IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE FULL COURT

SUIT NO. M43 OF 1987

CORAM: ORR J.

THEOBALDS J.

WALKER J.

REGINA VS COMMISSIONER OF CORRECTIONAL SERVICES EX-PARTE JUNIOUS C. MORGAN.

P.J. Patterson Q.C., Ian Ramsay, Mrs. Myrtle Johnson-Abrahams and Walter H. Scott instructed by Rattray, Patterson, Rattray for the applicant.

Patrick Robinson, Deputy Solicitor General and Miss Denier Lyttle for the respondent.

Kent Pantry, Deputy Director of Public Prosecutions, as amicus curiae.

Heard; September 28, 29, 30 and October 1, 2, and 9, 1987.

WALKER J.

In these proceedings which we have been told are novel, there being no precedent of a fugitive criminal having absconded between the verdict of a jury and sentence of the court, counsel moved for a writ of habeas corpus ad subjiciendum on behalf of the applicant, one Junious C. Morgan, who was then being held at the General Penitentiary in Kingston pursuant to a warrant of committal issued by His Honour Mr. Karl Harrison, Resident Magistrate for the parish of Kingston on June 4, 1987. The applicant was then awaiting his surrender to the authorities of the United States of America pursuant to the Extradition Act, 1870 (hereinafter referred to as "the Act") for the purpose of being sentenced on an indictment on which he had been tried and found guilty by a jury in that country. On October 9, 1987 we dismissed this application and promised to put our reasons for so doing in writing at a later date. This we now do.

Nine grounds were filed and argued in support of the case for the applicant. They read as follows:

"1. The Learned Resident Magistrate misdirected himself in law in finding that possession with intent to distribute marijuana is an extraditable offence.

2. The Learned Resident Magistrate misdirected himself in law in finding that the foreign warrant is valid and discloses an extraditable offence.

3. The Learned Resident Magistrate misdirected himself in law in finding that he was entitled to look to the depositions without examining the nature of the foreign warrant.

4. The Learned Resident Magistrate misdirected himself in law in finding that there is sufficient and proper evidence with regards to my conviction.

5. The Learned Resident Magistrate misdirected himself in law in finding that I am a convicted person within the meaning of the Extradition Act.

6. The Learned Resident Magistrate misdirected himself in law in finding that the principle of conviction in absentia "is not relevant nor is admissable to my case."

7. That the Laws of Jamaica including the Constitution require and mandate a fair trial for persons accused of criminal offences: That accordingly, I ought not to be returned to the State of Mississippi as the evidence discloses at a prima facie level at least, that I would not receive a fair trial there, and did not receive a fair trial there in the instant matter.

8. That Section 3 (2) of the Extradition Act 1870 mandates that a fugitive criminal shall not be surrendered to a foreign state unless certain provisions are made by law or arrangement in respect of trial of the Extradition crime only: That the trial had in the State of Mississippi was on 16 counts, only one of which it was submitted, is extraditable. Accordingly without specific provision I would be tried and/or sentenced on all 16 counts instead of one and for that matter

on any prior charge that may be framed.

9. That in any event it is submitted that an open-ended "conviction" that is one without judgment (sentence) is not a "conviction" within the meaning of our law or the Extradition Act 1870, and that therefore the requisition on the basis must, in law, fail."

The applicant had been tried and found guilty on all sixteen counts of the indictment which had been preferred against him, and his surrender was being requested on all sixteen counts. However, before us it was common ground that the applicant was not liable to be extradited on any of the counts numbering 1 and 2 and 4 through 16, the reason for this being that none of these counts disclosed an extradition crime within the meaning of the relevant treaty. That treaty governing the extradition of fugitive criminals between Jamaica and the United States of America was published in the Jamaica Gazette dated August 15, 1935 and remains in force today. Section 24 of Article 3 thereof provides for the reciprocal grant of extradition of fugitive criminals between the two countries for "crimes or offences or attempted crimes or offences in connection with the traffic in dangerous drugs." The question was, therefore, whether count 3 of the indictment in respect of which the applicant's surrender was being sought disclosed an extradition crime or offence, or attempted crime or offence, within the terms of s. 24. Count 3 reads as follows:

> "That on or about April 15, 1985, in Hinds and Madison Counties in the Jackson Division of the Southern District of Mississippi, and elsewhere, JUNIOUS C. MORGAN a/k/a J.C. MORGAN and LINDA HAWKINS, defendants herein, knowingly and intentionally did possess with intent to distribute approximately 453 pounds of marijuana, a Schedule 1 non narcotic controlled substance, aided and abetted by others in the aforesaid acts, in violation of Section 841 (a) (1), Title 21 United States Code and Section 2, Title 18 United States Code."

With regard to count 3, counsel for the applicant submitted that the applicant was not liable to be extradited for the reason that possession with intent to distribute marijuana is not a crime or offence within the contemplation of s. 24 of Article 3. It was counsel's argument that "something more" was needed to satisfy that requirement of the treaty. For our part, we found this argument to be quite untenable. Giving words their ordinary meaning and applying plain common sense we have had no difficulty in concluding that the particulars set forth in count 3 are, indeed, capable of constituting a crime within the intendment of s. 24. Accordingly, the applicant's contention on this issue fails.

Secondly, the fundamental issue arose as to whether, for purposes of the Act, the applicant fell to be dealt with in Jamaica as a convicted person or an accused person. This issue brings into sharp focus the provisions of section 10 of the Act. So far as is relevant s. 10 reads as follows:-

> "In the case of a fugitive criminal accused of an extradition crime, if the foreign warrant authorising the arrest of such criminal is duly authenticated, and such evidence is produced as(subject to the provisions of this Act) would, according to the law of England, justify the committal for trial of the prisoner if the crime of which he is accused had been committed in England, the police magistrate shall commit him to prison, but otherwise shall order him to be discharged.
>
> In the case of a fugitive criminal alleged to have been convicted of an extradition crime, if such evidence is produced as (subject to the provisions of this Act) would, according to the law of England, prove that the prisoner was convicted of such crime, the police magistrate shall commit him to prison, but otherwise shall order him to be discharged."

Looking at these provisions of s. 10 it will immediately be appreciated that they draw a clear distinction between an accused fugitive criminal on the one hand and a convicted fugitive criminal on the other hand. Counsel for the applicant contended that upon careful scrutiny of the documents which accompanied the request for the applicant's surrender it is patent that the requisitioning state was, initially, uncertain

as to whether the applicant was to be treated as an accused person or a convicted person. Counsel observed that the foreign warrant, which he identified as the Bench Warrant issued in the United States of America for the arrest of the applicant, was prepared in terms which suggested that the applicant was being treated as an accused person. Counsel argued that if, on the other hand, the applicant was being treated by the requisitioning state as a convicted person, the foreign warrant was defective and invalid since the particular offence in respect of which the applicant's surrender was being sought had not been expressly stated therein as required by the law. By no stretch of the imagination, said counsel, could the applicant be regarded as a convicted person. Counsel contended that in its primary meaning the word "conviction" embraced the component factors of verdict and sentence, as authority for which he cited the case of R v Lloydell Richards SCCA 135/83 (unreported). Next, counsel for the applicant addressed himself to the subject matter of a conviction in contumacy or "par contumace". His submissions in this regard were, we suspect, precipitated by the provisions of s. 26 of the Act. S. 26 provides inter alia as follows:

> "The terms "conviction" and "convicted" do not include or refer to a conviction which under foreign law is a conviction for contumacy, but the term "accused person" includes a person so convicted for contumacy."

Now,therefore, comes the question whether, for purposes of the Act, the verdict rendered by the jury against the applicant in the United States of America was in effect a conviction for contumacy. Counsel for the applicant submitted that it was. He argued that a conviction recorded in absentia was the equivalent of a conviction for contumacy which, in turn, was to be treated by courts exercising a common law jurisdiction on the same basis as where a request was made for the extradition of an accused fugitive criminal. By this process of reasoning counsel for the applicant concluded that the applicant fell into the category of an accused fugitive criminal, and he contended that the resident magistrate erred in categorizing, and dealing with, the applicant as a convicted fugitive criminal. Finally while conceding that the status of a fugitive criminal fell to be determined by reference to

No. J85-00046 (B) (S.D. Miss). Thus I am familiar with the evidence and charges in the case, and the contents of the files of the United States District Court and of the Office of the United States Attorney regarding this matter.

5. On August 15, 1985, a grand jury formally accused Junious C. Morgan a/k/a J.C. Morgan of violating the laws of the United States. I have obtained a true copy of the indictment from the Clerk of Court, and attached it to this Affidavit as Exhibit "A".

6. The statutes cited in the indictment and applicable to this case are Title 21, United States Code, Sections 846, 963, 841 (a)(1), 843(b) and Title 18, United States Code, Sections 1001, 2, & 371. True and accurate copies of the text of those laws are attached to this affidavit as Exhibit "B" . A violation of any of those statutes is a felony under United States Law. Each of these statutes was the duly enacted law of the United States at the time that the offenses were committed, at the time that the indictment was filed, and is now in full force.

I have also included in Exhibit "B" a true and accurate copy of the text of Title 18, United States Code, Section 3282, which is the statute of limitations on prosecuting the crimes charge the indictment. Since the applicable statute of limitations is five years, the indictment, which charged criminal violations beginning in June, 1984, was filed within the prescribed time.

9. I was present in Court on July 14 through July 26, 1986 as Mr. Morgan was tried on the charges in the indictment before presiding judge William H Barbour, Jr., and a jury. Mr. Morgan who had been released from custody on bail, was present and was represented by his attorney Russell Moore. I saw Mr. Morgan present in Court on each day of trial until the evening of July 25, 1986, after the jury began its deliberations. On July 26, 1986, the jury found Mr. Morgan guilty on all sixteen counts of the indictment. I have attached a true copy of the jury's verdict to this affidavit as Exhibit "D". The court subsequently entered a judgment of guilty as to the defendant Morgan on all sixteen counts. I have attached a true copy of this judgment to this Affidavit as Exhibit "E".

10. Although he was required to appear in Court on July 25 and 26, 1986, Mr. Morgan did not appear in Court on those days, and has not returned for sentencing. Under United States Law, a defendant who is present at the beinning of the trial but leaves the jurisdiction of the Court after the

the relevant foreign law, counsel for the applicant submitted that in the instant case sufficient proof of foreign law (i.e. the law of the United States of America) had not been adduced before the resident magistrate so as to facilitate a proper assessment of the true status of the applicant.

Contra, counsel for the respondent submitted that there was sufficient and admissible evidence of the law of the United States of America adduced before the resident magistrate. That law, said Mr. Robinson, was contained in the depositions of Ruth R. Harris and William H. Barbour Jr. These depositions, Mr. Robinson observed, were permitted by s. 14 of the Act. Respectively, they read in part as follows:

> "I Ruth R. Harris, being duly sworn, depose and say that;
>
> 1. I am a citizen of the United States, and a resident of Jackson, Mississippi.
>
> 2. I am 29 years old . In May, 1982, I received a Doctor of Jurisprudence Degree from Mississippi College School of Law, Jackson, Mississippi, and I was admitted in the same year to the Bar of the State of Mississippi. From October 1982, to January 1984, I was employed by the Governor's Office of Federal-State Programs, State of Mississippi, as staff attorney.
>
> 3. From January, 1984 until the present I have been employed by the United States Department of Justice as an Assistant United States Attorney for the Southern District of Mississippi. My duties are to prosecute persons charged with criminal violations of the laws of the United States.
>
> 4. During my practice inthe Office of the United States Attorney for the Southern District of Mississippi, I have personally participated in the preparation and trial of numerous cases involving violations of the laws of the United States and have become knowledgeable about those laws, and more particularly in that area of the criminal law relating to violations of the Controlled Substances Act. (Title 21, United States Code, Sections 801, et seq.) I also represented the Government in the case of United States of America v. Junious C. Morgan a/k/a J.C. Morgan, et al, Criminal

evidence in the case has been presented to the jury, and thereafter fails to return to court, can be found guilty by the jury without being personally present, However under United States Law the defendant may not be sentenced unless he is personally present. Accordingly, while Mr. Morgan has been convicted of the offenses charged in the indictment, he has not been sentenced yet."

"I , William H. Barbour Jr. being duly sworn depose and say that:

1. I am the acting Chief United States District Judge of the United States District Court for the Southern District of Mississippi.

2. That I personally presided over the trial of United States of America vs Junious C. Morgan a/k/a J.C. Morgan, et al. Criminal No. J85-00046(B) from July 14, 1986, through July 26, 1986.

3. That after the defendant Morgan's initial arrest on the indictment in this case, he was released from custody on a bond which required his appearance before this Court for trial and all other proceedings.

4. That the defendant Morgan was personally present on each day of trial until the evening of July 25, 1986, after the jury began its deliberations. On that date, when the defendant Morgan failed to appear I orally issued a bench warrant for his arrest.

5. On July 26, 1986, the jury found the defendant Morgan guilty on all sixteen counts of the indictment. On that date, I signed a written warrant for the arrest of the defendant Morgan for his failure to appear.

6. On August 11, 1986, I entered a written judgment of guilty as to the defendant Morgan on all sixteen counts of the indictment, based on the jury's verdict of guilty.

7. That to the present date, the defendant Morgan has failed to appear before this Court as required. The defendant Morgan, although he has been convicted of the crimes in the indictment has not been sentenced yet. This is because the laws of the United States require that a defendant be personally present when sentence is imposed."

Having drawn attention to this evidence, Mr. Robinson proceeded to argue, quite expertly we think, that the status of a fugitive criminal fell to be determined by reference to the effect which the law of the requisitioning state [i.e. foreign law] ascribed to the result of the proceedings against the fugitive criminal. That status, emphasized counsel, did not depend on whether the fugitive criminal had been dealt with as far as being sentenced. It was irrelevant and of no legal consequence that sentence had not been

imposed on surrender of the fugitive criminal. Were this not so, Mr.Robinson argued, one would not have expected to find any precedent in which sentence was imposed and yet the fugitive criminal was adjudged to be an accused person. As illustrative of this point counsel cited the cases of In Re Coppin (1866) L.R. 2 Ch. App. 47 and Re Caborn - Waterfield (1960) 2 All E.R. 178. Insofar as the instant case was concerned counsel for the respondent submitted that inasmuch as it was clear from the law of the United States of America that the applicant would not, if surrendered to that country, bear the status of a person who remained to be tried, the applicant was to be treated as a convicted person and not as an accused person in this country.

Of the authorities cited before us, In Re Coppin (supra) was the earliest case in which the phenomenon of a judgment par contumace was considered by the court. In that case a judgment par contumace was obtained against Coppin in his absence in France. Expert evidence as to French law was given before the magistrate in England as follows (vide p. 53 of the judgment):

> "If a man is accused of forgery in France, and a judgment par contumace is obtained against him, it would be a sentence of the court without the assistance of a jury. If that man is arrested or surrenders himself, that judgment is annulled so that it is exactly the same as if no proceedings had been taken against him, and then he undergoes his trial for the offence with which he was charged."

In giving the judgment of the Court Lord Chelmsford L.C. had this to say at page 54:

> "It will be observed that this article commences by calling the alleged offender, after a judgment par contumace, the accused, and not the condemned. And as upon his apprehension, the judgment against him is annulled, and he is to be put upon his trial for the offence, I do not see how he can be described otherwise than as an accused person. .....
> He has ceased to be a person condemned, because his condemnation is annulled upon his appearance, and he is to take his trial for offences with which he stands charged. What better, I ought rather to say what other, description of him could be given than that of a person accused?"

This, therefore was a case in which the offender against whom a judgment par contumace had been obtained later appeared and was, even then, liable to take his trial for the offences with which he stood charged, his appearance having had the legal effect of annulling that judgment. In Zezza v Government of Italy and another (1982) 2 all E.R. 513 the appellant applied for a writ of habeas corpus contending that the demand for his extradition was founded on a sentence "in contumacia", and that by virtue of s. 26 of the 1870 Act and Article 9 of the extradition treaty he was not to be treated as a convicted person but was to be included in the category of an accused person. On appeal to the House of Lords it was held that whether a person whose extradition was sought could properly be treated as a convicted person and not simply as a suspected and accused person depended on the true nature and effect of the procedure under which he had been convicted and sentenced. Accordingly, notwithstanding the label attached to the Italian proceedings under which the appellant had been convicted and sentenced in his absence, since the conviction did not bear the characteristics of a conviction or sentence in contumacy within s. 26 of the 1870 Act and art. 9 of the 1873 extradition treaty, the appellant was to be treated as an accused person.

Reliance was also placed by counsel on both sides on the case of Re Caborn-Waterfield (supra), We found this case to be most instructive indeed. Here it was held that the applicant would be discharged from custody since, although the proceedings in France in no way offended against English views of natural justice, the warrant of arrest and the warrant of committal wrongly described the applicant as "accused" of the crime of larceny whereas by virtue of the "judgment interatif defaut" he was a convicted person. In giving the judgment of the Court Salmon J said at page 182 G:

> "In our judgment a conviction for contumacy does not include a final judgment "iteratif defaut" which is radically different in character from a conviction "par contumace". A fugitive criminal convicted "par contumace" would on his surrender be tried, whereas a fugitive criminal subject to a final conviction "iteratif defaut" would on his surrender be sent straight to prison without any further trial."

Also illuminating was the case of Athanassiadis v Government of Greece (1969) 3 All E.R. 293 which was cited before us and in which In Re Coppin and Re Caborn - Waterfield were reviewed. In his speech in which he delivered the opinion of the House of Lords Viscount Dilhorne said at pages 302-303:

> "If the fact be that, on his arrest or surrender, the accused person will be put on trial as if he had never been convicted in his absence, it is clearly right that he should be dealt with in this country not as a convicted but as an accused person. The definition in s. 26 secures this..... The member of the Athens Bar who gave evidence said that under art. 341 of the Greek Code of Criminal Procedure a person convicted in his absence can within 15 days ask for a rehearing if his absence was caused by genuine reasons beyond his control whereby he could not have made an application for an adjournment previously. The existence of a right in certain circumstances to a rehearing does not mean that a person convicted in his absence will on arrest or surrender be treated as an accused person."

What then was the applicant's status in the instant case? The jury gave their verdict which was a final one. Should the applicant be surrendered to the United States of America, he would not bear the status of a person to be tried and would not be subject to further trial for the same crime. Instead he would be sent straight to prison or otherwise dealt with by way of sentence. Having examined the cases before us and harkened to the submissions of counsel we are prepared to say that the true status of a fugitive criminal is to be determined by reference to the effect which the law of the requisitioning state (i.e. foreign law) ascribes to the result of the proceedings against the fugitive criminal. Applying this test to the instant case we are i n no doubt but that the applicant falls into the category of a convicted person, and was properly treated as such by the resident magistrate. It follows, therefore , that we have concluded that the verdict rendered by the jury against the applicant on count 3 did not amount to a conviction for contumacy within the terms of s. 26 of the Act. Having categorized and, as we have found, quite

rightly categorized the applicant as a convicted person, the duty of the learned resident magistrate was twofold, namely:-

(1) to satisfy himself that there was before him sufficient proof, according to the law of Jamaica, that the applicant was convicted of a crime, and

(2) to satisfy himself that there was before him sufficient proof, according to the law of Jamaica, that the said crime was an extradition crime.

We find that the learned resident magistrate did have before him sufficient evidence in proof of the conviction of the applicant on count 3 and also sufficient evidence in proof of the fact that the crime charged on count 3 was an extradition crime. Accordingly, the applicant's contention on this issue also fails.

Ground 7 of the applicant's case may be disposed of very shortly as we take the view that this ground discloses no issue which is justiciable before us. The apprehension of the applicant that he will not be fairly dealt with if surrendered to the United States of America is, undoubtedly, a matter for the attention of the executive and not one for consideration by this court. We are in full agreement with the submission of counsel for the respondent which is that a fugitive criminal having fallen to be dealt with under the second paragraph of s. 10 of the Act, once the relevant statutory requirement of proof of the applicant's conviction is satisfied it is then mandatory that the magistrate should commit the offender to prison. At this stage it is not permissible for the magistrate to look behind the offender's conviction for any reason whatsoever. This we take to be the true ratio of the decision of the House of Lords in Royal Government of Greece v Brixton Prison Governor and Others (1969) 3 All E.R. 1337.

Lastly, we come to consider ground 8 of this application. Section 3(2) of the Act provides as follows:-

> "A fugitive criminal shall not be surrendered to a foreign state unless provisions is made by the law of that state, or by arrangement,

> that the fugitive criminal shall not, until he has been restored or had an opportunity of returning to Her Majesty's dominions, be detained or tried in that foreign state for any offence committed prior to his surrender other than the extradition crime proved by the facts on which the surrender is grounded."

Counsel for the applicant observed that in the instant case the applicant had been found guilty on all sixteen counts of the indictment on which he had been tried, but that only one of those counts disclosed an extradition crime in respect of which the applicant was now liable to be extradited. In the circumstances, counsel contended that without special arrangements being made one could not be sure that, if surrendered for sentence, the applicant would not be sentenced on all sixteen counts. Accordingly, counsel urged us not to deny the writ being sought without requiring that an undertaking be given designed to ensure compliance with the provisions of s. 3 (2) of the Act. In making this submission Mr. Ramsay hastened to say that he was not imputing mala fides to the requisitioning state. In answer to this submission counsel for the respondent assured us that such an arrangement as is required by s. 3 (2) was in fact in place between Jamaica and the United States of America. Counsel said that that arrangment was incorporated in Article 7 of the relevant treaty which is now in force between the two countries and legally binding on both. Counsel submitted that the obligation imposed by s. 3 (2) was wholly discharged by the fact of the existence of this arrangement, the efficacy of which was not addressed by that section and was, therefore, of no relevance.

We think that the approach of the courts to a complaint of this nature is well settled. That approach was clearly stated in the opinion of Lord Reid given in the case of Royal Government of Greece v Brixton Prison Governor and Others (supra). At pages 1339-1340 Lord Reid said:

> "So it would be a clear breach of faith on the part of the Greek government if he were detained in Greece otherwise than for the purpose of serving his sentence, and it appears to me to be impossible for our courts or for your Lordships sitting judicially to assume that any foreign government with which Her Majesty's government has diplomatic relations may act in such a manner."

In the instant case we are satisfied that there is currently in existence an arrangement between Jamaica and the United States of America which meets the requirement of s. 3 (2). Furthermore, we are in full agreement with the submission of counsel for the respondent which is to the effect that the fact of the existence of this arrangement wholly discharges the obligation imposed by s. 3 (2). Consequently, ground 8 of this application fails. At the time of announcing our decision in this matter we expressed our confident expectation that, if surrendered, the applicant would be sentenced only on count 3 of the indictment on which he has already been tried and convicted, that count being the only count which, in our judgment , discloses an extradition crime. In this regard we approve and adopt the above dicta of Lord Reid and think that it would be impossible for this court to assume that, if surrendered to the United States of America, the applicant would be detained in that country otherwise than for the purpose only of being sentenced on count 3 of the indictment now pending against him.

For these reasons, therefore, we dismissed this application.