In the Supreme Court of Judicature of Jamaica

Suit No. M. 11 of 1976

Before : The Full Court

Melville, Rowe, Wright, JJ.

Regina v. Director of Public Prosecutions

The Commissioner of Police

Ex parte Dafney Schwartz

(Application for writ of habeas corpus)

Ian Ramsay, Enos Grant, Howard Hamilton and Ronald McIntosh instructed by Grant, Cowan and Chin-See for applicant.

Henderson Downer and Mrs. Shirley Lewis instructed by the Crown Solicitor for the Director of Public Prosecutions.

Patrick Robinson instructed by the Crown Solicitor for the Commissioner of Police.

Melville, J. : June 1, 2, 3; Nov. 12, 1976

Mrs. Dafney Schwartz, the applicant, was committed under Extradition proceedings by a Resident Magistrate for the parish of Saint Andrew on 5th April, 1976, to the Half Way Tree Lock-up to await her return to the United States of America where it is alleged she had been convicted of "Conspiring with others to import and to sell and transport dangerous drugs within the jurisdiction of the United States District Court Eastern District of New York."

She applied to this Court for a writ of habeas corpus which after a hearing lasting four days was granted. We promised to put our reasons in writing and this I now proceed to do.

Briefly the facts are that the applicant, a Jamaican by birth, and her husband, apparently an American citizen, were put on trial for conspiracy in the Eastern District Court of New York on 24th March, 1975. Preliminary hearings before the selection of a jury seem to be a part of the proceedings in the New York Courts and the beginning of the preliminary hearings are apparently the start of the trial. The applicant was present at those hearings on the 24th and 25th March, but on the 26th she was absent. The trial continued in her absence and a conviction was

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subsequently recorded against her. In the meantime the applicant sought refuge in her native land "to flee the injustice and oppression of the United States of America" according to her affidavit. Proceedings were subsequently launched by the Government of the United States of America under the Extradition Acts 1870-1932 for the return of the applicant culminating in the application before this Court.

Mr. Ramsay, on behalf of the applicant, argued a number of grounds, some of which I need not refer to, having regard to the conclusion at which I arrived. These had mainly to do with what transpired or did not transpire at the hearing in the New York Court, and to the allegedly oppressive manner in which those proceedings were held thereby resulting in a breach of natural justice. Suffice it to say that although some of the procedural methods of the New York Court may not have evoked much sympathy in our Courts yet there was ample evidence before the resident magistrate to justify the conclusion that those proceedings were properly conducted.

Although I propose to deal with the arguments advanced by Mr. Ramsay in a different order from that in which he advanced them, I trust it will not be thought that I attached any less importance to the one than to the other.

No valid treaty

Turning first to his submission that there was no valid, legal modern Extradition Treaty between the United States and Sovereign Jamaica, he argued that at the stroke of midnight on 5th August, 1962, when Jamaica became an independent nation, all former treaties entered into by the United Kingdom as a high contracting party on behalf of Jamaica died. In International Law, said he, the relations between states are governed by treaties and as before independence, Jamaica was not and could not be a high contracting party; generally, all treaties undertaken for her as a subject territory expired at independence as they could not bind the new Juristic creature (Jamaica). Although he was prepared to concede that certain treaties "in rem" may continue after independence, unless they were expressly denounced, there was no such concept in so far as treaties "in personam" of which an extradition treaty is an example are concerned. This concept sometimes finds

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expression as the "clean slate" theory, that is, that a newly independent State begins its life with a clean slate, except in regard to "local" or "real" obligations. That this is so finds expression in the "Report of International Law Commission on the work of its twenty-sixth Session" /To be published as the "official records of the General Assembly" twenty-ninth, Supplement No. 10 (A/9610/Rev.1)/. Article 15 of which recommends that:

> " A newly independent State is not bound to maintain in force, or to become a party to any treaty by reason only of the fact that at the date of the succession of States the treaty was in force in respect of the territory to which the succession of States relates. "

The devolution agreement or "Exchange of Letters" between the newly independent State (Jamaica) and its predecessor (the United Kingdom) - see the Jamaica Gazette of 25th April, 1963 - did not, argued Mr. Ramsay, constitute any agreement, in relation to the Extradition Treaty of 1931 between the United Kingdom and the United States, between Jamaica and the United States for the reason that it purported to assume treaty rights and obligations which had already expired so that there would be nothing to assume. Alternatively, and in any event, the devolution agreement did not take in the United States as a third party so as to constitute a novation of the rights and obligations to be placed on a third party. As a further alternative even if the third party (i.e. the United States) were willing or even tacitly accepted those rights and obligations that would not amount to a formal 'actus' so as to create treaty relations in international law. Lastly, submitted Mr. Ramsay, even if the devolution agreement could be construed as applying to the United States of America it would be ineffective to create treaty relations between Jamaica and the United States because it has not received any approval by the Jamaican Legislature since independence.

Mr. Robinson who confined himself to replying to this aspect of Mr. Ramsay's arguments, took us through the various sources of international law and the differences between multi-lateral andbilateral treaties with their multi-farious effects on the newly independent State. The gravamen of his submission is stated in Article 23 at p. 202 of the

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the report of the International Law Commission already referred to. It states:

> " 1. A bilateral treaty which, at the date of a succession of States was in force in respect of the territory to which that succession of States relates, is considered as being in force between a newly independent State and the other State party in conformity with the provisions of the treaty when:
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> (a) they expressly so agree; or
> (b) by reason of their conduct they are to be considered as having so agreed.
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> 2. A treaty considered as being in force under paragraph 1 applies in the relations between the newly independent State and the other State party from the date of the succession of States, unless a different intention appears from their agreement or is otherwise established. "

He conceded that there has been no express agreement between Jamaica and the United States but relied on conduct as stated in paragraph 1(b) of the above Article to show that the 1931 Treaty has continued in force ever since between independent Jamaica and the United States.

At the outset one may begin by saying - and this was common ground - that prior to Jamaica becoming independent the English Extradition Acts 1870-1932, the Extradition Treaty of 1931 between the United Kingdom and the United States of America - see Jamaica Gazette of 13th August, 1935 - formed part of the Laws of Jamaica. So that it was not uncommon for the Courts in Jamaica to entertain requisitions from the United States for the return of persons accused of extraditable crimes in that country. Indeed, since Jamaica's independence in 1962, and prior to this application with which we are concerned, there have been at least two such applications - see ex parte McGann (Supreme Court No. M.29/71) and ex parte Fitz Henry (Supreme Court No. M.16/76). It has not been challenged and I do not think it could successfully be, that:

> " All Laws in force in Jamaica immediately before the appointed day shall (subject to amendment or repeal by the authority having power to amend or repeal any such law) continue in force on and after that day. "
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> See sec. 4(1) of the Second Schedule to the Jamaica Constitution.

That being so the Extradition Acts and the Treaty of 1931 were still in full force and effective at the date of this requisition. I can therefore see no necessity for the Jamaican Legislature to again enact legislation which is already on its Statute Book.

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Turning to the "clean slate" theory I am not all convinced as at present advised, that it has yet attained the status of a "customary rule" of International Law. In considering the Report of the International Law Commission, one should not be unmindful that the Articles proposed are at present no more than recommendations, albeit recommendations from persons of the highest reputation in the field of International Law. In their commentary on Article 15 this is what is stated at p. 137:

> " The majority of writers take the view supported by State practice, that a newly independent State begins its life with a clean slate, except in regard to 'local' or 'real' obligations. The clean slate is generally recognised to be the 'traditional' view on the matter. It has been applied to earlier cases of newly independent States emerging either from former colonies ..... or from a process of secession or dismemberment. "

It is therefore a moot point as to whether the clean slate theory has hardened into a "customary rule" of International Law. If it has not, then it ought not to be adopted in our Municipal Law. Compania Naviera Vascongado vs. SS. Christina (1938) A.C. 485 at p. 497, where Lord McMillan said:

> " Now it is a recognised prerequisite of the adoption in our municipal law of a doctrine of public international law that it shall have attained the position of general acceptance by civilised nations as a rule of international conduct, evidenced by international treaties and conventions, authoritative text books, practice, and judicial decisions. It is manifestly of the highest importance that the Courts of this country before they give the force of law within this realm to any doctrine of international law should be satisfied that it has the hallmarks of general assent and reciprocity. "

However, proceeding on the basis that the clean slate theory is a customary rule of international law I now have to consider whether it can be incorporated into our municipal law in the existing circumstances. Despite conflicting dicta, it seems safe to say that customary rules of international law are deemed to be part of our municipal law, subject, of course, to two important qualifications. Lord Atkin stated it thus in Chung Chi Cheung v. R. (1939) A.C. 160 at 168:

> " The Courts acknowledge the existence of a body of rules which nations accept among themselves. On any judicial issue they seek to ascertain what the relevant rule is, and, having found it, they will treat it as incorporated into the domestic law, so far as it is not inconsistent with rules enacted by Statutes or finally declared by their tribunals. "

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To apply the clean slate theory would therefore seem to me to be flying in the face of our Statutory provisions.

In case I am wrong in the conclusion at which I have arrived, I shall now consider Mr. Robinson's submission. What was the evidence of conduct to which he adverted? I have already mentioned the requisitions of the Government of the United States of America made to our Government and the devolution agreement. The United States has listed Jamaica among the countries with whom she has Extradition Treaties with the Secretary General of the United Nations. (See "Extradition in International Law" by Shearer at p. 40 and the Year Book of the International Law Commission 1970 Vol. 2 p. 120 para. 97). It was common ground in the arguments before us that the devolution agreement, without more, would not create binding treaty arrangements between this country and the United States. That is incontrovertible, but it must not be forgotten that a bilateral treaty is usually no more than an extension of the laws of contract operating between States rather than between individuals. Even if the devolution agreement amounts to no more than an offer to treat then the requisition by the United States must certainly be an offer which was accepted and acted upon by the appropriate Minister of our Government when, acting under the provisions of the Extradition Acts he forwarded his warrant to the Resident Magistrate to proceed with the extradition proceedings.

At all events in whatever way the matter was examined there was a clear rejection of the clean slate theory by the actions of both Governments. Accordingly, I can see no valid reason to differ from the finding of the learned Resident Magistrate that there was a valid Extradition Treaty subsisting between this Government and that of the United States of America.

No valid certificate of conviction

The next ground raised by Mr. Ramsay was that a conviction in and by foreign law in proceedings of this kind must be by due process and in due form and not informally. His argument went that the only evidence of any conviction was that in the deposition taken before the Resident Magistrate of Mr. Schlam - the prosecutor in the American Court - where he said:

> "the trial was in absentia and I was present when a verdict was recorded. It was one of guilty as charged in the indictment;"

and that contained in the affidavit of Mr. James Giokas, the Deputy Clerk of the District Court for the Eastern Division of New York, the relevant portion of which is paragraph 3 which stated:

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> " On April 18, 1975, I was present in Judge Judd's courtroom when the jury in the case of United States v. Dafney Schwartz 74 C.R. 775, announced that it had found Dafney Schwartz guilty of the charge set forth in indictment 74 CR. 775. "

Mr. Schlam in his affidavit repeated much the same thing. Mr. Ramsay's contention was that this being a matter in which extradition was requested on a purported "conviction" only, it behoved the Requisitioning State to prove such conviction strictly. That could only be done by producing the original documents or by a certified copy of the conviction in accordance with sec. 27 of the Evidence Act and not by oral evidence as was purportedly done.

I did not understand Mr. Downer in his reply, to be dissenting from the proposition put forward by Mr. Ramsay except perhaps on the point of the oral evidence but rather that there was indeed such evidence having regard to the provisions of secs. 10, 14, and 15 of the Extradition Act and sec. 25 of the Evidence Act.

Sec. 10 of the Extradition Act so far as relevant states:

> " 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 Jamaica, prove that the prisoner was convicted of such crime, the Resident Magistrate shall commit him to prison, but otherwise shall order him to be discharged. "

Sec. 14 reads:

> " Depositions or statements on oath, taken in a foreign state, and copies of such original depositions or statements and foreign certificates of or judicial documents stating the fact of conviction, may, if duly authenticated, be received in evidence in proceedings under this Act. "

I need not refer to sec. 15 as there was no question here but that all the documents from the Foreign Court were properly authenticated and I did not understand Mr. Ramsay to be arguing to the contrary. The problem is, can Mr. Giokas' affidavit be regarded as a "foreign certificate of or a judicial document" stating the fact of conviction as required by sec. 10 of the Extradition Act and/or secondly can Mr. Schlams oral evidence of the fact of the applicant's conviction be regarded as proof of such conviction? We were referred by Mr. Ramsay to the judgment of Rowe, J. in ex parte McGann where at pages 11 and 12 the certificate of conviction of a Maryland Court was set out. That certificate seemed to accord with the provisions of

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sec. 27 of the Evidence Act where all that is required is that the paper produced is a "copy of the record of the indictment, trial, conviction and judgment or acquittal, as the case may be, omitting the formal parts" and that it is "certified or purport to be certified under the hand of the Clerk of the Courts or other officer having custody of the records ..... or by the Deputy of either." But for this statutory method of proof one has to see how a conviction was proved at common law.

Hartley v. Hindmarsh (1885-86) L.R. 1 C.P. 553 was concerned with the proof of a conviction for assault and Erle C.J. is reported as saying at p. 556:

> " I think, moreover, that the conviction, if there had been one, could only have been proved in the ordinary way, according to the Common Law, by the production of the record, or an examined copy of it. "

Mash v. Darley (1914) 3 K.B. 1226 dealt with the admission of oral evidence to prove a conviction and after criticising the Divisional Court, Kennedy, L.J. said at p. 1233:

> " I confess that this is first time I have heard ..... that oral evidence of a conviction can be given by somebody who heard the jury give a verdict which is to let in indirectly evidence of conviction as to the proof of which we have express statutory provision. "

Much to the same effect are the cases of:

R. v. Bourdon 2 C. & K. 366

R. v. Smith 8 B. & C. 341.

When the history of the principle underlying the rule - (see Phipson on Evidence, 11th Ed. Chap. 42 para. 1681 et seq.) - is examined it appeared to me that oral evidence, whether given viva voce as it was by Mr. Giokas and which can have no greater weight than the viva voce evidence, cannot be regarded as proof of a judicial conviction.

As I mentioned earlier, the evidence of the conviction was contained in the affidavits of both Mr. Schlam and Mr. Giokas among the documents which were properly authenticated as required by sec. 15 of the Extradition Act. That, said Mr. Downer, was proper proof of the conviction by the foreign law. I find myself unable to accept that. Nowhere in any of the documents is that so stated, and in the absence of any evidence of the foreign law - which must be proved like any other fact - on the matter, the presumption is, that it is the same as our law (Cheshire, Private

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International Law, 5th. Ed. p. 129). These were common or garden type affidavits, perhaps in common use throughout the English speaking world, and in the absence of any evidence on the foreign law that they would be accepted as proof of the conviction, I am impelled to the conclusion that they cannot be so regarded. Mr. Downer relied on R. v. Ganz (1881-82) 9 Q.B. 93. But there the warrant was the copy of an order of a foreign court which satisfied the term "warrant" in sec. 26 of the Extradition Act. I cannot see how R. v. Zossenheim (1903-4) 20 T.L.R. 131 assists at all nor does sec. 25 of the Evidence Act which only makes the affidavits evidence in the matter and their contents truthful but cannot assist as to the probative value to be attached to such evidence. Had this been the only ground on which the applicant could succeed I would have had to give some thought to whether the matter should be remitted or not to the Resident Magistrate.

Is this conspiracy extraditable?

The burden of Mr. Ramsay's contention was that conspiracy to commit offences under the Dangerous Drugs Act, though indictable as a common law offence in our jurisdiction and is a statutory offence by United States Law, was not one of the offences listed as an extraditable crime as the provisions of the Extradition Act must be strictly construed. On the other hand, it was Mr. Downer's contention that the words of the Act were wide enough to embrace a conspiracy.

There is no doubt that extradition proceedings can only be in respect of the crimes listed in the First Schedule to the Extradition Act of 1870 as amended over the years by the addition of various other crimes to the Schedule and I need hardly add that such crimes must be specifically listed in the Treaty between the Contracting States. The Schedule begins:

> " The following list of crimes is to be construed according to the law existing in England, or in a British possession (as the case may be), at the date of the alleged crime, whether by common law or by statute made before or after the passing of this Act. "

Then follows the list of the crimes of which I need only mention:

> " Murder, and attempt and conspiracy to murder. "
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> " Sinking or destroying a vessel at sea, or attempting or conspiring to do so. "

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" Revolt or conspiracy to revolt by two or more persons on abroad a ship ..... "

As I have already mentioned there have been various additions to that Schedule but we were only concerned with the 1932 amendment (22 and 23 Geo. V. C. 39) which added:

" Offences against any enactment for the time being in force relating to dangerous drugs, and attempts to commit such offences."

Article 3(24) of the 1931 Treaty reads:

" Crimes or offences or attempted crimes or offences in connection with the traffic in dangerous drugs. "

Section 174 of Title 21, United States Code provides:

" Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States, or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States shall be imprisoned. "

The applicant was convicted of a statutory offence by the laws of the United States whilst such an offence would, under our laws be a common law misdemeanour only, as there is no statutory offence of "conspiracy" under our Dangerous Drugs Act, at least not so far as I can ascertain.

There seems to be a dearth of authority on the question that we have to decide. Indeed the only authority referred to was In re Counhaye (1873) L.R. 8 Q.B. 410. Mrs. Counhaye who had not been declared a bankrupt was charged with complicity in a fradulent bankruptcy involving her husband who was a bankrupt. The words to be construed were "Crimes by bankrupts against the Bankruptcy Law." It was held that as she herself was not a bankrupt her offence did not amount to an extraditable crime. In the course of his judgment Blackburn, J. is reported as saying at p. 417:

" I agree with the Attorney General that as to many of the crimes included in the list accessories before the fact would be included; they are now liable to be indicted as principals, and were always liable to be punished as principals. But the description of most of the crimes in the schedule is general - forgery, abduction; whereas in the description of this particular crime it must be committed by bankrupts; and I think we cannot, without stretching the meaning, extend it to persons who are not themselves bankrupts. It may have been a mistake in the legislature or intentional; but whatever was the intention

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> " it is impossible for us, with the language used, to say that the prisoner has been guilty of an extraditable crime, for she has not been guilty as a bankrupt of the crime against bankruptcy law. "

Consequent on that decision the Extradition Act was amended in the same year (36 and 37 Vict. C. 60). Sec. 3 provided:

> " Every person who is accused or convicted of having counselled, procured, commanded, aided, or abetted the commission of any extradition crime, or of being accessory before or after the fact of any extradition crime, shall be deemed for the purposes of the principal Act and this Act to be accused or convicted of having committed such crime, and shall be liable to be apprehended and surrender accordingly. "

Assuming, as Mr. Downer contended, that that amendment was merely declaratory of the common law, can it be assumed also that it included conspiracy to commit the listed crimes? The answer seems in my view to be no. Conspiracy, Attempts and Incitement were then well established offences in the English common law system, so having regard to what Blackburn, J. had said the legislature was, it appears to me, making it abundantly clear the persons to whom extradition applied. That is incitors, principals in whatever degree, and accessories.

Looking at the history of how extraditable crimes were characterised (see "Extradition in International Law" by I.A. Shearer p. 132 et seq.) two schools of thought seemed to exist - The "enumerative method" and the "eliminative or 'no list' method." From 1794 onwards it appears that the British have followed the enumerative method. For example in the Jay Treaty of that year between Great Britain and the United States murder and forgery were the only listed crimes. As time went on and civilisation is supposed to have progressed the list of crimes was extended by various treaties. If I understand it correctly, in the "enumerative method" each crime is specifically spelled out as it were in the Treaty. That this is so is not surprising for what may be regarded as a serious crime in one jurisdiction may not be so in another. Add the costs and the cumbersome procedure inherent in extradition proceedings, and one sees a reason why extradition is confined to what the contracting States regard as serious offences.

Bearing that history in mind when one looks at the crimes listed in the First Schedule of the Extradition Act it seems incontrovertible that "attempts" to commit some crime and "conspiracies" to commit those and/or other crimes are expressly listed. No doubt those conspiracies

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and attempts listed may all be regarded as serious crimes. With the possible exception of some of the offences under the Dangerous Drugs Act the listed crimes are all, more or less, cognisable on indictment in our jurisdiction. It is a well known concept of the common law that on a trial on indictment the accused may be convicted of an attempt if the substantive offence is not fully proved. If I may be permitted to digress for a moment let us assume a requisition for the offence of simple larceny, which is a listed crime, and the facts before the Resident Magistrate amounted to no more than an "attempt" to commit the larceny which would also be an offence under the law of the requisitioning State - would that be extraditable in the circumstances? Would a conspiracy which is no more than the mere agreement to effect an unlawful purpose, to commit the larceny also be extraditable?

According to Mr. Downer's submissions, these questions would be answered in the affirmative. He stressed that the Schedule to the Extradition Act was drafted in the way it was to take into account the common law situations that then existed in the various African, Hindu, Muslim, etc. countries over which Britian then exercised suzerainty and that was why some offences, e.g. murder, was set out with more particularity than others. Murder and the kindred offences listed were statutory offences in Britain whilst they remain ed mostly common law offences in the colonies, said he. In so far as Jamaica was concerned Mr. Downer was not quite correct when he said the common law situation applied to those offences. See secs. 8, 16, 17 and 23 of our Offences against the Person Act. As Mr. Ramsay pointed out Australia has now expressly added "conspiracy" to commit the scheduled offences to its listed extraditable crimes. (See Australia Acts of the Parliament (1901-1973) Vol. 5 at 681-682). The same applies in Britain under the Fugitive Offenders Act 1967. (Halsbury Statutes 3rd. Ed. Vol. 13 at p. 289).

One wonders why, if Mr. Downer is correct, should these countries have gone to the extra trouble to expressly include "conspiracy" in general terms to the lists of their extraditable crimes. To my mind the answer can only be that conspiracies were not regarded as extraditable crimes unless so expressly stated, having regard to the amendment made by 36 and 37 Vict. C. 60 which followed almost immediately the decision in In re

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Counhaye.

"Attempts" are expressly listed in relation to dangerous drugs offences, but "conspiracies" are not. In my opinion, they ought to have been listed as was done in the case of murder for example, if they are to be regarded as extraditable crimes. I do not think it can successfully be controverted that there can be conspirators who are neither incitors (except among themselves) nor principals nor accessories to a particular crime. Halsbury's Laws of England, 3rd. Ed. Vol. 16 p. 567 para. 1161 states in part:

> " All the crimes enumerated in the Extradition Acts are not to be found in every treaty ..... "

An Extradition Treaty is a matter of contract between the High Contracting Parties and it is a matter for their representatives to say what crimes shall or shall not be extraditable. Applying the strict construction rule for which Mr. Ramsay contended, and which has always been consistently applied to the provisions of the Extradition Act, as the liberty of the subject is involved; I accordingly held that the writ must go as the crime for which the applicant's return was sought was not an extraditable crime in the circumstances.

There was one other matter argued that I would like to mention. It was argued that it was wrong for the Resident Magistrate to have committed the applicant to the Half Way Tree Lock-up to await her return to the United States. We were told that the matter was canvassed before the learned Resident Magistrate and that Mr. Ramsay strenuously opposed the applicant's committal to the Lock-up instead of to a "prison" as required by the Extradition Act. Unfortunately, none of this appeared in the documents before us. In the circumstances it can only be assumed that the Resident Magistrate properly exercised her discretion in committing to the lock-up as it would have been "dangerous to the life or prejudicial to health of the prisoner to remove her to prison" as provided by sec. 1(3) of 1895 Extradition Act (58 and 59 Vict. C. 33).

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Rowe, J.

I have had the opportunity to read the Judgment of Melville, J. and I agree with it. I propose to add these few words of my own.

It is my view that a conspiracy to contravene the provisions of the Dangerous Drugs Act of Jamaica is not an extraditable offence within the meaning of the Extradition Acts 1870-1932 and the Extradition Treaty between Jamaica and the United States of America. Conspiracy to commit an offence against the Dangerous Drugs Act of Jamaica is not made an offence by that statute. I construe the provisions of the Extradition Act 1932, 22 and 23 George V. Cap.39, which provides:

> "It (Extradition Act 1870) shall be construed as if offences against any enactment for the time being in force relating to dangerous drugs and attempts to commit such offences were included in the list of crimes in the first schedule to that Act (Extradition Act 1870),"

to mean that only statutory offences and attempts to commit those statutory offences are covered by that Act.

As the hearing of the application proceeded, I was troubled as to the reason why the applicant was charged in the United States of America for conspiracy, whereas the overt acts recited in the indictment dealt with completed substantive offences. On reflection I am now of the clear view that having regard to the evidence available in that Court it would have been impossible to have proved the substantive offences without the exhibits or scientific evidence as to those exhibits. It could not therefore, be said that the pith and substance of the charge against the applicant in the United States of America was either importing, selling or otherwise dealing in cocaine as distinct from the separate

offence of conspiring to do those acts.

I do not agree with Mr. Ramsay's submissions that applying the "clean-slate" theory of international law, at the instant of time when Jamaica became an independent state, this country was automatically freed from its predecessor States' treaties in such a way that those treaties could never be revived either by express agreement of the States parties or by their conduct.

I accept that the true rule of international law governing the conditions under which a bilateral treaty is considered as being in force in the case of a succession of States is that contained in article 23 of the draft code on "Succession of States in Respect of Treaties" prepared by the International Law Commission at its 26th Session in 1974:

> "1 A bilateral treaty which, at the date of a succession of States was in force in respect of the territory to which that succession of States relates, is considered as being in force between a newly independent State and the other State party in conformity with the provisions of the treaty when:
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> (a) they expressly so agree; or
>
> (b) by reason of their conduct they are to be considered as having so agreed.
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> 2 A treaty considered as being in force under paragraph 1 applies in the relations between the newly independent States and the other State party from the date of the succession of States, unless a different intention appears from their agreement or is otherwise established."

In an exchange of notes with the British Government, Jamaica expressed itself as having assumed, as from the 6th August, 1962 all treaty rights and obligations entered into on its behalf prior to independence, by the British Government. That is a clear indication that the primary rule as to the time of commencement of the treaty relations, which are by Article 23 considered as being in force, is the one applicable so far as Jamaica is concerned, and the date is therefore, independence day.

There has been the clearest and most unambiguous conduct

on the part of the United States of America and Jamaica in support of the proposition that they consider themselves bound by the Extradition Treaty entered into between the United Kingdom and the United States of America and applied to Jamaica by the United Kingdom. The United States of America did not ignore Jamaica's declaration of its willingness to be bound by inter alia, its Extradition Treaties. In 1971 the United States of America took the positive step of applying to the Jamaican Government for the Extradition of Duke McGann specifically invoking the provisions of the 1931 Extradition Treaty. In his affidavit in support of this extradition application, Kenneth Norman Rogers, Consul of the United States of America, swore:

> "This Affidavit is submitted in the matter of the extradition of Clarence Duke McGann, whose extradition is sought by the United States of America under Articles 1 and III of the Treaty of Extradition between the United States of America and Jamaica, adhered to by Jamaica on August 6, 1962, for robbery with violence, receiving stolen property, and larceny."

The Jamaican Government accepted the reference and applying the provision of the Treaty and the Extradition Acts caused the fugitive McGann to be arrested. After this, Court refused McGann's application for a writ of Habeas Corpus, the Government of Jamaica extradited McGann to the United States of America. In applying for the extradition of Fitz Henry the United States of America again invoked the provisions of the Extradition Treaty and the Jamaican Government again accepted the reference under the Treaty.

To my mind, conduct of this nature by the United States of America on the one hand and Jamaica on the other, demonstrates beyond the pale of argument that these two States are to be considered as having agreed that the bilateral Extradition Treaty which at the date of independence was in force in relation to Jamaica, a colony, is to be in force in relation to independent Jamaica and the United States of America.

Wright, J.

I have read the judgments of Melville and Rowe, JJ. and in my opinion, all the questions that merit attention have been adequately dealt with therein. I need add no more than to signify my concurrence.

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