IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE FULL COURT

SUIT No. 1987/M10

COR: The Hon. Mr. Justice Patterson J.
" " " " Walker J.
" " " " Panton J.

REGINA V. The Director of Public Prosecutions and The Commissioner of Correctional Services ex-parte Donald Anthony Bevin Thompson.

Howard Hamilton Q.C. & Earl Witter, instructed by Carlton Williams for the applicant.

Glen Andrade Q.C., Deputy Director of Public Prosecutions and Garth McBean for the Director of Public Prosecutions.

Patrick Robinson, Jeff Madden & Judith Brown for the Commissioner of Correctional Services.

June 10, 11, 12, 15, 16, 17, 18, 1987

Patterson, J.

The applicant moved the Court firstly, for the issuance of a writ of habeas corpus ad subjiciendum and, alternatively, for his discharge from custody by virtue of the provisions of Section 10 of the Fugitive Offenders Act, 1881.

The Court, having heard the submissions of counsel for the applicant and counsel for the respondents, dismissed the motion and promised to put its reasons in writing at a later date. In fulfilment of that promise, Walker J. has written the leading reasons for judgment which I have had the privilege of reading, and I express my agreement with it.

However, there is just one point that I shall deal with. Mr. Andrade in his submissions to the Court, expressed his disapproval of the procedure adopted by the applicant in applying for the writ of habeas corpus ad subjiciendum. As it transpired, the applicant filed an ex-parte summons,

the relevant part of which reads as follows:-

"LET ALL PARTIES CONCERNED attend a Judge in Chambers at the Supreme Court, King Street, Kingston on the 6th day of February, 1987 at 10:00 o'clock in the forenoon or as soon thereafter as Counsel may be heard to show cause why a writ of Habeas Corpus should not issue directed to the Commissioner of Corrections to have the body of the said Donald Anthony Bevin Thompson before a Judge in Chambers at .....

Dated 5th day of February, 1987."

The ex-parte summons was heard by a Judge in Chambers on the 6th February, 1987 and the form of order filed reads in part:-

"1. Leave granted to apply to the Full Court for a Writ of Habeas Corpus ad Subjiciendum to issue directed to the Commissioner of Correctional Services to have the body of DONALD ANTHONY BEVIN THOMPSON brought before the said Court.

2. Such application to be made by Notice of Motion.

3. A copy of this Order and a copy of the aforesaid Notice of Motion together with copies of all affidavits, whether sworn to by the applicant or others and other documents if any which is proposed to be used at the hearing of the application shall be served on the learned Director of Public Prosecutions and the learned Attorney General representing the Commissioner of Correctional Services and the Commissioner of Police.

4. .....

5. .....

6. ....."

The Constitution of Jamaica protects the fundamental right to liberty of every person within Jamaica and guards against arbitrary arrest or detention (S.15). The common law has always provided a remedy, by means of the writ of habeas corpus ad subjiciendum, to secure the release of every person who has been unjustifiably detained, and various statutes have, from time to time, assisted the common law remedy in its relentless quest to vindicate the liberty of the subject. The procedure to be followed in invoking the Court's jurisdiction has varied over the years. Today, the application for a writ of habeas corpus ad subjiciendum is governed by the provisions of S. 564 of the Judicature (Civil Procedure Code) Law.

Sec. 564K provides that an application "shall be made in the first instance to either a Full Court or to a single Judge in Court except that

(a) in vacation or at any time when no Judge is sitting in Court, it may be made to a Judge sitting otherwise than in Court;

(b) in cases where the application is made on behalf of a child, it shall be made in the first instance to a Judge sitting otherwise than in Court".

A person detained is not required to seek the grant of leave to apply for the writ, and the procedure here should not be confused with the procedure laid down in applications for any of the prerogative orders of mandamus, prohibition or certiorari, where leave must first be obtained to apply. The liberty of the subject is so jealously guarded that the application takes precedence over all other proceedings before the Court on the same day. If the applicant is an adult and if the Full

Court is sitting, the applicant is entitled to a hearing before that Court on that day; otherwise he is entitled to have his application heard by any Judge at first instance who is then sitting in Court. The application in the first instance will go before a Judge sitting in Chambers only if neither the Full Court nor a Judge is sitting in Court, or if it is made in Vacation time.

"The application may be made ex-parte, and shall be accompanied by an affidavit by the person restrained showing that it is made at his instance and setting out the nature of the restraint" (S. 564K (2)).

The usual practice is for Counsel to appear before the Court armed with a copy of the affidavit, and make his application. This is done by way of motion and it is desirable that the original affidavit and the requisite copies for the use of the Court should be lodged in the Registry at least the day before the application is made, if possible. The applicant is at liberty to file a Notice of Motion accompanied by his affidavit and obtain a hearing date.

The application need not be made by the person restrained, nor is it obligatory that it should be in his name or that he should swear the affidavit. It is provided that

> " where the person restrained is unable owing to the restraint to make the affidavit, the application shall be accompanied by an affidavit to the like effect made by some other person which shall state that the person restrained is unable to make the affidavit himself." (See the proviso to S. 564K (2)).

S. 564 gives the Court or Judge to whom the ex-parte application is made power to order an immediate issue of the writ or to direct a summons or Notice of Motion. In practice, the power to issue the writ on the

ex-parte application will not be exercised unless the evidence and the law are clear, or where delay would defeat the ends of justice. The common practice is that the matter is heard before a Full Court after Notice of Motion and affidavits are served on the respondents.

In the instant case, it may be that on the day that the ex-parte application was made to a Judge in Chambers, neither a Full Court nor a Judge was sitting in Court, and so the application would have been made in a proper forum. That part of the Order which purports to grant leave is superfluous and may be disregarded. The directions that an application for the writ be made to the Full Court by Notice of Motion is in accordance with the provisions of the Civil Procedure Code referred to above.

In the event, we concluded that the procedure adopted by the applicant in bringing the matter before the Full Court did not prejudice the application in any way.

WALKER J.

In these proceedings counsel moved for a writ of habeas corpus to secure the release of the applicant, Donald Anthony Bevin Thompson, now detained in the General Penitentiary, Kingston, pursuant to an order of committal made by Her Honour Mrs. Norma McIntosh, Resident Magistrate for the parish of Kingston under the Fugitive Offenders Act, 1881. Alternatively, there was an application for relief under s. 10 of the Act . On June 18, 1987 we dismissed these applications and I now set out below my reasons for concurring in this decision.

For the record it must here be stated that the alternative application for relief under s. 10 of the Act was added as an amendment to the original notice of motion with the consent of the respondents. Another application was made by the applicant after the close of the respondents' arguments on June 16, 1987, this time to further amend the original notice of motion to include a prayer for "a declaration that the fundamental right of the applicant not to be deprived of his personal liberty, guaranteed by s. 15 of the Second Schedule of the Jamaica (Constitution) Order in Council 1962, has been and is being infringed by virtue of his incarceration pursuant to:

(i) an endorsed warrant of apprehension, and

(ii) a warrant of committal unlawfully issued."

Both counsel for the respondents opposed this application on the grounds that a full court was not the proper forum for hearing the subject matter of the application, that an application for a declaration under the provision of s. 25 of the Constitution could not be properly argued in habeas corpus proceedings and that, in any event, it was too late in the proceedings to entertain such an application. In the result we declined to accede to Mr. Witter's entreaties and this application was refused.

To come now to the facts, the applicant, a Jamaican citizen by birth, was charged with having committed in the Cayman Islands breaches of the Misuse of Drugs Law, each of which involved the possession of cocaine hydrochloride, a salt of cocaine. In each instance the amount for which the applicant was charged was less than two ounces. The applicant was arrested on these charges on July 28, 1986 and subsequently admitted

to bail. He appeared before the Magistrate's Court in Grand Cayman on several occasions, but on September 17, 1986 he failed to appear as he was required to do with the result that four warrants were issued for his arrest by the presiding Magistrate. The records show that while on bail the applicant, in company with others, fled the Cayman Islands by sea, embarking upon a long and fateful voyage which brought them to a point some 22 miles north-west of Montego Bay, Jamaica where they were intercepted by the Jamaica Coast Guard. Subsequently the applicant and two of his surviving companions (another two had died en route according to the applicant) were handed over to the local police. Thereafter the applicant was processed and, following information received from the Cayman Islands, he was detained with a view to being returned to Grand Cayman. In due course a provisional warrant for his arrest was issued in Jamaica by His Honour Mr. Armond Soares, Resident Magistrate for the parish of Kingston. That warrant was later endorsed by Wolfe J., a judge of this court acting under the provisions of s. 3 (1) of the Act of 1881.

In the presentation of his arguments counsel for the applicant contended, firstly, that the Fugitive Offenders Act, 1881 was not applicable to Jamaica. He submitted that the Act ceased to apply to Jamaica from and since August 6, 1962 when the country gained independent status. This point was not a novel one. It was taken, and decided, in the case (unreported) of R. v. Commissioner of Correctional Services Ex-parte Raphael Constantine Dillon and Errol Williams, (Supreme

Court suits Nos. 41 & 42 of 1977). But counsel for the applicant argued manfully, and with obvious sincerity, in inviting us to say that that case was wrongly decided. He reasoned in this way, that that court, having come to the conclusion that Jamaica was not a territory within Her Majesty's dominions for purposes of the Act of 1881, later fell into error when it pronounced a judgment which was adverse to the applicants therein. Counsel for the applicant maintained that that judgment should, rationally, have been given in favour of the applicants, relying heavily on that part of the judgment of Smith C.J. where the learned Chief Justice said /at pages 14 - 15/:

> In my opinion, /interpreting the provisions of the Act of 1881, the words and the terms used in it must be given the same meaning today as they bore at the time when the Act was passed. At that time, apart from the United Kingdom itself, the term "Her Majesty's dominions" in the Act meant dependent territories of the Crown i.e. territories in the ownership of the Crown and for which the United Kingdom parliament had the power to legislate. It is in this sense that I have used the word "sovereignty" in relation to Bermuda. Former dependent territories of the Crown, like our Country, which gained their independence but retained Her Majesty as head of state are referred to in Halsbury's Laws of England as "remaining within Her Majesty's dominions" (see 4th edn. Vol. 6 para. 817 et seq.). I do not think that those territories are within "Her Majesty's dominions" for the purposes of the Act of 1881."

Contra, counsel for the second respondent submitted that the Act of 1881 applied to Jamaica before independence (which was not in dispute) and continued to apply to Jamaica after independence either because of the constitutional status of the country, or by virtue of the provisions of s. 4 (1) of the Constitution of Jamaica.

S. 4 (1) provides as follows:

> "All laws which are 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, and all laws which have been made before that day but have not previously been brought into operation may (subject as aforesaid) be brought into force, in accordance with any provision in that behalf, on or after that day, but all such laws shall, subject to the provisions of the section, be construed, in relation to any period beginning on or after the appointed day, with such adaptations and modifications as may be necessary to bring them into conformity with the provisions of this Order."

The above provisions of s. 4 (1), counsel for the second respondent argued, were sufficiently clear in establishing that all laws in force prior to the date of independence continued in force after that date and were to be construed with such modifications and adaptations as were necessary to bring them into conformity with the order establishing the independence of Jamaica. Counsel for the second respondent said that the efficacy of s. 4 (1) in preserving any pre-independence law such as the Act of 1881 did not depend on the content or substance of a particular law, but rather on whether that law was a law in force prior to the appointed day. As authorities for this proposition he cited the cases of R. v. Director of Prisons and Another Ex-parte Morally (1975) 14 J.L.R. 1; Bhola v Baynes (1976) 28 W.L.R. 346 and the case of Williams and Dillon (supra).
In support of his submissions on this aspect of the matter counsel for the second respondent also referred us to several textural authorities and also to the case of R. v. Earl of Crewe Ex-parte Sekgome (1910) 2 K.B. 576 which, he argued, was distinguishable on its facts from the instant

case. Insofar as the Williams and Dillon case was concerned Mr. Robinson sought to explain and to justify the judgment given therein, doing so, if I may venture a compliment, with consummate skill and erudition. The dictum of Smith C.J. (above quoted) was closely examined by counsel for the second respondent who said that he was not necessarily in agreement with the opinion expressed therein as to the manner of interpretation of the Act of 1881. He opined that having formed the view, as it appeared, that independent Jamaica was not a territory within Her Majesty's dominions for purposes of the Act, the learned Chief Justice must finally have come to his judgment by what counsel for the second respondent termed the "preservation route" i.e. by application of s. 4 (1) of the Constitution of Jamaica.

In my opinion the Act of 1881 is today applicable to Jamaica, not only as a consequence of the constitutional status of Jamaica, but also by virtue of the rule of construction prescribed in s. 4 (1) of the Constitution of Jamaica. I have also concluded that for purposes of the Act of 1881 Jamaica is today a territory which is within Her Majesty's dominions. Such a conclusion seems to me to be inevitable when one gives due consideration and effect to the various provisions of the Constitution of Jamaica, particularly the provisions of sections 34, 60, 68, 90 and 110, the forms of the Oath of Allegiance and Judicial Oath prescribed in the First Schedule to the said Constitution and the constitutional status of the country overall. In this regard, therefore, I must respectfully dissent from the contrary opinion expressed by the court in the Williams and Dillon case (supra). Insofar as the

judgment in that case is concerned I think, myself, that it may be explained on the basis suggested by counsel for the second respondent, that is on the basis that their Lordships, having decided that Jamaica was not a territory within Her Majesty's dominions for purposes of the Act, proceeded to find that the Act was, nonetheless, applicable to Jamaica by virtue of the rule of construction prescribed in s. 4 (1) of the Constitution of Jamaica. If this be the true ratio decidendi of their Lordships' decision then I should be prepared to say that that case was rightly decided.

Secondly, it was argued that in point of fact there was no evidential basis for the finding of the learned Resident Magistrate that the evidence adduced before her gave rise to a strong presumption of the guilt of the applicant. In support of this argument counsel for the applicant referred to the case of Armah v. Government of Ghana (1966)3 All.E.R. 177 and also to the case of R. v. Director of Prisons and Director of Public Prosecutions Ex-parte Morally (supra) in which Armah's case was followed. It was conceded that in the instant case in determining the question whether or not the evidence gave rise to a strong or probable presumption of the guilt of the applicant, the learned Resident Magistrate applied the right test (i.e. the test laid down in Armah's case), but it was contended that having done so she came to the wrong conclusion. The question, therefore, is whether there was in fact evidential basis for the finding of the learned Resident Magistrate. The relevant evidence was summarized in paragraph 11A - F of the affidavit of Anthony Smellie, counsel in the Attorney General's chambers in Grand Cayman. It reads as follows:

> "11. The following is to the best of my information and belief a Summary of the Evidence herein.

A. Donald Anthony Thompson (the Fugitive accused) was, on the 28th day of July 1986 in the employment of the Cayman Islands Government as a Prisons Officer attached to the Northward Prison in Grand Cayman.

B. On account of information received, Thompson's motor vehicle #20416 was intercepted on the 28th July by officers of the Traffic Department of the Royal Cayman Islands Police along the West Bay Road. Thompson was alone in the car.

C. Thompson's person was searched and in his presence the car was also searched. Beneath the driver's seat of the car an air mail envelope containing two plastic bags was found. In those plastic bags was seen a white substance which upon analysis proved to be Cocaine hydrochloride, a salt of cocaine and a hard drug as defined in the Misuse of Drugs Law.

D. Subsequently, upon examination a latent impression that was found on one of those plastic bags proved to be Thompson's palm impression f rom his left hand.

E. In the trunk of Thompson's car was f ound a box of plastic bags of the same type and size as those found in the envelope beneath his seat. The box had been opened and some of its contents already removed.

F, Later, Thompson was taken to his home at Savannah in Grand Cayman. There in his presence and in the presence of his wife Louella Thompson the house was searched. In the closet of the bedroom occupied by the couple a pair of army-type fatigue pants was found. In a pocket of those fatigues Woman Police Constable Valerie Anderson found a small white plastic bag. Inside that plastic bag she found another, of the type and size as those found beneath the seat of Thompson's car. That second bag also contained a white substance which proved upon analysis to be cocaine hydrocloride.

In addition to this evidence there was the evidence of Constable Clive Howard Smith which was to the effect that, having been intercepted by the police, while his car was being searched but shortly before the two plastic bags were found the applicant was heard to say "Boy I am fucked now ." When asked what he meant by that remark the applicant is reported

to have replied "just wait and see." I am of the view that all of this evidence does, indeed, raise a strong or probable presumption of the guilt of the applicant. I think it justifies entirely the conclusion to which the learned Resident Magistrate came.

Next, the validity of the order of the learned Resident Magistrate was challenged on the ground that the request for the extradition of the applicant did not satisfy the requirements of s. 9 of the Act of 1881. So far as is relevant s. 9 reads as follows:

> "9. Offences to which this part of this Act applies. This part of this Act shall apply to the following offences namely, to treason and piracy, and to every offence, whether called felony, misdemeanour, crime or by any other name which is for the time being punishable in the part of Her Majesty's dominions in which it was committed either on indictment or information, by imprisonment with hard labour for a term of twelve months or more or by any greater punishment; and for the purposes of this section, rigorous imprisonment, and any confinement in a prison combined with labour, by whatever name it is called, shall be deemed to be imprisonment with hard labour."

More specifically, counsel for the applicant submitted that it had not been shown that the applicant is accused of having committed an offence which is punishable by imprisonment with hard labour for a term of twelve months or more, or by any greater punishment. Attention was drawn to the fact that the offences in respect of which the applicant's return to the Cayman Islands was being sought are punishable, as regards two of them each with a maximum sentence of seven years imprisonment plus a fine of $10,000, and, as regards the other two offences each with a maximum sentence of 15 years

imprisonment plus a fine without limit as to the amount thereof. Counsel for the applicant contended that inasmuch as the element of hard labour was not expressly stated and could not, on the evidence adduced before the learned Resident Magistrate, be deemed to be a part of the punishment which the applicant is liable to suffer, the applicant's case did not fall within the ambit of s. 9. Furthermore, it was argued that such punishment as it was shown that the applicant is likely to suffer, if convicted, did not amount to greater punishment in terms of the provisions of s. 9.

On the other hand, it was contended for the respondents that the punishment which the applicant is liable to suffer involves confinement in a prison as well as an element of labour such as is capable of being deemed hard labour within the meaning of the Act. It was urged that evidence of such labour was to be found in the deposition given by the applicant himself in the proceedings before the learned Resident Magistrate in Jamaica. Alternatively, it was submitted that the punishment which the applicant is liable to suffer is greater punishment as required by s. 9.

There can be no doubt that in extradition proceedings brought under the Fugitive Offenders Act, 1881 there is a burden cast on a requisitioning state to satisfy the requirements of s. 9 of that Act. Authority for this proposition is to be found in the case of R. v. Governor of Brixton Prison Ex-parte Percival (1907) 1 K.B. 696 where Lord Alverstone C.J. said at page 706:

> "I am of opinion that under s. 9 of the Fugitive Offenders Act, 1881, the magistrate has to be satisfied that

> the crime, "whether called felony, misdemeanour, crime or by any other name," is one "which is for the time being punishable in the part of Her Majesty's dominions in which it was committed, either on indictment or information, by imprisonment with hard labour for a term of twelve calendar months or more, or by any greater punishment." I understand the meaning of that provision to be in substance that there must be, in order to justify an order being made under this Act, an offence punishable in the part of His Majesty's dominions where it is alleged to have been committed by that term of imprisonment. In my opinion every person who comes and asks for an order for the deliver up of a fugitive offender must be prepared with evidence that that condition of the statute has been fulfilled. That is a very important matter, and having regard to the fact that we are dealing with the criminal law, we must apply the general principles of the criminal law, and the prosecutor must make out his case. We are also dealing with a breach of the criminal law which affects the liberty of the subject, and that condition should under ordinary circumstances be clearly fulfilled."

Looking at the instant case I see no evidence to prove that such imprisonment as the applicant is liable to suffer, if convicted, is imprisonment <u>with hard labour</u>. Such evidence as was brought to the attention of the court consisted of evidence elicited from the applicant himself. Having examined that evidence, it is my opinion that it is essentially of general application and can in no way be related specifically to offences of the nature of those of which the applicant is accused. But now comes the question whether such evidence as there was satisfied the alternative statutory requirement of "greater punishment." What then is the true meaning of the term "greater punishment" used in the context of s. 9? First of all it appears to me to be beyond argument that the section prescribes greater punishment as an alternative to punishment by imprisonment with hard labour for a term of 12 months or more. It was the submission of counsel for

the second respondent that the term "greater punishment" as used here means punishment not being of the nature of imprisonment with hard labour for a term of 12 months or more, but being punishment which, because of some additional element, is more severe than imprisonment with hard labour for a term of 12 months or more. I agree with that submission. In my judgment "greater punishment" within the context of s. 9 may include an element of imprisonment <u>without hard labour</u> as well as it may not e.g. life imprisonment. It is obvious that any punishment involving imprisonment <u>with hard labour</u> for 12 months or longer simpliciter would fall within the description of "imprisonment with hard labour for a period of 12 months or more." Essentially, the term "greater punishment" contemplates punishment which is altogether different in character from, andmore severe than, punishment by imprisonment with hard labour for a term of 12 months or more. At the same time, however, I think that "greater punishment" may include an element of imprisonment <u>with hard labour</u> for a term of 12 months or more. If it does, then in order to admit of the description "greater punishment" it must also carry with it something more which would have the effect of making such punishment, punishment which is more severe than one of imprisonment with hard labour for a term of 12 months or more. Or "greater punishment" may consist of punishment having an element of imprisonment <u>without hard labour</u> plus some additional element, both elements being taken together as constituting a single unit of punishment. Such punishment would then, by virtue of its severity, amount to greater punishment than punishment by imprisonment with hard labour for a term of 12 months or more. This, I think, is precisely the situation in the instant

case. Here the evidence showed that the offences of which the applicant is accused are punishable, in the one instance by imprisonment for a maximum term of 7 years plus a mandatory fine of a maximum sum of $10,000, and in the other instance by imprisonment for a maximum term of 15 years plus a mandatory fine of an unlimited sum of money. It seems to me, therefore, that the question is whether it was open to the learned Resident Magistrate to find that either one or other of these two punishments is capable of constituting "greater punishment" within the context of s. 9 of the Act. I would answer this question in the affirmative being, myself, of the opinion that either punishment constitutes "greater punishment" within the context of s. 9.

Next, it was submitted that the endorsement of the warrant for apprehension of the applicant was defective in the following respects:

(i) the endorsement was made by a judge of the Supreme Court and not by the Minister of Government of Jamaica having responsibility for the subject matter of extradition as required by s. 3 of the Act of 1881;

(ii) the form of the endorsement contravened the provisions of s. 5 of the Act inasmuch as it reversed the burden which lay on the requisitioning state to show cause why the fugitive offender should be surrendered;

(iii) the endorsement was improperly addressed to "All and each of the Constables of the Jamaica Constabulary Force and all other persons to whom this warrant was orginally directed or by whom it may lawfully be executed in Her Majesty's name." It should properly have been addressed to a named individual.

It was said that these defects rendered the endorsement invalid with the legal consequence that the applicant's detention under it became unlawful. I find no merit in any of these submissions, however, I make two observations in passing. Firstly, in the Williams and Dillon case (supra) on which reliance was placed, the endorsement of the warrant for apprehension was addressed in similar form to the endorsement of the corresponding warrant in this case. There it was argued that the endorsement was defective as having been improperly addressed, the same point now taken before this Court. That argument did not find favour with the majority of the Court, although Willkie J, who dissented, did consider it to have been well founded. For my part I agree with the majority decision in that case, and approve and adopt the reasons given therefor and set forth in the judgment of Smith C.J. Secondly, I find that the procedure adopted in this case, whereby the endorsement was made by Wolfe J., conformed with the requirements of s. 3 of the Act of 1881. The section reads as follows:

"3. Endorsing of warrant for apprehension of fugitive. Where a warrant has been issued in one part of Her Majesty's dominions for the apprehension of a fugitive from that part, any of the

following authorities in another part of Her Majesty's dominions in or on the way to which the fugitive is or is suspected to be; (that is to say),

(1) A judge of a superior court in such part: and

(2) In the United Kingdom . Secretary of State and one of the magistrates of the metropolitan police court in Bow Street; and

(3) In a British possession the governor of that possession, if satisfied that the warrant was issued by some person having lawful authority to issue the same, may endorse such warrant in manner provided by this Act, and the warrant so endorsed shall be a sufficient authority to apprehend the fugitive in the part of Her Majesty's dominions in which it is endorsed, and bring him before a magistrate."

The provisions of this section are clear and unambiguous. The endorsement was made by a judge of a superior court of Jamaica and that, I should think, effectively disposes of counsel's complaint.

Lastly, counsel for the applicant argued that even if this court were to find the detention of the applicant to be lawful, in the face of the evidence in the case the applicant was entitled to be granted relief under the provisions of s. 10 of the Act. It waw contended that to return the applicant to Grand Cayman would be unjust or oppressive against the background of this evidence.

The argument, counsel for the applicant submitted, was not that the applicant thought that if returned he would not receive a fair trial, but that the same would not be manifest to a layman. In other words, counsel for the applicant said that the applicant was hanging his hat on the peg of the maxim "Justice must not only be done, but must manifestly

be seen to be done." As proof of oppression counsel for the applicant pointed to evidence in the instant case which he contended established the following facts:

(i) that the applicant had been threatened with death and was in real fear of being assassinated if returned to Grand Cayman;

(ii) that upon trial, the law of Grand Cayman cast a burden of proof on the applicant;

(iii) that in Grand Cayman the applicant would not be tried by a judge and jury but by a judge sitting alone who, already, had made a pronouncement which was unfavourable to the applicant and which had not been traversed.

In answer to these submissions, which we heard in exercise of our original jurisdiction, counsel for the second respondent submitted that in order to succeed on an application brought under s. 10 of the Act it had to be shown either:

(i) that the applicant's return to Grand Cayman would expose him to the risk of prejudice in the conduct of the trial itself in the sense that the contemplated proceedings, though lawful, would be conducted in a manner that was contrary to the principles of natural justice, or

(ii) that in the event of his return, the applicant would be likely to suffer hardship resulting from some change in circumstances which occurred since his departure from Grand Cayman.

Where the applicant's fear of assassination was concerned, counsel for the second respondent submitted that this court would be entitled to assume that Grand Cayman was a civilised country which would take all necessary precautions to ensure the applicant's safety should he be returned there. With regard to the applicant's fears concerning the mode of his trial, counsel for the second respondent cited the case of R. v. Governor of Brixton Prison Ex-parte Savarkar (1908-1910)All.E.R. Rep. 603. This case, he said, was authority for the proposition that there was nothing inherently prejudicial in the conduct of a criminal case being undertaken by a judge, or judges, sitting alone rather than by a judge sitting with a jury. Furthermore, insofar as the applicant's objection to being tried by a particular magistrate was concerned, counsel for the second respondent pointed to certain evidence given by the applicant's attorney in the proceedings before the learned Resident Magistrate in Jamaica. It was evidence to the effect that were the applicant to be returned to Grand Cayman, it would be open to him (the applicant) to seek the disqualification of the magistrate against whom objection was being taken and to have his case tried before a different tribunal. In this regard the case of Re Henderson. Henderson v Secretary of State for Home Affairs and Another (1951)1 All E.R. 283 cited by counsel for the second respondent is apposite. In that case, on an application to the Court of Appeal for relief under s. 10 of the Fugitive Offenders Act, 1881, the applicant, whose extradition from England to India was being sought, contended inter alia:

> "(a) that it would not be possible for him to defend himself properly in India owing to the difficulties caused by the delay, and
> (b) that a fair trial in India was no longer possible as the constitution

of the special tribunal which had been set up to try the case had entirely changed since it was first set up and the present members would not see and .. hear the witnesses for the prosecution themselves, but would merely read their evidence. He submitted that, in these circumstances, it would be too severe a punishment, within the meaning of s. 10, to return him, and that the court had a discretion to discharge him from custody."

It was held:

"(i) assuming that the correct interpretation of s. 10 of the Act of 1881 was that the court had a discretion to make an order under the section in any case where "having regard to the distance, the facilities for communication, and to all the circumstances of the case, it appears to the court that it would be oppressive, or too severe a punishment, to return the fugitive..." (as was submitted by the Attorney-General in R. v. Brixton Prison (Governor), Ex parte Waite (1921) The Times, Feb. 22) and accepted by the Divisional Court for the purpose of that case), the court would make an order for the release of a fugitive only (a) where it appeared that the contemplated proceedings, although, perhaps, lawful by the law of the country concerned, would be conducted in a way contrary to natural justice, or (b) if it appeared that the charges were trivial and that the punishment entailed in being returned was out of all proportion to the gravity of the alleged offence.

(ii) the difficulties which the applicant would experience in presenting his defence as a result of the length of time that had elapsed since the proceedings started were matters for the consideration of the tribunal dealing with the case and were factors which would be considered by the tribunal of any civilised country when dealing with a criminal matter.

(iii) the facts that the constitution of the tribunal had changed since the trial started and that the rules of procedure were different from those in England were not a ground for assuming that the applicant would not obtain justice.

(iv) the charges against the applicant were serious ones, and it was impossible to say that he would be unduly punished by having to return to India for the trial or that the action of the government of India in seeking his extradition was, in the circumstances, oppressive, and, therefore, he had failed to make out a case for the intervention of the court under s. 10 of the Act of 1881."

In his judgment Tucker L.J. said at p. 287:

"I think that the kind of matters with regard to which this court would act would be where it appears that the contemplated proceedings, although, perhaps, lawful by the law of the country concerned, are really going to be conducted in a way contrary to natural justice or contrary to our ideas of it. A case of that kind has, in my view, certainly not been made out on the material laid before us. It is not sufficient to say: That would not be the procedure in this court. That would appear to entail hardship."

I approve and adopt this dictum of Lord Justice Tucker and am, myself, satisfied that the applicant in these proceedings has not shown that were he to be returned to the Cayman Islands, the proceedings against him would be conducted in a manner that is contrary to the principles of natural justice as we understand them.

In the result, and for these reasons, I would dismiss these applications.

PANTON, J.

On the 21st January, 1987, Her Hon. Mrs. Norma McIntosh, Resident Magistrate for the parish of Kingston, in accordance with section 5 of the Fugitive Offenders Act, 1881, hereinafter referred to as "the Act", committed the applicant to prison to await his return to the Cayman Islands to stand trial on charges of possession of cocaine and possession of cocaine with intent to supply, in contravention of the Cayman Islands' Misuse of Drugs Law.

In an affidavit dated 5th February, 1987, the applicant claimed that the learned Resident Magistrate misdirected herself in law in finding that "there is evidence in this case giving rise to a strong presumption of guilt."

In a further affidavit dated 2nd April, 1987, the applicant claimed that he ought to be discharged on the ground that the application for his return was not being made in good faith, in the interests of justice or otherwise and that having regard to all the circumstances of the case it would be unjust, or oppressive to order his return.

In yet another affidavit dated 25th April, 1987, the applicant sought his discharge on the additional grounds that -

1. there was no treaty, arrangement or provision between Jamaica and the Cayman Islands to facilitate the return of fugitive offenders from Jamaica to the Cayman Islands; and

2. the Resident Magistrate had no jurisdiction to make the committal order.

These affidavits formed part of the proceedings which came before us by virtue of an Originating Notice of Motion dated 3rd April, 1987. The applicant sought an Order that a writ of habeas corpus ad subjiciendum be issued to the Commissioner of Correctional Services to have the body of the applicant "before the Full Court at such time as the Court may direct upon the grounds set out in the affidavit (of

the applicant) sworn to on the 5th day of February, 1987."

On the last day but one of the seven days of submissions before the Court, that is, in the dying moments of the hearing, an amendment to the Originating Notice of Motion was sought by the applicant. The Court, generously, if I may say so, granted the amendment to add these words: "Alternatively, that the applicant be discharged by this Honourable Court exercising its powers under section 10 of the Fugitive Offenders Act, 1881." At this late stage, indeed, another application was made to include a prayer for the protection of the fundamental rights of the applicant guaranteed by section 15 of the Constitution. The applicant, it was hoped, would then seek a declaration from this Court that his fundamental rights were being infringed. This latter application to amend was refused.

Summary of allegations against the applicant

On the afternoon of the 28th July, 1986, the applicant, a Prisons Officer employed by the Government of the Cayman Islands and attached to the Northward Prison, Grand Cayman, was driving his motor car along the West Bay main road, Grand Cayman, when he was stopped by the police who were acting on information that they had earlier received. During a search of the car the police found under the driver's seat two plastic bags containing a salt of cocaine. The applicant's left palmar impression was found on one of these bags.

The applicant's house was searched in his presence. Another plastic bag containing a salt of cocaine was found in the pocket of a pants in a closet in his bedroom.

Does the Act apply to Jamaica?

It was submitted on behalf of the applicant that there is no law which permits the extradition of a fugitive from Jamaica to the Cayman Islands as the Act does not apply to Jamaica. There was no

dispute that the Act was in operation up to midnight August 5, 1962, but according to the applicant, the language of section 2 is inconsistent with applicability to Jamaica after that date.

In this regard, it is necessary to look at section 4(1) of The Jamaica (Constitution) Order in Council 1962. It reads thus:

> "All laws which are 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, and all laws which have been made before that day but have not previously been brought into operation may (subject as aforesaid) be brought into force in accordance with any provision in that behalf, on or after that day, but all such laws shall, subject to the provisions of this section be construed, in relation to any period beginning on or after the appointed day, with such adaptations and modifications as may be necessary to bring them into conformity with the provisions of this Order."

There was no suggestion that the Cayman Islands do not form part of Her Majesty's dominions. However, the applicant's attorney-at-law has hotly contended that in this twenty-fifth year of Jamaica's independence there can be no thought or suggestion that Jamaica is still part of Her Majesty's dominions.

Nearly a decade ago, Smith, C.J. in Regina v. Correctional Services ex parte Dillion and Williams (unreported - Suits nos. M41 and 42 of 1977)(date of Judgment - 17th July, 1978), said:

> "An Imperial Act applied directly to a dependency when passed if it so appeared from the use of express words or from the necessary intendment of the Act. A cursory glance at the Act of 1881 is sufficient to establish that, by its provisions, the Imperial Parliament legislated directly for the United Kingdom and dependent territories of the Crown. The provisions of Parts 1, III and IV were, therefore, in force in Jamaica from the Act was passed. Part II was applied to West Indian colonies, including Jamaica, as a group by an Order in Council dated 29th November, 1884. The Act was in force when Jamaica became fully independent in 1962. It has continued in force since then by virtue of section 4(1) of the Jamaica (Constitution) Order in Council 1962. It is still in force and will remain so until repealed by the Jamaican Parliament."

The Act has not been repealed since Smith, C.J., used those words.

In my judgment, this is a question of construction and logic. If the Act was in force at midnight on August 5, 1962, and it certainly was, then by section 4(1) of the Jamaica (Constitution) Order in Council it continues in force until repealed. All that is necessary is for it to be construed with "such adaptations and modifications as may be necessary to bring (it) into conformity with the provisions of (the) Order.

In view of the fact that the Act is still in force in Jamaica, and considering the provision of section 4(1) of the Jamaica (Constitution) Order in Council, 1962, relating to adaptations and modifications, it is somewhat puzzling to hear the submission that in any event the terminology of section 2 prevents that section from having any reference to Jamaica. The section reads thus:

> "Where a person accused of having committed an offence (to which this part of this Act applies) in one part of Her Majesty's dominions has left that part, such person (in this Act referred to as a fugitive from that part) if found in another part of Her Majesty's dominions, shall be liable to be apprehended and returned in manner provided by this Act to the part from which he is a fugitive."

There can be no dispute that these words applied to Jamaica up to midnight August 5, 1962. Their effect was to make liable to apprehension and return any fugitive from one part of Her Majesty's dominions if found in another part of Her Majesty's dominions (that is, Jamaica).

In my view, by virtue of section 4(1) of the Jamaica (Constitution) Order in Council, these words continue to be applicable to Jamaica. Section 4(1) is aimed at maintaining continuity in the law. To say that the words are contrary to one's feelings of nationalism does not mean that they are therefore inapplicable.

Quite apart from section 4(1), however, I am prepared to accept Mr. Robinson's submission that there are further bases for saying that constitutionally, Jamaica is a part of Her Majesty's dominions.

Mr. Robinson referred the Court to various sections of the Constitution pointing out the dominant role of Her Majesty in the whole scheme of things. To my mind, there is much merit in what Mr. Robinson said and I am prepared to hold that by choice Jamaica has remained part of Her Majesty's dominions for the purposes of the Act; and that this is clearly supported by various provisions of the Constitution.

By section 27, Her Majesty is given the sole power to appoint the Governor General who holds office during her pleasure and who is Her Majesty's representative in Jamaica.

By section 34, it is provided that Parliament consists of Her Majesty, a Senate and a House of Representatives.

By section 60, Bills do not become law until the Governor General assents thereto in Her Majesty's name and on Her Majesty's behalf.

By section 68, the executive authority in Jamaica is vested in Her Majesty and may be exercised on her behalf by the Governor General either directly or through officers subordinate to him.

By section 90, the prerogative of mercy is exercised by the Governor General in Her Majesty's name and on Her Majesty's behalf.

The nonpproduction of the prohibited substance

It was further submitted on behalf of the applicant that the evidence before The Learned Resident Magistrate was insufficient for her to order the return of the applicant, as the cocaine hydrochloride itself had not been tenderèd in evidence and produced before the Resident Magistrate. According to learned attorney-at-law for the applicant, the cocaine hydrochloride should have been sent along

with the affidavits for the Resident Magistrate to see and examine. This insufficiency of evidence, it was submitted, resulted in a lack of jurisdiction.

The evidence presented to the Resident Magistrate in support of the application for the fugitive's return showed:-

1. the finding of the prohibited substance in the applicant's car and bedroom; and

2. the analysis of the substance by a Forensic Chemist showing it to be cocaine hydrochloride, possession of which is contrary to the Cayman Islands' Misuse of Drugs Law.

What useful purpose would have been served by producing the substance before the Resident Magistrate? The answer is none. There is no principle of law that I am aware of which makes its production at this stage imperative, and Mr. Witter did not refer to any authority which supports his submission.

At a criminal trial in Jamaica or the Cayman Islands, there is no duty on the prosecution to produce in a case of this nature the substance itself for there to be a valid conviction. What is vital for a valid conviction is evidence of the analysis by a chemist or analyst and the finding that the thing was a prohibited substance. If authority is needed, Regina v. Jadusingh 6 W.I.R. 362 may be referred to. In that case vegetable matter was examined by the analyst who certified that it was ganja. However, at the trial the ganja was not produced as it had mysteriously disappeared and grass substituted. It was held that the fact that the ganja was missing did not preclude the magistrate from finding that the vegetable matter seized was ganja as there was clear and convincing evidence of this.

It follows that if at the trial the substance need not be produced, it cannot be seriously argued that its production is imperative at a stage prior to trial. So astounding was this proposition that I agreed with my learned brethren that it did not require any answer by the respondents.

The third submission was that an essential requirement was lacking in that there was no evidence before the learned Resident Magistrate that the offences with which the applicant was charged were punishable by imprisonment at hard labour. Section 9 of the Act reads thus:

> "This part of this Act shall apply to the following offences, namely, to treason and piracy, and to every offence, whether called felony, misdemeanour, crime, or by any other name, which is for the time being punishable in the part of Her Majesty's dominions in which it was committed, either on indictment or information, by imprisonment with hard labour for a term of twelve months or more, or by any greater punishment; and for the purposes of this section, rigorous imprisonment, and any confinement in a prison combined with labour, by whatever name it is called, shall be deemed to be imprisonment with hard labour."

So, the offences must be punishable -

(a) either with imprisonment with hard labour for a term of twelve months or more; or

(b) by greater punishment than in (a) above.

According to learned attorney-at-law, Mr. Earl Witter, the Court's approach to this matter should be strict. Taken literally, he meant that if the actual words "hard labour" were missing from the legislation, there could be no extradition. However, this attitude is not in keeping with the decisions of the Courts. There are cases that indicate flexibility in the interpretation of "hard labour".

Under Bermudan law, "hard labour" has been abolished and replaced by "useful work". In the Dillon and Williams case, referred to earlier, "useful work" was held to be sufficient for the purposes of section 9 of the Act.

In Bailey v. Kelsey (1959) 100 C.L.R. 352, the legislation made no reference to "hard labour". At page 359 of the report, the High Court of Australia in determining an appeal from the Supreme Court of the Northern Territory said:

> "But when the draftsman of section 9 employed the word "labour" in the material phrase, it was not for the purpose of marking a contrast between "work" and "labour". The rigor, burden or physical effort involved was not the point. The point was the character of the punishment as reflecting the view taken in the claiming country of the quality of the offence."

In Rex v. Morris (1951) 1 K.B. 394 Lord Goddard, C.J., in considering the history of penalties in England, said:

> "Long before 1948 prison discipline had become of a less rigorous character. The tread mill, shot drill and the plank bed had disappeared. The rigours of a sentence of imprisonment which had existed at the time when Charles Reade wrote in mid-Victorian days had become entirely different. Moreover, imprisonment with hard labour became almost indistinguishable from simple imprisonment and gradually that distinction died out".

I am of the view that the interpretation of "hard labour" in Bailey v. Kelsey is appropriate. The Court has to view the punishment and satisfy itself that the matter is neither a civil matter nor a petty crime.

In the instant case, although there is no evidence that the law used the words "hard labour", there was evidence before the learned Resident Magistrate that prisoners at the particular prison in the Cayman Islands were employed in "gardening, menial tasks such as painting"; there was evidence also from the applicant to the following effect: "those inmates who are able are allowed to do art and craft work - of using match sticks to make boats. There is a specific work party for painting and maintenance work. Prisoners who are not in the maximum security section are allowed to work both inside and outside the prison. The ones who go outside work on the farm which is on the Prison compound but is outside the enclosed area of the prison. This privilege of working outside is reserved for Caymanians. Non-Caymanians work inside when work is available. They are paid for work done".

There was evidence further from a prisoner, Selvin Brown, that while at that prison serving a term for possession of cocaine he "was assigned to the work detail for the stores"; and from yet another prisoner, Delroy Graham, serving a term of imprisonment for possession of ganja, that he "was relieved of the comparatively prized kitchen duties and assigned to a more rigorous regime".

It is clear therefore from the evidence presented that prisoners on drug charges are required to do work, hard as well as serious. However, in the instant case, there is another matter for consideration; and that is whether any of the sentences qualify as "greater punishment" as defined in section 9 of the Act.

Mr. Witter startlingly submitted that "greater punishment" has to be greater than imprisonment at hard labour for life. I cannot agree with him.

The evidence presented before the learned Resident Magistrate in relation to the provisions of the Cayman Islands Misuse of Drugs Law did not indicate that the offences were punishable by imprisonment with hard labour for a term of twelve months or more. What it did indicate was that for the offence of possession of less than two ounces of cocaine, the applicant was liable to a maximum sentence of imprisonment for a period of seven years plus a fine of $10,000; and for the offence of possession of less than two ounces of cocaine with intent to supply, he was liable to a maximum sentence of imprisonment for fifteen years plus a fine without limit as to amount.

The question that arises for determination is this: are the offences within the category of offences that are punishable by "greater punishment" than imprisonment with hard labour for a term of twelve months or more?

In my judgment, the Court has to adopt a common sense approach to the matter - particularly in the absence of any previous decision

directly in point. In the case of each offence, it seems to me that there are two forms of punishment forming one sentence. In my judgment, this form of double punishment qualifies as "greater punishment" than a mere twelve months imprisonment with hard labour. The matter is beyond doubt however when the length of the term of imprisonment coupled with the huge fine in one case, and the unlimited fine in the other case, is considered.

In effect, there are two different forms of punishment for each offence, in that there is imprisonment coupled with a mandatory fine. It is difficult to conceive of this combination being anything but greater punishment than twelve months imprisonment with hard labour.

The fourth submission was that the relevant warrant was not validly endorsed so it was unlawful.

Prior to midnight on the 5th August, 1962, only the Governor could endorse a warrant in accordance with section 3 of the Act. After that time, according to the submission no such power was conferred on a Judge of the High Court. The submission was extended to assert that the warrant should have been endorsed by a Minister.

Section 3 of the Act reads thus:

> "Where a warrant has been issued in one part of Her Majesty's dominions for the apprehension of a fugitive from that part, any of the following authorities in another part of Her Majesty's dominions in or on the way to which the fugitive is or is suspected to be; (that is to say),
>
> 1. A judge of a superior court in such part ....."

Section 97 (4) of the Constitution reads thus:

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

Section 4(1) of the Jamaica (Constitution) Order in Council which has already been quoted above, is also relevant at this point.

offences should face trial. There is no evidence that the system of justice practised in the Cayman Islands is different from what is practised in Jamaica. The fears expressed in the affidavits are groundless as the case may be tried by another magistrate. Furthermore, one ought to assume - in the absence of evidence to the contrary - that the Government of the Cayman Islands takes whatever steps it deems necessary to protect persons in custody awaiting trial. Finally, reversal of the burden of proof is not a new thing. It is known throughout the Commonwealth.

In my judgment, this final submission was not a serious one as it is clearly without any merit whatsoever. It was obviously made with tongue in cheek.

For the reasons that I have endeavoured to set out, I agreed with my learned brothers that the applications should be refused and the motion dismissed.