IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE FULL COURT

SUIT NO. M. 151/93

BEFORE: THE HONOURABLE MR. JUSTICE ZACCA, CHIEF JUSTICE
THE HONOURABLE MR. JUSTICE PATTERSON J.
THE HONOURABLE MR. JUSTICE HARRISON, J.

REGINA

vs.

COMMISSIONER OF CORRECTIONS

and

THE DIRECTOR OF PUBLIC PROSECUTIONS

EXPARTE PRINCE ANTHONY EDWARDS

Ian Ramsay, Enos Grant & George Soutar for applicant

Lloyd Hibbert, Senior Deputy Director of Public Prosecutions for Director of Public Prosecutions

Laxton Robinson, Asst. Attorney General for Commissioner of Correctional Services

Heard: 26th, 27th, 28th January 1994

Harrison J.

In these proceedings, the applicant Prince Anthony Edwards a Jamaican national, seeks a writ of habeas corpus to issue for his release from custody where he is held prior to being extradited to answer charges on an indictment preferred against him in the District Court in Dallas, Texas, in the United States of America. He was ordered to be so held in custody on the 29th day of October, 1993 by Her Hon. Miss M. Hughes, Resident Magistrate for the parish of St. Andrew at the conclusion of a hearing in accordance with the provisions of the Extradition Act, 1991.

The applicant was indicted in the U.S. District Court of the Northern District of Texas on twenty eight counts as a result of a hearing by the Grand Jury and as a consequence a warrant was issued on the 14th day of December 1989 by the said Court for his arrest. Affidavits of witnesses Gifford Roy Plummer, Chameka Childs and Peter Lloyd Atkinson, each sworn to before a notary public, on the 21st, 16th and 26th day of April, 1993, respectively, submitted along with other documents, reveal that between April 1988 and July 1989, the applicant was involved in transporting cocaine and cocaine base

from New York to Dallas, Texas, where it was distributed, packaged and sold by dealers in "crack" houses and the monies from such sales returned to the applicant. The said witnesses, at the time each gave the statement were serving sentences for offences related to drug. The applicant returned to Jamaica, probably in December 1989. He was arrested on the 1st day of March 1993, and whilst in custody arrested on a provisional warrant dated the 12th day of March 1993 issued by the Resident Magistrate for the parish of St. Andrew under the Extradition Act for the offences of:

(a) conspiracy to possess with intent to distribute cocaine

(b) aiding and abetting travel in interstate commerce for the purpose of distributing drug proceeds and

(c) aiding and abetting the possession with intent to distribute cocaine.

On the 2nd day of June 1993 the Minister of National Security and Justice issued his order under the said Act to the said Resident Magistrate "to issue your warrant for the apprehension of such fugitive ..." The Resident Magistrate then conducted the hearing into the matter.

In his affidavit filed in support of this application, the applicant stated, inter alia, that in 1989 he was a club operator in , and visited Texas, but was never "in any trouble there," that he returned to Jamaica in 1989; that on the first day of March 1993 police officers came to his home, took him into custody at the Central Police Station and told him that there was a warrant issued in Texas for him, which warrant he first saw in court; that it was said in court that he was wanted for aiding and abetting and conspiracy to possess cocaine; that the statements on oath of Chameka Childs, Gifford Plummer and Peter Lloyd Atkinson in support of the said charges are false, in that he had never been involved in any such activites there.

The grounds on which the applicant seeks to be released are, that the foreign warrant was issued as a consequence of an indictment which was not supported by any evidence at the time that the indictment was laid and therefore the said warrant was a nullity; the Resident Magistrate erroneously assumed that any such evidence existed then, and consequently her warrant issued under section 9 was unlawful and in any event there was no valid authority of the

Minister to proceed; that the said statements on oath of Childs, Plummer and Atkinson were not authenticated as required by section 14 of the Extradition Act and therefore there was no evidence before the Resident Magistrate; that the extradition treaty between Jamaica and the United States of America was ever ratified in accordance with Jamaican law and therefore was never a part of the municipal law; that certain counts of the indictment, namely, counts 11, 12, 14, 15, 21, and 22, concerned with travelling in interstate commerce to distribute the proceeds of an unlawful activity, were not offences known to Jamaican law and therefore no order should have been made in respect of them; that he should not have been ordered to be extradited on count 1, relating to conspiracy, because it was not an extraditable offence in 1989; and this court should exercise its discretion and hold that habeas corpus should issue because the said statements were uncorroborated statements of accomplices and applying the provisions of section 11 (3) (b) or (c) of the Act, it would be unjust and or oppressive to extradite the applicant.

Mr. Ramsay for the applicant argued that the statements of Childs, Plummer and Atkinson, were given in 1993, were not available when the indictment was filed on the 13th day of December, 1989 , therefore the foreign warrant issued for the arrest of the applicant is a nullity, because the Resident Magistrate could not assume that there was evidence before the grand jury to support its issue - he relied on Regina vs. Director of Prisons et al., ex parte, David Morally (1975) 14 JLR 1; that the Resident Magistrate, under the provisions of section 10 (5) of the Act, could therefore examine the action of the Minister and say that his order for the issue of a warrant, under section 9 was as a consequence baseless and a nullity. The provisonal warrant was issued by the Resident Magistrate on the 12th day of March 1993, the applicant had been arrested on the 1st day of March 1993, and the order was given by the Minister on the 2nd day of June 1993. This latter order he stated was invalid, because the Minister had no authority to order the issue of another warrant, it was a procedural error, no valid authority to proceed had been issued as required by section 9 of the Act. The Resident Magistrate therefore had no jurisdiction. He submitted further that the affidavit of John P. Lydick, reciting the facts and the law satisfied the requirements of section 8 (2), but the certification by

Mary Warlow, Deputy Director, Office of International Affairs, U.S. Department of Justice, of the said indictment, warrant and statements on oath of Childs, Plummer and Atkinson, was not an authentication "by a judge, magistrate or office of the Court .... or an officer of the diplomatic or consular service of that State ...." and therefore the said statements were inadmissible - he cited in support Regina vs. Governor of Brixton Prison, Ex parte Otchere (1963) C.L.R. 43 and Regina vs. Governor of Brixton Prison, Ex parte Lennon (1963) C.L.R. 41.

He continued, that the treaty signed between Jamaica and the United States of America was subject to ratification, Art. 19 of the said treaty. It was ratified by U.S.A. by its President, Ronald Reagan on 17th August 1984 with the advice and consent of the Senate. The ratification sought to be done by the Government of Jamaica with the signing by Carl Rattray, Minister of Justice on 31st May 1991 was ineffective because there was no prior ratification by Parliament; section 4 (3) of the Act which makes the published list by the Minister conclusive evidence that a particular is in force between Jamaica and a foreign State, is only operative if the treaty was properly ratified previously. He conceded that the treaty was binding internationally but was not ratified to be absorbed into the municipal law of Jamaica and so bind its subjects.

He argued further, that counts 11, 12, 14, 15, 21 and 22 of the indictment related to interstate travel, and for the purpose of distributing the proceeds of an unlawful activity, are offences in themselves which were unknown to Jamaican law and therefore the Resident Magistrate should not have made any order in respect of these counts; that the offence of conspiracy was not an extraditable offence in 1989, when the indictment was filed, but first became so in 1991, and so, it should not be construed retroactively against the applicant. He concluded that the evidence contained in the statements of Childs, Plummer and Atkinson was uncorroborated evidence of accomplices and therefore inadmissible; therefore for that reason and because of the length of time since the offences were allegedly committed and because the accusations were not made in good faith, this Court should exercise its

discretion under section 11 of the Act and hold that, in all the circumstances, it would be unjust and or oppressive to extradite him.

Mr. Robinson argued that in order to succeed the applicant had to show that the Resident Magistrate had no jurisdiction to make the order that she did, that any defect in the foreign warrant, a document verifying the fact that the applicant is accused in a foreign jurisdiction, is irrelevant; the issue of the provisional warrant even if unlawful, is merely technical and once the Minister issues his order to proceed under section 9, the Resident Magistrate may commence the hearing and has no power under section 10 (5) to look behind the said order; that the document, contemplated by section 14 of the Act incorporates all the attachments in the bundle and it is sufficiently authenticated by the certificate under the hand and seal of the Secretary of State who is head of the diplomatic service; that the treaty was ratified as provided by the Vienna Convention and in conformity with article 19 of the treaty by exchange of instrument and the Extradition Act being an expression of Parliament, the Order in Council by the Minister issued under section 4 (1) is sufficient to bring the treaty into operation in municipal law. He cited, in support Regina vs. Governor of Pentonville Prison, Ex parte Sotiriadis [1975] A.C. 1, Regina vs. Governor of Brixton Prison [1911] 2 K.B. 82, Regina vs. Ganz [1882] 46 L.T. 592, Regina vs. Weil [1882] 9 Q.B.D., 701, Regina vs. Governor of Pentonville Prison Ex parte Osman [1990] 1 All ER 999, and Regina vs. Wilson [2877] 3 Q.B.D., 42.

Mr. Hibbert argued that counts 11 to 23 of the indictment encompass the act of travelling interstate with intent to distribute the proceeds of and with intent to promote, manage and carry on a business activity, i.e. the acquisition, possession and distribution of cocaine and thereafter performing acts to distribute the proceeds of and acts to promote manage and carry on the possession and distribution of cocaine. These are offences known to the Jamaican law, i.e. dealing and possession of cocaine, and consequently are offences known to both states and therefore extraditable. He concluded that there is no basis for the argument that it would be unjust and oppressive to extradite. He relied on Regina vs. Dix (1902) 18 T.L.R. 231.

In these proceedings this Court needs to determine whether or not the Resident Magistrate, when she order that the applicant be detained and to await his extradition, validly exercised her powers under the Extradition Act, 1991. ("The Act")

The Act is a domestic Act of the Jamaican Parliment designed to give effect to any extradition treaty made with a foreign State or a Commonwealth country.

Every Jamaican national is, as a consequence, subject to the Act and its effects.

Section 4(1) of the Act provides:

> "Where any extradition treaty has been made with any foreign State, whether before or after the commencement of this Act, the Minister may, by order, declare that the provisions of this Act shall apply in respect of such foreign State, subject to such exceptions, adaptions or modifications, as the Minister, having due regard to the terms of such treaty, may deem expedient to specify in the order for the purposes of implementing such terms."

Section 6, provides:

> "Subject to the provisions of this Act, a person found in Jamaica 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, may be arrested and returned to that State as provided by this Act."

The Act is therefore of comprehensive application and is effective to bind Jamaican nationals. Parliament, as it saw fit, provided for the extension of the operation of the Act.

Section 4 (3) reads,

> "The Minister may from time to time, by order, compile and publish in the Gazette a list of foreign States with which extradition treaties or agreements binding on Jamaica are in force; and, without prejudice to any other form of proof of the existence of such a treaty or agreement, such a list shall, in any proceedings, be conclusive evidence that an extradition treaty or agreement is in force between Jamaica and each foreign State named in the list."

An extradition treaty was entered into between Jamaica and the United States of America, by the signing of the said document on the 14th day of June 1983, by the then Minister of National Security and Justice on behalf of the

Government of Jamaica and by the Ambassador of the United States of America - an executive act.

Article 19 of the said treaty provides,

> "This Treaty shall be subject to ratification; the instruments of ratification shall be exchanged at Washington as soon as possible."

Article 11 of the Vienna Convention on the Law of Treaties, recites the means by which parties may be bound by a treaty,

> "The consent of a State to be bound by a treaty may be expressed by a signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed."

The instrument of ratification, consented to by the Senate, was signed by the President of the United States on the 17th day of August 1984. The Minister of Justice on behalf of the Government of Jamaica signed its instrument on the 31st day of May 1991. The exchange of instruments was effected on the 7th day of June 1991, on behalf of the said Governments as required by Article 19 of the treaty and in accordance with the Vienna Convention. Mr. Ramsay for the applicant conceded that the treaty was ratified, internationally.

On the 11th day of June 1991, in the exercise of his powers under Section 4 (1) of the Act, the Minister of Justice issued the Extradition (Foreign States) Order, 1991, published in the Jamaica Gazette Supplement, Proclamations, Rules and Regulations dated the 27th day of June 1991. The said Order read, inter alia,

> "The provisions of the Act shall apply in respect of the foreign State specified in the Schedule hereto.
>
> Schedule
>
> The United States of America ....."

The use of the Order in Council is an effective method to bring a treaty into operation in domestic law as it affects one's nationals, without further recourse to Parliament or employing a full recital of the treaty in the statute - vide Regina v. Wilson [1877] 3 Q.B.D. 42.

Consequently this Court finds that the said treaty was effectively ratified and valid and binding on all Jamaican nationals.

The applicant was in custody having been arrested on a provisional warrant dated the 12th day of March 1993, issued by the Resident Magistrate for the parish of St. Andrew in the exercise of her powers under section 9 (1)(b)

The Resident Magistrate thereafter has a duty to determine that the offence or offences relating to the person requested is an extradictable offence and that the evidence, tendered then at the hearing,

> "would be sufficient to warrant his trial for that offence if the offence had been committed in Jamaica..." section 10 (5) (a).

If both findings are in the affirmative, the person accused should be committed to await his extradition under the Act. Contrary to the argument of counsel for the applicant, I am of the opinion that section 10 (5) of the Act, is procedural only, and bestows no power on the Resident Magistrate to reopen and examine the validity of the executive act of the Minister who granted his permission for the holding of the said proceedings.

In this regard the complaint of the applicant that the foreign warrant is invalid, and the said committal proceedings flowing therefrom were as a consequence invalid, is without force. The Resident Magistrate, is required to act

> "....after hearing any evidence tendered in support of the request for the extradition of that person or on behalf of that person ....."

She is not permitted to act retroactively. The evidence she was empowered to hear was that which was then before her, i.e. the evidence contained in sworn affidavits of Chameka Childs, Gifford Roy Plummer and Peter Lloyd Atkinson. This is the evidence that needs to satisfy the statutory requirements of section 10 (5) (a), and on which the applicant will be subsequently tried.

In Regina vs. Governor of Brixton Prison [1911] 2 K.B. 82, a complaint was made that the executive act of the Home Secretary and the request of the French Government were defective and therefore the magistrate had no jurisdiction to issue his warrant under the Extradition Act (U.K.). Ridley, J. said, at page 83,

> "Under those circumstances the question which we have to determine is whether we can go behind the Secretary of State's order and inquire into the materials upon which it was made. In the case of In re Counhaye L.R. 8 Q.B. 410 a similar question was raised upon an objection that none of the depositions accompanying the requistion were taken before the judge or magistrate who had issued the warrant for the prisoner's arrest .... Blackburn, J. expressed an opinion that the objection was ill founded. 'As to the objection' he said, 'that the terms of the treaty have not been compiled with, and the order of the Secretary of State ought therefore not to have been made, I do not think that affects the magistrate's

> jurisdiction; if the conditions of the treaty have not been complied with the Secretary of State might have refused to order a magistrate to proceed; but these conditions are not in the Act to Parliament; and the Secretary of State having made the order, and the magistrate having acted under it, all we have to do is to look at the Act to see whether he had jurisdiction under it."

Ridley, J. held that the opinion of Blackburn J. was directly in point. I also humbly adopt that reasoning. Where the committal proceedings are lawful and valid, a technical flaw which occurred in getting the accused before the Court will not by itself entitle him to a writ of habeas corpus, see Regina vs. Governor of Pentonville Prison, Ex parte Sotiriadis [1975] A.C. 1.

I find that the Resident Magistrate applied the correct test, in examining the evidence before her and committed the applicant accordingly.

Section 14 of the Act provides, inter alia,

> "(1) In any proceedings under this Act, including proceedings on an application for habeas corpus in respect of a person in custody under this Act --
>
> (a) a document, duly authenticated, which purports to set out testimony given on oath in an approved State shall be admissible as evidence of the matters stated therein;
>
> (b) .....
>
> (c) .....
>
> (2) A document shall be deemed to duly authenticated for the purpose of this section -----
>
> (a) in the case of a document which purports to set out testimony given as referred to in subsection (1) (a), if the document purports to be certified by a judge, magistrate or officer of the Court in or of the approved State in question or an officer of the diplomatic or consular service of that State to be the original document containing or recording that testimony or a true copy of that original document;
>
> (b) .....
>
> (c) .....
>
> and in any such such case the document is authenticated either by the oath of a witness or by the official seal of a Minister of the approved State in question." (emphasis added).

The "document" referred to in the section may in fact consist of several documents that "...set out the testimony given on oath ...," of the several witnesses. In the instant case the evidence contained in the affidavits of witnesses Childs, Plummer and Atkinson each sworn to before a notary public, is

itself a "document .... authenticated.. by the oath of a witness ...", i.e. the said witnesses themselves. Furthermore, a bundle of documents, containing a certified copy of the indictment filed against the applicant, a certified copy of the warrant issued for the arrest of the applicant, copies of the relevant statutes, the said affidavits of Childs, Plummer and Atkinson, and the affidavit of John P. Lydick, an Assistant United States Attorney, were certified by one Mary Ellen Warlow, the Deputy Director, Office of International Affairs, Criminal Division, United States Department of Justice. This bundle of documents was tied together with a ribbon and seal and all certified by the Acting Secretary of State, Department of State, United States of America, with his certificate in these words,

> "I certify that the document annexed is under the seal of the Department of Justice of the United States of America, and that such seal is entitled to full faith and credit."

The Secretary of State signed the said certificate and the Authentication Officer also signed. The Secretary of State is an officer of the diplomatic service and a "Minister of the approved State." His certification and seal are sufficient authentication of the "document" to satisfy the statutory requirements of section 14 of the Act. The document was accordingly properly admitted in evidence by the learned Resident Magistrate.

This very question was considered in habeas corpus proceedings before the Full Court in the case of Regina vs. Clarence Duke McGann (unreported) in which judgment was delivered on the 17th day of September, 1971, dismissing the application for habeas corpus.

Rowe J. said, at page 11,

> "In my opinion the seal consisted of the ribbon and the red wafer impression seal and when these acts were done by the Secretary of State it was his manifest intention to seal the several pages in each bundle. The certificate of the Secretary of State is explanatory evidence of the function of the ribbon and impression seal. I am of the opinion that each and every page of the documents .... were properly authenticated by the seal of the U.S. Department of State and fully complied with the provisions of section 15 of the 1870 Extradition Act (U.K.)."

Section 15 is in similar terms as section 14 of the Extradition Act 1991.

The applicant's objection to his committal on counts 11, 12, 14, 15, 21 and 22 of the indictment is, that these offences are unknown to Jamaican law.

On an examination of these counts one will see two distinct components, namely,

(a) the intent - mens rea, " .... a person ... did travel in interstate commerce ....."

(1) "with intent to distribute the proceeds of an unlawful activity, to wit: a business enterprise involving the acquisition, possession and distribution of a controlled substance, namely, cocaine,"

and

(ii) "with intent to promote, manage establish, carry on and facilitate the promotion, management and carrying on of the said unlawful activity,"

and

(b) the actus reus —

" ... and thereafter did perform and attempt to perform,

(i) acts to distribute proceeds of the said unlawful activity and

(ii) acts to promote, manage, carry on, and facilitate the promotion, management and carrying on of the said unlawful activity."

The substance of these counts, as Mr. Hibbert correctly submitted, is that of dealing in cocaine, an offence well known to Jamaican law. The unlawful activity is the promotion of the sale of cocaine. The distribution of the proceeds is merely a part of the activity consequent on the possession, packaging, dispatching for sale and collecting of monies - a dealing in cocaine; it does not matter if the offence is known by a different name or is differently described in the respective States - Regina vs. Dix [1902] 18 Times Law Reports, 231.

Darling, J. said, at page 232,

> "It is not ..... essential that the offence should be called by the same name in both countries."

Count 1 of the indictment alleges conspiracy in the applicant and others in the year 1988, The applicant argues that the Act which came into force in 1991, should not be construed retroactively against him. However, section 21 of the Act specificially deals with this circumstance and countenances its retroactive application.

It reads,

> "21 - "A fugitive whose extradition is sought by an approved State, or from such State to Jamaica shall, subject to the provisions of this Act, be liable to be dealt with under this Act whether the offence in respect of which he had been accused or convicted was committed before or after the commencement of this Act."

Further, with regard to the complaint that the evidence was not corroborated, I am of the view that the said "accomplice" evidence though not corroborated is admissible and may be acted upon at a trial, with the requisite caution.

It is observed that the offences were alleged to have been committed in 1988, the Grand Jury hearing was held and the warrant of arrest was signed in 1989, and the affidavits of the witnesses sworn to in 1993. In all the circumstances, the period of time since the alleged commission of the offences is not so long, nor does the accusation against the applicant qualify as "not made in good faith", to impel this Court to hold that it would "be unjust or oppressive to extradite" the applicant, as contemplated by section 11 (3) of the Act.

For the reasons stated above the application for the issue of the writ of habeas corpus should be refused.

Zacca, C.J.

I agree.

Patterson J.

I agree.

Zacca C.J.

The application for the writ of habeas corpus is refused.

Cases referred to

(1) Regina v Governor of Brixton Prison, Ex parte Otchere (1963) C.L.R. 43

(2) Regina v Governor of Brixton Prison, Ex parte Lenman (1963) C.L.R. 41

(3) Director Governor of Pentonville Prison, Ex parte Sotiriadis. (1975) A.C.