IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE FULL COURT

SUIT NO. E.389 OF 1998

CORAM: THE HONOURABLE MR. JUSTICE WOLFE, CHIEF JUSTICE
THE HONOURABLE MR. JUSTICE D.O. MCINTOSH
THE HONOURABLE MR. JUSTICE M. DUKHARAN

IN THE MATTER of The Extradition Act

AND

IN THE MATTER of an Extradition Order in respect of Desmond Brown made by the Resident Magistrate for the Parish of Saint Andrew

AND

IN THE MATTER of the Jamaica (Constitution) Order in Council 1962.

Regina v. The Director of Correctional Services and the Director of Public Prosecutions Exparte Desmond Brown

Miss Nancy Anderson and Leroy Equiano for the Applicant
Miss Cheryl Lewis and Miss Reid Jones for the Director of Correctional Services
Miss Carol Tyndale for the Director of Public Prosecutions

Heard: July 18, 19, 2000

WOLFE, CJ.

On the 19th July 2000, we dismissed the motion and promised to put our reasons for so doing in writing. We now do so.

The applicant seeks an order for Habeas Corpus Ad Subjiciendum to set aside an order of committal made by His Honour Mr. Gayle, Resident Magistrate for the parish of Saint Andrew, under the Extradition Act.

The requesting State contends that the applicant was involved in the commission of several criminal offences ranging from offences against the Narcotics Act to attempted murder.

Following a Grand Jury hearing, a warrant for the arrest of the applicant was issued on September 23, 1997, by Judge Marilyn Dolan Go of the United States District Court, Eastern District of New York.

The application for the Writ of Habeas Corpus is made on the following grounds:

(i) That the proposed witnesses for the requesting state are persons who have pleaded guilty to criminal offences and have entered into plea bargaining arrangements with the Prosecution

(ii) That there is no proper or sufficient identification of the applicant.

Miss Anderson for the applicant argued that the Court should not order the extradition of the applicant because the witnesses for the prosecution all had an interest to serve.

Plea bargaining is an accepted procedure in the United States of America. While there is no statutory provision sanctioning plea bargaining in Jamaica, it is a procedure which is sometimes used in Jamaica where persons plead guilty to lesser offences and are used as witnesses by the Crown.

The question of interest to serve is a matter of credibility and therefore becomes a matter for the trial court when it comes to assess the credibility of the particular witness or witnesses.

INDENTIFICATION EVIDENCE

The affidavits of each of the proposed witnesses for the prosecution have identified the applicant as the Desmond Brown referred to in their affidavits by means of a photograph of the applicant attached thereto.

No where in his affidavit in support of his motion has the applicant contended that the attached photograph is not a true photograph of him or that he is not known by the proposed witnesses.

In *R v. Governor of Pentonville Prison Ex Parte Voets [1986] 1 WLR 470* it was held that photographs were admissible in evidence to prove identity and their admissibility as proof of identity was not excluded because they tended to show that the applicant had a criminal record; that, although a judge might exclude such photographs at the trial because of their prejudicial effect on the jury, the magistrate was determining under section 10 of the Extradition Act 1870 whether there was a prima facie case against the applicant to justify issuing a warrant of committal and, in those circumstances there could be no prejudicial effect in using the photographs, or grounds for varying the accepted practice of admitting photographs as evidence of identification in committal proceedings under the Act of 1870.

In *R. v. Rory Gordon v. The Director of Public Prosecutions et al, SCCA 63/97 January 1998* the Court of Appeal followed the dictum in *R. v. Governor of Pentonville Prison, Exparte Voets (Supra).*

Finally, Miss Anderson sought refuge in section 11(3)(b) of the Extradition Act which 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 -
>
> (a) by reason of the trivial nature of the offence of which he is accused or was convicted; or
>
> (b) by reason of the passage of time since he is alleged to have committed the offence or to have become unlawfully at large, as the case may be; 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."

There was no submission that the offences with which the applicant is charged are of a trivial nature or that the accusations are not made in good faith. It is, however, contended that the delay between the commission of the offence and the request for extradition makes it unjust or oppressive to extradite him.

The warrant for arrest was issued in September 1997. The request for extradition was made in November 1997. The Order for Committal was made on July 6, 1998. The delay in disposing of this matter has been due to the applicant. As a matter of fact the Director of State Proceedings on October 11,

1999, filed a motion to dismiss the application for Habeas Corpus for want of prosecution.

The applicant has been less than diligent in the pursuit of this matter. The requesting state on the other hand has acted with promptitude in seeking to bring the matter to a close.

In ***Kakis v Government of the Republic of Cyprus and Others (1978) 2 All ER 264 Lord Diplock*** stated at p.638

> "My Lord, the passage of time to be considered is the time that passed between the date of the offence on 5th April, 1973 and the date of hearing in the Divisional Court on 15th December 1977, for that is the first occasion on which this ground for resisting extradition can be raised by the accused. So one must look at the complete chronology of events that I have summarised above and consider whether the happening of such of those events as would not have happened before the trial of the accused in Cyprus if it had taken place with ordinary promptitude has made it unjust or oppressive that he should be sent back to Cyprus to stand his trial now. Unjust, I regard as directed primarily to the risk of prejudice to the accused in the conduct of the trial itself, oppressive as directed to hardship to the accused resulting from changes in circumstances that have occurred during the period to be taken into consideration; but there is room for overlapping, and between them they would cover all cases where to return him would not be fair."

Bearing in mind the approach enunciated by Lord Diplock, (supra) I find that the arguments as to delay are without merit.

For the reasons stated herein I concur in ordering that the motion be dismissed.

MCINTOSH J.

I have had the privilege of reading the draft judgments of my Lords, Wolfe, C J. and Dukharan, J. and have nothing useful to add except that I concur with their decision.

Dukharan, J.

This is an application by Desmond Brown a national of Jamaica for a Writ of **Habeas Corpus** that he be released from an Order of Committal under the Extradition Act 1991. He was ordered to be extradited on the 6th July, 1998 at the Half Way Tree Resident Magistrate's Court by his Honour Mr. Martin Gayle to answer charges on an indictment preferred against him in the Eastern District Court of New York, U.S.A.

The Applicant is charged on a twenty-eight (28) count indictment with various offences including racketeering, murder, conspiracy to launder narcotics proceeds and illegal distribution of heroin and cocaine. These are offences punishable by more than one year of imprisonment.

The allegation against the Applicant was that he was a member of a criminal organisation known as the "Gullymen Posse" with the main base operation in Brooklyn, New York. This organisation was headed by a Jamaican named Eric Vassell and referred to as the "Vassell Enterprise". This "enterprise" routinely employed murder and other acts of criminal violence to further its unlawful narcotics trade. Murder, assault, arson and torture were some of the means utilized to eliminate competing narcotics traffickers. The Applicant was a member of that enterprise serving primarily

as an enforcer and as Vassell's personal driver and participating in the murder of one Fitzgerald Reid.

The application for **Habeas Corpus** is based upon the following grounds:

(1) The affiants Andrew Barrington, Robert Bell and Donald Reid have an interest to serve and cannot be relied on as credible witnesses.

(2) That no proper or sufficient identification has been submitted with the Extradition request.

In relation to Ground 1 Miss Anderson for the Applicant submitted that the deponents cannot be relied on as credible witnesses.

Andrew Barrington in his affidavit stated that he was a member of the Eric Vassell organisation. He said he grew up in Jamaica with the Applicant Desmond Brown. While in the United States himself and the Applicant worked for Vasssell cutting up and bagging cocaine for distribution. He said that Vassell conspired with himself, the Applicant and others to murder two brothers. He said he was present when they all fired guns at them. The other two affiants also said they knew the Applicant and that they along with him were members of the Vassell organisation, and that they were present when he opened fire with an M16 gun at one Fitzgerald Reid.

The Applicant has also complained that eleven (11) years have passed since the alleged offences were committed and by reason of the passage of time it would be oppressive to extradite him to the U.S.A.

Section 11 (3)(b) of Extradition Act 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 –
>
> (a) by reason of the passage of time since he is alleged to have committed the offence ..."

Miss Anderson submitted that in the case of **Byles vs Director of Public Prosecutions and Director of Correctional Services** S.C.C.A. 44/96 the Court of Appeal examined the question of delay which was eight to ten years. In allowing the appeal, the Court stated that the Applicant Byles openly lived and carried on his business in Jamaica and that no responsibility for the delay could be laid at his door. As Rattray, P. stated:

> "The foundations of extradition arrangements rest upon the principles of comity and reciprocity. That is the basis upon which nations enter into extradition treaties with each other. Consequently, the evidence would have to be compelling to find an absence of good faith which I do not. However, the effect of the passage of time would be so disruptive to the appellant who has lived an open and settled life over those years that in the absence of any contributory factor on his part and of any explanation on the part of the Requesting State, coupled with the extraordinary difficulties of defending serious criminal charges of such staleness and

> antiquity, I am compelled to the view, having regard to all the circumstances of this particular case that would be unjust and oppressive to extradite the appellant".

Miss Anderson urged this Court to follow the decision in the Byles Case as in the instant case eleven (11) years have passed since the alleged committal of the offences.

Miss Cheryl Lewis for the Director of Correctional Services submitted that the applicant has to show by affidavit that the passage of time has prejudiced him and that he has not done so. She relies on the case of **Kakis vs Government of the Republic of Cyprus et al [1978] 2 A.E.R 634**

In that case it was held **per curiam** that delay in the commencement or conduct of extradition proceedings which is brought about by the accused himself by fleeing the country, concealing his whereabouts or evading arrest, cannot, save in exceptional circumstances, be relied on as a ground for holding it to be either unjust or oppressive to return him.

With regard to delay Lord Diplock stated:

> "Where a delay is not brought about by the acts of the accused himself the question of where the responsibility lies for the delay is not generally relevant what matters is not so much the cause of such delay as its effect or, rather the effects of those events which would not have happened if the trial of the accused had taken place with ordinary promptitude. Thus, where the application for discharge under section 8 (3) is based on the 'passage of time', under paragraph (b) and not on absence of of good faith under paragraph (c) the court is not

> normally concerned with the task of considering whether mere inaction of the requisitioning government or its Prosecuting authorities which resulted in delay was blame-worthy or otherwise."

There is nothing in the applicant's affidavit to suggest that he did not flee the United States and that he was not concealing his whereabouts in Jamaica. In my view the applicant has not shown that the passage of time has prejudiced him in any way.

On the question of identification it was submitted that no proper or sufficient identification has been submitted with the Extradition request. Miss Anderson submitted that photographic evidence alone is not sufficient.

In response Miss Lewis contends that the identification evidence provided by the requesting state was in fact sufficient and that even though it appears that the photographs were taken from a Police record of the Applicant, this did not make photographic evidence inadmissible. She also submitted that the Resident Magistrate could act on that evidence. She relies on the case of **Regina vs Governor of Pentonville ex parte Voets** 1986 1 W.L.R. 410. In this case the applicant was arrested and in committal proceedings under Sec. 10 of the Extradition Act 1870, the evidence included signed statements by two victims and photographs of the applicant from the Belgian Criminal Records Department by which the victims had identified the applicant as their assailant. The Magistrate ordered that the

applicant be committed to prison. On an application for a writ of habeas corpus it was held, dismissing the application, that photographs were admissible in evidence to prove identity and their admissibility as proof of identity was not excluded because they tended to show that the applicant had a criminal record. Although a judge might exclude such photographs at the trial because of their prejudicial effect on the jury, the magistrate was determining whether a prima facia case has been made out. In the instant case the affiants all knew the Applicant. They were partners in crime. The photographic evidence in my view is sufficient to establish a Prima Facie case.

Accordingly I would dismiss the application for **habeas corpus**.