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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE FULL COURT

SUIT NO. M110 OF 2000

CORAM: 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 CLAVEL BROWN

Bert Samuels for the Applicant
Miss Paula Tyndale and Herbert McKenzie for the First Respondent
Mrs. Susan Reid-Jones for the Second Respondent

Heard: January 17 and March 23, 2001

WOLFE, C.J.

The applicant moves the Court for an order that a writ of habeas corpus in respect of a committal order made pursuant to the Extradition Act 1991, on October 18, 2000, by His Honour Mr. Ralston Williams, Resident Magistrate for the parish of St. Andrew.

The applicant, a citizen of Jamaica, resided in the United States of America and attended the State of Texas High School from which he graduated in 1992. He eventually returned to Jamaica in December 1997.

In his affidavit sworn to on November 2, 2000, he deposed that his reason for returning to Jamaica "was to be reunited with his brothers and sisters whom he had not seen and to live with my girlfriend".

The affidavit by the requesting State in support of the application for the applicant's extradition alleges that the applicant was involved in the distribution of marijuana in the United States of America.

If the affidavit evidence is to be believed he was the master mind behind an elaborate distribution system in which women were used as "drug mules" to distribute marijuana. Each "mule" was paid a fee of US$1,000.00 per trip and provided with an airline ticket by the applicant.

Following the arrest of Rickardo Folkes, Sharon Thomas and Charlotte Hunter on September 16, 1995, a Federal Grand Jury sitting in Buffalo, New York, issued an indictment charging co-conspirators of Clavel Brown with –

"Conspiracy to possess with intent to distribute marijuana."

On January 28, 1998, a Federal Grand Jury sitting in Buffalo, New York, issued a superseding indictment charging Clavel Brown and the co-conspirators with the offence of conspiracy to possess with intent to distribute marijuana.

On May 28, 1998, a Federal Grand Jury issued a second superseding indictment charging Clavel Brown with the offence of possession with intent to distribute marijuana.

The offences, with which the applicant is charged, are all felonies punishable with imprisonment for more than a year.

It is against this background of evidence that the Learned Resident Magistrate made the order of committal.

In his affidavit in support of the Motion, the applicant contends:

(i) That the charges against him are founded exclusively on the testimony of women who alleged that they themselves were involved in the trafficking of marijuana in 1995.

(ii) That the said persons have subscribed the affidavits against him under very suspicious circumstances and at a time when they themselves were under threat of criminal prosecutions.

(iii) That such testimony will be tenuous and very unreliable.

(iv) That there was no scientific proof that the marijuana is in fact canabis in accordance with American Law or Jamaican Law.

(v) That the Learned Resident Magistrate erred in granting the Warrant of Committal on the basis of evidence which was not from an independent source.

(vi) That the evidence of identification relied on by the requesting State was inadmissible by Jamaican Law and by virtue of section 10(5) of the Extradition Act 1991.

At the outset, Mr. Samuels for the applicant, objected in *limine* contending that the supporting documents seeking the extradition of the applicant had not been served upon the requested State within the statutory period of sixty (60) days of the Authority to Proceed and therefore breached Article X (4) of the Treaty between Jamaica and the United States of America. ***Article X (4) stipulates***:

> "A person who is provisionally arrested shall be discharged from custody upon the expiration of sixty days from the date of arrest pursuant to the application for provisional arrest if the executive authority of the requested state has not received the formal request for extradition and the supporting documents required by Article VIII."

Miss Tyndale for the first defendant conceded that all documents were not served upon the requested State within the statutory period but regarded this lapse as *de minimis* because even if the applicant had been released from custody in accordance with Article X (4) he could have been re-arrested as is provided for in Article X (5) which states:

> "The fact that a person is discharged from custody pursuant to paragraph (4) shall not prejudice the extradition of that person if the extradition request and the supporting documents mentioned in article VIII are delivered at a later date."

Miss Tyndale's response is in my view sound in law. The Preliminary objection fails.

Mr. Samuels, notwithstanding the number of grounds raised in the applicant's affidavit urged only one ground upon the Court, viz., that the Certificate of the Chemist failed to established that the marijuana was in fact cannabis as defined in Dangerous Drug Act of Jamaica.

This submission is grounded in the provisions of ***section 5(1)(b)(ii) of the Extradition Act 1991***.

> "For the purpose of this Act, any offence of which a person is accused or has been convicted in an approved State is an extradition offence if –
>
> (b) in the case of an offence against the law of a treaty State –
>
> (i) it is an offence which is provided for by the extradition treaty with that State; and
> (ii) the act or omission constituting the offence, or the equivalent act or omission, would constitute an offence against the law of Jamaica if it took place within Jamaica or, in the case of an extra-territorial offence, in corresponding circumstances outside Jamaica.

In ***Walter Byles v. The Director of Public Prosecutions and Anor SCCA No. 44/96***, Rattray P delivering the Judgment of the Court, when dealing with the said point said:

> "I am of the view, unlike Harrison J, that these definitions despite being of a botanical classification are of assistance in determining the nature of marijuana as being ganja. Particularly, is this so, when the definition of ganja is one which "includes" and is therefore in my view not exhaustive."

The words of Wills J in ***re Bellencontre [1891] 2 Q.B. 122*** are significant:

> "We cannot expect that the definitions of description of the crime when translated into the language of the two countries respectively, should exactly correspond. The definitions may have grown under widely different circumstances in the two countries; and if an exact correspondence were required in a mere matter of definition, probably there would be great difficulty in laying down what crimes could be the subject of extradition."

In keeping with the dicta referred to above, I am satisfied that the substance marijuana referred to in the certificate of the chemist, is one and the same as ganja defined under the Dangerous Drugs Act of Jamaica.

Although Mr. Samuels did not burden the Court with arguing other grounds referred to in the supporting affidavit, let me say that those grounds are without merit. There is nothing objectionable about accomplice evidence. Convictions founded upon such evidence are safe as long as the trial Judge or Jury understands that in acting upon such evidence caution must be applied.

For the reason stated, I would dismiss the motion seeking the writ of habeas corpus.

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 Motion

The applicant Clavel Brown, seeks 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 under the Extradition Act 1991 by His Hon. Mr. Ralston Williams on the 18th day of October, 2000, committing him pending his return in custody to the United States of America.

The facts

The affidavit evidence supplied by the requesting State reveal inter alia, that the applicant and other persons were involved in the distribution of marijuana in several cities throughout the United States of America. He was responsible for taking couriers to various airports with suitcases of marijuana and these couriers would then travel by air to designated cities in the United States distributing the drugs. Each courier was paid U.S $1000 per trip and given an airline ticket.

On September 16, 1995 agents of the Buffalo, New York office of the Drug Enforcement Agency arrested three individuals for possession of approximately 75 pounds of marijuana at the Buffalo International Airport. These persons were identified by law enforcement officers as couriers of marijuana and who had been assisting the applicant in the transportation and distribution of the marijuana.

On June 21 1996, a federal grand jury sitting in Buffalo, New York, issued an indictment containing two counts charging the applicant and other co-conspirators with conspiracy to possess with intent to distribute and to distribute marijuana and possession with intent to distribute and distribute marijuana respectively. Superseding indictments were issued in 1998 having regards to the weight of the drugs alleged and the addition of names of co-conspirators to the indictment.

It is further alleged that the applicant fled the United States of America in the summer of 1998 and that his exact location was unknown at the time. Law enforcement officers discovered however, that he was in Jamaica and he was arrested in Kingston, on the 17th March 2000 pursuant to a request for his provisional arrest.

The applicant, states inter alia, in his affidavit sworn to on the 2nd day of November 2000, that he is a Jamaican citizen residing at 20 Chancery Hall Estate in the Parish of St. Andrew. He was a student at the State of Texas High School in the United States of America during 1992. According to him, he had returned to Jamaica in December 1997 in order to be re-united with his brothers and sisters and to live with his girlfriend. He further deposed that since his return to Jamaica he has lived continuously here.

He contends that the charges against him are based exclusively on the testimony of women who themselves were involved in the trafficking of marijuana and that their testimony would be tenuous and very unreliable.

He further contends that there is no scientific proof that the marijuana complained of was in fact cannabis in accordance with American Law or Jamaican Law and that the Learned Resident Magistrate had erred in granting the Warrant of Committal. Furthermore, he contends that the evidence of identification tendered by the Requesting State was inadmissible by Jamaican law and by virtue of section 10(5) of the Extradition Act, 1991.

Preliminary objection

Mr. Samuels objected in limine that the supporting documents for extradition were not served upon the requested State within sixty (60) days of the Authority to Proceed hence, the applicant ought to be discharged from custody pursuant to Article X (4) of the Extradition Treaty between Jamaica and the United States of America which states that :

"(4) – A person who is provisionally arrested shall be discharged from custody upon the expiration of sixty days from the date of arrest pursuant to the application for provisional arrest if the executive authority of the requested State has not received the formal request for extradition and the supporting documents required by Article V111".

Counsel for the first Respondent submitted however, that the supporting documents were served within the prescribed period but additional documents were requested in order to satisfy certain evidential proof. She further submitted that even if the applicant were to be discharged from custody he could be re-arrested and the proceedings continue according to Article X(5) of the above Treaty which provides:

"X(5) The fact that a person is discharged from custody pursuant to paragraph (4) shall not prejudice the extradition of that person if the extradition request and the supporting documents mentioned in article V111 are delivered at a later date."

I do agree with Counsel for the Respondent that the objection is "of no moment" at this stage. If at all, the applicant was unlawfully detained he could seek redress. See **Prince Edwards v The Director of Public Prosecutions** (1994) 47 WIR 302.

The ground argued

A number of issues were raised in the applicant's affidavit but Mr. Samuels concentrated on only one ground. He submitted that there was no scientific proof that the marijuana referred to in the Chemist's certificate was in fact cannabis in accordance with the Jamaican Law. Section 5(1)(b)(ii) of the Extradition Act, 1991 is therefore relevant and it provides as follows:

> "5(1) "For the purposes of this Act, any offence of which a person is accused or has been convicted in an approved State is an extradition offence, if –
>
> (b) in the case of an offence against the law of a treaty State –
>
> (i) it is an offence which is provided for by the extradition treaty with that State; and
>
> (ii) the act or omission constituting the offence, or the equivalent act or omission, would constitute an offence against the law of Jamaica if it took place within Jamaica or in the case of an extra-territorial offence, in corresponding circumstances outside Jamaica".

The Act requires therefore, that the person whose extradition is sought should have been accused in a foreign country of something which is a crime by Jamaican law. Ganja is defined in the interpretation section of the Dangerous Drugs Act of Jamaica as follows:

> "'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 plant, but does not include medicinal preparations made from that plant..."

In view of this definition, it is being argued that extradition ought not to take place since the facts on which the request for the applicant's return is grounded do not constitute an offence in Jamaica. What are the facts relied upon? The evidence as it relates to the prohibited substance, is contained in the certificate of Joanne Mendola, a Forensic Chemist. It states inter alia, that the vegetable matters analyzed were found to contain marihuana (sic). These facts according to Mr. Samuels, would be insufficient to create an offence in Jamaica since it is not stated by the Chemist that the resin had not been extracted.

The very issue raised by Mr. Samuels was argued in the cases of **Regina v Director of Public Prosecutions and Anor. Ex Parte Newton Fitzgerald Barnes** Full Court M 60/95 delivered on the 12th March 1996 and **Walter Gilbert Byles v The Director of Public Prosecutions and Anor.** SCCA 44/96, delivered on the 13th day of October 1997.

In Barnes case (supra) Harrison J, (as he was then) had opined, that a scientific analysis, as distinct from a botanical classification is required in proof of the substance ganja, in the Jamaican Courts. The Court held in that case that the Resident Magistrate did not have before her sufficient proof, that, "marijuana" is "ganja", as defined in the Dangerous Act.

In Byles case (supra) marijuana was defined under the relevant United States Law as follows:

> "Marijuana means all parts of the plant cannabis sativa, 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.."

Counsel for the applicant in that case had contended that the Chemist did identify the substance as marijuana and the resin as cannabis resin but that was insufficient to satisfy the definition in Jamaican law. Rattray P stated however, that the Chemist's evidence was sufficient to identify the substances that he examined as falling within the definition of ganja under the Dangerous Drugs Act. There was evidence that the plant material examined was marijuana; the dark green oily substance was marijuana (hashish) oil and the greenish brown solid substance was cannabis resin (hashish). His Lordship did not share Harrison J' s view with respect to the scientific analysis argument. He stated inter alia, at page 13 of the judgment:

> " I am of the view, unlike Harrison J, that these definitions despite being of a botanical classification are of assistance in determining the nature of marijuana as being ganja. Particularly is this so, when the definition of ganja is one which "includes" and is therefore in my view not exhaustive..."

In the instant case, no definition of marijuana has been supplied by the requesting State but Mr. Samuels contended that the facts in relation to the dangerous drugs were distinguishable from the Byles' case. He also referred to and relied upon the case of **Stephen Robert Hill** (1993)96 Cr. App. R 456 which held inter alia, that while scientific evidence was not in every case required to identify a drug, the prosecution must establish the identity of the drug that was the subject matter of a charge with sufficient certainty to achieve the standard of proof required in a criminal case. It is my considered view however, that Hill's case is not quite relevant. The facts of that case reveal that before arrest certain actions were observed by the police but the descriptions given by the witnesses of what had changed hands was insufficient to justify the inference that the substance was cannabis resin. The prosecution had therefore failed to prove the charge as laid so the conviction was quashed.

Miss Tyndale submitted however that the evidence before the Magistrate was sufficient to justify the committal and that it did not offend against the principle of double criminality. She argued that Byles case (supra) was relevant and ought to be followed.

The authorities

In **re Bellencontre** [1891] 2 QB 122 Wills J said :

> " We cannot expect that the definitions of description of the crime when translated into the language of the two countries respectively, should exactly correspond. The definitions may have grown under widely different

circumstances in the two countries; and if an exact correspondence were required in a mere matter of definition, probably there would be great difficulty in laying down what crimes could be the subjects of extradition." (emphasis supplied)

In **R v Governor of Pentonville Prison, exparte Budlong and another** [1980] 1 AER 701 the United States Government had requested the extradition of the two applicants on charges of burglary. The evidence put before the Magistrate revealed that certain persons acting on the applicants' instructions had unlawfully entered certain government offices in the United States as trespassers. The Magistrate was satisfied that burglary was an extraditable offence and that a prima facie case of burglary had been made out against the applicants under both American and English law. Although trespass was an essential ingredient of burglary under the Theft Act it was not an essential ingredient under American law. The applicants applied for writs of habeas corpus on the grounds inter alia, that it would be against the principle of double criminality to extradite them because the crime of burglary was not identical under English and American law. The Court of Queen's Bench held inter alia, that the definition of the crime in the foreign country was not required to be identical with the definition of the English crime although the crime had to be substantially similar in concept in both countries.

The authorities seem to indicate therefore, that it is the actual facts of the offence that are all important rather than the definition of the crime in the foreign or local law.

Conclusion

I am of the view, that extradition ought to take place once the crime amounts to an extradition offence under the Extradition Act 1991 and the facts of the offence, that is, the conduct complained of, show it to be a criminal offence punishable by the laws of both countries. Conspiracy and possession of dangerous drugs are

indeed extraditable offences between the United States and Jamaica and they do offend against the laws in both Jamaica and the United States of America. I can see no injustice therefore, in returning the applicant to the United States of America to stand his trial. I would dismiss the application for the writ of habeas corpus.

WOLFE, CJ

The motion is accordingly dismissed.