IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE FULL COURT

SUIT NO. M121 OF 2000

CORAM: THE HONOURABLE CHIEF JUSTICE
THE HONOURABLE MR. JUSTICE GRANVILLE JAMES
THE HONOURABLE MR. JUSTICE KARL HARRISON

REGINA VS. DIRECTOR OF PUBLIC PROSECUTIONS
DIRECTOR OF CORRECTIONAL SERVICES
EX PARTE DAVE ANTONIO GRANT

Mrs. Jacqueline Samuels-Brown and Keith Bishop for the Applicant
Miss Paula Tyndale for the Director of Public Prosecutions
Mrs. Susan Reid-Jones for Director of Correctional Services

Heard: January 18 and March 23, 2001

WOLFE, CJ

The motion herein seeks an order for a writ of habeas corpus on behalf of the applicant arising out of a committal order made by His Honour Mr. Ralston Williams on the 9th day of November, 2000.

The applicant is a Jamaican national who resided in the United States of America.

On January 11, 1998, he was arrested and charged for the offence of possession with intent to distribute marijuana and on April 14, 1998 pleaded guilty to the said offence before the United States District Court for the Southern District of Texas, Houston Division.

The applicant was remanded on bail to come up for sentence on July 14, 1998. He failed to appear and a warrant was issued for his arrest by order of Nancy F. Atlas, Senior United States District Judge.

The applicant returned to Jamaica and on August 18, 2000, he was arrested and taken into custody on a Provisional Warrant issued by His Honour Mr. Ralston Williams, Resident Magistrate for the Corporate Area Criminal Court.

Set out below are the grounds of the application.

(i) That the Extradition Act stipulates an exclusive, mandatory and strict statutory scheme , which must be strictly complied with before a proper committal may be made by a Magistrate and before extradition, can ultimately take place. In your applicant's case the strict statutory scheme was not adhered to.

(ii) That the Extradition Act permits only two categories for extradition of persons that is either (a) as an accused person, or (b) as a person unlawfully at large after conviction.

(iii) That in the present case your applicant is not a convicted person within the meaning of section 8 (2) (a) of the Act. This is supported both by admission of the United States Attorney and by Rule 32 (d) of the Federal Rules of Criminal Procedure.

(iv) That in any event no certificate of conviction and sentence, as is required by section 8 (2) (b) (in relation to requests for convicted persons), has been supplied.

(v) Alternatively, if the extradition of your applicant is to be based on your applicant falling within the category of a "person accused" then a warrant for the applicant's arrest on the extradition offence must be supported as part of the request.

(vi) That no such warrant has been supplied, instead the only warrant supplied is a warrant of arrest for the violation of a condition of release; that is, not honouring a bond.

(vii) That further and in any event, if the request is made pursuant to section 8 (2) (a) of the Act, the Requesting State must prove a *prima facie* case before committal for extradition can be justified. In the present case a fundamental element of the case against your applicant for possession with intent is proof of the nature of the substance. In the present case it is the opinion of my advisers that the Requesting State failed to establish that 'marijuana' in the United States is the same as any prohibited substance under Jamaican Law. Accordingly, in the premises, the committal is bad in law.

(viii) That the Warrant of Committal is wholly defective in that it fails to commit the applicant as an accused or convicted person as the act

requires. Instead the warrant creates a novel, third and impermissible category for extradition on the basis of the accused's guilty plea.

Grounds 1 - 6 were argued together and the burden of the submission in respect of these grounds is that the regime of the Extradition Act 1991 is strict and must be faithfully complied with failing which the request of the requesting state must not be acceded to.

The statutory regime requires that the offence for which it is sought to extradite the applicant must be an extradition offence as defined by section 5 1(b)(i) and (ii) of the Act.

There is no issue joined between the parties in respect of the offence with which the applicant is charged being an extradition offence.

Section 6 requires that the person whose return is sought must be in Jamaica and must be a person who is accused of an extradition offence in any approved state or who is alleged to be unlawfully at large after conviction of such an offence in any such state.

The respondents have conceded that the applicant is not a convicted person within the meaning of section 8 (2) (b) which requires the requesting state to furnish in respect of a person unlawfully at large after conviction of an offence a certificate of conviction and sentence. The applicant although convicted by virtue of his plea of guilty had not yet been sentenced when he absconded. A fact which he admitted.

The issue then is, does the applicant come within the definition of an accused person?

It is my view that he is an accused person for purposes of the Act.

In a criminal case there are only three categories of persons, *viz.* those arrested and charged, that is, accused of a crime. Those accused persons who are either convicted or acquitted by a court of competent Jurisdiction. There is no middle category of persons. A man who pleads guilty to an offence and is admitted to bail and absconds prior to being sentenced remains an accused person until he is sentenced.

If he is an accused person, as I have stated, Section 8 (2) (a) requires as follows:

> "There shall be furnished with any request made for the purposes of this section by or on behalf of any approved state –
>
> (a) in the case of a person accused of an offence, a warrant for his arrest issued in that state
>
> (b) .....
>
> together with, in each case, the particulars of the person whose extradition is requested, and of the facts upon which and the law under which he is accused or was convicted, and evidence sufficient to justify the issue of a warrant for his arrest under section 9."

Mrs. Samuels Brown, for the applicant, submitted that the Warrant of Arrest discloses one offence while the charge on which the applicant is requested

and the particulars supplied is in relation to another and accordingly, the request is not in compliance with the statute.

The argument of Learned Counsel is indeed attractive, but wanting in merit.

All the documents must be read together. It is a fact that the Warrant of Arrest from the Requesting State refers to a -

"violation of condition of release"

but the Diplomatic Notes Exhibits 4 and 5 at pages 15 - 18 of the record are revealing. I cite some extracts from these documents.

Exhibit 4 - paragraph 3.

> "Grant is wanted to be sentenced in the Southern District of Texas for Narcotic offenses . . . . .
> On April 14, 1998, Grant pled guilty to the charge in the indictment and was released on bond. On July 10, 1998, Grant failed to appear as ordered for sentencing. Based on this failure to appear, a warrant for Grant's arrest was issued on July 14, 1998 by order of Nancy F. Atlas, Senior United States District, Judge of the above Court."

Exhibit 5 page 24

> "On April 14, 1998, Dave Antonio Grant pled guilty to the charge of possession with intent to distribute marijuana as alleged in the indictment before United States District Judge Nancy F. Atlas. U.S. District Judge Atlas set the sentencing for Dave Antonio Grant to July 10, 1998. On July 10, 1998, Dave Antonio Grant did not appear in Court to be sentenced. U.S. District Judge Nancy F. Atlas ordered that a warrant be issued for the arrest of Dave Antonio Grant for violating his conditions of release."

Common sense dictates that the warrant could only be issued in respect of the applicant's failure to appear. The purpose of the warrant is to have him arrested so that he may be brought for sentence in respect of the offence to which he has pleaded guilty.

The failure to mention specifically in the Warrant of Arrest and other documents that the applicant is an accused person is in my view of no consequence.

No one could be mistaken as to the purpose of the arrest.

GROUND 7

The argument as to the rule of double criminality reared its head in the case of Clavel Brown Suit No. M110 of 2000 in which Judgment was delivered today and this Court has already ruled that marijuana as defined by the Law of the United States of America and Ganja as defined by the Dangerous Drug Act of Jamaica are one and the same substance.

I am satisfied that the Chemist's certificate in the instant case is sufficient evidence that the applicant is charged in respect of a substance which is prohibited by law in Jamaica and which constitutes an extradition offence under the Extradition Act of 1991.

GROUND 8

Counsel submitted that the Warrant of Committal is defective in that it fails to specify under what category the applicant is being extradited, whether as a convicted person or an accused person.

The words used in the warrant are –

> "his guilty plea and his release on bond on April 14, 1998, of the crime of one count of possession with intent to distribute marijuana."

The uncontested facts are that the accused pleaded guilty, was admitted to bail on condition that he come up for sentence on July 14, 1998 and that he absconded.

There can be no doubt in the mind of any reasonable person that he is not being referred to as a convicted person. Since he can only be a convicted person or an accused person, it follows inexorably that he is being committed as an accused person.

The decision cited by Counsel in ***Re Cobion v. Waterfield [1960] 2 All E.R. 178*** is readily distinguished from the instant case.

For the aforesaid reasons I hold that it is neither unjust nor oppressive or both to return the applicant to be sentenced.

The motion seeking a writ of habeas corpus is accordingly dismissed.

GRANVILLE JAMES, J

I have had the opportunity of reading the judgments of the Learned Chief Justice and Harrison J. I agree with their reasoning and conclusion.

HARRISON J

The applicant Dave Antonio Grant has filed this Motion seeking an order that a Writ of Habeas Corpus be directed to the Director of Correctional Services in respect of his committal under the Extradition Act 1991 by His Honour Mr. Ralston Williams, Resident Magistrate for the Corporate Area.

The facts

The facts reveal that the applicant was apprehended by Houston Police officers in the United States of America on the 11th day of January 1998, with respect to prohibited drugs. He was charged with possession with intent to distribute marijuana and placed before the Court in Houston, Texas on the 14th April 1998. The marijuana was submitted to the Houston Police Department Crime Laboratory for testing and Robert J. Prince who had performed a chemical analysis of the substance submitted, verified that it was marijuana weighing approximately 214 pounds. The applicant pleaded guilty to the charge and sentence was postponed to a later date. He was released on bond to return to Court but he failed to do so. The trial Judge therefore, ordered a warrant for his arrest for violating his conditions of release.

The applicant had returned to Jamaica in July 1998 and he has stated in his affidavit in support that he had absconded because he did not trust the Justice system in the United States.

On the 18th day of August 2000, he was arrested on a Provisional Warrant in Jamaica and was subsequently placed before the Resident Magistrate's Court for the Corporate Area to face extradition proceedings. On the 9th day of November 2000, the presiding Resident Magistrate made an Order committing him to custody to await extradition to the United States of America.

The law relating to conviction in the United States

Assistant District Attorney Robert Stabe, has deposed in his affidavit of the 20th September 2000, that under United States law a conviction was not final until a defendant was sentenced. He states inter alia , at paragraph 10 :

> "Rule 32(d) of the Federal Rules of Criminal Procedure states that a judgment must set forth the sentence. The judgment is not issued until after the defendant is sentenced. Therefore, Grant's extradition is sought for the purpose of sentencing him for committing the crime of possession with intent to distribute marijuana."

The grounds

The grounds upon which the applicant relies are set out in his affidavit in support and they state inter alia:

1. "That the Extradition Act stipulates an exclusive, mandatory and strict statutory scheme which must be strictly complied with before a proper committal may be made by a Magistrate and before extradition can ultimately take place. In your applicant's case the strict statutory scheme was not adhered to.
2. That the Extradition Act permits only two categories for extradition of persons that is either (a) as an accused person or (b) as a person unlawfully at large after conviction.
3. That in the present case your applicant is not a convicted person within the meaning of section 8(2)(a) of the Act. This is supported both by the admission of the United States Attorney and by rule 32 (d) of the Federal Rules of Criminal Procedure.
4. That in any event no certificate of conviction and sentence, as is required by section 8(2)(b) (in relation to requests for convicted persons) has been supplied.
5. That alternatively if the extradition of your Applicant is to be based on your applicant falling within the category of "a person accused" then the warrant for the applicant's arrest on the extradition offence must be supplied as a part of the request.

6. That no such warrant has been supplied, instead the only warrant supplied is a warrant of arrest for the violation of a condition of release; that is, not honouring a bond.
7. That further and in any event, if the request is made pursuant to section 8(2)(a) of the Act, the Requesting State must prove a prima facie case before the committal for extradition can be justified. In the present case a fundamental element of the case against your applicant for possession with intent is proof of the nature of the substance. In the present case it is the opinion of my advisers that the Requesting State failed to establish that "marijuana" in the United States is the same as any prohibited substance under Jamaican Law. Accordingly, in the premises, the committal is bad in law.
8. That the Warrant of Committal is wholly defective in that it fails to commit the Applicant as an accused or convicted person as the Act requires. Instead the warrant creates a novel, third and impermissible category for extradition on the basis of the accused's guilty plea."

The issues to be resolved

Re Grounds 1-6

Counsel for the applicant submitted that it is established law that the strict provisions of the Extradition Law must be complied with and that failure to so do by the requesting State or the local authorities , executive or judiciary, will lead to the denial of the request for extradition of the accused. She argued that extradition has been refused in instances where there has not been strict compliance with the requirements of the law even where it was plain that some crime was committed. In support of this argument she cited **R v Governor of Brixton Prison Exp. Lennon** [1963] Criminal Law Review p. 41; **R v Governor of Brixton Prisons Exp. Otchere** [1963] Criminal Law Review p. 43; **Byles v Director of public Prosecutions and Anor**. (unreported) SCCA 44/96 and **R v Director of Prisons et al Exp. Morally** [1975] 14 JLR. She submitted therefore, that "the requesting State must put its tackle in order otherwise extradition will not issue".

Counsel also contended that the requesting State had failed to send the warrant for an extradition offence. She submitted that the Act mandates that certain documents must be submitted with the request and that in their absence, extradition is not permissible. By section 8(2) it is stated "There shall be furnished with any request made for the purposes of this section by or on behalf of any approved State –

(a) in the case of a person accused of an offence, a warrant for his arrest issued in that State; or

(b) in the case of a person unlawfully at large after conviction of an offence, a certificate of the conviction and sentence in that State and a statement of the part, if any, of that sentence which has been served.

She also submitted that the wording makes it plain that conviction as used in the Extradition Act bears the inclusive meaning, encompassing both verdict and judgment. She argued that in this respect, it was different from the provisions under the previous Fugitive Offenders Act where it was not so expressly stated. Accordingly, the Privy Council decision in **Junious Morgan v R** P.C Appeal 17/89 which defined conviction was not applicable.

Counsel also submitted that in relation to a request for the extradition of a person accused, the requesting state must supply the warrant of arrest for the extradition offence. She contended that to send some other warrant for some other offence was not to comply with the strict statutory requirement. Furthermore, she submitted that since no certificate of conviction in relation to an extradition offence has been provided, the applicant cannot be extradited as a convicted person. Similarly, since no warrant of arrest for the requested extradition offence has been provided the applicant cannot be extradited as an accused person. Finally, she submits that the warrant of arrest disclosed one offence (violating a law of the land) while the charge on which he is requested and the particulars supplied, is in relation to another. Accordingly, the request was not in compliance with the Letter of the Law.

How then should the Court resolve the issue that touches and concerns the category under which the applicant falls in respect of his extradition? The facts have revealed that he was placed before the Court in Houston, Texas on a charge to which he had pleaded guilty but thereafter, he voluntarily removed himself from the jurisdiction of the Court before sentence was imposed. For all intents and purposes he would in my view, be a fugitive from justice. It is further my considered view that his distrust of the justice system in Houston, Texas is really no excuse that this Court can act upon, when it comes to decide whether or not he ought to be returned.

Now, how does the Extradition Act 1991 (hereinafter referred to as "The Act") define a fugitive? Section 2 of the Act states inter alia, that a fugitive is someone "who is accused or convicted of an extradition offence committed within the jurisdiction of a Commonwealth country or a foreign State and is, or is suspected to be, in Jamaica...."(emphasis supplied) It is abundantly clear therefore from reading section 8(2)(b) of the Act that the applicant does not fall within the category of a convicted person. The section speaks about a person who is unlawfully at large after conviction of an offence and in respect of whom there is a certificate of conviction and sentence. Accordingly, the Privy Council decision in **Junious Morgan v R** (supra) is no longer applicable in its definition of a convicted person. Counsel for the Respondent has correctly conceded this point. Furthermore, the law in the United States of America makes it abundantly clear also that a conviction is not final until a defendant is sentenced.

For my part, I would have no difficulty in concluding that the applicant is indeed an accused person. The next issue then for consideration is whether there has been compliance with the law so far as it concerns the extradition of someone who is accused of an extradition offence.

In the instant case, the Provisional Warrant of Arrest states inter alia :

> "WHEREAS it has been shown to me the undersigned..... that DAVE ANTONIO GRANT pleaded guilty and was released on bond on April 14, 1998 of the Extradition offence of one count of possession of ....."

The Warrant of Committal recites inter alia:

> "BE IT REMEMBERED that on the 9th day of November 2000 DAVE ANTONIO GRANT is brought before me pursuant to a warrant for his arrest issued under Section 9 of the Extradition Act 1991 on the ground of his guilty plea and his released (SIC) on bond....."

The Warrant for Arrest from the requesting State states inter alia:

> "YOU ARE HEREBY COMMANDED to arrest DAVE ANTONIO GRANT .....charging him.....with VIOLATION OF CONDITION OF RELEASE".

Let me say from the very outset that no prescribed forms are provided for in the Act. This Court has been advised by Counsel for the Respondent however, that the forms in use by Magistrates, are usually drafted by the Office of the Director of Public Prosecutions with a view to assist them in the preparation of the necessary documents for extradition. Be that as it may, I cannot agree with Counsel for the Applicant that the documents as drafted above are in violation of the statutory requirements. They may not have been drafted elegantly but I do believe that the offending words could only be construed as meaning that the applicant is a person who has been accused of an extradition offence; that he pleaded guilty and was placed on bond. It is therefore my considered view, that the absence of the usual words "an accused person", in these documents, is not fatal.

GROUND 7

The rule as to double criminality

Counsel for the applicant submitted that by virtue of section 5(1) (b) (ii) of the Extradition Act, the offence must be one known to Jamaican law. Counsel submitted

therefore, that the requesting State must adduce evidence that the substance is an illegal drug(ganja) according to Jamaican law and it had failed to do so. She submitted that since the definition of ganja in the Dangerous Drugs Act excludes ganja from which the resin has been extracted, then chemical evidence must be adduced to establish the presence of the resin. Hence she argues, that it is for the requesting State to provide evidence that it was not. She referred to and relied upon the cases of **Exparte Barnes** (unreported) M60/95 delivered on the 12th March 1996 and **Hill** (1993) 96 Cr. App. R. p. 456.

She further submitted that in the absence of such chemical evidence the only acceptable proof is a guilty plea to a charge in which ganja is by law defined as the botanical plant (by whatever name) from which the resin has not been extracted. She argued that there has been no evidence adduced in this case to show that ganja is so defined in U. S law and in fact in the Analyst's report there is no evidential averment that the resin was not extracted. She contended therefore, that the applicant's guilty plea in the United States of America to possession of marijuana is not evidence of the substance ganja from which the resin has not been extracted and cannot be prayed in aid to sufficiently establish a breach of the Dangerous Drugs Act. In this context she submitted that the decision in Byles case (supra) had to be reviewed. She submitted that the learned President of the Appeal Court did not suggest that a botanical classification will satisfy the requirements of the statute. Rather what he said was that it may be "of assistance". Secondly, she submitted that in that case the President's pronouncement of being satisfied that the evidence was sufficient to establish a prima facie case of ganja in Jamaica was based on scientific evidence produced in that case that the resin was present.

I cannot agree with Counsel for the applicant that the rule relating to double criminality has been breached. I have also dealt with this issue in my judgment in suit M 110 of 2000, an application by Clavel Brown for a writ of habeas corpus. I will repeat here what I said in that case. It is the actual facts of the offence that are all important rather than the definition of the crime in the foreign or local law. I am of the firm view, that extradition ought to take place once the crime amounts to an extradition offence under the

Extradition Act 1991 and the facts of the offence, that is, the conduct complained of, show it to be a criminal offence punishable by the laws of both countries.

GROUND 8

Counsel submitted that when one peruses the Warrant of Committal the applicant was not committed as either an accused person or a convicted person. Accordingly, the committal was bad. She also submitted that there was nothing in law which authorizes the committal of a person "who has pleaded guilty". She has contended that in the circumstances, the requesting State had clearly led the Magistrate into error by not stipulating in which category they requested the applicant to be extradited. She further submitted that it is established that if the request is for a convicted person he cannot be extradited as an accused person. Similarly if the request is for neither a convicted person nor an accused person there is no lawful request to accede to. Finally, she submitted that for these reasons, the committal is not according to law and the applicant ought to be discharged from custody.

Counsel in the course of her submissions had referred to the case of **Re Carbon v Waterfield** [1960] 2 All E.R 178. In that case the warrant of committal wrongly described the applicant as "accused" of the crime of larceny whereas by virtue of the "jugement interatif defaut" submitted by the requesting State he was a convicted person. The Court held that there could be no doubt that on a true construction of the statute, the applicant's committal as an accused person was wrong in law. Accordingly, the applicant was discharged from custody.

It is regretted that I cannot agree with these submissions. It is my considered view, that there could be no ambiguity as to the category under which the applicant falls for extradition. The words used in the Warrant of Committal, that is, "his guilty plea and his release on bond" ought to be construed cumulatively. It would be obvious to anyone reading these words that the applicant has not yet been sentenced so he could not be classified as a convicted person. He therefore stands in the category of an accused person and had it not been for him forfeiting his bond he would have been sentenced. I find

therefore, that the facts in the case of **Waterfield** (supra) are distinguishable from those in the instant case.

Conclusion

I can see no injustice therefore, in returning the applicant to the United States of America in order for the sentence of the Court to be carried out. In the circumstances, I would dismiss the application for the writ of habeas corpus.

WOLFE, CJ

The motion is accordingly dismissed.