Young Duffis in his affidavit states that Nembhard told him that he had a good connection to get cocaine into the United States and that if he Young Duffis ever needed to get a shipment of cocaine into the United States he (Nembhard) could make it happen.

He further stated that in 2002 Nembhard released 500 kilograms of cocaine to Williams and he was present and heard when Williams and Nembhard spoke about the successful arrival of the 500 kilograms of cocaine into the United States.

Yes they are accomplices, but a Court after giving itself the proper warning may act upon the uncorroborated testimony of an accomplice witness. See ***Prince Anthony Edwards vs The Director of Public Prosecutions and Director of Correctional Services [1994] 3 JLR 526***.

The Magistrate was not engaged in a trial. His role was merely to decide if there was a prima facie case made out. He could not possibly have come to any other decision in the circumstances.

I reject the contention that there was a lack of sufficient evidence to properly commit the claimant Nembhard to custody for the purpose of extradition.

Re King Pin Designation

Nembhard was declared a Kingpin under the Foreign Narcotics Kingpin Designation Act (" the Kingpin Act") of 1999 issued by the President of the United States.

It is contended that the designation deprives him of his right to a fair trial.

The decision in ***Noel Heath and Glenroy Matthew vs The Government of the United States Privy Council Appeal No. 58 of 2004*** has made it clear that the mere designation is not evidence upon which one can without more say that the claimant cannot have a fair trial in the United States.

In any event the fair trial issue is essentially a matter for the trial Court. ***Nankisoon Dooram v Attorney General and Another [1996] 47 W.I.R. 459 at 495.***

The argument as to the improper authentication of the documents submitted along with the request was not pursued, the Court of Appeal having ruled in a recently decided case of ***Leebert Ramcharan and Donovan Williams v Commissioner of Corrections et al. S.C.C.A. Nos. 106 and 107/2005 (unreported) dated 16th March 2007*** that the argument lacked merit.

Re Vivian Dally

The claimant Dally having filed eight grounds as the basis for the application for Habeas Corpus relied upon only two (2) of those grounds viz.

(i) Insufficiency of evidence;

(ii) Improper authentication of documents relied upon by the requesting state.

The contention that there was not sufficient evidence before the Learned Resident Magistrate upon which he could properly commit Vivian Dally is wholly misconceived.

In the affidavit of Delroy Anthony Williams he says:

> "I know that in spy's organization, Jungo (who I now know to be Vivian Dally) served as a 'trustee' who carried and wired money. I know this because Jungo was the person who wired $500.00 in US currency at Spy's direction on two separate occasions in April and May 2002 while I was in Columbia waiting to transport cocaine to Jamaica for Spy. This load of cocaine was the load on which I was ultimately arrested.
>
> I also know that Jungo has carried large sums of money (to include US currency) generated from drug sales in the United States from Jamaica to Panama for Spy on at least two occasions."

Young Duffis in his affidavit of the 13th July 2004 stated that Vivian Dally was present at a meeting between himself, Robroy Williams and a Colombian. He further stated that Robroy Williams told Dally to invest in the shipment of cocaine to the United States.

He said "approximately two (2) of the one thousand three hundred (1,300) kilograms shipped to the United States belonged to Dally".

At this point in time this evidence stands unchallenged.

He further stated that Williams told him that the cocaine shipment arrived in the United States.

In dealing with this affidavit counsel, for the claimant, submitted that the Learned Resident Magistrate ought to have excluded the affidavit. He submitted that the Learned Resident Magistrate failed to weigh up the evidence contained in the affidavit.

In ***R v Governor of Pentonville Prison and another Exparte Osman (1989) 2 AER 701*** at page 703 the Court had this to say :-

> "He is neither entitled nor obliged to determine the amount of weight to be attached to any evidence or to compare one witness with another since that would be for the jury at any subsequent trial. It follows therefore that the magistrate is not concerned with any inconsistencies or contradictions in a witness' evidence unless they are such as to justify rejecting or eliminating his evidence as a whole, nor is he concerned with whether the witness's evidence is corroborated."

The court further stated:

> "The court's approach is best defined in terms of whether the magistrate's decision was one which a reasonable magistrate, directing himself properly and

> in accordance with the law could have reached and not whether he came to the right decision or to a decision with which the court necessarily agrees."

I am convinced that the decision of the Learned Resident Magistrate in not rejecting the supplementary affidavit is one which a reasonable magistrate directing himself properly and in accordance with the law could have reached.

The complaint re the authentication of the documents is, with respect, void of merit.

All the affidavits were signed by a notary public or judicial officer.

Re Herbert Henry

The claimant Henry was arraigned by the Grand Jury with knowingly and willfully conspiring with persons known and unknown to distribute five (5) kilograms or more of a mixture or substance containing a detectable amount of cocaine a schedule II controlled substance and to distribute one thousand (1,000) kilograms or more of a mixture or substance containing a detectable amount of marijuana a schedule 1 controlled substance, knowing and intending that such substance would be unlawfully imported into the United States or into waters within a distance of twelve (12) miles to the coast of the United States in violation of Title 21, United States Code Section 959.

Mr. Bailey of Counsel, representing Henry, submitted that Count 1 of the indictment formed the substratum of the case for the requesting state relative to the extradition of Herbert Henry.

He argued that the count suggested that all or at least two of the conspirators agreed to distribute 5 KG or more cocaine in the United States and

any overt acts on the part of Henry must be in relation to the alleged conspiracy and no other.

He further submitted that the affidavits relied upon by the requesting state did not show that Henry was in anyway connected with any conspiracy.

The indictment alleged that the conspiracy was with "persons known and unknown".

In the supplemental affidavit of Alexander Young Duffis dated July 13, 2004 Young Duffis stated that he delivered 100 kilograms of cocaine to Henry on behalf of Robroy Williams and that Henry told him that the cocaine would be shipped to the United States. Henry be said, further sated that an associate of his would place the cocaine on board an aircraft destined for the U.S.A. He further stated that Henry promised to Dixon, another police officer, that he would pay him for his assistance as soon as the cocaine was sold in the United States.

Paul Newton Christopher Dixon, a police officer himself, in his affidavit dated June 2, 2004 stated that Henry o/c Scary had suggested to him that they should provide security and transport for the drug traffickers in order to make some additional money.

He said that Robroy Williams o/c Spy gave him packages containing cocaine to take to Henry which he did and for which he was paid J$30,000.00 as payment for the transportation of the drugs.

From the pronouncement attributed to the Learned Resident Magistrate, at the hearing it is obvious that the Learned Resident Magistrate accepted the evidence referred to above after due consideration.

Mr. Bailey in his submissions stated that the case of Henry was tailored to meet the decision in ***Berkley Hepburn v Director of Correctional Services and The Director of Public Prosecutions.***

An unreported judgment of the Supreme Court of Jamaica dated May 28, 2004.

I have not been convinced by counsel's submission that the Learned Resident Magistrate's decision can be impugned at this stage

The complaint by counsel is in my considered opinion a matter to be addressed by the trial court.

The fact that the affiants are co conspirators and therefore accomplices does not automatically make their evidence unreliable. Such evidence, it is trite law, can be acted upon providing the court gives itself the usual warning of the danger of acting upon the uncorroborated evidence of the accomplices.

The duty of the Learned Resident Magistrate is to hear the case in the same manner, as nearly as may be, as if he were sitting as an examining justice and as if that person were brought before him charged with an indictable offence committed within his jurisdiction. See section 10 (1) (2) of the Extradition Act.

The complaint that the indictment was not signed is of absolutely no consequence. The indictment is not one of the documents which the Act requires to be submitted to the requested state when making the request for extradition.

Counsel raised the issue of the identification of the claimant and observed that no photograph of the claimant was exhibited. The identity of the claimant was not strictly a TURNBULL situation.

The situation was more a case of recognition. Recognition by Paul Dixon, a colleague of the claimant.

Re Robroy Williams

Seven grounds were filed on behalf of the claimant Robroy Williams as set out hereunder:-

(i) The Resident Magistrate for the Corporate Area His Honour Mr. Martin Gayle had no jurisdiction to commence extradition hearings in this instance where there was no adequate proof that the indictment charging Robroy Williams was signed by the foreperson of the Grand Jury and properly certified as required by law.

(ii) All the affidavit evidence with respect to Robroy Williams is hearsay evidence and is inadmissible.

(iii) Even if the affidavit evidence with respect to Robroy Williams was admissible it would require corroboration.

(iv) The Learned Resident Magistrate erred in law in not holding specifically, that there was no evidence of any conspiracy with respect to Robroy Williams against the laws of the United States of America.

(v) The Learned Resident Magistrate erred in law in ordering the extradition of the applicant on Count 2 of the indictment, as the applicant was not a part of any conspiracy with any persons on board any vessel which was subject to the jurisdiction of Jamaica.

(vi) The Learned Resident Magistrate erred in law in not holding that the documents presented at the extradition hearing were not properly authenticated.

(vii) The Learned Resident Magistrate erred in law in admitting into evidence additional information and documents after the commencement of the hearing which were obtained contrary to the laws governing extradition.

Grounds (ii) (iii) & (iv) were argued together under the title of Sufficiency of Evidence.

The claimant contends that evidence relied on was hearsay and inadmissible. The basis of this submission lies in the decision in ***Prince Anthony Edwards v The Director of Public Prosecutions and Director of Correctional Services (1994), 31 JLR p 525*** where Downer JA citing from the case of ***R v Governor of Renton Ville Prison exparte Osman [1990] 1 WLR 277 at p 315*** said:-

> "The acts and omissions of one conspirator are only admissible against the others on the ground that he is their agent (p 316) there must always be some evidence other than the hearsay evidence of a fellow conspirator to prove that a particular defendant is party to a conspiracy".

The evidence contained in the affidavit cannot on any basis be referred to as hearsay evidence.

The evidence clearly demonstrates that that the affiant Young, had personal knowledge of the events of which he spoke. He was present when the transactions took place.

In Williams' dealings with the Colombian, from whom Williams obtained the cocaine, Young, acted as translator for Williams.

The affiant Delroy Anthony Williams a nephew of Robroy Williams also provides direct evidence of Williams' involvement in the smuggling of drugs into the United States of America.

It must be borne in mind that the offence of conspiracy to commit a crime is constituted in the agreement and not in the completion of an act. See ***Liangsiriprasert v United States Government and Another (1991) 1 AC 225.***

Grounds 1, VI & VII

These grounds were concerned with the documents submitted by the requesting state in support of the request for extradition.

In respect of Ground 1 it is contended that there was no proof that that the indictment was signed by the fore person of the grand jury and properly certified by law.

It has already been pointed out that the indictment is not one of the documents required to be submitted before the Resident Magistrate can assume jurisdiction to hold the inquiry.

The Resident Magistrate's jurisdiction to hold the enquiry lies in the authority to proceed furnished by the Minister of Justice.

Ground VI deals with the authentication of the documents supporting the request.

This matter of authentication was dealt with by the Jamaican Court of Appeal in ***Leebert Ramcharan and Donovan Williams v Commissioner of Correctional Services and Director of Public Prosecutions Appeal Nos. 106 & 107/2005***. Judgment delivered on March 16, 2007.

In respect of arguments similar to those submitted before us the Court of Appeal ruled unanimously that the arguments were without merit. This ruling led Mr. Charles to withdraw his ground which was based on the principle of authentication.

Ground VII complains of the court relying on documents received after the hearing had commenced contrary to the provisions of the Extradition Treaty.

Article 1X 3 of the Treaty deals with additional information. It states:

"Nothing in paragraph (1) or (2) shall prevent the executive authority of the Requested State from presenting to a court of that State information sought or obtained after submission of the request to the court or after expiration of the time stipulated pursuant to paragraph (2)."

Re Glenford Williams

The main ground upon which the Writ of Habeas Corpus is sought is that of Autrefois.

Williams was charged for Possession of Dangerous Drugs.

He was convicted on one charge and acquitted on the other.

The notes of evidence in respect of the trial of both charges were made available to the court.

A careful examination of the notes of evidence does not reveal that the offences for which he will be tried in the United States are the same offences for which he was tried in Jamaica. There is no evidence of double jeopardy.

This ground fails.

Glenford Williams also relies on the grounds argued on behalf of Robroy Williams and which have already been examined herein.

Re Luis Arias

Seven grounds of complaint were filed by the claimant Arias.

Ground seven (7) which dealt with the indictment was abandoned.

Ground 1 complained about the Jurisdiction of the requesting state in respect of the vessel which was conveying the prohibited substance into the United States.

It is contended that the nationality of the vessel involved was unknown and as such the Courts of the United States could not exercise jurisdiction over the boat which was outside of its territorial waters.

The supplemental affidavit of Pamela Cothran Marsh it is submitted contains hearsay evidence, as she was not present on the boat.

However the statement of James Fortier an Executive Petty Officer of the U.S. Coast Guard Station Jonesport provides evidence which justified treating the boat as stateless and therefore legitimized the boarding of the boat by the United States Coast Guard.

Fortier said there was no visible markings or flag on the vessel. No documentation was produced by the persons onboard the vessel to indicate the vessel's nationality and there was no one on board who claimed to be the master or the person in charge to determine the nationality of the vessel.

In Ground 2 Arias challenges the adequacy of the identification evidence. He complains that the identification evidence was unreliable and tenuous because of the quality of the photograph from which Arias was pointed out.

In dealing with the question of identification counsel for Arias seemed to have forgotten that the persons who purported to identify Arias were persons who knew him before.

The witness Delroy Williams knew him since 2001. In May 2002 he visited Columbia where he was met by Arias and for two weeks he stayed at the home of Arias' girlfriend.

Williams says that in May 2002 both himself and Arias left Columbia on a go fast boat which was carrying over 1000 kg of cocaine. This was the trip on which the boat was seized by the United States coast guard.

It is the evidence of Delroy Williams that Arias was one of the persons on the boat.

The identification evidence before the Learned Resident Magistrate required him to leave same for the consideration of the trial Court.

The complaint that the Jamaican authorities were in possession of documents belonging to Arias prior to his being identified does not impair the quality of the identification by Williams who knew Arias before.

The decision in ***Regina v Governor of Pentonville Prison Ex Parte Volts (1986) 1 WLR 470*** is instructive as to the use of photographs in extradition cases.

Lloyd L.J. delivering the judgment of the Court said:-

> "If there is anything unsatisfactory about the identification by photographs in the present case, then that was a matter for the magistrate. It was for him to decide whether the identification by photograph was sufficient to establish a prima facie case and not for this court".

Grounds 3, 4 & 5

In these grounds the complaint relates to the authentication of documents:

The question of authentication has already been addressed with reference to decision in the case of ***Leebert Ramcharan and Donovan Williams v Commissioner of Corrections Et Al (Supra)***.

Ground 6

This ground questions the correctness of the indictment which was submitted with the request for extradition but was not pursued by counsel.

For the reasons stated herein I am of the view that the claimants have failed to satisfy me that their committals by the Learned Resident Magistrate were wrong in law.

I would therefore order that the applications for Writs of Habeas Corpus to issue be refused.

M. MCINTOSH, J.

The Claimants, Norris Nembhard, Vivian Dally, Robroy Williams, Glenford Williams, Herbert Henry and Luis Miguel Avila Arias having been committed by His Honour, Mr. Martin Gayle in the Resident Magistrates Court to await extradition to the United States of America have exercised the right conferred on them by Section 11 of the Extradition Act and seek orders of Habeas Corpus that they may be discharged from custody.

NORRIS NEMBHARD

Mr. Frank Phipps, Q.C., on behalf of Norris Nembhard, argued that the application was based on the grounds of irregular procedure, insufficient evidence and no corresponding offence in Jamaican law.

He submitted that it was most important that the Minister of Justice who issues the authority to proceed is acting in a manner so that the Claimant is fairly treated. The whole jurisdiction of the Resident Magistrate rests on the authority to proceed and there should be no concealment of the relevant facts. The Minister ought to have been informed of his designation before he issued his authority to proceed.

Queen Counsel referred to indictment and complained that to submit an indictment which was neither signed nor dated was to submit a paper which has no significance and it was on the basis of this "paper" that the Minister gave his authority to proceed and the warrant issued. Further he said:

(1) The document exhibited as a warrant of arrest does not show that it was authorized by a judge.

(2) It is not signed by the Clerk of the Court as required by the Laws of the United States.

(3) The indictment was not signed by the United States Magistrate judge, and submitted that the affidavit, the U.S. Rules, the Jamaican Treaty and Warrant on the face of it is irregular.

Although there is evidence that there was a signed Grand Jury Indictment, it is not a necessity as provided under Article VIII. In extradition proceedings, it is not a necessity that there be a signed indictment – it is not a required document which the Requesting States has to provide.

He argued that the warrant of arrest was defective and incompetent for the proceedings for the committal as:

1. The document exhibited as a warrant of arrest does not show that it was authorized by the judge and

2. It is not signed by the Clerk of the Court as required by the laws of the United States.

Rule 9(a) of the Federal Rules of Criminal Procedure provides:

> "(a) ISSUANCE. The Court must issue a warrant ...." And Rule 9(b)(1) provides that "The warrant must conform to rule 4(b)(1) except that it must be signed by the clerk and must describe the offence charged in the indictment or information."

There is no provision in these rules that it must be signed by a Clerk of the Court, in the rule merely states, "The Clerk".

The complaint that the document sworn before the Notary Public and the affidavit submitted as testimony were post dated is without merit. The affidavits sworn before the Notary Public were authorized documents which were attached to the affidavit of Mrs. Pamela Marsh as required under Section 14 of the EXTRADITION ACT.

Further, the complaint of the claimant that the affidavit post dated the indictment does not create any flaw as there is nothing in the Extradition Act that suggests that this was irregular. See ***BYLES V THE DIRECTOR OF PUBLIC PROSECUTIONS AND ANOR [1997] 34 JLR 471 at page 473, letter H***

> "The affidavits were forwarded in support of the request and the fact that they post-dated the indictment does not invalidate the evidence in the affidavits which are in respect of incidents which pre-date the indictment and formed the subject matter of these accusations."

The affidavit of Delroy Anthony Williams indicates that he had an intimate knowledge of what was happening and what was involved and he refers extensively to the claimants dealings with Robroy Williams. This affidavit reveals Nembhard's involvement in the drug trade and the last paragraph of this document clearly reveals that there was a conspiracy to distribute cocaine.

Alexander Young Duffis's affidavit indicates when he met Nembhard and a clear inference can drawn of Nembhard's knowledge in respect of the importation of the cocaine and also that it was intended to transport it to the United States for distribution, there is sufficient evidence in this affidavit on which the Resident Magistrate could conclude that Norris Nembhard was involved in a conspiracy to smuggle cocaine into the United States.

The affidavits of John Pablo Garcia Washington, Paul Winston Christopher Dixon and John Doe also contained information which clearly stated and/or from which it can be inferred that Norris Nembhard was deeply involved in the importation of cocaine from Columbia and therefore was involved in drug dealing. This ground fails.

The second ground argued was insufficiency evidence.

The evidence which the Learned Resident Magistrate had before him emanated from these persons who were eye witnesses to the activities of which they spoke. They were in fact accomplices – eye witnesses possessed of first-hand knowledge of the activities and the illegality of such activities of which they deposed. Their evidence would be admissible and cogent. In ***LEBERT RAMCHARAM & ANOR V THE DIRECTOR OF PUBLIC PROSECUTIONS AND ANOR SCCA 106 & 107/2005*** delivered 16th March 2007, it was stated at p. 29 that:

> "The hearing before the Resident Magistrate is governed by the provisions the Extradition Act. The Resident Magistrate's principal concern is not the credibility of the witnesses, though important, but the ascertainment of whether a prima facie cases has been made out against the person sought."

The Learned Resident Magistrate had before him sufficient evidence on which to find that a prima facie case had been made out against the claimant and ground 2 of the grounds relied on by Nembhard must fail.

The aspect as to Kingpin designation was referred to in the submissions and it was contended that this designation was capable of affecting the outcome of the case in Jamaica and the case in the United States of America. The claimant would not be given a fair trail.

This is matter for the trial court and in ***HEATH & MATTHEWS V THE GOVERNMENT OF THE UNITED STATES Privy Council Appeal*** 58 of 2004, it was

held that this designation was not evidence upon which, without more, it could be claimed that the claimant would be deprived of a fair trial.

The authorization of documents was not pursued by the claimant in the light of the decision in ***RAMCHARAN & WILLIAMS V DPP. SCCA 106/107/2005***

VIVIAN DALLY

Mr. Patrick Atkinson argued for the claimant that there was one charge in the indictment that was forwarded on which the authority to proceed was granted and that charge was for "conspiracy to distribute." The Warrant of Committal issued on 30th June 2005 was for "conspiracy to distribute five (5) kilos or more of a mixture or substance containing cocaine and knowing and intending that such substance would be unlawfully imported to the U.S.A."

It is contended that the claimant was not committed for any charge of mixture of substance containing marijuana and the indictment does not conform with the charge for which the claimant was committed.

There is nothing in the Treaty or the Act that requires that the indictment must be submitted (See ARTICLE VIII of the EXTRADITION TREATY)

If the claimant has been committed for a particular offence he should be tried for that offence and not for something else. It would be a matter for the Court of trial.

The second argument advanced on behalf of the claimant, Vivian Dally, dealt with the sufficiency of evidence against him and it is contended that the Resident Magistrate did not have sufficient evidence on which to commit the claimant, Dally.

The affidavits of Delroy Anthony Williams, Alexander Young-Duffis and Paul Dixon provide a strong basis for the conclusion that there was sufficient evidence of participation by the Claimant in the conspiracy to commit the offence for which he is charged in the indictment.

Delroy Anthony Williams in his affidavit states:

> "An individual who I knew as JUNGO, and who I now know to be Vivian Dally, is Spy's (Robroy Williams) accountant"

and in his supplemental affidavit, Williams described Dally (Jungo) as being the person who served as "trustee" and carried the wired money and he also speaks of overt acts on the part of Dally – wiring money to him (Williams) on more than one occasion to facilitate the activities, carrying large sums of money generated from drug sales in the U.S. from Jamaica to Panama.

This evidence reveals Jungo (Vivian Dally) was an integral part of the drug smuggling operation.

Young Duffis' affidavit reveals that the deponent knows most of the conspirators, including Vivian Dally who carried large sums of money from successful drug sales and was not only involved in the massive conspiracy of drug distribution in the U.S. but was an integral part of the conspiracy, the person ordered by "Spy" Williams to "get rid of everything" on the occasion where it was apprehended that records and documents which could be used as evidence of "Spy" Williams' involvement in drug trafficking would fall into the hands of the authorities.

Young Duffis' affidavit also reveals that in July 2000, cocaine was shipped from Jamaica and the claimant Dally was present at a meeting which was held between a

Columbian and Williams to ship this cocaine to the U.S., Williams even told Dally he should invest in the shipment of cocaine to the U.S.

In this affidavit, Young-Duffis goes on to relate an occasion on which Dally was instructed to go to Miami, Florida, to collect a large sum of money from the proceeds of drug sales and it can be inferred that Dally must have known the extent of the conspiracy and the proceeds coming from the U.S. In any event, the acts of the claimant are evidence of overt acts of the conspiracy being carried out in the U.S.

Paul Dixon's affidavit merely indicates that the affiant knew Dally as an associate of Robroy Williams and Herbert Henry who are involved in the drug trade.

The complaint in regard to the authentication of documents has already been dealt with in the application of Norris Nembhard and applies equally to this claimant.

The evidence before the Learned Resident Magistrate was sufficient for him to find that a prima facie case had been made out against this Claimant, Vivian Dally and his ruling to that effect was correct.

ROBROY WILLIAMS (SPY)

The claimant is relying on seven grounds:

1. The Resident Magistrate had no jurisdiction to commence extradition hearings where there was no proof that the indictment charging Robroy Williams was signed by the foreperson of the Grand Jury as a properly certified as required by law.
2. All the affidavit evidence with respect to Robroy Williams is hearsay evidence and is inadmissible.

3. Even if the Affidavit evidence with respect of Robroy Williams was admissible, it would require corroboration as the witnesses were "cooperating witnesses" and accomplices. No such supporting evidence was preferred before the Resident Magistrate.

4. The Learned Resident Magistrate erred in law in not holding specifically, that there was no evidence of any conspiracy with respect to Robroy Williams.

5. The Learned Resident Magistrate erred in law in ordering the extradition of the claimant on Count 2 of the indictment, as the claimant was not a part of any conspiracy with any person on board any vessel, which was subject to the jurisdiction of Jamaica.

6 The Learned Resident Magistrate erred in law in not holding that the documents presented at the extradition hearing were not properly authenticated.

7. The learned Resident Magistrate erred in law in admitting into evidence additional information and documents after the commencement of the hearing which were obtained contrary to the laws governing extradition.

Mr. K.D. Knight, Q.C. on behalf of this claimant sought and argued Grounds, 1, 6, and 7, together, but he conceded ground 7 could not now stand and did not proceed on that ground.

Grounds 2, 3 and 4 were argued together.

The Learned Resident Magistrate it was contended did not weigh the evidence before him, if he had he would have found that the affidavits were riddled with hearsay,

opinion evidence. The Court was invited by Queen's Counsel to go through the weighing up process and if the evidence fell short then the Court should issue Habeas Corpus. In this process, the case of ***EDWARDS V DPP [1994] 31 JLR p 526 at p 538 letter C*** should he considered.

In his submission reference was made to the affidavit of ***DELROY ANTHONY WILLIAMS.*** There is no evidence in this affidavit that there was a conspiracy to get the cocaine to the U.S. and the statement that the affiant had the "understanding that the plane was going to the Bahamas and from there, the cocaine would be transported to the United States" was hearsay evidence and there is nothing is remaining paragraphs of the affidavit to show a conspiracy to import drugs to the United States. The affidavit of John Pablo Garcia does not contain evidence to support the charge nor does the affidavit of Alexander Young Duffis and they do not add anything to the case.

The evidence falls into the category of hearsay opinion or evidence of a co-conspirator who is not an agent of the others and in the circumstances such evidence would be inadmissible and would not constitute evidence of a conspiracy to import drugs to the U.A.

The issue of authentication was dealt with in case of LEEBERT RAMCHARAN V D.P.P. and the decision in that case makes it unnecessary for the submission to be dealt with at any length here. Suffice it to say that the Court of Appeal ruled that the arguments as to authentication were without merit.

On an examination of the affidavits of Delroy Anthony Williams, John Pablo Garcia Washington and Young-Duffis, there is direct evidence which reveals a

conspiracy on the part of Robroy Williams to distribute cocaine knowing that it would be unlawfully imported into the U.S.

The fact that no request was made for some documents which were placed before the Resident Magistrate would not render them inadmissible. The real test is whether or not the documents were in fact proper or duly authenticated documents and these documents were submitted under the seal and duly authenticated. On a careful construction of the Treaty between the U.S. and Jamaica, Article 1X of the Treaty speaks to additional information "sought or obtained."

In addition, to the above arguments, it was submitted that Jamaica had no jurisdiction over a go fast boat which was seized in international waters and was stateless and it was also submitted that the offence was committed outside the territory of the requested state.

In determining whether Jamaica would have jurisdiction, the charges stated in the indictment would have to be looked at carefully. The issue before the Resident Magistrate is whether or not Robroy Williams and Luis Arias had conspired together with persons known and unknown including persons who were aboard a vessel subject to the jurisdiction of Jamaica to possess with intent to distribute, 5 kilograms or more of cocaine.

It is clear from the evidence in Delroy Anthony Williams' affidavit that the conspiracy started in Jamaica in May 2002. It continued when he went to Columbia and met with Alvira who supplied cocaine, provided charts etc. and assisted in the transportation of cocaine from Columbia. Clearly it is a continuing offence and ended on 25th May when the vessel was intercepted by American authorities.

The U.S. claims jurisdiction on the basis that when the ship stopped, no one identified himself as master or captain and it was therefore a stateless ship and the U.S. had jurisdiction.

Did they conspire with person on board a vessel? Section 22(1)(b) of the Dangerous Drugs Act takes that into consideration. From this section it is clear that Jamaica would have jurisdiction over this offence and in extradition cases there is double criminality issue.

Section 22(1)(b) clearly gives Jamaica jurisdiction. This section confers extra territorial jurisdiction on the Jamaican Courts and the offence committed was such that Jamaica could have asserted its jurisdiction to try both Robroy Williams and Miguel Arias.

The section contemplates that acts done in furtherance of a conspiracy may cross territorial boundaries and is mindful of the fact that crimes, especially conspiracies, span multiple jurisdictions and are committed on an international scale.

Section 21(1) of the Maritime Drugs Trafficking Suppression Act has no application or relevance to these proceedings. The purpose of this Act is only to address jurisdiction over Jamaica territorial space by ships, aircraft or a foreign power.

GLENFORD WILLIAMS

Mr. K. D. Knight, Q.C. argued that the principle of Autrefois acquit applied in this claimant's case as he had already been tried in Jamaica for the same offences for which the requesting state was seeking extradition in order to try him.

The notes of evidence of the trial which took place in Jamaica were obtained by this Court and perusal of these notes clearly revealed that the offences for which the claimant had been tried in Jamaica were different from those for which the U.S. was seeking to have him extradited.

HERBERT HENRY

Mr. Patrick Bailey presented the arguments to the Court in respect of the claimant, Herbert Henry and submitted that there was no evidence that Herbert Henry was a part of the conspiracy as alleged.

Count 1 of the Indictment forms the substratum of the case put forward by the requesting state for the extradition of Herbert Henry and that count is suggesting that all or at least 2 of the named conspirators agreed with the other or others not named.

Counsel argued that an overt act must be done in connection with the offences alleged or some lesser act in the parameters of the offence alleged and cited ***THE EXTRADITION ACT 1991 SECTION 7(1)*** through to***(3)(A)(I)(II)(III)***. If it is established that Herbert Henry was guilty of being involved in any narcotic offence such offence must relate to the offence for which his request for extradition was made.
The affidavits of *Alexander Young Duffis* and Paul Dixon even if believed, they stand alone.

Young Duffis' affidavit referred to one transaction which involved Williams and Henry and this was on the nature of sale and purchase of illegal drugs and not in the nature of a conspiracy to export drugs to the U.S. This transaction bore no relation to the

other transactions referred to by Young Duffis, although the affidavit is replete with other transactions there is no mention of transporting to the U.S.

Submitted further that Paul Dixon's affidavit is no more helpful. Dixon is the deliveryman and provides security but his affidavit does not mention the U.S.A. in connection with Herbert Henry.

There is no evidence, it is contended, that Henry was involved in any conspiracy whatsoever.

The main ground is in relation to be sufficiency of evidence against Herbert Henry. The affidavit of Paul Dixon states:

> "I know Herbert Henry, who is also called "Scary" who I knew to be a Police Officer. "Scary" introduced me to a Columbian in 2001. After being introduced to 'Spy' and the Columbian I realized that they were dealing in drugs. "Scary" told me that we were suffering too long and it is about time that we make some money. "Scary" suggested to me that we should provide security and transport for the drug traffickers in order to make some additional money."

This paragraph in Dixon's affidavit shows that he was familiar with a Columbian and "Spy" and was aware of the activities in which Robroy Williams (Spy) was involved and he urged and encouraged Dixon to participate in these actions.

The supplemental affidavit of Dixon discloses that he picked up about 30 or 40 packages of cocaine for Robroy Williams and delivered the packages of cocaine to Henry.

> "After I had delivered the packages with cocaine to Henry, he told me that he plans to ship the cocaine overseas immediately and this cocaine was not enough and that he needed to ship more cocaine overseas."

This supplemental affidavit goes on to reveal that Henry gave J$40,000 to Young Duffis who complained that it was not enough.

"This money was for payment for the delivery of the cocaine that I gave to Henry."

Henry was also seen with a draw string bag filled with U.S. currency and Henry told Dixon the money had come from "up so" which he, Dixon, understood to mean overseas.

On another occasion, Henry boasted that he had someone who works on American Airline who "move things twice a week for him." Dixon understood the "thing" to be cocaine and "move" meaning to ship the cocaine overseas. All these interpretation and inferences would be for the Court of trial.

In Young Duffis's supplementary affidavit the affiant stated that in May 2002, he had gone with Dixon to Winston's Garage to perform a cocaine transaction for Williams and a second individual.

> "When the cocaine was delivered to Constable Henry, Henry told me that the cocaine would be shipped to the United States. Herbert Henry stated that an associate of his would place the cocaine on board an aircraft destined for the United States."

Herbert Henry was not an innocent party to the activities, he was perfectly aware of the drug smuggling operation and participated in it and there was sufficient evidence on which the Learned Resident Magistrate could find that a prima facie case had been made out against Henry.

LUIS MIGUEL AVILA ARIAS

Seven grounds were filed by the Claimant Arias.

Ground 7 was abandoned. This dealt with the indictment.

Ground 1 complains that the Learned Resident Magistrate in ordering that Luis Miguel Avila Arias be extradited relied on evidence that contained hearsay and other unreliable evidence.

The main focus of complaint relates to the identification of the Claimant Arias in that the learned Resident Magistrate erred when he relied on the evidence of identification of the claimant which was unreliable and improper.

The interview to identify the claimant was conducted by the United States authorities after the claimant Arias was detained in Jamaica when the Jamaica or and United States authorities already had information on his date of birth, Columbian nationality number and other particulars.

In addition there was complaint that the photograph purportedly used by Delroy Anthony Williams to identity the person referred to as "Miguel" was unreliable. It was submitted that no one could be distinguished in the photograph as it does not show hair, eyes or height of the person or any other distinguishing features. The photograph which Delroy Anthony Williams purported to use to identity the claimant was that of a man wearing shades (dark glasses) and cap.

RORY GORDON SCCA 63/97 delivered 18th January 1998 with the issue of identification by photograph.

This is a matter which ought to be dealt with at trial. Identification would not have been an issue before the Magistrate there was sufficient evidence on which he could find that this was the correct person before him.

It was argued that there was no connection between Avila and the other conspirators. This is contradicted by evidence that Avila is closely connected to Robroy

Williams, a co-conspirator. The evidence in the affidavit of Delroy Anthony Williams provides this. He met Miguel (Avila) in October/November 2001 at Spy's Coral Gardens office in Jamaica and was in Jamaica to organize a cocaine smuggling venture from Columbia, Alviva is also connected to an incident in 2002 involving "Spy." Alviva was one of the suppliers of cocaine to "Spy". There is no need to show that the parties in the conspiracy knew each other.

Different conspirators may enter the venture at different stages and this fact does not place those who came in at a later stage in any different position from the initiators of the conspiracy.

The Learned Resident Magistrate had sufficient evidence before him to find that a prima facie case had been made out against this claimant.

The Claimants have all failed to show that the Learned Resident Magistrate was wrong in law when he committed them.

The application for Habeas Corpus as it relates to all applications is therefore refused.

Hibbert, J.

The Claimants Norris Nembhard, Vivian Dally, Herbert Henry, Robroy Williams, Glenford Williams and Louis Miguel Avila Arias were indicted to stand trial before the United States District Court, Middle District of Florida, Tamper Division.

The first count on the indictment charges all (6) six claimants together with two (2) other persons with the offence of Conspiracy to distribute five (5) kilograms or more of a mixture or substance containing a detectable amount of cocaine, Schedule II controlled substance, and to distribute one thousand (1,000) kilograms or more of a mixture or substance containing a detectable amount of marijuana, a Schedule I controlled substance knowing and intending that such substance would be unlawfully imported into the United States or into waters within a distance of twelve (12) miles of the coast of the United States.

Count two of the indictment charges Robroy Williams and Louis Miguel Avila Arias with conspiring with each other and other persons, including persons who were abroad a vessel subject to the jurisdictions of the United States, to possess with intent to distribute five (5) kilograms or more of a mixture or substance containing a detectable amount of cocaine, s Schedule II controlled substance.

Consequent on the requests for extradition made by the Government of the United States of America, the claimants were brought before His Honour Mr. Martin Gayle, Senior Resident Magistrate for the Corporate Area, who conducted a hearing. At the end of the hearing he committed the claimants to custody to await their surrender to the United States of America.

The Claimants now seek writs of habeas corpus and each has filed several grounds in support of his application

Norris Nembhard

On behalf of Nembhard the following grounds were filed:

1. Irregular procedure. The order of committal for extradition resulted from material irregularity in the proceedings and was therefore void and of no effect.
    (a) There was no valid Grand Jury indictment and warrant for arrest of the applicant Norris Nembhard issued in the USA.
    (b) The documents shown before a Notary Public are inadmissible to prove the facts in the document.
    (c) The affidavits submitted as testimony are all dated after the applicant was arrested in Jamaica and cannot establish the testimony that was presented to the Grand Jury or any court in the USA for extradition.
2. Insufficient evidence. The facts presented as evidence against the applicant was insufficient to establish a prima facie case of conspiracy.
    (a) The uncorroborated evidence of accomplices was tenuous and vague and without more was insufficient to establish a prima facie case against the applicant.
    (b) The evidence against the applicant was contradicted and so eroded by the evidence of the Commissioner of Police that it was incapable of belief.

3. No corresponding offence in Jamaican law

(a) The Authority to Proceed, Warrants of Arrest, and the indictments show no offence known to Jamaican law to be enquired into at committal proceedings.

(b) The US Arrest Warrant does not comply with the US Rules of Criminal Procedure submitted by Pamela Marsh through her affidavit.

4. Denial of fair hearing in Jamaica and in the USA

(a) The applicant was deprived of a fair hearing at proceedings in Jamaica and in the USA when there was nondisclosure of the evidence that is the foundation for the charge in the indictment. The nondisclosure of the evidence deprived him of the opportunity to prepare his defence for a subsequent trial in the USA.

(b) The applicant was deprived of a fair hearing at committal proceedings in Jamaica and any subsequent trial in the USA by reason of Pre-trial prejudicial publicity indicating that he was designated a Foreign Narcotics Trafficker.

5. Jurisdiction

(a) The courts of the United States have no jurisdiction for offences committed in Jamaica.

(b) The applicant is denied of his constitutional right of Freedom of Movement in Jamaica and protection from expulsion from Jamaica where the Extradition Act under which the committal proceedings were held is in breach of section 16 of the Jamaica Constitution.

6. No proper authentication of documents

The documents submitted for extradition were not authenticated and certified as required by law.

Relative to **Ground I** Mr. Phipps, Q.C. elected not to proceed with paragraphs (b) and (c). The first irregularity complained of at paragraph (a) concerns the issue by the Minister of Justice of his authority to proceed. Mr. Phipps, Q.C. submitted that the

authority to proceed, from which the magistrate derives his authority to conduct the extradition hearing, was unfairly obtained.

Section 8 (1) of the Extradition Act states:

> Subject to the provisions of the Act relating to provisional warrants, a person shall not be dealt with under the Act except in pursuance of an order of the Minister (in this Act referred to as "Authority to Proceed") issued in pursuance of a request made to the Minister by or on behalf of an approved State in which the person to be extradited is accused or was convicted.

Nembhard was arrested on a provisional warrant of arrest and brought before the court on April 23, 2004. On June 1, 2004 the President of the United States of America designated him a "foreign narcotics trafficker" pursuant to the Foreign Narcotics Kingpin Designation Act. On June 22, 2004 the Minister issued his authority to proceed. This designation was brought to the Minister's notice on July 16, 2004.

Thus, Mr. Phipps, Q.C. argues, had this been known to the Minister, he might have withheld his authority to proceed. This in my view in speculative. The real question is: Did this render the authority to proceed invalid?

Section 8 (3) of the Extradition Act states:

> On receipt of such a request the Minister may issue an authority to proceed, unless it appears to him that an order for the extradition of the person concerned could not lawfully be made, or would not in fact be made, in accordance with the provisions of this Act.

I can find no provision in the Act which could invalidate the authority to proceed, hence all that was done by a magistrate in reliance on it would be valid.

The next irregularity complained of was that the copy of the indictment which was submitted with the first set of documents was not signed and that a signed copy was only sent after the committal proceedings had commenced.

Section 8 (2) of the Extradition Act and Article VIII of the Extradition Treaty list the documents which must accompany a request for extradition. Neither of these provisions require that a copy of the indictment be furnished. The production of a signed copy of the indictment after the commencement of extradition proceedings could not therefore, adversely affect the proceedings.

The validity of the warrant for arrest issued in the United States of America is also challenged. It is contended that the warrant was not signed by the appropriate Judicial Officer and issued by the Clerk of Courts.

Article VIII 3 of the Treaty states:-

3. A request for extradition relating to a person who is sought for prosecution shall also be supported by

(a) a copy of the warrant of arrest issued by a judge or other judicial authority in the Requesting State: and

(b) .....

Pamela Cothran Marsh, Assistant United States Attorney, in her affidavit setting out the applicable legal provisions, states that the office of the Clerk of the Courts is the competent authority under the laws of the United States to execute warrants pursuant to Rule 9 of the Federal Rules of Criminal Procedure, a copy of which was exhibited to her

affidavit. She further states that Deputy Clerks are fully empowered to execute attestation to arrest warrants. On the copy of the arrest warrant, at the section marked, "Name and Title of Judicial Officer" the name Sheryl L Loesch is inserted and the title of listed as Clerk, U.S. District Court. At the section marked "Signature of Issuing Officer" the signature of the Deputy Clerk appears. I therefore agree with the Attorneys for the Defendants that the warrant complies with the relevant rules and is therefore valid.

Based on the foregoing **Ground 1** must fail.

Relative to **Ground 5** it was argued that since any acts allegedly done by Nembhard were done in Jamaica, the courts in the United States would have no jurisdiction to try any offences arising from them.

Whereas this might be a correct statement of a general principle of law it must be remembered that Nembhard is charged with conspiracy which falls outside the general principles. This was demonstrated in the decision of the Privy Council in **Liangsiriprasert v. United States Government and another {1990] 2 All ER 866**. In that case it was held that a conspiracy, hatched outside of the United States of America and of which the appellant was a part, to import illegal drugs into the United States from Thailand through Hong Kong was justiciable in the United States owing to the fact that the conspiracy was to have effect ultimately in the United States.

Lord Griffiths, in delivering the decision of the Board stated at page 878:-

> "Unfortunately in this century crime has ceased to be largely local in origin and effect. Crime is now established on an international scale and the common law must face this new reality. The Lordships can find nothing in precedent, comity or good sense that should inhibit

the common law from regarding as justiciable in England inchoate crimes committed abroad which are intended to result in the commission of criminal offences in England".

This decision was followed and the above passage cited with approval by the Jamaican Court of Appeal in **Shervin Emmanuel v. Commissioner of Correctional Services and another SCCA 100/04 (Unreported).**

The allegation in the instant case was that drugs were to have been imported from Columbia into Jamaica and then transshipped to the United States. This would therefore give jurisdiction to the United States Courts. Accordingly this ground also fails.

The only other ground pursued by the applicant was **Ground 2.** As this is a ground common to each applicant, I propose to deal with this later in a review of the evidence tendered by the United States with a view to establishing a prima facie case against each applicant.

Robroy Williams

On behalf of Robroy Williams the following grounds were filed:

(i) The Resident Magistrate for the Corporate Area His Honour Mr. Martin Gayle had no jurisdiction to commence extradition hearings in this instance where there was no adequate proof that the indictment charging Robroy Williams was signed by the fore-Person of the grand jury and properly certified as required by law.

(ii) All the affidavit evidence with respect to Robroy Williams is hear-say evidence and is inadmissible.

(iii) Even if the affidavit evidence with respect to Robroy Williams was admissible it would require corroboration as the witnesses were 'cooperating witnesses' and accomplices. No such supporting evidence was preferred before the Resident Magistrate.

(iv) The Learned Resident Magistrate erred in law in not holding specifically, that there was no evidence of any conspiracy with respect to Robroy Williams against the laws of the United States of America.

(v) The Learned Resident Magistrate erred in law in ordering the extradition of the applicant on Count 2 of the Indictment, as the applicant was not a part of any conspiracy with any persons on board any vessel, which was subject to the jurisdiction of Jamaica.

(vi) The Learned Resident Magistrate erred in law in not holding that the documents presented at the extradition hearing were not properly authenticated.

(vii) The Learned Resident Magistrate erred in law in admitting into evidence additional information and documents after the commencement of the hearing which were obtained contrary to the laws governing extradition.

Additionally re **ground (vii)** Mr. Knight Q.C. submitted that supplemental bundles furnished by the United States after the request for extradition were inadmissible in evidence as they were not requested by the Ministry of Foreign Affairs. Hence, he submits the Learned Resident Magistrate erred in admitting then into evidence.

Grounds (ii), (iii) and (iv) were grouped together and argued under the heading "Sufficiency of evidence". These, as I previously indicated will be dealt with later when I review the evidence tendered on behalf of the United States to see whether or not prima facie cases were made out. **Ground (vi)** was not pursued.

Ground (v) refers to Count 2 of the indictment. It is submitted that the interception of the boat conveying cocaine was outside the territorial waters of both the United States and Jamaica and although the United States' courts would have jurisdiction based on their statutory provisions, Jamaican courts would have no such jurisdiction. It is

submitted, therefore, that extradition on this count would be in breach of Article I of the Treaty. It states:

> 1. The Contracting Parties agree to extradite to each other, subject to the provisions of this treaty:
>
> (a) .....
>
> (b).....
>
> 2. With respect to an offence committed outside the territory of the Requesting State, the Requested State shall grant extradition, subject to the Provisions of this treaty, if there is jurisdiction under the laws of both states for the punishment of such an offence in corresponding circumstances.

Mrs. Jackson-Haisley for the 2nd Defendant submits that section 22 of the Dangerous Drugs Act would confer Jurisdiction on the Jamaican courts in corresponding circumstances.

It states:

> 22. – (1) Every person who –
>
> (a) .....or
>
> (b) in the Island aids, abets, counsels, or procures, the commission in any place outside the Island of any offence punishable under the provisions of any corresponding law in force in that place, or does any act preparatory to, or in furtherance of, any act which if committed in the Island would constitute an offence against this Act; or
>
> (c) .....
>
> shall be guilty of an offence against this Act.

The allegations which gives rise to the charge in Count 2 of the indictment are that a boat conveying cocaine which was purchased in Columbia on the instructions of Robroy Williams was apprehended in international waters.

I agree that these circumstances would fall within the scope of section 22 of the Dangerous Drugs Act. Consequently this ground must fail.

Ground (vii) in my view must also fail. Article IX of the Treaty makes provision in paragraph 1for the Requested State to seek additional information before the request is submitted to a court of the Requested State.

Paragraph 3, however, states:

> Nothing in paragraphs 1 or 2 shall prevent the executive authority of the Requested State from presenting to a court of that State, information sought or obtained after submission of the request to the court or after expiration of the time stipulated pursuant to paragraph 2.

Ground (i) also fails. Mr. Knight, Q.C. relies on the submissions by Mr. Phipps Q.C. relative to a similar ground filed on behalf of Nembhard and which I had already dealt with.

Glenford Williams

On behalf of Glenford Williams the following grounds were filed:-

(i) That the Learned Resident Magistrate erred in granting the Warrant of Committal as the acts for which my Extradition is being sought are acts covered by and dealth with in the charges 1 faced in the trial in Saint James in which Orders of conviction and acquittal were made.

(ii) That the acts relied on by the Unites States of America in proof of the conspiracy alleged against me are the very acts for which I was charged and convicted and acquitted by the Court of Competent/Jurisdiction in Jamaica

(iii) That the evidence contained in the Affidavit of the Witnesses do not establish my participation in any offence for which my Extradition is sought.

(iv) That the Indictment of the Grand Jury was not signed up to the time my extradition was sought and was never properly filed.

(v) That I have been advised and verily believe that I have good grounds to making this application and my Defence is in accordance with the provisions of the Extradition Act of Jamaica and I pray that this Honourable Court will grant me leave to file a Supplemental Affidavits.

The Claimant Glenford Williams was convicted of the offences of Possession of Cocaine and Dealing in Cocaine and was acquitted of Taking steps preparatory to exporting cocaine in the Resident Magistrate Court for the parish of St. James. This resulted from the finding of cocaine at his premises at Latium St. James on the 17th April, 2003.

Mr. Knight, Q.C. in **Grounds (i) and (ii)** contends that this possession of cocaine for which he was tried in Jamaica forms the substratum of the charge against him in the United States. His extradition would therefore be in breach of Section 7- (2) of the Extradition Act which states:

> (2) A person accused of an offence or alleged to be unlawfully at large after being convicted of an offence shall not be extradited to any approved State, or be committed to or kept in custody for the purposes of his extradition, if it appears to the Minister, to the court of committal, to the Supreme Court on an application for habeas corpus or to the Court of Appeal on an appeal against a refusal to grant a writ of habeas corpus that if charges with that offence in Jamaica he would be entitled to be discharged under any rule of law relating to previous acquittal or conviction.

In essence what is tantamount to a plea of autrefois acquit and autrefois convict is being raised.

It is to be noted that Count 1 of the indictment changes a continuous offence of conspiracy spanning a period between 1998 and March 30, 2004 and the evidence supplied suggests a participation by Glenford Williams in the illicit drug activities from as early as 2002. Furthermore the offence charged in Count 1 of the indictment is a completely different offence from those for which Glenford Williams was tried and depends on a different set of facts.

Accordingly, in my view the extradition of Glenford Williams would not be contrary to the provisions of section 7 (2) of the Extradition Act.

The two remaining grounds concern the signing of the indictment, which I have already dealt with and the sufficiency of the evidence which I will deal with later.

Dally

In support of his application the following grounds were filed:

(a) The Learned Resident Magistrate in deciding the Application for an Order for Extradition erred by relying on Affidavits or sworn statements rather than on testimony as required by the Extradition Act and that this amounts to a violation of the constitutional rights of the claimant as guaranteed by Section 16 of the Constitution of Jamaica.

(b) That the Learned Resident Magistrate in committing the Claimant, erred in relying on the Affidavits or sworn statements which are not sufficient evidence under the Extradition Act.

(c) The Learned Resident Magistrate relied on Statements which were made after the Indictment against the claimant was returned, and which has no

established nexus to the allegations in the said Indictment. There was no evidence before the Learned Resident Magistrate as to the evidence on which the said Indictment was based.

(d) That the Learned Resident Magistrate failed to weigh the contents of the statements supplied by the requesting state and did not assess whether there was any evidential value to be placed on the contents of any of the said statements.

(e) The Learned Resident Magistrate failed to require from the requesting state all relevant information concerning the circumstances including any Plea Bargain under which alleged criminal participants were moved to give their Affidavits, nor was there any evidence that said participants were sentenced before they gave their Affidavits. In the circumstances the Learned Resident Magistrate was not in a position to weigh whether these statements had any evidential value at all.

(f) The documents provided to the Court were not properly authenticated and as such the Learned Resident Magistrate erred in relying, on any of them.

(g) There was no sufficient evidence before the Learned Resident Magistrate of any participation by the claimant into any conspiracy to commit any crimes in the United States.

(h) There is no evidence that the claimant/appellant committed any crimes in the Jurisdiction of the United States.

At the outset Mr. Atkinson, the Attorney representing Dally indicated that in light of the decision of the Court of Appeal in **Ramcharan v. Commissioner of Correctional**

Services and Director of Public Prosecutions and **Williams v. Commissioner of Correctional Services and Director of Public Prosecutions SCCA 106 and 107/2005** (unreported) **grounds (a), (b) and (c)** would not be proceeded with.

Grounds (d), (g) and (h) were grouped together and argued under the heading "sufficiency of evidence" and will be dealt with later.

Although **Ground (e)** was not elaborated on it was not abandoned and so needs to be addressed. In **R v. Governor of Pentonville Prison ex p Lee [1993] 3 All ER 504** Ognall, J. at page 508 stated:

> "It is important to remember that the conduct of extradition proceedings is entirely a creature of statute. This has a number of consequences.
> (1) The requesting state must be the sole arbiter of such material as it chooses to place before the court in support of its application and in purported compliance with the relevant domestic extradition legislation. ..... Neither principles of comity nor the express terms of the Act afford a court in this country any right, still less power, to request further material from the requesting state as a condition precedent to committal".

The judgment was cited with approval on **Reg. v. Governor of Belmarsh Prison ex p Francis [1995] 1 WLR 1121** where the differences between extradition proceedings and committal proceedings were highlighted.

Similarly there is nothing in our Act which gives the Court the right or the power to request additional information, hence this ground fails.

In relation to **Ground (f)** it is submitted that the evidence supplied by the United States was not duly authenticated as is required by section 14 of the Extradition Act and so could not properly have been relied on by the magistrate. This argument has been raised unsuccessfully in several cases dealt with by our Courts such as **Edwards v. Director of Public Prosecutions and Director of Correctional Services [1994] 30 JLR**

526, Coke et al v. Superintendent of Prisons et al [1991] 28 JLR 365 and Ramcharan and another v. Commissioner of Correctional Services and another SCCA 106 and 107/2005 (unreported).

In my view nothing new has been urged. This ground therefore, also fails.

Avila Arias

The following were the grounds filed in support of the application made by Avila Arias:

(1) The Learned Resident Magistrate in ordering that Luis Miguel Avila Arias be extradited relied on evidence that contained hearsay and other unreliable evidence.

(2) The Learned Resident Magistrate erred when he relied on the evidence of identification of the claimant which was unreliable and improper in that:-

i. The interview to purportedly identify the claimant was conducted by the United States Authorities after the detention of the claimant in Jamaica when the Jamaica and United States Authorities already has information on his date of birth, Columbian national identity number and other particulars.

ii. The photograph purported used by the Delroy Anthony Williams a/k/a Sky Blue to identify the person he referred to as "Miguel" was unreliable as it could not distinguish anyone as the photograph does not show the hair, eyes, or height of the person or any distinguishing feature(s).

iii. The said Delroy Williams purported identification of the claimant could not be considered independent.

iv. The said Delroy Williams said that he saw or met with the person he called "Miguel" on three occasions over a period of 18 months.

v. The said Delroy Williams gave no physical description of the person he called "Miguel" in his Affidavit.

vi. The Said Delroy Williams purported to identify the Claimant from a photograph of a man in shades and cap.

3. The Learned Resident Magistrate erred when he relied on the indictment contained in the Original Affidavit of Pamela Cothran Marsh as it was not signed by the Foreperson of the Grand Jury the subsequent "copy" and explanation did not validate the indictment.

4. The Learned Resident Magistrate erred when he relied on the warrant for the Claimant arrest by the United States District Court Middle District of Florida Tampa Division, which was invalid.

5. The Learned Resident Magistrate erred when he relied Affidavit of Pamela Cothran Marsh and attachment thereto as they were not properly authenticated.

6. The Learned Magistrate erred when he held that there was a prima facie case for possession of a detectable amount of ganja made out against the Claimant when there was no material before the Court to establish this.

7. The Learned Resident Magistrate erred when he held that there was a prima facie case for the allegations made out in court one of the indictment against the

claimant as there was no evidence linking the claimant to the other persons named in the indictment save and except Robroy Williams.

Miss Cummings, the Attorney representing Avila Arias adopted the submissions made by Mr. Phipps Q.C. in relation to **Ground 4** and these of Mr. Atkinson in relation to **Ground 5**. My response to these submissions would therefore apply. This also goes for **Ground 3** which is substantially the same as are argued by Mr. Phipps Q.C. on behalf of Nembhard.

Ground 6 was abandoned as in the Warrant of Committal the reference the marijuana was omitted as it appears that in the view of the magistrate there was no sufficient evidence to make out a prima facie case in relation to marijuana.

The remaining **Grounds 1, 2 and 7** may be grouped together and dealt with under the heading - Sufficiency of evidence.

Henry

On behalf of the claimant Henry, his Attorney Mr. Bailey urged only one ground. In this he submits that the evidence presented before the Learned Resident Magistrate was not sufficient to make out a prima facie case against Henry in relation to count I of the indictment on which he is charged.

Sufficiency of evidence

Having dealt with all the other grounds it is now convenient to deal with the various grounds filed by each claimant, claiming that the Learned Resident Magistrate erred in holding that prima facie cases were made out against each Claimant.

In seeking to make out prima facie cases against the claimants relative to Count I of the indictment reliance was placed primarily on the testimony of Delroy Williams, the nephew of Robroy and Glenford Williams, John Pablo Garcia Washington, Alexander Young Duffis and Paul Dixon.

Delroy Williams speaks of bring hired by Robroy Williams to participate in smuggling cocaine from Columbia to Jamaica by go fast boat.

In early 2002 he participated in about four or five trips in go fast vessels belonging to Robroy Williams from Montego Bay to Negril to receive cocaine from Columbian vessels, and to transport it to Montego Bay. The cocaine would then be conveyed to a stash house in Lilliput.

In either February of March of 2002 he was sent by Robroy Williams to Columbia to transport cocaine to Jamaica. There he met and dealt with John Pablo Garcia Washington at whose house he stayed. About a week later he with Garcia Washington transported cocaine from Columbia to Negril in Jamaica where they were met by another of Robroy Williams' boat and some of his workers.

About three to four days later at Robroy Williams' request he loaded some of the cocaine which he had brought from Columbia onto an aircraft at the Montego Bay airport. The aircraft which was piloted by a Bahamian then took off. His understanding was that the cocaine was to be taken to the Bahamas then transported to the United States. He knew that Robroy Williams had associates in Bahamas who cordinated the shipment of drugs from the Bahamas to the Unites States.

During his association with Robroy Williams in either October of November, 2001 he met Louis Miguel Avila Arias at Robroy Williams' office in Coral Gardens. He

got to know Avila Arias as one of Rodney Williams main suppliers of cocaine in Columbia and who organized a shipment of cocaine by go fast boat to Negril.

In May, 2002 at Robroy Williams' request he went to Columbia and met with Avila Arias who arranged a shipment of cocaine and provided nautical instruments and maps for the journey to Jamaica. The crew including Delroy Williams were however apprehended by United States law enforcement officers.

Because of his association with Robroy Williams he knew that some of the cocaine imported into Jamaica was kept at a stash house under the control of Glenford Williams, the older brother of Robroy Williams, who he states was a willing participant in the drug smuggling operation and knew that the major goal of the operation was to support the cocaine to the United States. This knowledge he states was gained as a result of his participation in the drug smuggling operation as well as from his relationship with Glenford Williams.

As a result of his participation Delroy Williams also became acquainted with Vivian Dally who may be described as the financial controller for Robroy Williams' operations, being involved in payments for purchases of cocaine and collections from sales.

He also states that he knows Norris Nembhard who have on occasions since 1999 visited Robroy Williams' office to make arrangements to purchase cocaine.

He in the presence of United States investigators identified photographs of Robroy Williams, Nembhard, Dally and Avila Arias.

On behalf of Avila Arias it was submitted that Delroy Williams could not properly identify Avila Arias because of their limited association and the fact that the

photograph which Delroy Williams identified as that of Avila Arias, showed a person in a cap and wearing sunglasses. I am afraid I can find no merit in this submission, neither can I find any merit in the suggestion that there might have been impropriety in the identification.

John Pablo Garcia Washington also speaks of smuggling cocaine from Columbia to Jamaica on behalf of Robroy Williams using go fast boats and of being met off the coast of Jamaica by other boats. He mentions one particular venture in about April 2002 which involved Delroy Williams who stayed at his house on arrival in Columbia.

In his affidavit Washington also speaks of participating in smuggling cocaine on behalf of Nembhard whom he identified from a photo line up.

Alexander Young Duffis, a Columbian, resided in Jamaica from January, 1998 to August, 2004. During his stay in Jamaica he came to know Robroy Williams, Norris Nembhard, Herbert Henry, Glenford Williams and Vivian Dally.

He states that he often acted as mediator and translator in cocaine dealings between Robroy Williams and a Columbian and was aware of Williams receiving shipments of cocaine from Columbia. He also assisted with negotiations between Williams and the Columbian to ship cocaine to the United States at a meeting where Dally was present. He speaks of an association and cooperation between Robroy Williams and Nembhard. In particular he mentions an occasions in May 2002 when Nembhard received approximately one thousand, three hundred (1,300) kilograms of cocaine for a Columbian who later instructed him to release seven hundred and fifty (750) kilograms to Williams. Williams subsequently on the authorization of the

Columbian subsequently shipped two hundred and fifty (250) kilograms first then five hundred (500) kilograms to Miami, Florida.

He further states, in relation to Dally, that Dally was involved in taking money to Panama to pay for cocaine from Columbia and in collecting money in Florida from cocaine sales. The activities of Henry were also mentioned. He said that in May 2002 he along with Paul Dixon assisted Henry in purchasing cocaine from Robroy Williams.

Young Duffis subsequently, in the presence of United States investigators identified the photograps of Robroy Williams, Vivian Dally, Herbert Henry and Norris Nembhard.

Paul Dixon in his affidavit states that Henry introduced him to a Columbian in 2001 and after that he realized that they were dealing in drugs. Reference is also made of the purchase of cocaine from Robroy Williams by Henry.

To make out a prima facie case in relation to Count 2 of the indictment reliance was placed on the evidence of Delroy Williams as it relates to the events leading up to the seizure of the go fast boat on the 25th May, 2002 and on the sworn statement of the Chief Petty Officer James M. Fortier. Fortier gives evidence of the boarding of the go fast boat which contained cocaine, and the circumstances leading to the classification of it as a stateless vessel and the arrest of Delroy Williams and others. It is from this designation of the vessel as stateless that the United States authorities derived jurisdiction.

The evidence adduced clearly reveals an elaborate scheme whereby cocaine was imported into Jamaica and most of it transshipped to the United States, sometimes through the Bahamas. When looked at as a whole, it is my opinion that the evidence

identifies Robroy Williams, Norris Nembhard, Louis Miguel Avila Arias, Vivian Dally and Glenford Williams as co-conspirators in this scheme as charged in Count 1 of the indictment.

The application for habeas corpus as it relates to them should therefore be refused.

Herbert Henry, from the evidence, is shown to be a person who acted on his own by purchasing cocaine from Robroy Williams. Although he may have conspired with other persons in his dealings, in my view the evidence does not show him to be a participant in the conspiracy engaged in by the other claimants as charged in Count 1 of the indictment.

The application of Herbert Henry should therefore be granted and a writ of habeas corpus be issued.

ORDER

Application for Writs of Habeas Corpus by the claimants Norris Nembhard, Vivian Dally, Robroy Williams, Glenford Williams and Luis Arias unanimously dismissed.

Application for Writ of Habeas Corpus by the claimant Herbert Henry dismissed by a majority decision.