IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE FULL COURT

SUIT NO. M122 OF 2000

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

REGINA VS DIRECTOR OF PUBLIC PROSECUTIONS
DIRECTOR OF CORRECTIONAL SERVICES
EX PARTE CHARLES CLARKE

Bert Samuels instructed by Knight, Pickersgill, Dowding and Samuels for the Applicant

Miss Paula Tyndale for Director of Public Prosecutions

Mrs. Susan Reid-Jones for Director of Correctional Services instructed by Director of State Proceedings

Heard: January 17 and March 23, 2001

WOLFE, CJ

The applicant Charles Clarke, a Jamaica national is applying for a writ of habeas corpus to issue for his release from a committal order that he be extradited to answer charges preferred against him in the United States District Court for the Southern District of Texas, Houston Division.

The Provisional Warrant of Arrest was issued by His Honour Mr. Martin Gayle, Resident Magistrate for the Corporate Area Criminal Court on the 25th

day of April 2000. Having heard all the evidence the said Resident Magistrate on the 8th day of November 2000, issued a warrant of committal against the applicant pending his extradition to stand his trial in the United States of America.

The affidavit of the applicant, in support of the motion, alleges the grounds on which the writ of habeas corpus is sought. However, Counsel for the applicant confined his arguments to section 11(3) (C)of the Extradition Act 1991.

Section 11(3) (C) states:

> "On any such application the Supreme Court may, without prejudice to any other power of the Court, order the person committed to be discharged from custody if it appears to the Court that - because the accusation against him is not made in good faith in the interest of Justice."

The applicant contends that the requesting State acted in bad faith in that it knew of the alleged offence prior to the applicant being deported to Jamaica on January 23, 1998 (sic) and ought to have charged him prior to deportation rather than seek to extradite him now that he is settled in the land of his birth.

The question of bad faith was raised in the case of ***Vivian Blake v the Director of Public Prosecutions et al SCCA No. 107/96 M65/95.*** This was a case under the Extradition Act of 1991. Forte JA, as he then was, dealing with the question of Good Faith had this to say:

> "This allegation must be determined on the the presumption that countries that enter into extradition treaties for the return of prisoners or suspects from one country to another, for purpose either of ensuring the imprisonment of the convicted person, or the trial of the fugitive, do so honourably and with sincere intentions of acting according to the terms of the treaty. Consequently, any such allegation must be put forward on very strong grounds."

Lord Russell CJ in Re Arton [1896] 1 Q.B. 108 pointed to the gravity and serious nature of an allegation of bad faith in a case of extradition.

> "It has been pointed out by myself and my learned brothers during the argument that this is in itself a very grave and serious statement put forward, and one which ought not to be put forward except upon very strong grounds, it conveys a reflection of the greatest possible kind, not only upon the motive and actions of the responsible government, but also impliedly upon the judicial authorities of a neighbouring friendly power."

Against the background of the dicta cited (*supra*), let me examine the evidence relied upon in support of this allegation of bad faith.

The applicant deposes that in October 1998, he was arrested in the State of Louisiana in the United States of America. He was finger printed and all his criminal records enquired into by the Federal Bureau of Investigations. He was detained in the State of Louisiana for four (4) months and then deported to Jamaica accompanied by Federal Marshals.

The point is made that the alleged offences for which extradition is sought were all committed prior to his deportation and would have been known to the Federal Government at the time of deportation. He refers in particular to the

affidfavit evidence of Michael Todd Lee, a Special Agent, who deposed that he saw the applicant involved in a drug transaction on September 19, 1998.

The argument is that the Federal Government in failing to charge him prior to his deportation, in the light of the available evidence, is demonstrating bad faith and in the interest of justice the application should be refused.

The argument as to bad faith is seriously flawed. There is not one scintilla of evidence that at the time of deportation the Federal Authorities had information of his involvement. Even if they had and through negligence they allowed him to be deported without charging him, this would not be evidence of bad faith, bearing in mind the dictum of Forte JA and Lord Russell CJ, (*supra*).

The evidence relied upon as bad faith must be cogent and compelling to displace the presumption of good faith alluded to in the authorities.

On the other hand, the quality of the evidence relied upon to support the application, including the identification evidence, is of a substantial nature.

In the circumstances, I hold that the argument of bad faith has not been made out and it would not be unjust or oppressive to extradite the applicant.

In respect of the other grounds which were not argued by Counsel, I would wish to say that good sense prevailed because they all lacked merit.

For the reasons stated herein, I would dismiss the motion.

GRANVILLE JAMES, J

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

HARRISON J

The applicant Charles Anthony Clarke has moved this Court for an order that a writ of habeas corpus be directed to the Superintendent of the Tower Street Adult Correctional Centre in respect of a committal order made by His Honour Mr. Martin Gayle Resident Magistrate for the Corporate Area on the 8th day of November 2000 under the Extradition Act 1991 pending his return in custody to the United States of America. The grounds upon which he relies are set out in his affidavit sworn to on the 30th day of November, 2000.

The factual background

The applicant is a Jamaican national who was born on the 5th day of December 1964 in the Parish of Kingston. He states that he was arrested in the State of Louisiana in the United States of America in October 1998; fingerprinted whilst in custody and his criminal record enquired into by the Federal Bureau of Investigation. He was kept in custody in the State of Louisiana for four (4) months after which he was deported and accompanied by Federal Marshals to Jamaica on the 23rd January 1998 (sic).

He further states that on his return to Jamaica he lived and cohabited with his family and friends. He lived a normal life as a jeweler for a period of one year and five months and then he was arrested at his home on the 16th May 2000, with respect to drug offences committed in the United States of America. Extradition proceedings were brought on behalf of the requesting State and he was placed before the Resident Magistrate's Court at Half Way Tree, St. Andrew. He contends that he is innocent of the charges; he knows nothing about them and that they are based on false evidence.

He also states that the alleged offences were committed before his deportation on the 23rd January 1998 (sic) and the Federal Government would have been known of them at the time of his deportation since he was arrested in the name of Charles

Clarke and deported in that name. He also maintains that the requesting State is relying exclusively on the testimony of persons who alleged that they themselves were involved in the trafficking of cocaine. Furthermore, a number of persons including his half brother have given affidavits against him under very suspicious circumstances since at the time they deposed they themselves were under the threat of criminal prosecutions and in custody. It is his view that such testimony will be tenuous and very unreliable and that the Learned Resident Magistrate erred in granting the Warrant of Committal as the offences for which he is scheduled to face were not made out by any independent witness.

Finally, he states that he has been advised and verily believes that he has good grounds for making the application and his defence is in accordance with the provisions of the Extradition Act of Jamaica.

The case upon which the requesting State relies is contained in several affidavits. It has been summarized in the affidavit of Martha M. Vara an Assistant District Attorney of Houston, Texas sworn to on the 3rd day of May 2000. This is what she says:

> "18. Throughout much of 1998, federal law enforcement agents in New York, New York, Houston, Texas and other United States cities identified a Colombian and Jamaican cocaine trafficking organization smuggling multi-hundred kilogram quantities of cocaine into the United States from Mexico and Colombia. This organization transported cocaine from Texas to the New York and other northeast areas in trucks containing other products also. The Louisiana State Police seized 53.76 kilograms of cocaine, approximately 13 pounds of marijuana and two handguns in Baton Rouge, Louisiana from members of this organization on September 20, 1998. Prior to the seizure of this cocaine, court authorized interceptions of electronic communications in Houston, Texas revealed to agents that Hernan Payan was delivering to

> Clarke approximately 40-50 kilograms of cocaine, for which he was to receive partial payment in United States currency from Clarke on or about September 18, 1998. Agents on surveillance on September 18, 1998 saw Payan's associate (Luis Melendez) deliver the cocaine to Clarke at 4001 Tanglewilde. Melendez's affidavit is attached. The next day (September 19, 1998) DEA Special Agent (S/A) Michael Todd Lee was on surveillance at 4001 Tanglewilde when he saw Courtney Cunningham (see affidavit) Robert Mark Young and Richard Rupert Young, along with Clarke and an unidentified male, loading six boxes into a black BMW. FBI Special Agent Steve Tinsley saw the male and Clarke drive the BMW from 4001 Tanglewilde (see his affidavit) to the 9700 block of Harwin, Houston, Texas where S/A Tinsley saw Clarke and the male meet with Robert Dean Johnson (see affidavit) and Hugh Vernon Carter (see affidavit) where their tractor trailer was parked. According to S/A Tinsley, the boxes were loaded from the BMW into the trailer of the tractor. The truck was then driven from Houston, Texas and finally stopped by Officer Cowart (see Cowart's affidavit). The driver consented to the search of the truck and trailer. Boxes were discovered containing cocaine, marijuana and two handguns. The six boxes and their contents were submitted to the Louisiana State Police Crime Laboratory in Baton Rouge, Louisiana where chemical analyses were performed by Forensic Scientist Tara Milam who determined the boxes contained substances which were 53.76 kilograms of cocaine and 11.9 kilograms of marijuana (see affidavit).

Vara then concluded by stating inter alia:

> "19 Based on all the evidence, the prosecutor believes that if Charles Anthony Clarke is returned to Southern District of Texas to stand trial, the evidence will prove beyond a reasonable doubt that Charles Anthony Clarke participated in a narcotics conspiracy..."

Clarke is charged in Count 1 of the Indictment with the offence of "knowingly and intentionally conspiring to possess with intent to distribute cocaine, a controlled substance. Count Two charges him with the offence of "aiding and abetting and knowing and intentional possession with intent to distribute cocaine, a controlled substance. The evidence of Vara also reveals that the statute of limitations with respect to prosecuting the crimes charged in the indictment is five (5) years from the date of the commission of the crime.

The issue for consideration

Mr. Bert Samuels for the applicant, submitted that the accusation against the applicant was not made in good faith, hence in the interest of justice, it would, having regards to all the circumstances be unjust or oppressive to extradite him. He argued that even if there were a strong case against the applicant it would still be unjust to have him extradited since the requesting State had the applicant in custody for four (4) months and thereafter deported him without pressing any charges against him. It was contended by him also that the authorities in the Requesting State would have known if the applicant was implicated in any illegal activities so, the request for extradition after his deportation, was not made in good faith.

Miss Tyndale in response, submitted that no evidence was proffered to show that the Requesting State had not acted in good faith. She referred to and relied upon the case of **Vivian Blake v DPP and Anor**. SCCA 107/96 delivered on the 27th July, 1998 and argued that it was the duty of the applicant, to show bad faith.

I turn now to consider the issue of bad faith raised by the Applicant. I must say at the outset that it is universally accepted that once a request for extradition is made by a friendly country, it is expected that its officials are acting bona fide. Prior to the enactment of the Extradition Act 1991 (Jamaica) an applicant who seeks to have the Court exercise its discretion could show that the request for his return was not made

in good faith in the interest of justice or otherwise. (emphasis supplied) The words "or otherwise " were omitted however, from section 8(3)© of the Fugitive Offenders Act 1967 (U.K) which is in identical terms to section 11(3)© of the Extradition Act 1991 (Jamaica). Section 11(3)© of the Jamaican Act provides as follows:

> "11.(3) On any such application the Supreme Court may, without prejudice to any other power of the Court, order the person committed to be discharged from custody if it appears to the Court that -
>
> ....
>
> (c) because the accusation against him is not made in good faith in the interest of justice,
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> it would, having regard to all the circumstances, be unjust or oppressive to extradite him".

The words "or otherwise" were construed in **Re Naranian Singh** [1961] 2 All E.R 565 as conferring upon the Court a wide discretion to do what in all the circumstances of the case was just.

Having regards to the section 11(3)©, the Court is only concerned now with the allegation that the accusation is made against the applicant in bad faith.

In **Vivian Blake v The Director of Public Prosecutions and Anor**. SCCA 107/96 Misc. 65/95 delivered on the 27th July 1998, the issue of bad faith was raised. Forte J.A (as he was then) said at page 6 of the judgment:

> "This allegation must be determined on the presumption that countries that enter into extradition treaties for the return of prisoners or suspects from one country to another, for the purpose either of ensuring the imprisonment of the

> convicted person, or the trial of the fugitive, do so honourably and with sincere intentions of acting according to the terms of the treaty. Consequently, any such allegation must be put forward on very strong grounds."

In **Re Arton** [1896] 1 QB 108 Lord Rusell speaking in relation to a similar ground said:

> "It has been pointed out by myself and my learned brothers during the argument that this is itself a very grave and serious statement to put forward, and one which ought not to be put forward except on very strong grounds: it conveys a reflection of the gravest possible kind, not only upon the motive and actions of the responsible Government, but also impliedly upon the judicial authorities of a neighbouring, friendly Power." [p.114]

The gravamen of Counsel's argument as I understand it, is that, the applicant was held in custody in the United States of America for four (4) months and at a time when the authorities in the requesting State should have known of his incarceration before he was deported. This allegation has not been challenged by the requesting State but does it mean that there would be an act of bad faith on the part of the requesting State when it made the request for extradition subsequently to his deportation?

It is my considered view that the applicant must show by evidence that the requesting State is not acting in good faith. For example, it could be shown that the requesting State is using this request as a means to extradite him for other purposes or that he stands the risk of trial for matters not included in the indictment. One cannot speculate on these matters.

When one looks at the evidence that has been supplied by the requesting State it cannot be said that the charges against the applicant are trivial. Indeed, if I may say so, the charges are serious. The evidence in my view supports the counts in the indictment.

There is also no evidence of inordinate delay on the part of the requesting State to have him extradited.

Counsel for the applicant submitted however, that even if there is a strong case against the applicant, it would be unjust and oppressive to extradite him. For my part, I do believe that the Court cannot act without evidence where bad faith is alleged. The applicant has certainly failed in my view, to discharge the burden that rests on his shoulder to show bad faith. I would therefore dismiss the Motion with costs to the Respondent to be taxed if not agreed.

WOLFE, CJ

The motion is accordingly dismissed.