IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE FULL COURT

SUIT NO. M104/ OF 1995

BEFORE: THE HON. MR. JUSTICE THEOBALDS
THE HON. MR. JUSTICE CLARKE
THE HON. MR. JUSTICE REID

REGINA

V.

DIRECTOR OF CORRECTIONAL SERVICES

DIRECTOR OF PUBLIC PROSECUTIONS

EX PARTE WALTER GILBERT BYLES

IAN RAMSAY, MRS. VALERIE NEITA-ROBERTSON AND MRS. JACQUELINE SAMUELS-BROWN FOR THE APPLICANT

LACKSTON ROBINSON INSTRUCTED BY THE DIRECTOR OF STATE PROCEEDINGS FOR DIRECTOR OF CORRECTIONAL SERVICES.

LLOYD HIBBERT Q.C. AND MS. VIVIENE HALL FOR DIRECTOR OF PUBLIC PROSECUTIONS

HEARD: 22ND, 23RD, 24TH, 25TH JANUARY, 1996 AND 23RD, 24TH, 25TH, 26TH APRIL AND 15TH JUNE, 1996.

CLARKE J.

After hearing lengthy but illuminating submissions by counsel for the parties, this Court unanimously refused the application of Walter Gilbert Byles for a writ of **habeas corpus ad subjiciendum.** We now keep our promise to give written reasons.

The grounds of the application are manifold, and it is as well to give a history of the institution of the proceedings under the Extradition Act, 1991 as well as to summarise the evidence adduced before the Court of committal.

The applicant, whose extradition is sought by the United States of America, is accused of the following offences committed between 1986 and 1988 within the jurisdiction of that country:

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(a) conspiracy to import marijuana and hashish oil;

(b) importation of marijuana and hashish oil;

(c) distribution of and possession with intent to distribute marijuana and hashish oil;

(d) conspiracy to possess with intent to distribute marijuana and hashish oil.

On 6th July 1988, an indictment against the applicant charging the said offences was returned by the Grand Jury in the Southern District of Alabama and the following day a warrant for his arrest for the said offences was issued out of that District Court. On July 26, 1991 a request, renewed in November of that year, was made of the Government of Jamaica by the United States Government for his provisional arrest in respect of the said offences. The request for his apprehension on a provisional warrant was not pursued. But on 17th August 1993, two years later, a formal request for his extradition was made accompanied by authenticated documents including affidavits and exhibits thereto. On 4th December 1994 he was arrested in Spanish Town on a warrant issued on 22nd December 1993, the Minister of National Security and Justice having issued on 29th November, 1993 an authority to the Resident Magistrate for St. Andrew to proceed in conformity with the provisions of the Extradition Act, 1991 (the Act) in respect of the aforesaid offences allegedly committed by the applicant.

After hearing the case at committal proceedings which commenced in January 1995 the learned Resident Magistrate, Miss Marcia Hughes, on 8th December 1995 committed the applicant to custody to await his extradition under the Act. The evidence received in the committal proceedings comprised:

(a) authenticated affidavits with exhibits thereto sworn in the United States and

(b) depositions taken by the learned Resident Magistrate from witnesses called on behalf of the requesting State and on behalf of the applicant.

The authenticated affidavits supporting the request include those sworn by accomplices, Michael Mattner and Billy Williams on 5th March 1992 and James Senter on 25th January 1993. They had pleaded guilty in a United States District Court either to charges of importation of marijuana or conspiracy to distribute marijuana, and were sentenced. They deposed that after consulting with their lawyers they agreed to co-operate with the United States authorities in the prosecution of the matter. And they gave their affidavits while serving their sentences.

The three affiants purport to identify the applicant as one of the persons who conspired and participated with them and others in the importation of marijuana and hashish oil from Jamaica to the United States so as to possess and distribute same in the United States. They have sworn that the applicant and themselves and others imported a substantial quantity of marijuana and hashish oil into the United States from Jamaica from 1987 to 18th May 1988. These substances would be loaded into a hidden compartment aboard a sail boat in this country, which then brought the substances to the United States. The substances would be distributed to buyers once a shipment arrived in Baldwin County in the southern District of Alabama. On 18th May 1988 one such shipment was seized in Alabama by Drug Enforcement Agents. Some of the participants in the scheme including the affiants were thereupon arrested, but not the applicant, for he had left Alabama a few days earlier and subsequently returned to Jamaica.

Michael Mattner deposed that in his presence in Jamaica in 1987 and 1988 the applicant and one Robert Delisser discusses the marijuana importation scheme. The applicant allowed his

property in Jamaica to serve as one of the locations where planning to promote the scheme took place and where marijuana was stored. On one occasion in 1987 upon arrival in the United States aboard the Drifter which he had helped the applicant to load in Jamaica, the applicant paid him US10,000.00 for his work in furtherance of the scheme.

We are told by James Senter in his affidavit that in 1987 and 1988 he participated with the applicant and others in the drug smuggling scheme. On his trips to Jamaica to "grade" marijuana for Billy Williams he became acquainted with the applicant. He instanced a Sunday afternoon in August 1987 where in the presence of the applicant he inspected a bale of marijuana in the secret compartment of the Drifter then sailing in Jamaican waters and then indicated that the marijuana was of inferior quality. Then after sealing 50 pounds of good quality marijuana at the applicant's house in Jamaica he delivered it to the applicant to load on the Drifter. Senter said he returned to the United States for a short while. He said he returned to Jamaica in late 1987 and helped the applicant construct marijuana presses. He was informed by the applicant that there was unsold marijuana in Alabama and he, the applicant needed his help to assist in selling it. Senter also swore that in late December 1987 he was at a building in Alabama where marijuana was sorted when one Mike Drake came there accompanied by the applicant and Billy Williams. Drake inspected the marijuana and agreed to purchase it.

In his affidavit, Billy Williams, himself another accomplice, portrays the applicant as one of the participants from 1986 to 1988 in the marijuana smuggling scheme. Up to 1922 he had known the applicant for about 7 years. In 1983 Williams said he and others constructed a sail boat, "Serendipity", renamed in 1987, "Drifter", containing a hidden compartment which could conceal some 6,000 tons of marijuana. He became

involved with Robert Delisser who would supply marijuana to be smuggled into the United States. In early 1987 he along with the applicant loaded marijuana on to the sail boat in Jamaica. Williams further deposed that the applicant assisted him and Delisser in supplying the marijuana by arranging for loading it on to the sail boat and in obtaining crew members to sail the vessel with the drugs from Jamaica to the United States. The applicant also kept Williams informed about the progress of the smuggling ventures. In April 1988 the Drifter laden with tons of marijuana and hashish oil left Jamaica for the United States. On the trip problems with the boat were encountered. So Williams met with the applicant in Miami concerning the problems. The applicant later travelled to Mexico to make arrangements for the Drifter to finish the trip. Williams again met the applicant in South Florida and in early May 1988 the applicant travelled to Baldwin County Alabama where he stayed at the Elbertha House to await the arrival of the Drifter. On Williams' instructions the Drifter was sailed to a dock behind Williams' residence in Elberta, Alabama. On 18th May 1988, however, right after some marijuana and hashish oil were taken from the boat, he, Williams, was arrested along with Ruby Williams, Michael Mattner and Cortina Mattner-Byles.

Cortina Mattner, the applicant's wife also swore to an affidavit taken in the United States. It was one of the authenticated affidavits tendered at the committal proceedings in support of the request for the extradition of the applicant. Before us it was properly conceded by counsel for the respondents that the committal proceedings being criminal, the applicant's wife was and remains incompetent to give evidence for the requesting State in criminal proceedings in Jamaica: see Section 4(1) and (2) of the Evidence Act. Her affidavit should not,

therefore, have been received in evidence. Yet its reception in evidence was, in my view, not fatal, so long as there was admissible evidence before the Resident Magistrate sufficient to warrant the trial of the applicant for the offences alleged, had they been committed in Jamaica. The case is to be treated, as Mr. Hibbert submitted, as if the Resident Magistrate had before her no evidence from Cortina Mattner tendered on behalf of the requesting State. To hold otherwise, as Mr. Ramsay urged this Court to do so on the basis that the wrongful admission of her affidavit vitiated the proceedings, would be to reject the perfectly reasonable and just approach advocated by Mr. Hibbert.

The case of **Re Kirby** (1976) Crim. L.R. supports such an approach. There a document tendered as part of the evidence for extradition was admitted and considered by a Magistrate in England in making a committal order. The Divisional Court in refusing an application for a writ of **habeas corpus** held that, although the document was inadmissible and could not be a basis on which a person in England could be convicted, the committal order was justified in light of the remainder of the evidence.

In addition to the affidavit evidence of the accomplices, Michael Mattner, James Senter and Billy Williams, the Resident Magistrate had before her for consideration the affidavits of Douglas Lamplugh, Edward Odom, Charles Park, Allan Hancock and George Lester in support of the request for the applicant's extradition. She was also required to consider depositions given on behalf of the applicant by his wife Cortina Mattner-Byles and Ripton McPherson, an attorney-at-law.

Douglas Lamplugh, a United States Drug Enforcement Agent, deposed that on 8th May 1988 he arrested Billy Williams, Ruby Williams, Michael Mattner and Cortina Mattner-Byles at a water-front residence in Elberta in the Southern District of Alabama where the load of what he described as marijuana

and hashish oil was stored and the Drifter moored. The find and the arrests were made during the execution of a search warrant at the said residence. Other agents were present during the search and Lamplugh assigned duties to them. Agent Odom said in his affidavit that he siezed substances described by him as marijuana and hashish oil and that he took samples of these substances and submitted these by registered mail, duly sealed in bags and labelled, to the Drug Enforcement Administration Laboratory for testing. Another Drug Enforcement Agent, Charles Park, deposed that he susequently seized more marijuana and hashish oil, (as he describes them) from the Drifter. The substances had remained hidden in the concealed compartment of the vessel. Agent Hancock also swore by affidavit that he took custody of the additional substances he received from agent Park and submitted by registered mail samples of these, duly sealed in parcels and labelled, to the Drug Enforcement Administration Laboratory for analysis.

Lester deposed that as a forensic chemist for the Drug Enforcement Administration he analysed on 24th June, 1988 and 9th July 1988 at the Drug Enforcement Southern Laboratory in Dallas, Texas a quantity of samples of green plant material as well as samples of dark green viscocus substance received in that laboratory for testing. There is clear evidence that the samples were contained in bags or envelopes with their seals intact and had been received under registered cover bearing numbers which corresponded with the registered mail numbers of the sealed parcels containing substances described by Agent Odom and Hancock as either marijuana or hashish oil. These, they had submitted in sealed parcels via registered mail addressed to the said Laboratory.

So all that evidentiary material could provide the factual basis for a trier of fact reasonably to infer that George Lester received samples of substances submitted by

agents Odom and Hancock which had been taken from the Drifter and that Lester subsequently analysed and tested these samples in the laboratory. Lester said that he tested each sample to determine whether each was in fact a controlled substance, and found each to be either marijuana or hashish.

Observe that having been issued with an authority to proceed in respect of th applicant who was thereafter arrested on a warrant under section 9 of the Act, the learned Resident Magistrate, unless otherwise prohibited by the Act, was obliged to commit him to custody to await his extradition, once the evidence tendered in support of the request for his extradition and on his own behalf satisfied her that the offence to which the authority to proceed related were:

(a) extradition offences; and

(b) that that evidence would be sufficient to warrant his trial for those offences if they had been committed in Jamaica: see Section 10 (5) of the Act.

Question of sufficiency of evidence before Magistrate

Take the requirement at (b) above. Be it noted, first of all, that section 10(5) in dealing with the question of the sufficiency of evidence, indicates that same must be referable to the offence(s) connected to the authority to proceed issued by the Minister to the Resident Magistrate. In the instant case, the Minister issued the authority to proceed after he had been furnished together with the request for the applicant's extradition, the following:

(1) a warrant for the applicant's arrest issued in the United States,

(2) particulars of the applicant's identity

(3) facts upon which the applicant is accused.

(4) the law under which he is accused

(5) evidence sufficient to justify a magistrate issuing a warrant for his arrest under section 9.

Although Mr. Ramsay submitted to the contrary, there is, in my opinion, no requirement for either the evidence upon which the indictment is based, or for such indictment, to be furnished to the Minister by the requesting State.

In any case, the point to grasp here is that it is from the authority to proceed that the Resident Magistrate derived her jurisdiction. It was after receiving that authority that she issued a warrant for the arrest of the applicant for the offences listed in the authority to proceed. They are the offences set forth at the beginning of this judgment and in respect of which the learned Resident Magistrate had heard evidence and had thereupon issued her warrant of committal after she had been satisfied that the provisions of section 10(5) had been met. And although an indictment was supplied by the requesitng State none was required under the Act. Mr. Hibbert and Mr. Robinson nevertheless properly conceded that the affidavit as to foreign law sworn to by United States Attorney Gloria Bedwell, speaks to Indictment bearing Criminal No. 8900089 which is a different indictment from the one supplied with the papers, namely Indictment bearing Criminal No. 9100054 with the further inscription, Foreign Warrant Case No. G.J. 2. printed thereon. So it is common ground that the indictment referred to an particularised in Miss Bedwell's affidavit was not the indictment exhibited.

Mr. Ramsay argued that on that ground alone the committal order was bad. He submitted that since the Resident Magistrate had no power to amend the affidavits tendered by the requesting State, no committal order could properly be made on such contradictory and confusing documents. And the committing Magistrate, he submitted, would have been in error if she based the committal order on the allegation in the authority to proceed, for, in the language of the applicant's ground on which this submission was base, "those were indicative

charges and not specific charges laid by indictment". Yet, as counsel for the respondents submitted, it is precisely the allegations contained in the authority to proceed and iterated in the warrant of arrest issued thereafter, which provided the scope of the magistrate's inquiry at the committal proceedings. Those allegations formed the terms of reference for the learned Resident Magistrate to determine from the authenticated affidavits tendered and depositions taken before her, whether, had the offences been committed in Jamaica, a **prima facie** case had been established so as to warrant the applicant's trial for the self same offences recited in the authority to proceed. Since the Act does not require that an indictement be furnished by the requesting State as a pre-condition for the holding of committal proceedings, I am unable to accept mr. Ramsay's submission that the learned Resident Magistrate could only make a committal order based on specific charges laid by indictment.

All the same, Mr. Ramsay submitted, too, that the committal is also bad because the tackle of the requesting State was manifestly out of order at the committal proceedings. He contended that the Indictment bearing No. 9100054 supplied with the authenticated documents is the incorrect indictment and that the Indictment referred to as NO. 8900089 and particularised by Miss Bedwell in her affidavit, should have been exhibited but was not. Now, while it is clear that the indictment exhibited to Miss Bedwell's affidavit was not referred to therein, the learned Resident Magistrate was, I think, entitled to conclude from the bundle of documents admitted in evidence before her that the exhibited indictment bearing No. 9100054 was one which was returned against the applicant on 6th July 1988 by the Grand Jury in the Southern District of Alabama and on which the foreign warrant for the arrest of the applicant was issued the following day. The bundle concerned the request

for the applicant's extradition and, as Mr. Hibbert pointed out, it is clear from the affidavits of the accomplices that other persons were indicted jointly with them in relation to the same set of transactions and that the cases agaisnt the accomplices were disposed of. And when we look at Miss Bedwell's affidavit it is plain that that was the case because she mentions charges in relation to which the applicant was charged with others. The indictment the learned Resident Magistrate had before her, however, charged one person, namely, the applicant, for offences which coincided with those in the authority to proceed. The indictment was one on which the foreign warrant for the arrest of the applicant was issued. And in the result, reference to that indictment was made in the warrant of committal.

Accordingly, I agree with Mr. Hibbert that the error is to be found not in the indictment supplied but in Miss Bedwell's affidavit where she describes another indictment charging the applicant and others. So, it comes to this, that the learned Resident Magistrate was required to examine the evidence to determine whether a **prima facie** case had been made out in relation to the offences alleged in the authority to proceed and which corresponded to those in the indictment exhibited.

Counsel for the applicant, relying on a number of grounds, submitted that, in any event, a **prima facie** case had not been established. One ground relied on, and compendiously called, "the definition of ganja ground", and on which this broad submission was made reads as follows:

> "... the evidence as to foreign law disclosed that the definition of marijuana is wider that the definition of ganja in that in the United States definition there is no requirement that the resin be not extracted from the plant: Hence what would not be ganja for the purposes of Jamaican Criminal law is marijuana in American law".

Section 2 of the Dangerous Drugs Act defines ganja thus:

> "'Ganja' includes all parts of the plant known as cannabis sativa from which the resin has not been extracted and includes any resin obtained from that point..."

I read that definition to mean that a substance is ganja only if it is the plant cannabis sativa, or any part of that plant, from which, whether the whole plant or any part thereof, the resin has not been extracted, or any resin form that plant. Now, the evidence as to foreign law discloses that in American law,

> "'marijuana' means all parts of the plant cannabis sativa L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture or preparation of such plant, its seed or resin ..."

That evidence also discloses that marijuana is a controlled substance prohibited by American law. I agree that the definition of marijuana in American law is wider than the definition of ganja in Jamaican law in that in the American definition the resin need not be present.

The question that arises, however, is whether the Resident Magistrate had before her expert evidence capable of proving at trial that the questioned substances were ganja within the meaning of the Dangerous Drugs Act. The short answer is that on a review of the affidavit evidence of the chemist, George Lester, there was. He deposed that as a forensic chemist for the Drug Enforcement Administration in the United STates he conducted specific tests of samples of (a) a plant material resembling marijuana (b) a dark green viscous oily substance and (c) a greenish brown solid substance. The evidence shows that the same test was done in relation to all those sets of samples. He opined that

based on the results of the tests he conducted, and on his experience, the green plant material was marijuana, that the dark green viscous oily substance was marijuana (hashish) oil containing the active drug tetrahydrocanniabinol (THC) content and that the greenish brown solid substance was cannabis resin or hashish with the said active drug ingredi ent, THC.

Although neither hashish nor hashish oil is defined by the Dangerous Drugs Act I observe that in one case in which the appellant had plead guilty to possession of ganja where hashish was what had been found in his possession, the Court of Appeal accepted that the inference from the Magistrate's findings of fact in that case was that the hashish was the resin extracted from ganja itself: see Shawn Phillips v. R. R.M.C.A. No. 6/96 (unreported). And in another case the Court of Appeal accepted **sub silentio** that hashish is ganja within the meaning of the Dangerous Drugs Act. There, the Government Analyst had found that a blackish green viscous substance resembling hashish that he had tested contained the resin from the plant cannabis sativa and had concluded that that substance was therefore hashish or 'ganja': see R. v. Robert Bedwell R.M.C.A. No. 50/90 (Unreported).

There was therefore, in my view, ample basis for concluding that sufficient evidence had been adduced at the committal proceedings that the questioned substances identified by George Lester as marijuana, hashish and hashish oil respectively were ganja within the meaning of the Dangerous Drugs Act. So much then for "the definition of ganja" ground.

Equally untenable is the ground, succinctly termed in argument, "the break in the chain of custody ground", relied on in support of the submission that a **prima facie** case had not been made out. Mrs. Jacqueline Samuels-Brown submitted that the requesting State had failed to establish an unbroken

chain of custody of the substances in question, commencing with the find on the boat, Drifter, as well as in the boat house, and ending with the findings from the chemical tests conducted by George Lester at the Drug Enforcement Administration Laboratory in Texas. As samples of the substances were sent through the Post Office that method of transmission was, she submitted, manifestly flawed. She further submitted that as the tests carried out by George Lester related exclusively to the samples he received from the supervisory chemist of the said Laboratory, Stewart Summers, who did not depose, the court of committal could not say that samples of substances found in the boat and boat house were the ones tested by George Lester.

Now, the Court below had evidence from Special Agent Park that he retrieved from the Drifter quantities of substances regarded by him as marijuana and hashish oil, which, with help, he loaded on to a truck which he then locked and sealed. The truck now locked and sealed, he kept the key which he subsequently handed over to Special Agent Hancock. Hancock deposed to receiving from Park the key to the sealed and locked truck and to taking possession thereof. He said he found that the Drug Enforcement Administration seal on the lock was unbroken. He subsequently removed the seal and found in the truck a bulk of, what he described as, marijuana and hashish oil. He took samples of each of these substances, packaged and labelled each and sealed these in a box. He sent the sealed box and contents by registered post with a particular number and addressed to the Drug Enforcement Administration South Central Laboratory, Dallas, Texas. Special Agent Odom deposed that after seizing what he calls, "the marijuana, hashish oil and hashish" from the boat house, he made samples of each substance, packaged, labelled and initialled each. Then he sealed each package. He placed

the packages in boxes and sent them addressed to the Drug Enforcement administration South Central Laboratory in Dallas, Texas by registered mail bearing particular numbers. One of the boxed packages was returned because he had failed to seal the outer box. He checked the package and found that all the samples were still each sealed. So he sealed the outer box and returned the whole consignment to the said Laboratory via registered mail bearing a particular registration number.

George Lester's affidavit was also very much before the learned Resident Magistrate. He said that the samples he tested came from sealed Drug Enforcement Administration packages he received from Stewart Summers. Whilst it is true that Summers has not deposed, the evidence presented indicates that the seals of the packages were intact and that the packages received by registered mail each bore a registration number coinciding respectively with the registration number of individual packages sent respectively by Hancock and Park by registered mail addressed to the Laboratory. The evidence also shows that particulars written on each package received by Lester coincided respectively with the particulars including case number and initials borne by each package mailed under registered cover to the Laboratory by Hancock and Park respectively.

So, I bear in mind that the learned Resident Magistrate was not required to embark on a trial but to determine whether there was sufficient evidence to raise a **prima facie** case. It is therefore my view that it would be open to the triers of fact to conclude from the evidence in this connection, if accepted, that the samples of the substances recovered by Odom and Park and sent by them by registered mail addressed to the said Laboratory were the very substances tested by Lester.

A different ground formed the basis of Mr. Ramsay's

submission that the learned Resident Magistrate acted without jurisdiction in that there was no admissible evidence before her to justify the trial of the applicant, if the aforesaid offences had been committed in this country. That ground reads thus:

> "That improper methods of inducement and threat used by agent of the Requesting State to secure Affidavits containing testimony were thoroughly exposed by the witness Cortina Mattner-Byles ..."

What the learned Resident Magistrate had to consider here, and must be taken to have considered in the light of Cortina Mattner-Byles' **viva voce** evidence before her, was the reliability of the testimony of the accomplices Michael Mattner, James Senter and Billy Williams. And whilst the learned Resident Magistrate had to consider Cortina Mattner-Byles' evidence that she and others had been coerced or otherwise induced to despose against the applicant, it does not follow that the aforesaid accomplices, whose affidavits were taken in the absence of Mrs. Byles, were induced by agents of the requesting State to give their affidavits. The testimony of each accomplice was such that its strengths or weaknesses depended on the view to be taken of its reliability. In the result, the learned Resident Magistrate was entitled to act upon it as well as on other admissible evidence before her and to conclude as she did, that a prima facie case had been established.

The applicant also contends that he was denied fundamental rights and due process in two respects:

(1) by the refusal of learned Resident Magistrate to allow him to give an unsworn statement on his own behalf in the committal proceedings; and

(2) by, what he characterises as, the conspiratiorial conduct of the Jamican police and agents of the requesting State, in depriving Michael Mattner, the brother of Cortina Mattner-Byles, of the opportunity to be interviewed [illegible] and preventing

> him from testifying in the committal proceedings where he would have been expected to testify to the same effect as his sister had done and thereby "expose the subornation of testimony by agents of the Requesting State."

Take the second first. Mr. Ramsays submitted that as Mrs. Mattner-Byles' allegations have not been controverted by other evidence, the committal order should not be allowed to stand. Now, even if the learned Resident Magistrate was obliged to accept, in the absence of evidence to the contrary, the evidence, albeit challenged, that Michael Mattner had been expelled from the Island within hours of his arrival with a view to preventing him from being interviewed by counsel and from subsequently giving evidence, the question that arises is whether she as nevertheless entitled to come to the conclusion she reached on the admissible evidence before her. The answer is clearly in the affirmative, for what she had essentially to consider was the reliability of the testimony of the accomplices Senter, Williams and Michael Mattner himself, in determining whether there was sufficient evidence to warrant the trial of the applicant for the said offences, were they committed here.

That was the approach adopted by the House of Lords in the helpful case of <u>Alves v. Director of Public Prosecutions</u> and another [1992] 3 All E.R. 787. There, an accomplice had pleaded guilty to offences relating to the distribution in Sweden of cannabis imported from abroad and had been sentenced to imprisonment. He retracted before a committing magistrate in England the evidence he had given while serving his sentence. That evidence had implicated the fugitive in the commission of the said offences. The accomplice based his retraction on the ground that his evidence had been obtained by pressure exerted upon him by Swedish and Norwegian police officers. The Magistrate nevertheless made a committal order. On the

fugitive's application for a writ of **habeas corpus** the Divisional Court discharged the magistrate's order on the ground that the accomplice had retracted his Swedish evidence before the magistrate. On appeal, the House of Lords laid it down under legislation in **pari materia** to section 10 (5) of the Extradition Act, 1991, that the magistrate could take into **account** evidence of an accomplice of the fugitive implicating the fugitive in the offences for which his extradition was ought. This he could do although the accomplice had subsequently retracted his evidence. In their lordships opinion, what the magistrate had to consider was the reliability of that evidence in deciding whether there was sufficient evidence to justify an order for committal. The law lords allowed the appeal, since on the evidence before the magistrate he had been justified in committing the fugitive to custody notwithstanding the accomplice's retraction of the evidence previously given by him implicating the fugitive.

Likewise, even if Michael Mattner had testifed at the committal proceedings and had thereat disavowed his earlier evidence and had asserted that he and others had been suborned by agents of the requesting State, the learned Resident Magistrate would, even in those circumstances, have been entitled to conclude on the entirety of the evidence before her that a **prima facie** case had been made out for the trial of the applicant for the offences to which the authority to proceed related.

I now come to the question as to the correctness of the decision not to allow the applicant to give an unsworn statement on his own behalf. Mr. Ramsay submitted that Section 10(5) of the Act where it says "any evidence tendered in support of the request for the extradition of that person or on behalf of that person" includes the giving of an unsworn

statement by a person accused of an extradition offence (a fugitive) before a court of committal. And by shutting out the opportunity of the applicant to give an unsworn statement, the learned Resident Magistrate, Mr. Ramsay further submitted, breached the **audi alteram partem rule** thereby denying the applicant a fair hearing as required by section 20(1) of the Constitution of Jamaica.

It is to be observed that she did hear the evidence of Ripton McPherson and Cortina Mattner-Byles tendered on behalf of the applicant. But prior to adducing evidence from Ripton McPherson, Mr. Ramsay applied to have the applicant make an unsworn statement, citing in support, section 10(1), (2) and (5) of the Extradition Act 1991 and the Justices of the Peace Jurisdiction Act. She refused the application on the ground that an unsworn statement is not evidence as contemplated by section 10(5) of the Extradition Act: see page 1 of copy of the Resident Magistrate's note exhibited before this Court on behalf of the applicant.

Section 10(1) provides that the Court of committal "shall hear the case in the same manner, as nearly as may be, as if [that court] were sitting as an examining justice and as if [the arrested fugitive] were brought before [that court] charged with an indictable offence within [its] jurisdiction". Section 10(2) provides that that court "shall have, as nearly as may be, the like jurisdicition and powers ... as it would have if it were sitting as an examining justice and the [fugitive] were charged with an indictable offence committed within its jurisdiction."" Where an authority to proceed has been issued in respect of the fugitive, section 10(5) requires the court of committal to hear any evidence tendered in support of the request for his extradition or any evidence tendered on his behalf.

Appealing to thos provisions as well as to section 14(4) which declares that nothing in that section shall prevent

the proof of any matter in accordance with any other law in Jamaica, Mr. Ramsay submitted that evidence as used in the Extradition Act means evidentiary material which the court must take into account as the court does in preliminary examinations. Since a court of committal is required to hear as nearly as possible a case in the same manner as if it were conducting a preliminary examination into an indictable offence, Mr. Ramsay argued that just as an accused is entitled to make a statement upon being cautioned in terms of section 36 of the Justices of the Peace Jurisdiction Act, so is a person accused of an extradition offence before a court of committal entitled to make an unsworn statement from the dock.

Therein, with respect, lies the fallacy of the argument. Section 36 of the Justices of the Peace Jurisdiction Act deals with what is known as a statement of accused. The section is not concerned with an unsworn statement from the dock, a right of respectable antiquity that an accused person <u>at a trial</u> is entitled to make. And that right has been preserved by the Evidence Act, section 9(h) which also recognises the provisions of section 36 of the Justices of the Peace Jurisdiction Act. After the depositions of the witnesses for the prosecution have been read to the accused that latter section directs the examining magistrate to caution the accused as follows, or in words to the like effect:

> "Having heard the evidence do you wish to say anything in answer to the charge? You are not obliged to say anything unless you desire to do so; but whatever you say will be taken down in writing and may be given in evidence against you upon your trial, ... and [you are] clearly to understand that [you have] nothing to fear from any threat, which may have been holden out to [you] to induce [you] to make any admission or confession of [your] guilt; but that whatever [you] shall [now] say may be given in evidence against [you] upon [your] trial, notwithstanding, such promise or threat."

I agree with Mr. Hibbert that such a statement, in practice recorded in a form headed "Statement of Accused," may be used only fo[illegible] trial [illegible] Jamai[illegible] and that what is recorded as the

statement of accused may only be used by the prosecution if inculpatory or at least partly so. If exculpatory it would be inconceivable in light of the language of the section 36 that such a statement could influence the magistrate not to commit such an accused for trial.

Now what the applicant sought to do was not to make a statement of accused as is envisaged in section 36, but to give an unsworn statement from the dock as is customary in criminal trials in Jamaica. Section 37 of the Justices of the Peace Jurisdiction Act shows that a statement under section 36 is put on an entirely different footing from evidence given by witnesses. Section 37 provides that before the magistrate shall commit the accused for trial(s)he shall, upon obeying the directions of section 36, ask the accused if he desires to call any witnesses.

If the accused calls witnesses they are required to give evidence on oath or affirmation and be subject to cross examination in his presence.

At the close of the evidence tendered on behalf of the requesting State the applicant did call witnesses who testified. Although he did not choose to go into the witness box and be subject to cross examination he had every right to do so, for section 9 of the Evidence Act makes him a competent witness for the defence at every stage of the proceedings. The right, preserved by section 9(h) of the Evidence Act, of an accused at trial to make an unsworn statement from the dock cannot properly be extended by this court to committal proceedings, because such an extension would, in my opinion be a naked insurpation of the function of Parliament. In any case, conferment of such a right in respect of those proceedings would, I think, be indefensible on jurisprudential grounds, for that right arose as a concession to accused persons at the trial stage

in order to give their version of the facts without being liable to cross examination in the age when they were unable to give sworn or affirmed evidence at their trial.

For these reasons I hold that the learned Resident Magistrate was correct in ruling that an unsworn statement from the dock (which Mr. Ramsay had applied to have the applicant make) would not constitute evidence as contemplated by section 10(5) of the Extradition Act, 1991. Her refusal to allow the applicant to make a statement did not therefore amount to a denial of due process.

Question as to whether there was sufficient basis for concluding that the offences to which the authority to proceed related were extradition offences.

The learned Resident Magistrate had to determine not only the question of the sufficiency of evidence in respect of the offences to which the authority to proceed related, but also whether she was satisfied that the said offences were at all material times extradition offences. She had ample basis to say (a) that the acts constituting the said offences would constitute offences against the law of Jamaica and (b) that the said offences were provided for by the Extradition Treaty between the Government of Jamaica and the Government of the United States of America ratified by Jamaica on 31st May, 1991. Nevertheless the applicant says, in effect, that the Resident Magistrate had no basis for concluding that the said offences were extradition offences. His ground for saying so reads as follows:

> "... at the time that proceedings under the Extradition Act were initiated against your applicant the 1991 Treaty between the United States of America and Jamaica had not been published in the Gazette: And that publication is a necessary part of the process of incorporation of a Treaty into municipal law"

Section 4(1) of the Extradition Act provides that where an extradition treaty has been concluded with a foreign State the Minister may by order declare that the Act applies to that foreign State for the purpose of implementing the terms of the treaty. The provisions of the Act apply to the United States by the authority of section 4(3) and the Extradition (Foreign States) Order, 1991 which was exhibited in the Court below. In accordance with section 4(4) of the Act that Order was affirmed by the House of Representatives on 15th August 1991 and by the Senate on 13th September 1991.

Mr. Ramsay submitted that the treaty was not yet a part of Jamaican law when proceedings for the extradition of the applicant commenced. He urged that it only became incorporated into Jamaican law on 2nd February 1995, the date of the publication in the Jamaica Gazette of the treaty and resolutions by the House of Representatiove and Senate affirming the said Order. In other words, the Order, he submitted, became effective not when it was affirmed by a resolution of each House, as was suggested by Mr. Hibbert, but when the resolutions affirming it were published in the Gazette. In support of this submission he relied on section 31(1) of the Interpretation Act which states:

> "All regulations [which include orders] made under any Act ... and having legislative effect shall be published in the Gazette, and unless it be otherwise provided shall take effect and come into operation as law on the date of such publication." **(emphasis supplied)**

That submission cannot be correct, for it flies in the face of section 30(2) which says:

> "The expression, 'subject to affirmative resolution' when used in relation to any regulations shall mean that those regulations are not to come into operation unless and until affirmed by a resolution of each House of Parliament."

Though cast in negative form, the subsection means that when affirmative resolutions are passed by the House of Parliament,

the related regulation, or order, thereupon come into force.

In Prince Anthony Edwards v. the Director of Public Prosecutions and the Director of Correctional Services S.C.C.A. No. 43/94 delivered on 7th November 1994 (unreported) the Court of Appeal comprising Wright, Downer and Wolfe J J.A., laid it down that once the Extradition (Foreign States) order, 1991 was affirmed by the resolutions of both Houses the treaty was enforceable. In that case copies of the resolutions affirmed by the House of Representatives and the Senate on 15th August 1991 and 13th September 1991 respectively, were exhibited. Downer J.A. with whose judgment the other members of the court agreed, maintained that as these resolutions form part of the record of that Court, there ought to be no issue in future cases concerning the completion of the legislative process as regards the United States of America.

As far as concerns the case before this Court, the legislative process was completed, be it noted, not, as Mr. Robinson submitted, on the date of the publication in the Gazette of the Order, but when the Order was affirmed by a resolution of each House of Parliament. It is abundantly clear therefore that at the time that the proceedings under the Extradition Act were launched against the applicant the treaty was incorporated into Jamaican law and the said offences extradition offences.

Was there a failure to observe the rule of speciality so as to preclude the Magistrate making a committal order?

The applicant says that that question must be answered in the affirmative, for in this connection his ground for the issue of the writ reads thus:

> "That no evidence was offered as to any provision made by the laws of the Requesting State as to the observance of the Rule of Specialty as required by section 7(3) of the Extradition Act 1991; nor alternatively was any certificate of the responsible Minister tendered to confirm the existence

> of an arrangment with the requesting State as provided by section 7(4) of the said Act."

Mr. Ramsay submitted that in the absence of a certificate of the Minister under section 7(4), in order for the applicant to be afforded the protection of the rule under section 7(3), there had to be evidence before the Resident Magistrate that the extradition treaty had been incorporated in American law. He further submitted that there was no such evidence.

Section 7(3) of the Extradition Act ordains that "[a] person shall not be ... committed to ... custody for the purposes of [extraditing him to an approved State] unless provision is made by the law of that State, or by an arrangement made with that State, for securing that he will not ... be tried or detained with a view to trial for ... any offence committed before his extradition ... other than ... the offence(s) in respect of which his extradition is requested ... or any lesser offence(s) proved by the facts proved before a court of committal...". So it is plain that the requirements of the subsection would be met if it were proved before the court of committal either that (a) provision had been made by the law of the United States for securing the aforesaid requirements or (b) that an arrangement had been made with the United States for securing same. As to (a) above it is common ground that there was no evidence before the court of committal. And in respect to (b) Mr. Ramsay submitted that by the terms of section 7 of the Act it was the duty of the Minister to provide a certificate if there was any such arrangement as is mentioned in section 7(3). Since no certificate was forthcoming the rule of speciality had not been satisfied, so the argument ran.

Section 7(4) of the Act states:

> "Any such arrangement as is mentioned in subsection (3) may be arrangement of a more general nature; and for the purposes of that subsection a certificate issued by ... the Minister confirming the existence of an

> arrangement with any approved State and stating its terms shall be conclusive evidence of the matter contained in the certificate."

Section 2(1) of the Act defines an approved State as either a designated Commonwealth State or a treaty State, as the circumstances may require. The United States of America was a treaty State since before extradition proceedings against the applicant were instituted, because the Extradition (Foreign States) Order 1991 applying the provisions of the act to that country has been in force since 13th September 1991 as has already been found. And Artice XIV of the treaty recites the rule of speciality set forth in section 7(3) of the Act.

The treaty, as counsel for the respondents submitted, is an arrangement made between the United States and Jamaica as to the conduct of their relations in terms of the provisions of the treaty. I agree that the requirements of section 7(3) were satisfied at the committal proceedings. The reason is that article XIV of the treaty manifested, as it still does, an arrangement spoken of in section 7(3) of the Act. There was accordingly, no need for the respondents to show that the rule is part of the law of the United States. Nor was there any duty to furnish a certificate from the Minister confirming the existence of such an arrangement for securing the rules which **ex hypothesi** the treaty, already incorporated in Jamican law, contains. Counsel for the respondents are, I think, correct in submitting that a certificate would only be appropriate in relation to designated Commonwealth States, for in that regard there would be nothing else tendered before a court of committal to show that an arrangement exists.

Mr. Ramsay further submitted that the rule of speciality could not be applied in this case or could be easily evaded on the basis that the committal order could be made to fit either of the two indictments referred to. That submission

can be dealt with shortly. The committal order relates only to the offences stated in the authority to proceed. Those offences are the subject of Indictment No. 9100054 exhibited with the request for extradition. There ought therefore to be no likelihood of the misgivings betrayed by Mr. Ramsay's submission being realised, as Indictment NO. 89-00089 referred to in Miss Bedwell's affidavit concerns separate and different charges which are clearly caught by the rule of speciality.

In the result the learned Resident Magistrate acted within her jurisdiction in committing the applicant to custody to await his extradition to the United States of America.

Would it in the circumstances be unjust or oppressive to extradite the applicant on the basis of lapse of time or on the basis that he accusation against him is not made bona fide in the interest of justice?

I now turn to the final grounds. These grounds were not open to the applicant before the learned Resident Magistrate. They are dealt with by section 11(3) (b) and (c) of the Extradition Act which empowers the Supreme Court to order the applicant to be discharged from custody -

> "If it appears to the Court that-...
>
> (b) by reason of the passage of time since he is alleged to have committed the offence ..., or
>
> (c) because the accusation against him is not made in good faith in the interest of justice,
>
> it would, having regard to all the circumstances, be unjust or oppressive to extradite him."

Paragraph (c) of the subsection deals with an accusation made in bad faith. So, was the requesting State acting improperly in making the accusation and in requesting the extradition of the applicant? Mr. Ramsay pointed to the fact that accomplices who had palpable interests to serve were used to depose against

the applicant. Yet, as Mr. Hibbert reminded, the practice of using accomplices to give evidence against accused persons has been approved in Jamaica, England and several other common law jurisdictions. For instance, in the Prince Edward case (supra) the Court of Appeal accepted **sub silentio** that there was nothing improper for accomplices of the fugitive to give evidence implicating him even though they were in prison when they gave their testimony. All that would be required would be for the appropriate warning to be given at trial.

Mr. Ramsay contended that Michael Mattner was expelled from Jamaica by the Jamaican police as to prevent him giving evidence before the court of committal. Assuming for present purposes, without deciding, that this was so, that could not, as Mr. Hibbert observed, have affected the accusation, for it had been already made. And, in my view, there is no evidence before this court, nothing in the affidavits and other documents supplied in support of the request, that could cause this Court to say that the accusation against the applicant was not made in good faith in the interest of justice. Nor is there anything in the evidence that shows, or from which it can reasonably be inferred, that the accusation was not made in good faith.

As regards paragraph (b) of the subsection, the passage of time to be considered is the time that elapsed between the date of the alleged offences in May 1988 and the date of the commencement of the hearing in this Court on 22nd January, 1996, because that was the first occasion on which this ground for resisting extradition could be raised by the applicant.

On 6th July 1988 the indictment charging the offences was returned by the Grand Jury and the following day the foreign warrant for the applicant's arrest was issued. However, it was not untl 26th July, 1991, three years later, that

a request was made for the applicant's extradition. It was a provisional warrant that was sought then, as also in November 1991, when the request was renewed, but was not acted upon. The formal request was made two years later, viz 17th August 1993.

On 29th November 1993 the authority to proceed was issued by the Minister. Then on 22nd December 1993, less than a month later, the warrant of arrest was issued but was executed on 4th December the following year. I accept the evidence of Lewis Burchell, an Assistant Superintendent of Police, that between 4th January and 4th December 1994 he made efforts to locate the applicant but was unsuccessful. I also find from his evidence that it was consequent on information he received from a detective at the Negril Police Station that he arrested the applicant at the Spanish Town Police Station lock-ups on a warrant under the Extradition Act. Nevertheless, in his affidavit in support of his application, the applicant says that during that period he resided at Point Village in Negril, operated the "Red Snapper" Restaurant in Negril and was living openly and working in Negril and Montego Bay. All that has not been refuted.

Relying on the case of Kakis v Republic of Cyprus [1978] 2 All E.R. 643, Mr. Ramsay contended that this Court should be satisfied that the provisions of section 11(3) (b) are applicable here. He submitted that it would be unjust to extradite the applicant because the risk of prejudice in the conduct of the trial itself is denoted by the risk of his wife, Cortina Mattner-Byles, becoming a witness against him, she having given an affidavit against him in April 1992 to the requesting State. The risk, counsel submitted, had been occasioned by the failure to have the applicant tried with ordinary promptitude before 1992. Mr. Ramsay further submitted that it would be oppressive to extradite the applicant

because the failure of the requesting State to take action with reasonable promptitude would have allowed a build-up of a sense of security in the applicant, and the stability if his life would now be threatened.

It is correct that "unjust" is directed primarily to the risk of prejudice to the fugitive in the conduct of the trial itself, and "oppressive" is directed to hardship to the fugitive resulting from changes in his circumstances that have occurred during the period to be taken into consideration: see the speech of Lord Diplock at page 638 g to h in Kakis' case (supra). Yet, it is not enough to rely on Lord Diplock's rendering of "unjust" and "oppressive." The applicant must show that the proper inference to be drawn from the primary facts established before this court is that it would be unjust or oppressive to extradite him.

In Kakis' case the House of Lords held that that was the proper inference to be drawn in the circumstances of that case. There, Kakis was alleged to have participated in a murder in Cyprus in 1973. He went into hiding and some 15 months later he took part in a coup which ousted the government. He emigrated to England in September 1974 with the permission of the new government. In December 1974 the former government was returned to power and an amnesty proclaimed. Kakis understood himself to be included in the amnesty and in early 1975 he visited Cyprus for about three weeks with the permission of the government of Cyprus, wound up his affairs there, and then returned to England. In 1976 extradition proceedings were instituted and at the hearing in England in September 1977 Kakis and two alibi witnesses testified that he was at home at the time of the murder. Both alibi witnesses, viz Kakis' wife and a man who had taken part in the 1974 coup, had settled in England. They gave evidence that they

would not return to Cyprus to testify at any trial for fear of ill treatment by political opponents. Had a murder trial taken place in Cyprus before the male witness had left, he would have been available and compellable as a witness for the defence but at the time of the extradition hearing he was no longer a willing or compellable witness.

The House of Lords held that having regards to all the circumstances it would be unjust and oppressive to return the applicant to Cyprus for trial. That last circumstances (outlined by the last sentence of the previous paragraph) would make it unjust, to return him for trial, for it would detract significantly from the fairness of the trial if he were deprived of the opportunity to call the evidence of the only independent witness as to his alibi. To return him for trial would also be oppressive because during the relevant period he was justified in believing that the government of Cyprus had no intention of prosecuting him for the alleged offence and was warranted in feeling a sense of security from prosecution.

Had the extradition proceedings in that case been pursued with promptitude then that alibi witness would have been available for a trial in Cyprus. And referring to Kakis, Lord Scarman in his speech said:

> "The loss of his compellable witness and the build up of a sense of security both result from the passage of time, the effect of which ... has to be considered having regard to all the circumstances. It is not permissible, in my judgment, to consider the passage of time divorced from the curse of events which it allows to develop. For the purposes of this jurisdiction, time is not a abstraction but the necessary cradle of events, the impact of which on the applicant has to be assessed."

Unlike that case there is no evidence before this court that there are any relevant events in the instant case

which would now make it unjust or oppressive to extradite him to the United States for trial. There is no evidence before this court, nothing in his affidavit or in the deposition of his wife or that of Ripton McPherson to show any disability or unfairness he would suffer if his trial was now to take place. Nor is there evidence from which this court can say, or infer, that he would suffer prejudice in the conduct of his defence if he is returned to face trial in respect of the said offences.

Whilst I agree that the evidence does not warrant a finding that the applicant concealed his whereabouts or sought to evade arrest in Jamaica, it is to be observed that Lord Diplock's speech in Kakis' case makes it clear that responsibility for delay not brought about the accused is not generally relevant. And it is clearly irrelevant in the instant case. Indeed, the tenor of Lord Scarman's dictum, referred to above, indicates that lapse of time is not in itself enough to give rise to oppression or injustice. Then again, the instant case is devoid of complexity. The prosecution is saying that between 1986 and 1988 the applicant and others, conspiring together, were responsible for bringing into the United States for distribution illegal drugs that were found in a boat and boat house in that country. And there is no evidence that any defence witness is no longer available. Then too, as Mr. Hibbert put it, on the material before this court the applicant will suffer no more than the ordinary hardship to be expected by any person who is extradited to stand his trial.

So taking into account all the circumstances it would not, in my opinion, be unjust or oppressive to extradite the applicant to the United States of America for trial.

CONCLUSION

It is for that foregoing reasons that in agreement with my learned brothers I concluded that the application must be refused.

Theobalds J.

I have read in draft the judgment of my learned colleague Justice Clarke. I agree totally with his reasons; there is nothing that I can usefully add.

Reid J.

I agree.