IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE FULL COURT

SUIT NO. M65/95

BEFORE: THE HON. MR. JUSTICE SMITH
THE HON. MR. JUSTICE REID
THE HON. MRS. JUSTICE HARRIS

REGINA

VS. DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT

DIRECTOR OF CORRECTIONAL SERVICES 2ND RESPONDENT

EXPARTE VIVIAN BLAKE

Lord Gifford Q.C. and George Soutar for the Applicant.

Lloyd Hibbert Q.C. and Miss Viviene Hall for the First Respondent.

Laxton Robinson and Marc Harrison for the Second Respondent.

Heard: October 10 & 11, 1996

SMITH, J.

Pursuant to a request of the Government of the United States of America, the applicant Vivian Blake on the 5th July, 1995 was ordered by a Resident Magistrate for St. Andrew to be committed to custody to await his extradition. This committal is in relation to two matters:

1. An indictment in the United States District Court for the Southern District of Florida (the Florida Indictment). This indictment charges Vivian Blake along with Lester Coke, Richard Morrison and others with Sixty (60) violations of law, six (6) of which are the subject of this request. All of these six (6) violations are offences committed in connection with trafficking in dangerous drugs and murder. The affidavit evidence of at least seven (7) witnesses was tendered in support of this indictment. The evidence shows that Vivian Blake, Jim Brown and Richard Morrison were leaders of a drug distribution organisation known as the Shower Posse.

2. An indictment in the United States District Court for the Eastern District of Virginia (the Virginia indictment).

This indictment charges Vivian Blake with violations of the criminal drug laws of the U.S.A., laws that specifically relate to the distribution of cocaine and the possession with intent to distribute cocaine.

Affidavits of two witnesses using the names John Doe #1 and John Doe #2 were submitted in support of the request in relation to this indictment.

By Notice of Motion dated 6th August, 1996 the applicant, Vivian Blake, applied for a writ of habeas corpus. The applicant relies on two grounds:

1. In relation to the order for his extradition upon the Florida indictment the applicant contends that the accusation against him had not been made in good faith in the interest of justice.

2. In relation the order for his extradition upon the Virginia indictment the applicant contends that the learned Resident Magistrate erred in law in accepting into evidence and/or relying upon the affidavits purportedly made by "John Doe" #1 and "John Doe" #2.

Ground 1

This ground as said before, relates to the Florida indictment.

Lord Gifford for the applicant referred to section 11 (3) (c) of the Extradition Act, 1991. This section empowers the court, on an application for habeas corpus, to order the person committed to be discharged from custody if it appears to the court that:

a. .....

b. .....

c. because the accusation against him is not made in good faith in the interest of justice, it would, having regards to all the circumstances be unjust or oppressive to extradite him

He also referred to the affidavits of Mr. George Soutar, and Mr. Kinly Engvalson. The evidence contained in these affidavits is to the effect that one Richard Morrison who was charged in the same indictment as the applicant was extradited from Jamaica at the request of the United States Government and was indicted and tried upon a wholly different indictment.

He argued that the history of Richard Morrison's extradition as revealed on the evidence, sufficiently shows that the United States authorities acted in bad faith in relation to him since having requested and obtained his extradition on one indictment they proceeded to try him and convict him on another in breach of the treaty. He contended that, in the absence of any explanation for such conduct the inference can properly and reasonably be drawn that the United States authorities are not interested in prosecuting the alleged Shower Posse conspiracy but rather have sought their extradition for some ulterior purpose. The cases of the applicant Blake and Morrison are so closely intertwined that Blake's case should be considered as being affected by the same vice, he urged. He therefore asked the court to draw the inference that the extradition of the applicant has been requested for reasons other than the prosecution of the crimes alleged. This he submitted would amount to bad faith and motive other than the interest of justice.

Mr. Hibbert for the first Respondent submitted that for the application under S. 11 (3) (c) of the Extradition Act to succeed the applicant must show that the initial request was made in bad faith. He contended that no evidence was adduced to show that at the time of the request "the accusation against the applicant was not made in good faith in the interest of justice."

He referred to the affidavits of Mr. Soutar and Mr. Engvalson and submitted that from these it cannot be inferred that the United States authorities acted in bad faith. These submissions were adopted by Mr. Robinson on behalf of the second Respondent.

The evidence of Mr. Engvalson is to the effect that Richard

Morrison was tried, convicted and sentenced in the United States District Court for the Middle District of Florida and that he has not stood trial with respect to the Southern District indictment which has been dismissed.

Mr. Soutar's evidence is that the only matter for which the extradition of Richard Morrison was ordered was the indictment in the Southern District of Florida. He also states that Morrison was formally indicted with the applicant.

It is not in dispute that the case of the applicant and that of Morrison are closely linked.

Both sides agree that in order to succeed in submissions based on S.11 (3) (c) of the Act, the applicant must show:

1. that the requesting state has not requested the extradition in good faith and in the interest of justice and;

2. that it would be unjust and oppressive in all the circumstances to extradite him.

It seems to us that the proof or allegation of a breach of the treaty in respect of Richard Morrison is not and cannot be a sufficient basis for the inference that "the accusation" against the applicant was not made in good faith in the interest of justice. It must be borne in mind that this alleged breach took place long after the request for extradition.

What the applicant is really saying is that there is a breach in respect of Morrison and consequently there can be no assurance that section 7(3) of the treaty would be a safeguard. Section 7 (3) provides:

> A Person shall not be extradited to an approved State or be committed to or kept in custody for the purposes of such extradition, unless provision is made by the law of that State, or by an arrangement made with that State, for securing that he will not-
>
> (a) be tried or detained with a view to trial for or in respect of any offence committed before his extradition under this Act other than-

(i) the offence in respect of which his extradition is requested;

(ii) any lesser offence proved by the facts proved before a court of committal or, in relation to a fugitive brought before a magistrate pursuant to section 17, any lesser offence disclosed by the facts upon which the request for his extradition is based; or

(iii) any other offence being an extraditable offence in respect of which the Minister consents to his being so dealt with;

(b) without the consent of the Minister, be returned or surrendered to another State or detained with a view to such return or surrender, unless he had first been restored to Jamaica, or had had an opportunity of leaving the approved State.

We find it rather strange that Mr. Engvalson, the American attorney-at-law who represented Morrison at his trial failed to mention anything about appealing the conviction of Morrison in the Middle District Court of Florida. Surely his trial for offences other than those for which he was extradited would be unlawful.

We venture to think that it is not for this court to assume or infer that any foreign government with which the government of this country has diplomatic relations will not honour the treaty. It is our view that any <u>fear</u> that the treaty will not be honoured in respect of the applicant because of the history of Morrison's case must be addressed to the Minister. In this regard S.12 (3) of the Act provides:

> "The minister shall not make an order under this section in the case of any person if it appears to the Minister on the grounds mentioned in subsection (3) of section 11, that it would be unjust or oppressive to extradite that person."

We are clearly of the view that there is not one scintilla of evidence before this court to show that the accusation made against the applicant was not made in good faith in the interest of justice.

Accordingly the application for habeas corpus on this ground must fail.

Ground 2

This concerns the Virginia indictment. I will restate this ground for convenience. It is that:

> The learned Resident Magistrate erred in law in accepting into evidence and/or relying upon the affidavits purportedly made by John Doe #1 and John Doe #2.

Lord Gifford submitted that a court cannot properly accept the evidence of anonymous deponents who because their identity is withheld cannot be controverted or challenged.

Counsel for the applicant refers the court to S.10 of the Extradition Act and to Article VIII S.3 (b) of Instrument of Ratification and the evidence in support of the request. Section 10 (1) of the Act provides:

> A person arrested in pursuance of a warrant issued under S.9 shall, ... be brought as soon as practicable before a magistrate ..... who shall hear in the same manner, as nearly as may be, as if he were sitting as an examining justice and as if that person were brought before him charged with an indictable offence committed within his jurisdiction.

Article VIII Section 3(b) in similar vein states:

> A request for extradition relating to a person who is sought for prosecution shall also be supported by:
>
> (a) .....
>
> (b) such evidence as would justify the committal for trial of that person if the offence had been committed in the Requested State.

Lord Gifford submitted:

1. That the law requires that the evidence albeit written, must be evidence which if given orally in a Preliminary Enquiry would be sufficient to justify a committal for trial. In this regard hearsay evidence is no more admissible in an extradition hearing than it would be in a preliminary enquiry.

2. That in terms of proof the Requesting State relies only on the evidence of John Doe #1 and John Doe #2.

3. That anonymous witnesses are not permitted in the Courts of Jamaica. Therefore a Resident Magistrate could not lawfully order the committal of an accused person in Jamaica on the basis of evidence from persons whose identity was not disclosed.

4. The reason for the unlawfulness of anonymous evidence is that an accused person at a Preliminary Enquiry or trial is entitled to know who are his accusers so that he may refute them if he can.

5. Where cross examination is not possible because evidence is being given by affidavit and the witness cannot be compelled to attend, there is all the greater necessity in the interest of justice for the identity of the witness to be disclosed.

6. It is a dangerous precedent, which should not be countenanced, to allow a foreign state to obtain extradition of Jamaican citizens on the evidence of anonymous informers.

He submitted generally that Jamaican law and practice have never allowed the testimony of anonymous witnesses.

Counsel for the applicant, in the highest tradition of practice at the bar, cited not only cases which support his contention but cases which are against him. He observed that cases in which anonymous evidence was allowed are not cases in which the credibility of the witnesses was essential to the prosecution.

Mr. Hibbert on the other hand submitted that by virtue of section 14 of the Extradition Act the affidavits of John Doe #1 and John Doe #2 are admissible in any proceeding under the Act.

Counsel for the first Respondent contended that once the affidavits are admissible it is not for the magistrate to enquire into anything not disclosed therein but rather his/her duty is to satisfy himself/herself of the sufficiency of the evidence.

If a prima facie case is made out then the magistrate must commit. He agreed that the general rule is that the accused is entitled to know the identity of his accusers but submitted that there are exceptions to this rule, for example where there are real grounds for fear of the consequences if the identity of the witness were revealed. These submissions were also adopted by Mr. Robinson.

There are two questions to be considered. First, are the affidavits of John Doe #1 and John Doe #2 admissible in this country.

If they are, did the magistrate err in relying on their contents?

Admissibility of the Anonymous Affidavits

The question according to Lord Gifford may be put this way - Is it permissible in this country for a witness to give evidence without his true identity being disclosed? If the answer is no, then Lord Gifford's contention is that the magistrate at the hearing of extradition proceedings for committal cannot receive anonymous evidence.

Section 14 (1) of The Extradition Act provides that:

> (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 matters stated therein;
>
> (b) .....
>
> (c) .....

In this case the documents are the depositions or affidavits in question. Their authenticity is not in issue.

It is clear as can be that S.14 of the Act makes depositions, properly authenticated, evidence in proceedings under the Act, whether they were taken in the presence of the person charged or not, whether taken anonymously or not. The law is indifferent in the matter - See **Re Counhaye (1873) L.R. Q.B. 410 at 416 (Blackburn J.)**. This is a statutory derogation from the general rule. Another statutory derogation from the rule is S.31(D) of the Evidence Amendment Act which provides that:

> A statement made by a person in a document shall be admissible in criminal proceedings as evidence of any fact of which direct oral evidence by him would be admissible if it is proved to the satisfaction of the court that such person -

(D) cannot be found after all reasonable steps have been taken to find him.

But is this conclusive? I think not. Even though the depositions are admissible, the magistrate must be satisfied that the evidence would sufficient to warrant the applicant's trial for the offence if the offence had been committed in Jamaica. Thus if, for example, the depositions contain only hearsay evidence or evidence which in law requires corroboration, and the is none, the magistrate would attach no weight to such evidence and would not commit the prisoner. This leads us then to the second question.

Sufficiency of Evidence

There must be such evidence as according to the law of this country would justify the magistrate in committing the prisoner for trial if the alleged crime had been committed in this country.

It is important to note that this court is not a court of Appeal from the magistrate's decision. It is for the magistrate to decide whether or not the evidence is sufficient. So long as the magistrate keeps within his/her jurisdiction and does not err in law, this court has no power to interfere with such decision. The court can only interfere in circumstances where the magistrate has exceeded his or her jurisdiction, for example, where there is no proper evidence to support the order for extradition. See **The Queen v. Maurer (1883) 10 Q.B.D. 513** and **Re Arton (No. 2) (1896) 1 Q.B. 509 at 518**.

It is not denied that the only evidence before the magistrate is so far as the Virginia indictment is concerned, is contained in the depositions of John Doe #1 and John Doe #2.

Are anonymous depositions evidence upon which a committal court in this country can act? In other words can a magistrate attach any weight to depositions so taken? We can safely say that in this regard the law applicable in England is the law applicable in this jurisdiction. As there is a dearth of cases on this point in the country, we must see how the English Courts deal with the reception of anonymous evidence.

In **R. v. Taylor (1994) Times Law Report 484** (The Times August 16, 1994) the Court of Appeal held that:

> "A defendant in a criminal trial had a fundamental right to see and know the identity of his accusers including witnesses for the prosecution. The right should only be denied in rare and exceptional circumstances; whether such circumstances existed was pre-eminently a matter for the exercise of the trial judge's discretion."

In the Taylor case the prosecution applied for a vital witness to be allowed to give evidence behind a screen where the defendant could not see her and also that her name and address should not be revealed. The application was granted by the trial judge.

On appeal the Court of Appeal adopted and followed the decision in **R. v. Watford Magistrates' Court, Exparte Lenman (1992) TLR 285.** The Court of Appeal held that the law gave the trial judge the power to make an order that the witness remain anonymous in the exercise of his discretion. The Court set out the factors relevant to the exercise of that discretion.

1. There must be real grounds for fear of the consequences if the evidence were given and the identity of the witness revealed.

2. The evidence must be sufficiently relevant and important to make it unfair to make the Crown proceed without it. A distinction could be drawn between cases where the credit worthiness of the witness was in question rather than his accuracy.

3. The Crown must satisfy the court that the credit worthiness of the witness had been fully investigated and disclosed.

4. The court must be satisfied that there would be no undue prejudice to the accused, although some prejudice was inevitable, even if it was only the qualification placed on the right to confront a witness as accuser.

5. The court could balance the need for protection of the witness including the extent of that protection against unfairness or the appearance of unfairness.

In exparte Lenman reliance was placed on the decision in **R. v. DJX, SCY and GCZ (1989) 91 Cr. App. 36** where the witnesses were screened from the accused. Lord Lane C.J. stated the principle applicable to all cases where witnesses, for one reason or another, may be fearful of giving evidence. He said:

> "The learned trial judge has the duty on this and on all other occasions of endeavouring to see that justice is done. Those are high sounding words. What it really means is he has got to see that the system operates fairly: fairly not only to the defendants but also to the prosecution and also to the witnesses. Sometimes he has to make decisions as to where the balance of fairness lies. He came to the conclusion that in this case the necessity of trying to ensure that these children would be able to give evidence outweighed any possible prejudice to the defendants by the erection of the screen."

Lord Gifford relied heavily on the third factor in the Taylor case (supra) namely - that the Crown must satisfy the court that the credit worthiness of the witness had been fully investigated and disclosed. However in **Lloyd Brooks v. Director of Public Prosecution - Privy Council Appeal No. 43 of 1992** their Lordships held that:

> Question of credibility, except in in the clearest of cases, do not normally result in a finding that there is no prima facie case. They are usually left to be determined at trial."

It seems to me that this factor might well be more relevant at trial than at committal proceedings. As was said in the Exparte Lenman case (supra) "should the applicant be committed for trial, the question of the witnesses' anonymity would be a matter for the trial judge. Indeed when the matter goes to trial in the U.S.A. the witnesses might well be compelled to disclose their names - see Smith v. Illinois 390 U.S. 129.

Another case in which the question of anonymity of witness arose in **Attorney General v. Leveller Magazine Limited and Ors. (1979) 1 All E. R. 745**. The House of Lords held:

> "In exercising its control over the conduct of proceedings being heard before it, a court was entitled to derogate from the principle of open justice by sitting in private or permitting a witness not to disclose his name when giving evidence if it was necessary to do so in the due administration of justice...."

Counsel for the applicant relied on a passage from the speech of Lord Diplock where in reciting the facts His Lordship said at p. 748 (b):

> "....counsel for the prosecution made an application that the next witness whom he proposed to call should for his own security and for reason of national safety, be referred to as "Colonel A" and that his name should not be dislcosed to anyone. The magistrates, on the advice of the clerk, ruled correctly but with expressed reluctance that this would have to be written down and disclosed to the court and to the defendants and their counsel....."

Lord Gifford argued that it was expressly assumed by the House of Lords that the original desire of the prosecutor to call a witness whose identity would remain a secret would not be permissible. This certainly is the general rule.

However, Lord Diplock was at pains to point out at p. 750 (b) that "since the purpose of the general rule is to serve the ends of justice it may be necessary to depart from it where the nature or circumstances of the particular proceeding are such that the application of the general rule in its entirely would frustrate or render impracticable the administration of justice."

So also in **R. v. Murphy and Another (1990)** N.I. Reports 306 it was held inter alia, that while it was contrary to the normal rule that a court should conduct its proceedings in public, the judge was not in error in permitting the evidence of media witnesses to be given anonymously and from behind screens. A court had

inherent jurisdiction to control its own procedure and might direct exceptions to the normal rule if it was necessary in order to achieve the due administration of justice.

From the cases mentioned above it may be deduced that as to whether the identity of a witness should be withheld is a matter for the exercise of the discretion of the magistrates. The exercise of this discretion will only be interfered with if it was shown that "it was so unreasonable that no magistrate properly considering it and properly directing himself could have reached that conclusion."

In the instant case the witnesses John Doe #1 and Jonn Doe #2 deponed before a judge of The United States District Court for the Eastern District of Virginia. Both swore that they used pseudonyms becuase of fear of threat or bodily injury, given the repuration for violence of the accused.

It is for the magistrate to decide whether the rights of the applicant particularly his ability to prepare and conduct his defence to the charges was thereby prejudiced. He must balance the interests of the applicant and the interest of justice in deciding, whether based on such evidence, he should commit the applicant to custody to await his extradition.

In coming to this decision the magistrate would no doubt give careful consideration to the submissions of the applicant's attorney-at-law that the withholding of the identity of the witnesses deprived the applicant of the opportunity of calling witnesses to rebut the specific allegations made against him.

We cannot in the circumstances of this case conclude that the magistrate acted unreasonably in relying on the evidence of those two anynymous witnesses. This ground also fails.

Accordingly the application for habeas corpus is dismissed.

Reid J. - I concur

Harris J. - I concur