[2012] JMSC Full 4

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE FULL COURT

CLAIM NO. 2011 HCV 05915

COR: The Honourable Miss Justice G. Smith
The Honourable Mr Justice Sykes
The Honourable Miss Justice Edwards

IN THE MATTER OF THE EXTRADITION ACT

A N D

IN THE MATTER OF THE EXTRADITION ORDER IN RESPECT OF MARTIN GIGUERE MADE BY THE RESIDENT MAGISTRATE FOR THE CORPORATE AREA

BETWEEN	**MARTIN GIGUERE**	**APPLICANT**
A N D	**GOVERNMENT OF THE UNITED STATES OF AMERICA**	**1ST RESPONDENT**
A N D	**COMMISSIONER OF CORRECTIONAL SERVICES**	**2ND RESPONDENT**

Lord Anthony Gifford and Mr Vernon Bailey instructed by Gifford, Thompson and Bright for the Applicant.

Mrs Ann-Marie Feurtado-Richards and Mr Garcia Kelly instructed by the Director of Public Prosecutions for the First Respondent.

Mr Curtis Cochrane instructed by the Director of State Proceedings for the Second Respondent.

EXTRADITION – PROCEEDINGS BEFORE MAGISTRATE – DUTY OF MAGISTRATE – TEST FOR COMMITTAL – WHETHER MAGISTRATE OBLIGED

TO CONDUCT MEANINGFUL JUDICIAL PROCEEDINGS – NEED FOR PROCEEDINGS TO BE CONDUCTED FAIRLY – WHETHER ARREST IN GOOD FAITH.

EXTRADITION – DELAY IN MAKING REQUEST – MEANING OF UNJUST OR OPPRESSIVE – HABEAS CORPUS APPLICATION – REVIEW OF ORDER FOR COMMITTAL – ROLE OF THE REVIEWING COURT – WHETHER TO DISCHARGE FROM CUSTODY.

Heard: March 19 and 20 and April 13, 2012

G. SMITH J

[1] I have read in draft the judgments of Sykes and Edwards JJ. I agree with their reasoning and conclusion and I have nothing to add.

SYKES J

[2] This is an application by Mr Martin Giguere, a Canadian citizen, for a writ of habeas corpus after he was ordered to be extradited to the United States of America by the Resident Magistrate (RM) for the Corporate Area, sitting as a court of committal under section 10 of the Extradition Act.

[3] The application is based on three grounds. Permission was granted to add another ground as part of ground two.

[4] At this point an overview of the case against Mr Giguere will be given. The details will be analysed in relation to each ground argued on behalf of Mr Giguere. The allegation against Mr Giguere is that he is part of an international drug trafficking ring operating across the common border of the United States of America (USA) and Canada. The case for the USA is that between November 16 and 27, 2010, a number of persons including a Mr Benoit David and Mr Giguere agreed with each other and with others to distribute at least five kilogrammes of cocaine or more in the USA. The conspiracy began in Newark, New Jersey, continued to New York City, then to Kansas City, Missouri, then to California, on

to Phoenix, Arizona and back to New Jersey. It is in Arizona that Mr Giguere is alleged to have taken part in the conspiracy.

[5] According to an anonymous confidential witness, Mr David arrived in Corona, California and booked into the Dynasty Hotel on November 14, 2007. He left the hotel and rented a grey Dodge Durango. He then purchased a four track cell phone as well as three nylon roller bags. Mr David left his room at the hotel and met two Hispanic looking men in the parking lot of the hotel. At this meeting, Mr David handed over a black nylon bag to the two men who then left the parking lot of the same hotel. The witness asserts that he knew that that bag contained USA currency and that it was payment for drugs. One of the two Hispanic looking gentlemen was subsequently identified via a photograph shown to the witness by Special Agent Milton Lynn of the United States Department of Homeland Security.

[6] On November 15, 2007, Mr David checked out of the hotel taking with him the remaining two black nylon bags. These bags were taken to, and loaded onto an airplane at Corona Regional Airport, Corona, California. Mr David took off in the plane and arrived at Buckeye Municipal Airport, Arizona on November 16, 2007.

[7] Mr David checked into the Holiday Inn Express at Goodyear, Arizona. Later on November 16, Mr David received eighty kilograms of cocaine in two black nylon roller bags from a Hispanic male who received from Mr David a small black nylon bag containing approximately US$250,000.00 as part payment for the cocaine.

[8] On the same November 16, Mr David drove the same grey rented Dodge Durango to Phoenix International Airport where he picked up a man called Francis. Both men (David and Francis) returned to Buckeye Municipal Airport and then back to the Holiday Inn.

[9] Later on the same day, Mr David called someone in Canada to ask for assistance in concealing the cocaine. Mr David received additional cocaine on November 17.

[10] It is at this point that Mr Giguere enters the picture. He arrives and meets with Mr David at the same Holiday Inn. He goes to Mr David's room. The witness alleges that he observes Mr Giguere take custody of the cocaine which was in the three black nylon bags and places them in a green Jeep Liberty rental vehicle which Mr Giguere had driven to the hotel. Mr David then gives Mr Giguere the keys to the rented grey Dodge Durango and he (Giguere) drove away the Durango. After he had gone for some time, Mr Giguere sent a text message to Mr David which read, 'It's done.'

[11] The witness continues by asserting that after Mr David read this message, he (David) drove the Jeep Liberty to Buckeye Municipal Airport, loaded the bags with the cocaine on the plane and took off heading east. The evidence continues with other allegations regarding the transportation and securing of the drug.

THE NATURE OF EXTRADITION

[12] As is well known, extradition is a primarily political process where the executive of one state agrees with the executive of another state that each will surrender to the other, persons within its borders who are sought by the other state. The courts are interposed to answer the purely legal questions and thereafter, if the courts decide that extradition is legally permissible in any given case, then it is for the executive branch of government of the requested State to decide whether the person will be surrendered to the requesting State.

[13] However, the fact that it is ultimately a political decision does not mean that the role of the courts is that of a rubber stamp. McLachlin CJ of the Canadian Supreme Court in **United States of America v Ferras; United States of America v Latty** 268 DLR (4^{th}) 1 held that extradition law requires that the

basic demands of justice be met in these types of proceedings. Her Ladyship insisted that ‘a person cannot be sent away on mere demand or surmise.’ Her Ladyship also held that ‘it must be shown that there are reasonable grounds to send the person to trial’ and that a ‘prima facie case for conviction must be established through a meaningful judicial process.’ According to the very learned Chief Justice, a ‘meaningful judicial process … involves three related requirements: a separate and independent judicial phase; an impartial judge or magistrate; and a fair and meaningful hearing.’ It was emphasized by her Ladyship that the ‘judicial aspect of the process provides a check against state excess by protecting the integrity of the proceedings and the interests of the ‘named person’ in relation to the state process.’ The judicial phase ‘must not play a supportive or subservient role to the executive. It must provide real protection against extradition in the absence of an adequate case against the person sought.’ Mr Giguere is entitled to have all these things spoken of by McLachlin CJ.

[14] McLachlin CJ made these observations en route to discarding the previous test for extradition which was simply that there had to be some evidence against the suspect and adopting another test which was expressed by her to be looking ‘at the whole evidence presented at the extradition hearing and [determine] whether it discloses a case on which a jury could convict.’ Her Ladyship went to say that ‘[i]f the evidence is so defective or appears to be so unreliable that the judge concludes that it would be dangerous or unsafe to convict, then the case should not go to a jury and is therefore not sufficient to meet the test for committal.’ More will be said about this later in this judgment particularly the unsafe aspect of it since in Jamaica, the courts here have adopted the position in **R v Galbraith** [1981] 2 All ER 1060 in deciding whether a case should go to the jury. Also her Ladyship discussed the difference the wording of the new extradition legislation had on the old case law which drew a close analogy between ‘extradition hearings and domestic preliminary inquiries.’ The old statute stated that the extradition judge should ‘hear the case, in the

same manner, as nearly as may be, as if the fugitive was brought before a justice of the peace, charged with an indictable offence committed in Canada.' The new Act dispensed with close analogy by saying that the extradition judge had powers of a justice under Part XVIII of the Criminal Code with any modifications that the circumstances require. Therefore her Ladyship reasoned the extradition judge no longer followed 'as nearly as may be' the procedure of a preliminary inquiry.

[15] The old extradition statute in Canada used the same formulation of words used in the Jamaican Act save that the Jamaican Act ended with the words 'within his jurisdiction' whereas the former Canadian statute used the words 'in Canada.' I am therefore quite aware that the actual decision in **Ferras** was influenced by the changes in the Canadian legislation but this does not negate the points made by her Ladyship regarding a meaningful judicial process with the components as described by her.

[16] The right of a person whose extradition is sought, whether a Jamaican national or otherwise, is buttressed by section 14 (1) (i) (ii) of the Jamaican Charter of Fundamental Rights and Freedoms. The section reads:

> *No person shall be deprived of his liberty except on reasonable grounds and in accordance with fair procedures established by law in the following circumstances*
>
> *(i) the arrest or detention of a person –*
>
> *(i) …*
>
> *(ii) against whom action is being taken with a view to deportation or extradition or other lawful removal or the taking of proceedings relating thereto.*

[17] The person sought by the requested state is entitled to fair procedures established by law. The law that establishes the procedures is the Extradition Act

('the Act') and section 43 of the Justices of the Peace Jurisdiction Act. Section 10 (1) and (5) of the Act provides:

> *(1) Any person arrested in pursuance of a warrant issued under section 9 shall, unless previously discharged under subsection (4) of that section, be brought as soon as practicable before a magistrate (in this Act referred to as the "court of committal") who shall hear the case 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.*
>
> *…*
>
> *(5) Where an authority to proceed has been issued in respect of the person arrested and the court of committal is satisfied, after hearing any evidence tendered in support of the request for the extradition of that person or on behalf of that person, that the offence to which the authority relates is an extradition offence and is further satisfied*
>
> *(a) where the person is accused of the offence, that the evidence would be sufficient to warrant this trial for that offence if the offence had been committed in Jamaica;*
>
> *(b) …*
>
> *the court of committal shall …. Commit him to custody to await his extradition under this Act; but if the court of committal is not so satisfied or if the committal of that person is so prohibited, the court of committal shall discharge him from custody.*

[18] The magistrate is indeed required to act judicially, that is to say, act fairly, impartially and properly to consider all the evidence and all issues raised including those in favour of the fugitive. The magistrate is to approach the matter as if he or she were conducting a preliminary inquiry to see whether the person, had he been charged with an indictable offence in Jamaica, would be committed

to stand trial at the Circuit Court. This is captured in section 43 of the Justices of the Peace Jurisdiction Act which reads:

> *When all the evidence offered upon the part of the prosecution against the accused party shall have been heard, if the Justice or Justices then present shall be of opinion that is not sufficient to put such accused party upon his trial for any indictable offence, such Justice or Justices shall forthwith order such accused party, if in custody, to be discharged as to the information then under inquiry; but if, in the opinion of such Justice or Justices,* ***such evidence is sufficient to put the accused party upon his trial for an indictable offence****, or if the evidence given raise a strong or probable presumption of the guilt of such accused party, then such Justice or Justices shall by his or their warrant … commit him to prison to be there safely kept until he shall be thence delivered by due course of law, or grant him bail as hereinbefore mentioned.* (emphasis mine)

[19] What this means in practice was spelt out by Cooke JA in **Boyd v The Commissioner of Correctional Services** SCCA 47/2003 (unreported) delivered February 18, 2004, when his Lordship said 'the approach of the magistrate in extradition proceedings is the same as if he was (sic) deciding whether or not there should be a committal to the Circuit Court' (page 5). In this regard 'no more than that a prima facie case must be established and by that is meant only that there must be such evidence that if it be uncontradicted at trial a reasonable jury may (not probably will) convict upon it' (Cooke JA at page 6 citing and approving dictum from Edmund Davies J in **Regina v Governor of Brixton Prison and another Ex Parte Armah** [1966] 3 WLR 23, 31).

DISCRETION TO EXCLUDE EVIDENCE

[20] Learned Queen's Counsel consistently submitted that the RM sitting as a court of committal in an extradition matter has a discretion to exclude evidence

that is relevant and technically admissible. I must confess that I am not sure that this correct. If the court of committal is to have the same power as committing justices in a preliminary inquiry then it has to be shown that committing justices in a preliminary inquiry had a discretion to exclude relevant and admissible evidence. Committing justices are statutory creatures and therefore can only act in accordance with the powers conferred on them. Nowhere in the Justices of the Peace Jurisdiction Act has it been shown that such a discretion was conferred on them. If that is the case and the court of committal in extradition matters has the same powers, what then is the basis of the discretion if it is not found in the statute? If it is not in the statute then the only other source must be the common law and added to this is that, generally speaking, inferior courts have no inherent power.

[21] The principle that inferior courts, generally do not have inherent powers was stated by the Jamaican Court of Appeal in **Metalee Thomas v The Asset Recovery Agency** [2010] JMCA Civ 6. In that case the issue was whether a Resident Magistrate had the power to hear a civil recovery application under the Proceeds of Crime Act in chambers. The court held that in the absence of power being conferred on the Resident Magistrate's Court to hear such applications in chambers then they had to be heard in open court. The basis of this reasoning was that, '[t]hey are inferior courts without any inherent jurisdiction and with only such jurisdiction as is conferred upon them by Statute' (para. 34, Harrison JA citing with approval **Lindo v Hay** Clarke's Reports 118). Harrison JA continued that it 'is therefore reasonable to think that Resident Magistrate's Courts may exercise only such powers as are given to them by statute, and that in doing this they must act in accordance with the procedures laid down in the statute and not otherwise' (paragraph [34]). If all this is true of Resident Magistrates why is it not true of committing justices who are also creatures of statute? To this no satisfactory response was forthcoming except, as Lord Gifford, said the cases from the Court of Appeal of Jamaica and the House of Lords do speak of such a discretion. It is therefore important to see what these courts have to say on this

point. Before examining the cases it should be pointed out that there are strong persuasive authorities identified by Lord Griffith in **Regina v. Horseferry Road Magistrates' Court, Ex parte Bennett** [1994] 1 AC 42 that have held that magistrates do have inherent power to prevent abuses of their process but that is confined to very limited circumstances. His Lordship held the magistrate's power was confined to 'in the case of magistrates this power should be strictly confined to matters directly affecting the fairness of the trial of the particular accused with whom they are dealing, such as delay or unfair manipulation of court procedures' (page 64). Also Lord Griffith cited cases from the House of Lords which expressly held that in extradition proceedings the committing magistrate has no discretion to refuse to surrender a fugitive on the grounds of abuse of process. Lord Griffith was prepared to accept that magistrates had an inherent power to prevent abuse but he was speaking in the context of a trial and did not indicate that those decisions of the House of Lords excluding any discretion not to extradite on abuse of process grounds in extradition matters were wrongly decided.

[22] Lord Gifford referred to **Vivian Blake v The Director of Public Prosecutions** SCCA No. 107/96 (unreported) delivered July 27, 1998 and **Ramcharan v Commissioner of Correctional Services** (2007) 73 WIR 312 to support his point. These are decisions of the Court of Appeal of Jamaica in extradition matters. He also cited **Re Al-Fawwaz; Re Eiderous** [2002] 1 All ER 545, a decision of the House of Lords. Having read these cases I am not convinced that they decided that in extradition proceedings the committal court has a discretion to exclude relevant and admissible evidence. All three cases dealt with the specific issue of whether anonymous witness statements could be relied on to ground the extradition order. To be more accurate the issue of anonymous witnesses was not raised before the RM at the extradition hearing but assumed importance after those proceedings. In all three cases, the answer was in the affirmative, albeit that they said that the material before the court permitted the court to exercise its discretion to admit them.

[23] The case before this court is one of anonymous witnesses. Lord Gifford pressed the cases cited above on this court and they provided the foundation for his submissions on ground one of this application. The cases and his further submissions will be dealt with when that ground is examined.

[24] With this background in mind it is appropriate to examine the grounds advanced by Lord Gifford QC on behalf of Mr Giguere.

GROUND 1

[25] Ground one reads:

> *That the learned Resident Magistrate erred in law in admitting into evidence and/or in relying upon the Affidavit made by a person identified only as "CW-1", in circumstances where (a) the case for the Requesting State depended entirely upon the evidence of that person; (b) no sufficient reason was provided by the Requesting State as to why his or her identity was not revealed; (c) the learned Resident Magistrate assumed that the United States Magistrate Judge would have determined the basis for the suppression of the witness' identity, without having any grounds for such assumption.*

[26] The Confidential Witness' ('CW') identity was not disclosed and neither was his address. Lord Gifford submitted that the requesting state has not provided, in the evidence placed before the RM, any reason why the identity of the witness could not be disclosed. He submitted that one cannot assume that there was a good reason. There must be some reason demonstrated by evidence before the RM that the identity of the witness could not be disclosed. He pointed out that the closest one comes to some material (which he did not concede was evidence) was a statement in a footnote of the affidavit of Mr Christopher Romano, an Assistant United States Attorney, that 'the identities of the confidential informant (CI) and confidential witness (CW – 1) have not been disclosed in this request due to concerns for their safety.' There is no statement,

it was submitted, in the affidavits of either the confidential informant or cw that they were in fear or that they feared for their own safety. Lord Gifford continued by saying that it was not enough for Mr Romano to stop where he did. He did not say whether it was his (Romano's concern) or the concern of the United States government.

[27] As I understood the submission, if the courts were to act on this type of evidence, the threshold requirement would be set too low and it may eventually get to the point where the legal standard that has to be met and how the assessment is to be made will vanish.

[28] In support of his submissions he cited the cases referred to earlier. Lord Gifford submitted that both **Blake** and **Ramcharan** there was evidence clearly indicating that the witnesses were in fact fearful and the evidence provided the basis of the witness's fear. By contrast he submitted, the current case provides no basis for the fear, and the material provided regarding fear is woefully inadequate.

[29] In **Blake's** case only one member of the Court of Appeal specifically addressed the issue (Forte JA). From Forte JA's judgment it is clear that the issue was not raised before the RM (page 15). A careful reading of his Lordship's reasoning is important here. Mr Ramsay QC for the applicants in **Blake's** case relied heavily on **R v Taylor** [1994] TLR 484 for his submissions on the point that the evidence of anonymous witnesses should not be admitted because it infringed the fundamental principle of criminal justice, namely, the defendant should not be deprived of the right to confront his accuser and knowing his identity is an integral part of that right. In response to that submission Forte JA said at page 19:

> *To begin with, however, Evans L.J. was speaking of factors which are relevant to the exercise of the judge's discretion in the context of a trial, whereas the matter under review concerns not committal*

proceedings or a preliminary hearing as we have in this jurisdiction; but committal proceedings for the purpose of extradition which is governed by the statutory provisions of the Extradition Act. The difference is broadly reflected in the fact that the ultimate trial of the appellant if he fails on appeal, and is eventually extradited at the instance of the Honourable Minister will be governed by the procedures of the Requesting State. In any event, had the learned Resident Magistrate in the instant case been invited to exercise such a discretion, it is my view that ***given the provisions of the Act he would have no option but to receive the evidence*** *and based on the content of the depositions before him would have been bound to make the order committing the appellant to custody to await his extradition.* (My emphasis)

[30] The learned Justice of Appeal was not saying that such a discretion to exclude existed. His Lordship was saying that had the application been made having regard to the provisions of the Act the RM could not exclude the evidence. This is why the RM would have had no option but to admit the authenticated evidence. The statute does not confer any statutory discretion. Needless to say, if any existed at common law outside of the statute, then Forte JA could not have said what he did say. The 'and' that appears after the highlighted text above is not a conjunctive 'and' but a disjunctive 'and.' His Lordship was not coupling them together as grounds for admissibility because logically, admissibility must come before examination of and reliance on content. The existence of a discretion to exclude does not fit harmoniously with the words 'no option but to receive.' What his Lordship was saying was that once admitted (which the RM was bound to do), if it turned out the content of the affidavit established an extraditable offence the RM would not have any legitimate basis for not making the order.

[31] Forte JA then went to say even if **Taylor** were considered the RM 'would

of necessity have had to exercise the discretion to forgo the identity of the witnesses in the process of the committal proceedings' (page 19).The phraseology is important. The actual evidence in the documents established that the witnesses were fearful. In other words, once the evidence established a legitimate basis for not disclosing the identity of the witness, then the RM had to act on the evidence to make the order once an extraditable offence was disclosed. His Lordship supported this conclusion by applying the criteria of **Taylor** in order to show that the stated criteria were met. Forte JA's reasoning has to be understood against the background of how extradition hearings are normally conducted. They are usually based on written evidence taken before a judicial officer or some person authorized by the requesting state to take such evidence. The limitations of this process are obvious and barring some remarkable evidence it is not easy to see how the discretion would operate to exclude admission into evidence of the documents and reliance on their contents.

[32] The provision Forte JA had in mind was section 14 of the Act when he said that the RM would have no option but to admit the depositions. In my view, the 'no option' was not in the exercise of a discretion to admit or not to admit but rather from the fact that once section 14 requirements are met the documentation must be admitted. That provision reads:

> *(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 the matters stated therein;*

(b) a document, duly authenticated, which purports to have been received in evidence, or to be a copy of a document so received in any proceedings in an approved State shall be admissible in evidence; and

(c) a document, duly authenticated, which certifies that--(i) the person was convicted on the date specified in the document of an offence against the law of an approved State; or (ii) that a warrant for his arrest was issued on the date specified in the document;

shall be admissible as evidence of the conviction or evidence of the issuance of a warrant for the arrest of the accused, as the case may be, and of the other matters stated therein.

(2) A document shall be deemed to be duly authenticated for the purposes of this section—

(a) in the case of a document which purports to set out testimony given as referred to in subsection (1)(a), if the document purports to be certified by a judge, magistrate or office of the Court in or of the approved State in question or an officer of the diplomatic or consular service of that State to be the original document containing or recording that testimony or a true copy of that original document;

(b) in the case of a document which purports to have been received in evidence as referred to in subsection (1)(b) or to be a copy of a document so received, if the document purports to be certified as aforesaid to

have been, or to be a true copy of, a document which has been so received; or

(c) in the case of a document which certifies that a person was convicted or that warrant for his arrest was issued as referred to in subsection (1) (c), if the document purports to be certified as aforesaid, and in any such case the document is authenticated either by the oath of a witness or by the official seal of a Minister of the approved State in question.

[33] A document is authenticated for the purposes of Extradition Act once it purports to do any of the things set out in section 14 (2). Section 14 is an enabling provision. It permits documents to be admitted into evidence without calling the maker (**Ramcharan v Commissioner of Correctional Services** (2007) 73 WIR 312, 369 (Harris JA)). Harris JA was reaffirming the position of the Court of Appeal taken in the earlier case of **Forbes v DPP** SCCA No 9/2004 (unreported) delivered November 3, 2005.

[34] Harrison P in **Ramcharan** said at page 322:

Although the provisions of s 14 of the Act are mandatory, the compliance therewith is not restricted by a single inflexible method of proof or style of authentication. The purpose and intention of the section are to ensure that the documents relied on by both the requesting and the requested states are genuine and authentic as originating from official sources and not contrived and falsified in order to procure the transfer of its nationals by devious means.

[35] While the Act does not say that witnesses of the facts being relied on to establish the extraditable offence have to be called before the RM there is nothing that precludes that possibility. Section 14 is a recognition that in many

instances it would be impracticable to have the witnesses attend court. This is why section 14 provides a statutory regime to deal with these potential difficulties.

[36] Therefore, at the extradition proceedings before the RM can admit the documents into evidence submitted by the requesting state the RM has to be satisfied that they are authenticated. This is done by examining the documents without going into the content or meaning of them. Once they purport to conform with section 14 (2) then it is very difficult to see the basis on which an RM could exclude them by the exercise of a discretion. Once admitted then the documents become evidence which can be acted upon.

[37] The fact that affidavit evidence is from anonymous witnesses does not make it any less evidence if section 14 is satisfied. The fact that evidence does not disclose any reason why the identity of the witnesses is not disclosed does not detract from it being evidence. If the document is in fact duly authenticated and purports to meet the requirements of section 14 (1) of the Act, then I do not see on what basis an RM could fail to admit it and then not make the order extraditing the fugitive if the contents if the material discloses evidence that meets section 10 (5) of the Act. The only basis I can see for an RM not to make the order is where the content of the evidence does not disclose an extraditable offence, or that the evidence presented is worthless because it is based on hearsay or other inadmissible material.

[38] My conclusion that an RM has no discretion to exclude documents purporting to comply with section 14 is supported by **Edwards v Director of Public Prosecutions** (1994) 47 WIR 302. The judgment of Downer JA in the Court of Appeal of Jamaica makes it plain that the word ‘purporting’ in section 14 means what it says: appearing to be what it claims to be just by looking at it. The enquiry under section 14 is a two stage one. The first stage is whether the document on its face (without any close examination of content and its meaning)

purports to be certified in the ways set out in section 14 (2); if yes, then it is duly authenticated. There is no necessity to examine closely the content at that stage. It is taking the document at face value. As Downer JA further reasoned, once this stage is passed (the first stage), then the second stage arises, namely, does the duly authenticated document purport to contain the matters mentioned in section 14 (1). The second stage arises after admission into evidence and is not a criterion to determine whether it is admissible. If is after admission then examination. If on examination it does not meet section 14 (1) then there is no need to go any further. If the examination shows that section 14 (1) is met then the enquiry becomes whether the contents disclose an extraditable offence. If yes, then the order extraditing the fugitive must be made.

[39] For these reasons it is very clear to me that Forte JA was saying, in **Blake**, that under section 14 of the Act, if duly authenticated documents are presented then the RM must admit the evidence. There is no discretion to exclude duly authenticated documents. The fact that the duly authenticated documents contain anonymous testimony does not go to either stage one or stage two of the enquiry.

[40] Until the documents are admitted there would not be any evidence before the RM. Smith JA pointed out in **Forbes**, the 'substantive rules of evidence apply to the contents of a document admitted under section 14' (page 24).

[41] I will examine this matter a bit further in order to show that this discretion spoken of by Lord Gifford, as a practical matter, cannot be of great assistance to him. The witnesses called at the hearing are usually officials from the Ministry of Foreign Affairs, the Ministry of Justice and the Ministry of National Security who speak to the receipt of the request for extradition and the authenticity of the documentation. That is to say, they provide evidence to show that the request emanated from the requesting state by way of proper diplomatic channels. This evidence goes to show that the request came from a proper source. The

evidence is akin to chain of custody testimony designed to show that the request is coming from a legitimate source. These officials cannot speak to the correctness and accuracy of the content of the request. There is usually the police officer who took the person into custody.

[42] Once the genuineness of the origin of the request is established, the next step is to see whether they are authenticated, that is do they purport to be what section 14 (2) requires. If yes, then they are to be regarded as authenticated. Up to this point, how would a discretion intervene? What would be its purpose and function? The RM is now satisfied that they are duly authenticated. The next step is to examine the content in order to see whether they meet section 14 (1). How could a discretion intervene at this stage? What would it be doing? Could it prevent the RM from looking to see if section 14 (1) is met? To say that discretion could do this would be strange. Having admitted the document the RM could not look at it? At this stage the document is not being studied closely to see if an extradition offence is made out though as a practical matter looking to see whether section 14 (1) and whether an extradition offence has been made out can take place simultaneously. The point is that on admission the main goal of the RM is to see whether the document purports to contain testimony, documents and proof of conviction, as the case may be as required by section 14 (1). Once these or any of them is satisfied then the RM now subjects the documents to close scrutiny to see if grounds for extradition are established. Up to this point, I do not see any basis for any discretion to prevent the RM from doing any of the things outlined so far. Once the RM has concluded that grounds for extradition exist the order must be made. It is only here, if at all, that a discretion may arise. But what would be the ground of the exercise of the discretion? It could not be a discretion to exclude evidence. The only possible discretion would be whether it would be fair in the circumstances to rely on anonymous witnesses. It is only at this point that Lord Gifford's submissions could find some traction. If there is a discretion it is at best deciding how best to achieve the balance between the requesting state and the fugitive. I prefer to use the language of requesting state

and the fugitive rather than the language of prosecuting authorities and defendant.

[43] Having regard to the nature of extradition, the requested state and the courts there have to assume that the requesting state is acting in good faith unless there is cogent evidence to the contrary. The reason is that extradition is state to state, not court to court. Both states have agreed to assist each other by returning fugitives wanted in one state to the other. Thus if one state gives assurances to the other that the anonymous witness will turn up at the trial then unless there is very good reason to doubt this assurance, then the courts of the requested state should act on that assurance. Good faith is presumed.

[44] McLachlin CJ in **Ferras** while discussing the Canadian statute had some words of wisdom and caution. Her Ladyship began by saying that when evidence is certified (we say authenticated) by the requesting state, the requested state should not begin to view it with a jaundiced eye. The principle of comity strongly suggests that there is a presumption that the evidence is reliable. In other words, on the face of it, does the evidence tendered bear the hall marks of prima facie reliability?

[45] The fact that the depositions and other evidence are not as fulsome on the question of fear is not a sufficient reason to conclude that the requesting state did not act in good faith in making the request and its assurances are meaningless. When an RM is presented with duly authenticated documents from a requesting state, he has to presume that they are presented in good faith and that the evidence is from a reliable source unless the contrary is shown.

[46] It would seem to me that the expression ‘right to face one’s accuser’ cannot apply with the same rigour in an extradition context as it would in a trial. In this particular case, one cannot help but note that the state requesting the extradition of Mr Giguere has an exceptionally strong position on the accuser

turning up at trial to face the defendant.

[47] From what has been said the RM in this case could not exclude the evidence. Section 14 was met and in keeping with the purpose of the section there was no basis for its exclusion. Thus the RM was correct on law to admit the duly authenticated documents notwithstanding that it contained anonymous testimony. The salvation of Mr Giguere lay in persuading the RM not to rely on them (assuming there is a discretion to do so) after all the evidence (including evidence from the fugitive if he chooses to do so) has been placed before the RM and final submissions are being made.

[48] In so far as a discretion exists this is what was said in **Ramcharan**. Harrison P in indicated that the RM 'was entitled to exercise his discretion by looking at all the evidence, and decide how best he could achieve that balance of fairness between the appellants and the prosecuting authorities' (page 330). Cooke JA held that there 'was nothing to indicate that the reception of the evidence of the confidential informant would so adversely affect the appellants in that there would be a deviation from the balance of fairness' (page 354). Harris JA held that 'magistrate, in the exercise of his discretion, would be required to strike a balance of fairness between the protection of the prosecution witness and the protection of an accused. However, in some cases, in the preservation of the anonymity of a witness, the pendulum of fairness swings in favour of the prosecution notwithstanding the absence of a reason for the anonymity' (page 373).

[49] Lord Slynn advised caution in admitting and relying on anonymous statements but they can be admitted (**Al Fawwaz** [44]). Lord Hutton indicated that it is a matter of fairness. Fairness to the accused and fairness to the prosecution (**Al Fawwaz** [85]). As indicated above, I prefer to speak of fugitive and requesting stated. Lord Roger indicated that the interests of the fugitive and the witness should be taken into account (**Al Fawwaz** [166]).

[50] **Al Fawwaz** made it plain that to persuade this court that the RM was wrong to rely on the anonymous witness evidence, it had to be shown that in the circumstances the decision by the RM was narrow Wednesbury unreasonable, that is, so unreasonable that no reasonable RM could have come to that conclusion. Mr Giguere cannot succeed by showing that another RM might have come to another conclusion. Neither is this court entitled to substitute its own view for that of the RM merely because we would have come to a different conclusion.

[51] I now turn to the RM's reasons for making the order to extradite Mr Giguere. Her Honour Mrs Georgiana Fraser noted the following:

a. *the identity of the witness was not revealed;*

b. *the accused is entitled to know his accuser;*

c. *in some cases anonymous witness testimony is used;*

d. *some explanation should be given why the identity of the witness is suppressed;*

e. *the reason given was concern about the witnesses safety;*

f. *the reason advanced was not fulsome;*

g. *the identity of the witness would be revealed at trial and so he can confront his accuser;*

h. *the witness appeared before a judicial officer in the United States of America*

[52] Her Honour then accepted the statement into evidence. The learned RM then stated that she would look at its contents and give consideration to what was there.

[53] The RM cannot be faulted here. All relevant matters were taken into account. Indeed the RM proceeded on the basis that she had a discretion to exclude the testimony. This was indeed a generous approach in favour of Mr Giguere.

[54] Lord Gifford was critical of the RM's reference to the appearance of the witness before the judicial officer which, in his view, suggested that once this happened the RM abdicated her responsibility to view the admission of the anonymous witness statement critically. I would not take that view. What I believe the RM meant was that a responsible judicial officer in the USA saw and heard the anonymous witness and would have undoubtedly been aware of the United States' Supreme Court's strong insistence on the appearance of witnesses before the court. So strong has that court insisted on the witness being present in the flesh that it once held that preventing the cross examiner from asking the witnesses name and address even though the witness was otherwise cross examined did not meet the high standard of confronting one's accuser (**Smith v Illinois,** 390 U.S. 129). In another case, a conviction was quashed because the trial judge prevented the defence from finding out where the witness lived (**Alford v. United States**, 282 U.S. 687). The reasoning was that being present in court is not enough. All this in the face of the witness actually turning up and giving evidence in the flesh. The defence has the right to secure the correct name and address of the witness because this kind of information may be the gateway to discrediting the witness.

[55] Once the anonymous witness statement came into evidence then it fell to be assessed by the RM as part of the overall evidence presented by the requesting state in order to determine whether Mr Giguere should be extradited.

[56] The fact that the reason given by Mr Romano did not enable the RM to make up her own mind regarding the safety of the witness is certainly a matter to be considered but that by itself is not necessarily decisive against using

anonymous testimony. I fully accept that there is a danger that if there is no insistence on giving full reasons so that the extradition judge can properly assess the basis for the concern about safety and then decide whether withholding the identity of the witness is appropriate, then it may send the wrong signal that anything goes. On the other hand, each case needs to be assessed in its context.

[57] The authorities make it plain that the circumstances may indicate why it would not be prudent to disclose the name of the anonymous witness until trial. The context may include the level of involvement of the witness; the nature of the crime; the type of crime and whether the fugitive belongs to an organized criminal enterprise with a reputation for fearsome violence.

[58] In the instant case the anonymous witness states that he has first- hand knowledge of the drug trafficking activities of Mr David and Mr Giguere. There is evidence from Special Agent Martin Lynn that the anonymous witness was himself a serious drug trafficker smuggling huge amounts of drugs over a number of years. The witness has provided evidence that has led to seizures of multi-million dollar quantities of illegal drugs. It is well known that drug trafficking also carries with it the risk of violence. The assertion by Mr Romano that there were concerns about the safety of the witness is not farfetched.

[59] For the reasons given ground one fails.

GROUNDS 2 AND 2A

[60] These two grounds were argued together. They are as follows:

> 2 *That the learned Resident Magistrate erred in law in holding that there was sufficient evidence on which an order of committal could lawfully made, and in failing to have regard to the following facts and matters in particular, namely (a) the only evidence linking the Applicant to any conspiracy to possess cocaine was that given by CW-1; (b) that*

evidence related solely to an incident alleged to have taken place over a short span of time on 18th November 2007; (c) CW-1 said that the person involved in that incident was known to him only as "Internet"; (d) CW-1 only claimed to indentify Internet as the Applicant on being shown a photograph by a US Special Agent on 3rd June 2008. In the circumstances the identification of the Applicant as a person involved in the alleged conspiracy was incredible and/or worthless.

2A The learned Resident Magistrate erred in law in holding that it would be sufficient for there to be "some evidence" against the Applicant; and in not weighing the evidence and rejecting evidence which (as in this case) was plainly unworthy of belief and/or manifestly unreliable.

[61] The main submission on ground 2A was that the evidence of identification here did not meet the Turnbull standard because there was no evidence (a) the witness knew the fugitive before; (b) of how long did he have the fugitive under observation; (c) what was the lighting was like at the time; (d) any distinguishing features of the fugitive; and (e) the identification took place by being shown a photograph some months after the incident which was on one day only, namely November 18, 2007.

[62] Lord Gifford commended to this court the approach adopted by McLachlin CJ in **Ferras**. This he did never mind the differences between the old and new Canadian extradition statute. As pointed out already, the old Canadian statute and the current Jamaican statute have identical words in the material parts. It is also to be noted that her Ladyship did not say that the approach under the old statute exemplified in **United States of America v Shephard** 70 DLR (3rd) 136 was incorrect. In that case the majority held that the test to be applied by an extradition judge was the same as that when deciding to leave the case to the jury. The majority also held that this test did not mean that the judge was entitled to say that the person should not be extradited because in his opinion the evidence was manifestly unreliable. The majority also accepted that if the

evidence was such that a reasonable jury properly directed could not convict then the judge cannot make an extradition order.

[63] The same test is applied in Jamaica (Downer JA in **Blake** pp 55 – 57). The test applied by Downer JA came from **R v Galbraith** [1981] 2 All ER 1060. **Galbraith** has been approved by our highest court, the Judicial Committee of the Privy Council (**Daley v R** (1993) 43 WIR 325). In **Daley**, the reasoning in **Galbraith** to the effect that a trial judge cannot stop a case because he thinks it would be unsafe or unsatisfactory was approved. The judge can only stop a case where the minimum evidence to establish the offence has not been called.

[64] McLachlin CJ in **Ferras** spoke of evidence being unreliable to the point where it would be unsafe and dangerous to convict then the extraditing judge should not make the order. It was this language that Lord Gifford was commending to this court. This type of language comes perilously close to the language used in **R v Mansfield** [1977] 1 WLR 1102 which was capable of meaning that a trial judge should stop the case if he felt that the prosecution witness was not speaking the truth. This possible meaning was refuted in **Galbraith**. It is not entirely clear what McLachlin CJ had in mind when she used the words she did. If she meant the possible meaning that could have been attached to the **Mansfield** dictum, then I am constrained by Jamaican authority not to accept that meaning. On that other hand, if she had in mind a chain of reasoning and conclusion as exemplified by **Galbraith** then I would agree with her. For these reasons I have my reservations about **Ferras** on this point and so I decline to adopt this aspect of the case.

[65] The evidence from the confidential witness begins by stating that he has first-hand knowledge of the activities of Mr David and Mr Giguere who was known to the witness as Internet. He also asserts that all facts stated by him were either personally observed or he was physically present and personally heard what was said. On this basis the witness is saying that he observed Mr Giguere

for an extended period of time on the day in question. He saw Mr Giguere arrive at the hotel in Phoenix. Saw him enter the room and took custody of the bag with the cocaine. He received the keys for the Durango and then left. This does not suggest a fleeting glance of Mr Giguere. The evidence suggests that he knew Mr Giguere before (see first sentence in paragraph 12 of witness' affidavit). The witness identified Mr Giguere from a photograph shown to him in June 2008.

[66] Lord Gifford submitted that the affidavit is not detailed enough on the issue of identification. However, it is not necessary that in every case where identification is in issue one is going to see direct evidence of the questions raised by **R v Turnbull** [1977] QB 224. There may well be evidence from which it can be inferred that the witness had an opportunity see the person properly. In this particular case, the witness makes the assertion that he knew Mr Giguere as Internet. While it is true that he did not say expressly that he knew Mr Giguere before that date, it appears that the more natural way of understanding his evidence is that he did know him before. The witness stated that all the events stated by him were observed directly or he was physically present. The details that he gives regarding what took place in the hotel room in his statement are more consistent with physical presence than the possibility looking on through binoculars or from a distance as suggested by Lord Gifford as one possible view of the evidence. Unless he was present it does not seem that he would be able to say with such specificity that once 'Internet arrived at David's hotel room, I observed Internet take custody of the 110 kilograms of cocaine, which was contained in three black nylon roller bags, and place them into a green Jeep Liberty rental vehicle, which Internet had driven to the hotel' (para 12 of confidential witness' affidavit).

[67] The witness also gave a reason why Internet drove the Durango. The reason was that Mr David was worried about being followed by law enforcement personnel. This maneuvering by Mr David and Mr Giguere is more consistent with planning than a random occurrence. The witness is able to ascribe a specific

reason. All these are matters to be tested in the court of trial and not the extradition hearing.

[68] I am not saying that these things are true but the test which was adopted by Cooke JA in **Boyd**, which was really another way of expressing the **Galbraith** test, is whether on the evidence a reasonable jury might convict if the evidence is uncontradicted. Included in this identification evidence is the fact that no identification parade was held and that the fugitive was identified some seven months later in a photograph. Despite its weakness a reasonable jury may conclude that the witness was in the hotel room and from his narrative also conclude that his opportunity to see was not a fleeting glance. If this is a possible reasonable conclusion arising from the evidence then the RM was justified in making the order. She is not determining overall credibility.

[69] Special Agent Lynn spoke to obtaining registration cards from the Holiday Inn Express Hotel, records from Enterprise Rent-a-Car in Phoenix, Arizona showing that Jeep Liberty was rented and information from a database. The first set of documents showed that a person named Giguere stayed at the hotel on November 18, 2007. The second set of documents showed that a person named Mr Giguere rented a green Jeep Liberty. The third set of documents showed that a person named Giguere flew from Pearson International Airport in Canada to the international airport in Phoenix.

[70] Lord Gifford submitted and counsel for the first respondent agreed (counsel for second respondent expressed no clear position but said he adopted the submissions of counsel for the first respondent) that these sets of documents were hearsay and therefore should not be taken into account for the truth of their contents.

[71] In the case of **R v Rice** [1963] 1 QB 857, during the cross examination of one of the defendants an airline ticket was put to him in order to suggest that he

and another man had flown from London to Manchester on a particular day. The defendant denied and the ticket eventually went into evidence. On appeal, Winn J held that the ticket was an item of real evidence from which the jury could infer that the persons named on the ticket had flown on a particular day. This case was not overruled by **Myers v DPP** [1965] AC 1001. It is interesting to note that when **Patel v Comptroller of Customs** [1966] AC 356 came before the Privy Council, Lord Hodson who was part of the majority in **Myers** and delivered the advice in **Patel**, did not say in **Patel** that **Rice** was no longer good law.

[72] By parity of reasoning it could be said that the first and second sets of documents because they came from the source where they would be issued (a critical fact in **Rice**) a jury in Jamaica may conclude that two men name David and Giguere were at the Holiday Inn on November 18, 2007, and a man named Giguere rented a green Jeep Liberty. They could take this into account along with the confidential witness's account that Giguere had driven a green Jeep Liberty to the same hotel at which both Mr David and Mr Giguere were. Since the third set of documents did not come from the airline but from a database the **Rice** reasoning may not be applicable.

[73] It would seem therefore that the first two sets of documents would be relevant to the issue of identification as part of the circumstances but not for the truth of their contents. If that is so then this may be evidence which would tend to support the correctness of the confidential witness' identification of Mr Giguere. This would be consistent with **Turnbull** which said that support for identification can come from evidence that may not be corroborative in the strict sense of the word (pp 229 - 230). Whether the evidence of the documents does this would be a matter for trial but what can be said is that there is a legal basis for admitting the documents and using them in the manner suggested.

[74] It may well be that this is a borderline case but as was said in **Galbraith**, 'There will of course, as always in this branch of the law, be borderline cases.

They can safely be left to the discretion of the judge' (p 1062).

[75] If the reasoning suggested so far was open to the RM then it cannot be said that her decision was unreasonable. This court cannot interfere on the basis that we would decide differently but only on the basis that the RM proceeded on an erroneous legal basis. This has not been shown. Her approach is consistent with the law in Jamaica and, dare I say it, the law in Canada as expressed in **Shepherd**. These two grounds fail.

GROUND 3

[76] The third ground is stated as follows:

> *That by reason of the passage of time since the Applicant is alleged to have committed the offence charged against him, it would, having regard to all the circumstances, be unjust and/or oppressive to extradite him. The circumstances relied on include (a) that three years and six months elapsed between the offence allegedly committed and the request for a provisional warrant by the Requesting State; (b) that no explanation has been provided for the delay; (c) that the Applicant has been living openly in Canada during the whole period; (d) that no request (to the knowledge of the Applicant) was made to the Canadian authorities for his extradition; (e) that the Requesting State deliberately waited until he left Canada for Jamaica before seeking his extradition; (f) that by so acting the Requesting State has caused unnecessary hardship to the Applicant and has caused prejudice to his being fairly tried.*

[77] The applicant submits that the delay in seeking his extradition makes any surrender of him to the USA unjust and oppressive. He submitted that he, since 2007, has been living a settled an open life in Canada and there is no evidence that authorities in the USA sought his extradition from Canada. Also, it was submitted that no reason has been forthcoming from the USA explaining the delay in seeking Mr Giguere's extradition.

[78] Mr Giguere was arrested on May 12, 2011. His involvement in the offence took place on November 18, 2007. On the face of it, the time between offence and arrest is three years and six months. In his affidavit, Mr Giguere states that at this time he cannot recall precisely where he was in November 2007. Neither does he recall any witness who might assist him.

[79] The issues raised by Mr Giguere on this ground have caused some concern. It is well known that if most of us were asked to say where we were and what we were doing five years ago on a specific date we would be hard pressed to do so. This must weigh in favour of Mr Giguere. On the other hand, the requesting state has made very specific allegations suggesting that he traveled from Pearson International Airport in Canada to Phoenix, Arizona; met with a man named Mr Benoit David; stayed at the Holiday Inn Express Hotel; drove two vehicles, a Dodge Durando and a green Jeep Liberty and then returned to Canada on November 20, 2007. This involves international travel, presumably with some kind of travel documents. In this context the delay does not seem to be of the kind where a fair trial is unlikely to take place. In addition he is protected by the presumption of innocence. There is no burden on him to prove his innocence but it is difficult to see how he would not be able to establish that he did not travel out of Canada on the date mentioned or that he did not go to Arizona.

[80] The latest advice on the issue of delay in the extradition context can be found in the Privy Council's decisions in **Rhett Allen Fuller v The Attorney General of Belize** [2011] UKPC 23 and **Knowles v Government of the United States of America** (2006) 69 WIR 1 and the House of Lords in **Gomes v Government of the Republic of Trinidad and Tobago** [2009] 1 WLR 1038. At paragraph 31 Lord Bingham, in **Knowles**, extracted four principles from the case of **Woodcock v Government of New Zealand** [2004] 1 All ER 478. The four principles do not necessarily arise for consideration in every case where the

issue of delay is raised. Lord Bingham indicated that under the lapse of time principle in extradition matter, the relevant question is not whether it would be unfair to try the fugitive in the requesting state but rather whether it would be unjust to extradite him. Also, there is no presumptive date by which it can be said that extradition must necessarily be unjust or oppressive. If the courts of the requesting state would regard it as unjust or oppressive to try the fugitive or a fair trial is not longer possible then it would make no sense to extradite the person. Finally, the courts of the requested state must have regard to any measures the courts of the requesting state have to protect a defendant from an unfair trial or an unjust or oppressive trial because of the delay. These principles were adopted by the House of Lords in **Gomes** and reaffirmed in **Fuller**. In **Gomes**, Lord Brown said these words at paragraph [36]:

> ***The extradition process, it must be remembered, is only available for returning suspects to friendly foreign states with whom this country has entered into multilateral or bilateral treaty obligations involving mutually agreed and reciprocal commitments. The arrangements are founded on mutual trust and respect. There is a strong public interest in respecting such treaty obligations. As has repeatedly been stated, international co-operation in this field is ever more important to bring to justice those accused of serious cross-border crimes and to ensure that fugitives cannot find safe havens abroad.***

[81] His Lordship was pointing that in light of what extradition is all about, it would be rare that domestic courts should conclude that a state with whom the executive has established friendly relations would be unable to give the fugitive a fair trial because of delay. The evidence of this would need to be strong, cogent and compelling. The case of **Kakis v Government of the Republic of Cyprus** [1978] 1 WLR 779 is now a major milestone along the pathway of the development of this area of law and is no longer considered the beginning and the end of the jurisprudence in this corner of the law.

[82] Lord Gifford relied on **Byles v The Director of Public Prosecutions and another** (1997) 34 JLR 471 for the proposition that if the fugitive has been living

openly and not hiding then that in and of itself may make it unjust and oppressive to extradite the person. I must confess that on reading the judgment of the Court of Appeal it is not entirely clear why living openly in that case would necessarily make it unjust to extradite the fugitive. The court did not give any reasons for its conclusions except to say that the charges were stale and took place a long time ago and therefore it would be unjust and oppressive to extradite the fugitive in a context where he was living openly. The court also held that it would be 'coupled with extraordinary difficulty of defending serious criminal charge of such staleness and antiquity' (page 484 F). The court did not elaborate why in that case, it would be difficult to refute the charges. The judgment did not indicate that Mr Byles said, for example, witnesses that he would have had earlier are no longer available, or forensic tests which might have assisted him cannot now be done or evidence which was available then was not available now.

[83] The recent cases above have indicated that delay in and of itself is not the critical thing but rather the consequence of the delay and its impact on the possibility of getting a fair trial in the requesting state. The tenor of the judgments and advice on the issue of delay suggests a heavy burden on the fugitive. There is language such as impossibility of a fair trial or risk of prejudice to the fugitive is such that a fair trial is difficult. The principle is applied on a case by case basis. **Byles** is an application of the principle and should not be understood to establish a principle that delay per se makes it unfair to extradite a fugitive. The fugitive must go further and make the link between the delay and the impact, if any, on his right to get a fair trial in the requested state. My understanding of **Gomes** is that the fugitive must go further to establish that there are no procedures in the requesting state for him to have issues relating to the possibility of getting a fair trial raised and properly considered. All this is indicating that holding that a fugitive will not get a fair trial on the ground of delay is not easily established and it is not a conclusion that courts in the requested state readily come to.

[84] In the case before this court the evidence is that the statute of limitations

in the USA places a five year time limit within which prosecutions must commence. The investigation and request for extradition were made within the five years. It would seem that in the requesting state this case would not be regarded as suffering from too long a delay. From this stand point the issue of what procedures there are in place to protect persons from delayed trials would not arise. Given that the nature of the case against Mr Giguere is a combination of eye witness testimony and documentary evidence it does not appear that the trial would suffer from faulty recollections of prosecution witnesses. As noted earlier, sufficient disclosure has been made to put Mr Giguere on alert that he is being accused of traveling twice across international borders between November 18 and 20, 2007 and participating in a drug distribution conspiracy by flying to Phoenix Arizona by (a) driving a van to act as decoy for law enforcement and (b) physically handling bags containing cocaine and placing them in Jeep Liberty which was driven away by Mr David. All this allegedly took place on November 18, 2007. So even without knowing who the witnesses are he know the nature of the case he has to meet.

[85] I, respectfully, do not agree with counsel that the ground of delay (lapse of time) mentioned in section 11 (3) (b) of the Act has been made out.

CONCLUSION

[86] The RM sitting as a court of committal in extradition proceedings has no discretion to exclude evidence properly authenticated under the Extradition Act. Any discretion, if it exists, can only arise after the properly authenticated evidence is admitted and there is circumstance disclosed which requires a discretion to be exercised. Any discretion that may be exercised has to be done cautiously because extradition is a purely statutory regime. All powers exercisable by the extradition judge must be grounded in some statutory provision. The extradition judge has no inherent power akin to that of judge of a superior court of record.

[87] The fact that anonymous witnesses are used to ground the extradition request is not a reason in and of itself not to accept the affidavit into evidence (assuming such a discretion exists) and neither is it a reason not to act on the evidence.

[88] Extradition proceedings are not analogous, in all respects, to committal proceedings for trials in domestic courts despite the close analogy drawn by the wording of section 10 (1) of the Extradition Act. Extradition is founded on notions of comity and reciprocity between nations. On this basis, unless the contrary is shown the courts of the requested state should proceed on the basis that the requesting state is acting in good faith and the evidence put forward is done on a good faith basis. Improper motives are not to be attributed to a requesting state in the absence of clear and compelling evidence.

[89] In reviewing the decision of the extradition judge, this court does not interfere on the basis that it would have interpreted the material differently. The test is whether the extradition judge could have come to the conclusion that he or she did having regard to the material placed before the court and the relevant principles of law.

[90] In this case, the RM acted properly and within the law by admitting the evidence of anonymous witnesses. She also acted properly and within the law by acting on all the material presented when she made the extradition order.

[91] There is no basis for concluding that the delay in this case will prevent Mr Giguere from receiving a fair trial in the USA.

[92] The application for the writ of habeas corpus is denied.

EDWARDS J

THE APPLICATION

[93] This is an application for the issue of a Writ of Habeas Corpus brought by Martin Giguere (the applicant) a resident and citizen of Canada. He was on a visit to the island of Jamaica when he was taken into custody by a team comprising Jamaican law enforcement officers and United States (US) marshals. They were acting pursuant to a warrant under and by virtue of the Extradition Act (the Act). This warrant was issued at the request of the US authorities where he is the subject of a grand jury indictment for conspiracy to possess and distribute cocaine. The US is one of Jamaica's extradition treaty partners.

[94] The indictment against the applicant was filed on 23rd February 2010 in the US District Court of Maryland. It charges one count of conspiracy to distribute and possess with intent to distribute cocaine. The offence is said to have been committed from about November 2007 in the District of Maryland, the District of Arizona, the District of New Jersey, and elsewhere.

[95] The applicant was brought on the warrant before the learned Resident Magistrate for the parish of Kingston who, after a hearing, subsequently committed him to custody to await his extradition. This application arose as a result of that committal. It raises several criticisms as to the Magistrate's treatment of the case. There were three main grounds, namely:

1. *That the learned Resident Magistrate erred in law in admitting into evidence and/or in relying upon the affidavit made by a person identified only as "CW-1", in circumstances where (a) the case for the Requesting State depended entirely upon the evidence of that person; (b) no sufficient reason was provided by the Requesting State as to why his or her identity was not revealed; (c) the learned Resident Magistrate assumed that the United States Magistrate Judge would have determined the basis for the suppression of the witness' identity,*

without having any grounds for such assumption.

2. *That the learned Resident Magistrate erred in law in holding that there was sufficient evidence on which an order of committal could lawfully be made, and in failing to have regard to the following facts and matters in particular, namely (a) the only evidence linking the Applicant to any conspiracy to possess cocaine was that given by CW-1; (b) that evidence related solely to an incident alleged to have taken place over a short span of time on 18th November 2007; (c) CW-1 said that the person involved in that incident was known to him only as "Internet"; (d) CW-1 only claimed to indentify "Internet" as the Applicant on being shown a photograph by a US Special Agent on 3rd June 2008. In the circumstances the identification of the Applicant as a person involved in the alleged conspiracy was incredible and/or worthless.*

3. *That by reason of the passage of time since the Applicant is alleged to have committed the offence charged against him, it would, having regard to all the circumstances, be unjust and/or oppressive to extradite him. The circumstances relied on include (a) that three years and six months elapsed between the offence allegedly committed and the request for a provisional warrant by the Requesting State; (b) that no explanation has been provided for the delay; (c) that the Applicant has been living openly in Canada during the whole period; (d) that no request (to the knowledge of the Applicant) was made to the Canadian authorities for his extradition; (e) that the Requesting State deliberately waited until he left Canada for Jamaica before seeking his extradition; (f) that by so acting the Requesting State has caused unnecessary hardship to the Applicant and has caused prejudice to his being fairly tried.*

[96] The applicant sought and was granted leave to argue one other supplemental ground to ground 2, namely that:

2(A) The learned Resident Magistrate erred in law in holding that it would be sufficient for there to be "some evidence" against the Applicant; and in not weighing the evidence and rejecting evidence which (as in this case) was plainly unworthy of belief and/or manifestly unreliable.

[97] The approach of this court, on an application such as this, is to review the decision of the Magistrate to see whether she was wrong in finding that on the evidence before her there was sufficient to commit and to ascertain whether she erred on an issue of law. Put another way, this court is obliged to determine whether there was evidence on which a reasonable Magistrate, properly directing herself in law, could commit. To do just that I will address the contentions of the applicant in the order they were made.

ANONYMITY OF THE WITNESS

[98] Documents tendered into evidence at the hearing before the Magistrate's Court included:-

A. Authority to proceed dated August 5, 2011.
B. Jamaica Gazette supplement dated June 27, 1991.
C. Jamaica Gazette dated February 2, 1995.
D. Diplomatic note #213 dated May 17, 2011.
E. Diplomatic note # 300/11 dated July 11, 2011 with documents attached.
F. Provisional warrant of arrest dated May 18, 2011.
G. Photograph dated May 19, 2011.

These were all duly authenticated documents as prescribed by the Act and accepted as such by the Magistrate. There is no issue raised in this case as to the authenticity of the documents.

[99] The applicant contended that the only witness implicating him was described in the documents as CW-1. That person speaks, in an affidavit sworn to before a US District Magistrate, of a person known to him as Internet. He described certain events which took place between Internet and a man called Benoit David (David) and certain things done by Internet and David in his presence. That evidence I will come to later. The evidence of CW-1 contained in his affidavit which was before the Magistrate was that in June 2008 he was shown a photograph which he identified as a photograph of the person known to him as Internet. This photograph was shown to the applicant at his arrest, which he confirmed was his likeness.

[100] In his affidavit filed in these proceedings, the applicant complained that, although the US attorney Christopher Romano in his affidavit stated that the identity of CW-1 would be revealed at the trial in the US, at the hearing in the corporate area criminal courts, the attorney representing the US Government indicated he had received no instructions in that regard. The applicant asserted that he desired to know the identity of his accuser so that he might show that his evidence was worthless. He further indicated that he was very concerned that in breach of his right to a fair trial, he will not know the identity of his accuser.

[101] It is to be noted firstly, that in the affidavit of CW-1 there is no mention of why his/or her identity was being concealed. In a footnote to the affidavit of Christopher Romano, it indicated that the identity of CW-1 was being withheld because of concerns for his safety and that the identity would be revealed at trial. Counsel for the applicant, learned Queens Counsel Lord Gifford, submitted that there was insufficient reason provided by the Requesting State as to why the identity of CW-1 was not revealed, neither were there sufficient assurances given that the identity would be revealed at the applicant's trial, pointing out that the US attorney had failed to elaborate on the nature and extent of those concerns.

[102] The Magistrate rejected an application by defence counsel to exclude the affidavit of CW-1 at the extradition hearing. She accepted the general principle that an accused is entitled to face his accuser and know his identity but showed an appreciation for the fact that the general principle may be departed from in certain circumstances and that there were guidelines to be followed. She also acknowledged that an explanation for the suppression of the witness' identity was required and referred to the explanation given by the prosecution.

[103] She took note of the undertaking by the prosecuting authorities to reveal the identity of the witness at the trial and determined that suppression at this stage would not prejudice the applicant at his trial. She further reasoned that the witness had appeared before a Judge in the US to swear his affidavit and that Judge would have been aware of his identity. In her ruling she further stated that the Judge "would have determined the professed basis for the suppression of the witness's identity". Lord Gifford argued that the Magistrate erred in making such an assumption and that there was no explanation as to the basis of this assumption.

THE LEGAL PRINCIPLES GOVERNING ANONYMITY

[104] The applicant contended that the Magistrate should not have received the affidavit of CW-1 it into evidence and having received it should not have relied on it. This, he claimed, was in breach of his constitutional right to face his accuser provided for in section 20 (6) (d) of the Constitution.

[105] The evidence being relied on for the extradition of the applicant is comprised in 4 depositions sworn to before a US Magistrate Judge in Maryland. One of deponents is CW-1. The affidavit of CW-1 complies with Section 14(1) (a) of the Act. Section 14 was described by Smith JA in the Court of Appeal in **Trevor Forbes v The Director of Public Prosecutions and anor** SCCA No. 9/2004 (unreported) November 3, 2005, as an enabling provision, which enabled a Magistrate to receive a deposition or affidavit in evidence without the need to

call the maker. In doing so he relied on the case of **Saifi v The Governor of Brixton and the Union of India** [2001] 1 WLR 1134. The requirements under section 14(1) go to the admissibility of the documents and not to the admissibility of its contents. The substantive rules of evidence of the Requested State apply to the contents of the documents admitted under section 14. See also **R v Governor of Pentonville Prison, Ex parte Kirby** [1979] 1 WLR 277.

[106] Section 14 of the Act states;

> *(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 the matters stated therein;*
> >
> > *(b) a document, duly authenticated, which purports to have been received in evidence, or to be a copy of a document so received in any proceedings in an approved State shall be admissible in evidence; and*
> >
> > *(c) a document, duly authenticated, which certifies that--(i) the person was convicted on the date specified in the document of an offence against the law of an approved State; or (ii) that a warrant for his arrest was issued on the date specified in the document;*

shall be admissible as evidence of the conviction or evidence of the issuance of a warrant for the arrest of the accused, as the case may be, and of the other matters stated therein.

(2) A document shall be deemed to be duly authenticated for the purposes of this section—

(a) in the case of a document which purports to set out testimony given as referred to in subsection (1)(a), if the document purports to be certified by a judge, magistrate or office of the Court in or of the approved State in question or an officer of the diplomatic or consular service of that State to be the original document containing or recording that testimony or a true copy of that original document;

(b) in the case of a document which purports to have been received in evidence as referred to in subsection (1)(b) or to be a copy of a document so received, if the document purports to be certified as aforesaid to have been, or to be a true copy of, a document which has been so received; or

(c) in the case of a document which certifies that a person was convicted or that warrant for his arrest was issued as referred to in subsection (1) (c), if the document purports to be certified as aforesaid, and in any such case the document is authenticated either by the oath of a witness or by the official seal of a Minister of the approved State in question.

(3) In this section 'oath' includes affirmation or declaration.

(4) Nothing in this section shall prevent the proof of any matter, or the admission in evidence of any document, in accordance with any other law in Jamaica

[107] Section 5 of Article VIII of the Extradition Treaty provides that statements, depositions and other documents shall be admissible if certified or authenticated in such a manner as may be required by the law of the Requested State. The Act was drafted to comply with the treaty obligations.

[108] The admissibility of the evidence of an anonymous witness in extradition proceedings was considered by the Jamaican Court of Appeal in **Vivian Blake v the Director of Public Prosecutions & Another** SCCA 107/96 (unreported) July 27, 1998 and **Ramcharan v Commissioner of Correctional Services** (2007) 73 WIR 312. The issue was also addressed by the House of Lords in **Re Al-Fawwaz v Governor of Brixton Prison** [2002] 1 All ER 545. In the Jamaican cases there had been no objection taken to the admissibility of the evidence before the Resident Magistrate's Court but in **Al-Fawwaz** there had been such an objection.

[109] Forte JA dealt with the issue starting at page 12 of the judgment of the Court of Appeal in **Vivian Blake**. He firstly examined the powers of a Magistrate in a matter involving extradition. He began by looking at the provisions of the Act. He addressed the issue of the right of the accused to know his accuser by holding that the Act contained provisions which were to enable the courts to abide by the provisions of the Constitution. He pointed to section 10 (1) of the Act which provides:

(1) A person arrested in pursuance of a warrant issued under section 9 shall, unless previously discharged under subsection (4) of that section, be brought as soon as practicable before a magistrate (in this Act referred to as "the court of committal") who shall hear the case 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.

(2) For the purposes of proceedings under this section, a court of committal shall have, as nearly as may be, the like jurisdiction and powers (including power to remand in custody or to release on bail) as it would have if it were sitting as an examining justice and the person arrested were charged with an indictable offence committed within its jurisdiction.

(3) Where the person arrested is in custody under a provisional warrant and no authority to proceed has been received in respect of him, the court of committal may, subject to subsection (4), fix a reasonable period (of which the court shall give notice to the Minister) after which he shall be discharged from custody unless an authority to proceed has been received.

(4) Where an extradition treaty applicable to any request for extradition specifies a period (hereinafter referred to as the treaty period) for the production of documents relevant to an application for extradition, any period fixed pursuant to subsection (3) shall be such as to terminate at the end of the treaty period.

(5) Where an authority to proceed has been issued in respect of the person arrested and the court of committal is satisfied, after hearing any evidence tendered in support of the request for the extradition of that person or on behalf of that person, that the offence to which the authority relates is an extradition offence and is further satisfied-

(a) where the person is accused of the offence, that the evidence would be sufficient to warrant his trial for that offence if the offence had been committed in Jamaica; or

(b) ….

> *the court of committal shall, unless his committal is prohibited by any other provision of this Act, commit him to custody to await his extradition under this Act; but if the court of committal is not so satisfied or if the committal of that person is so prohibited, the court of committal shall discharge him from custody.*

[110] Forte JA noted that the matter had not been canvassed before the Magistrate but pointed out that even if it had been canvassed she would have had no discretion to exclude based on section 14 and section 10 of the Act. He said:

> ***In any event, had the learned Resident Magistrate in the instant case been invited to exercise such a discretion, it is my view that given the provisions of the Act he would have no option but to receive the evidence and based on the depositions before him would have been bound to make the order committing the appellant to custody to await his extradition*.**

[111] The important thing to note from the judgment of Forte JA is that he took the view that once the statutory provisions were satisfied the evidence had to be received. It is after the reception of the evidence that the Magistrate then considers the contents in order to determine whether it could be relied on and whether it was sufficient for an order of committal to be made by virtue of section 10(5) (a). She does so by exercising the powers of an examining justice.

[112] It seems to me that the natural and logical conclusion from this is that so far as the reception of the authenticated documents are concerned it is to the statutory provisions governing the reception of evidence in extradition cases to which we must look and not the principles of common law. As far as the contents of the received documents are concerned, it is the law of evidence of the Requested State which must be considered.

[113] As to the rights under section 20 of the Constitution Forte JA had this to say:

> ***It is my view that the protection given to the citizen under section 20 (6) (b) is directed at securing that these facilities must be afforded him/her before any final conclusion of guilt or otherwise can be arrived at.***

A Magistrate conducting extradition proceedings does not determine guilt or innocence.

[114] In **Ramcharan** the issue of the reception of the evidence of an anonymous witness also arose. In that case the appellant complained that the evidence of the confidential informant was improperly received, there being no evidence of any reason why his name could not be revealed.

[115] On this particular point Harrison P, in his judgment, pointed to the jurat endorsed and signed by Theodore Klein indicating that the deponent had appeared before him, sworn and signed the affidavit. This the learned President took as an indication that the witness was a known individual who had appeared before the Magistrate Judge and swore to and signed the affidavit. He was therefore, not at that time, anonymous.

[116] Harris JA in her judgment alluded to the appellate court's decision in **Vivian Blake** on the point. She noted that the appellate court in that case having found that the affidavits of the anonymous informants purported to set out evidence given on oath and were duly authenticated, deemed them to be admissible in evidence under section 14.

[117] A similar situation obtains in the instant case. The authenticity of the document being unchallenged, the mere fact that the deponent was anonymous did not render the document inadmissible in the same way the obliteration of the witness's name in **Ramcharan** did not render that affidavit inadmissible.

[118] In my view when the Magistrate ruled in favour of receiving the affidavit evidence of the anonymous witness, she was correct. A reading of section 14 (1) (a) and (b) suggest to me that there is no discretion in the Magistrate acting under the Act not to receive testimony once it fulfilled the requirements of section 14 and is duly authenticated. It seems to me the Act envisages a two stage process in section 14 and in section 10. The first is the reception of admissible evidence under section 14. Here the Magistrate's role is to look at the documents to see if they fulfill the requirements and are duly authenticated. At that stage she shall admit them into evidence. The language of the statute is clear and is mandatory. In this regard the committing Magistrate is no different from an examining justice in a preliminary enquiry who has no discretion to refuse to admit admissible and relevant evidence.

[119] Lord Gifford, in the final stages of his submissions, having accepted and relied on the authority of **Trevor Forbes,** all but conceded that the Magistrate's duty was a two stage one.

SHOULD THE MAGISTRATE HAVE ACTED ON THE CONTENTS OF THE AFFIDAVIT OF THE ANONYMOUS WITNESS TO COMMIT THE APPLICANT?

[120] The second stage would then be for the Magistrate to consider the evidence provided to determine whether it was sufficient to commit the accused. This would necessarily include an assessment of whether the evidence of an anonymous witness should be relied on to commit the accused. In other words having received it pursuant to the statute should the Magistrate take any account of it? It is clear to me that it is only when the court comes to consider the contents of the documents, questions of who is the maker, is there anything in it that ought not to be, such as hearsay evidence, questions of fairness and the like will then be considered. The substantive rules of evidence and principles of fairness will then be considered and applied.

[121] In Re **Al- Fawwaz** the criticism of the Magistrate was that he should not have taken account of the affidavit of an anonymous witness. Whilst the House of Lords recognized the need for caution both at a trial and at inquiries such as extradition proceedings in admitting anonymous evidence, they also recognized that there was a clear jurisdiction to do so. The Law Lords considered it to be a question of whether the proceedings had been fairly conducted. In that regard there should be a balancing of the interest of the defence and the protection of the witness.

[122] Based on the judgment of Lord Hutton in **Re Al-Fawwaz,** the decision whether to act on evidence from an anonymous witness is a matter of deciding where the balance of fairness lies and is a matter for the discretion of the Magistrate or Judge. Lord Slynn at paragraph 44 of the same judgment puts it this way:

> ***It seems to me to me that the magistrate and the Divisional Court considered this matter carefully and were satisfied that the protection of the witness CS/1 made it necessary in all the circumstances to preserve his anonymity and that the interests of society in prosecuting required that the evidence be taken into account on the application for extradition. It would be a matter for the trial judge as to whether the statement should be admitted.***

[123] Having correctly received the duly authenticated document into evidence, ought the magistrate to have tipped the scales against the applicant and relied on it for committal in light of the fact that it was given by an anonymous witness? As accepted in **Ramcharan** this was a matter largely for the discretion of the Magistrate.

[124] I agree with counsel for the applicant that at this stage it is the duty of the Magistrate to conduct a meaningful judicial assessment as to whether the applicant would get a fair trial if he is committed on an affidavit done by an anonymous witness. One of the prevailing principles of the criminal law is that a

man has a right to confront his accusers. It is a general rule which may be departed from in certain circumstances. One such circumstance is whether the witness is in fear of his own life or the life of his family or any other harm or bodily injury. In assessing whether any such circumstances exist the Magistrate, in balancing the prevailing interest of the accused and that of the witness, should exercise his discretion in favour of where the balance lies.

[125] In **Vivian Blake** Forte JA juxtaposed the position in committal proceedings in respect of a request for extradition vis-a-vis a trial upon which a final conclusion of guilt or innocence would be necessary. He made a distinction between the authorities cited in the case of trials and those which were decided in the context of committal proceedings.

[126] Forte JA noted that in the case before him, the learned Magistrate was concerned with whether the evidence tendered was sufficient in our jurisdiction to establish the offence for which the appellant was charged in the Requesting State. He noted that the charges would have arisen out of grand jury indictments based on depositions of witnesses who remained anonymous. However, he noted that nothing suggested their identities were unknown to the US District Judge. On this point Forte JA had this to say:

> ***The non-disclosure of the names of these witnesses was obviously done with the acquiescence of the United States District Judge before whom they deposed, and no objection having been taken before the learned Resident Magistrate, she was entitled in my view given the reasons for the non-disclosure stated in the depositions, to admit into evidence, and, having done so she was obliged if they disclosed sufficient evidence to warrant his trial for the offences if they had been committed in Jamaica to commit the appellant given the provisions of section 10(5) (a) of the extradition Act.***

[127] Again Forte JA, in examining the cases dealing with anonymous witnesses, started with an examination of the circumstances where the court would depart from the general rule in the interest of justice. Such circumstances

involved cases where the application of the general rule in its entirety would frustrate or render impracticable the administration of justice or damage some other public interest. Such a departure may be sanctioned by parliament or by the courts where the court in the exercise of its inherent jurisdiction, justifiably departs from the general rule to the extent it feels it is necessary to achieve the ends of justice.

[128] The concealment of the identity of a witness is one such departure from the general rule that the accused has the right to know his accuser. In **Reg v Taylor** [1994] TLR 484 Evans LJ opined that such a departure was within the judge's discretion. He outlined five factors which were relevant to the exercise of such a discretion. These were:

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.*
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.*

[129] Forte JA was at pains to point out that Evans LJ was speaking in the context of trials and not committal proceedings and certainly not committal proceedings for the purposes of extradition which are governed by statute. He noted that the trial of the appellant would be governed by the procedures of the

Requesting State. He then went on to examine cases from the US from which he concluded that the procedures of the requesting state, in that case US, preclude the giving of evidence at trial by anonymous witnesses.

[130] He further stated that if the case were to be nevertheless judged by the factors outlined by Evans LJ in **R v Taylor** the Magistrate would of necessity have had to exercise the discretion to forego the identity of the witnesses in the process of the committal. He noted that the witnesses deposed as to being in fear and that the Requesting State's entire case rested on their evidence and must be considered so relevant and important as to make it unfair to ask the prosecution to proceed without it. He also noted that the Magistrate in the context of an extradition hearing would be entitled to come to the conclusion, in the face of no evidence to the contrary, that the creditworthiness of each witness was investigated and disclosed to the United States District Judge before whom they deposed. He also noted that the question of the disclosure of the witnesses would be reviewed at trial and therefore there would be no undue prejudice. He concluded by expressing doubt whether the Magistrate could rule on the balance of fairness where the question of the identity of the witnesses would once again be raised at trial.

[131] Lord Gifford argued that a distinction could be drawn between the case of **Vivian Blake** and the instant case. He argued that in the former case there was evidence in the deposition of the witnesses that they were in fear. In this case, he noted, there was no such evidence. Therefore, he argued, there were no real grounds for fear. In the absence of any real grounds for fear the Magistrate erred in relying on the evidence of anonymous witness CW-1. He argued that some reason ought to be given if the court were to find that there were any real grounds for it; the mere assertion of fear was not enough.

[132] In **Al Fawwaz** the confidential informant gave direct evidence of being involved in the conspiracy and of being in mortal fear. He needed anonymity at

that stage but expected his identity would be revealed at trial. The Magistrate felt herself satisfied that there were real grounds for fear. She applied the factors listed by Evans LJ in **R v Taylor** and although she did not accept that the creditworthiness of the informant had been investigated, she did consider it an issue for the trial court as it was rare for a witness at the committal stage to be so discredited that the court would consider his entire evidence worthless. This approach was approved by the House which held that the Magistrate was by his approach making a decision as to where the balance of fairness lay and he was entitled to find as he did.

[133] In the case of **Ramcharan** Harrison P examined the issue against the background of the principle that a man has a right to face his accusers. In considering **R v Taylor,** Harrison P relied on the following statement of Evans LJ:

> ***There must be real grounds for fear of the consequences if the evidence were given and the identity of the witnesses revealed…but in principle it might not be necessary for the witness himself to be fearful or to be fearful for himself alone. There could be cases where concern was expressed by other persons, or where the witness was concerned for his family rather than for himself.***

From this passage Harrison P accepted that the expression of fear need not come from the witness himself but it may emanate from others or be gleaned from all the circumstances of the case.

[134] Counsel for the first respondent relied heavily on this view in asking the court to consider the affidavit of the US attorney and the circumstances of the case, to conclude that the Magistrate had sufficient on which to exercise her discretion and weigh the balance in favour of committal.

[135] In **Ramcharan's** case there was affidavit evidence of the violent activities of the appellant and international drug traffickers which provided the Magistrate with relevant information of facts and circumstances from which he could infer

that anonymity was based on real grounds of fear. Lord Gifford lamented the absence of evidence of any such circumstance in the instant case. He cautioned that the existence of real grounds for fear could not be assumed in every case involving drug trafficking as there would be the risk of a claim for anonymity in all such cases.

[136] In cases involving international narcotics trafficking, the perception of violence is real. It may not be actual, but certainly for some, the threat of death or bodily injury and collateral damage is real. No doubt anyone who intends to testify against a person accused of involvement in international narcotic crimes would perforce cower in fear. For an illustration of this see the case of **Ramcharan**. Of course I take the point made by Lord Gifford that the court must guard against any universal assumption of such a fact.

[137] Applying the factors listed in the judgment of Evans LJ in **R v Taylor** to the instant case, on the issue of fear we see that upon an examination of the affidavit of CW-1 it is suggestive of the fact that he or she is likely to be an accomplice or a close associate of David. In those circumstances alone it would be justifiable to conceal his /her identity until trial because the danger to life and limb in those circumstances must be obvious. There was a clear attempt in the affidavit to disguise even the sex of the deponent.

[138] However, I have to agree with counsel for the first respondent, that the circumstances outlined in the affidavit of the agent Milton Lynn, which was before the Magistrate, that CW-1 was a confidential informant of many years whose co-operation with law enforcement had resulted in several arrests of those involved in the narcotic trade and seizures of illegal narcotic substances, presented a real ground for the concern for the safety of CW-1 expressed by the US attorney.

[139] Harris JA in **Ramcharan** was of the view that the factors in **R v Taylor** were persuasive but not binding, particularly in extradition proceedings. They

could not amount to an inflexible rule. In her view they could amount to no more than mere guidelines for Magistrates when deciding whether the testimony of an anonymous witness should be accepted or rejected. The Magistrate should carefully assess the evidence and determine whether a prima facie case had been made out against the accused, once she is satisfied that the affidavit containing the evidence was authenticated.

[140] The question of whether the accused is given the opportunity to confront his accusers is ultimately tied into the question of whether he will get a fair trial. If in making the assessment it appears to the committing Magistrate that at the trial he will be able to confront his accusers or despite the fact that he will not, he will still get a fair trial, the Magistrate may properly exercise his discretion to commit on that evidence given by an anonymous witness.

[141] In this case the Magistrate applied the common law principles in **R v Taylor** and found firstly, that there was an assertion of fear and that in the circumstances of this case there was a basis for such fear. Secondly, there was an undertaking given that at the trial in the Requesting State the witness will be identified. The Magistrate would have no reason to believe otherwise as there was an undertaking given to do so.

[142] As for the fear that the trial will be unfairly conducted because of the anonymity of the witness, I can only borrow from the words of Forte JA In **Vivian Blake** where he noted:

> ***…the ultimate trial of the appellant if he fails on this appeal, and is eventually extradited at the instance of the Honourable Minister will be governed by the procedures of the requesting State.***

This ultimately takes me back to the concern expressed by the applicant in his affidavit that he will not get a fair trial if the identity of the witness is not revealed at this stage. Separate and apart from the statement of the US attorney, the case

law emanating from the US suggest that the witness will have to be identified at the trial. It is also at that stage that the credit worthiness of the witness would be tested.

[143] The evidence by CW-1 is the only evidence against the accused outside of the evidence of his mere presence in the US at the time and any other potential documentary evidence the US attorney may possess. The evidence of CW-1 as to his arrival in Arizona at David's request, his participation in an agreement to switch vehicles and move cocaine is sufficiently relevant and important to make it unfair to ask the State to proceed without it. Without CW-1 the Requesting State has no case.

[144] The evidence of agent Lynn was that CW-1 had proven himself to be reliable and that he personally found him to be credible based on years of association. These are matters which would have been before the US Magistrate Judge Stephanie A. Gallagher for consideration. However, the affidavit of CW-1 was taken before US Magistrate Judge Beth P. Gestner and it cannot be assumed that the credit worthiness of CW-1 was examined by her. Of course there is no evidence that it was not. I however, do not believe it is necessary to determine that. In making that a part of her reasons the Magistrate was following the judgment of Forte JA in **Vivian Blake** and in this regard cannot be faulted. In my view the issue of creditworthiness is for the trial court and not for the committing Magistrate.

[145] I am also of the view that what is important is the certificate of the US Magistrate judge that she was apprised of the actual identity of CW-1 prior to his swearing to the affidavit. It is important as part of the Magistrate's assessment that she found that such a person actually existed and would be available at trial. It cannot be said that the Magistrate's decision to rely on the evidence of CW-1 was unreasonable or so irrational that no reasonable Magistrate properly directing herself could have arrived at the same conclusion.

[146] There would be no undue prejudice to the accused at this stage as he will be given the opportunity to face his accusers at trial. The court in **R v Watford Magistrates' Court, ex p Lenman** [1993] Crim LR 388 summed it up best when they said:

> ***If a magistrate was satisfied that there was a real risk to the administration of justice, because a witness on reasonable grounds feared for his safety if his identity were disclosed, it was entirely within the powers of the magistrate to take reasonable steps to protect and reassure the witness so that the witness was not deterred from coming forward to give evidence. If, however, the rights of an accused, particularly his ability to prepare and conduct his defence were thereby prejudiced, justice required the court to balance the prejudice to him and the interests of justice. It might well be that on substantial grounds being shown justice would require the witness's identity to be disclosed. It was difficult to think of a decision more dependent on the exercise of discretion than the magistrate's decision in this case. The court would not interfere with such a decision unless it was shown that it was so unreasonable that no that no magistrate properly considering it and properly directing himself, could have reached that conclusion.***

In the US the right to know the identity of the accuser is enshrined in the constitution and is one of their fundamental guarantees to life and liberty.

DID THE MAGISTRATE ERR IN FINDING THAT THERE WAS SUFFICIENT EVIDENCE TO COMMIT?

[147] The applicant's complaint in ground two relates to the Magistrate's treatment of the evidence given by CW-1 in holding that it contained sufficient evidence on which to act to commit him. Learned Queens Counsel argued that the case for the US depended solely on that evidence and was predicated on a single incident over a short period of time. This he claimed was insufficient to ground the charge. Furthermore, he pointed out that CW-1 claimed to have identified a person known only as Internet whom he pointed out from a photograph some six months later. He argued that the Magistrate ought not to have acted on that evidence as it was incredible and worthless. In his view the

Magistrate applied the wrong test when she found that there was "some evidence" and showed a failure on her part to properly weigh the evidence and reject it as worthless, unworthy of belief and manifestly unreliable.

[148] In this case the Magistrate gave reasons for her decision which was delivered September 9, 2011. The note of the oral decision was taken by counsel present at the time and is attached to the applicant's affidavit before this court. It was partially (to the extent that is relevant here) in these terms:

> *Whether a magistrate or a jury trial, it is not for the tribunal to withdraw the case from the jury where there is some evidence.*

The learned Magistrate in this finding was echoing the dicta of Lord Diplock in the case of the **Government of the Federal Republic of Germany v Sotiriadis** [1974] 1 All ER 692 at 705, where he said that the decision of the Magistrate could not be interfered with if there was some evidence to justify committal.

[149] Learned Queens Counsel argued that by taking this approach the Magistrate erred and this resulted in her erroneously basing her judgment on the assumption that if there was some evidence implicating the subject to the charge she must commit. This, he said, was a wrong approach to the law. He argued that on a proper approach the court would be bound to hold that, on the material submitted by the Requesting State, the evidence would be found insufficient by the domestic court as it depends on an identification which was unreliable and for which there was no supporting evidence.

[150] The applicant is charged on the grand Jury indictment with conspiracy. The indictment alleges conspiracy to distribute and possess with intent to distribute 5 kilograms or more of a quantity of a mixture or substance containing a detectable amount of cocaine in violation of Title 21 U.S.C. & 841 (a) (1) and 21 U.S.C. & 846. The particulars of this offence are that he did knowingly, intentionally and unlawfully combine, conspire and agree with others, known and

unknown, to knowingly and intentionally distribute 5 kilograms or more of a substance containing a detectable amount of cocaine. This is alleged to have occurred in the district of Maryland, the district of Arizona, in the District of New Jersey, and elsewhere.

[151] The US attorney outlined in his affidavit how the law on conspiracy is defined in US. I do not believe any issue can arise as to the fact of its similarity in all material particular to the law in Jamaica and indeed the English Commonwealth. The offence is not statute barred in the US. There is no limitation period for the prosecution of such offences in this jurisdiction.

[152] It is trite law that an agreement between two or more persons to do an unlawful act constitutes a conspiracy. It is often a matter of inference drawn from certain overt criminal acts of the accused, done in contemplation of and pursuant to a common criminal purpose. The conspiracy is complete the moment the agreement is made. It need not be written or even verbal. It may be expressed or implied. A conspirator need not know the full details of the conspiracy or the identity of all the parties to it. A person can become a party to a conspiracy at beginning or in the middle or nearing the end after it was initially formed. Though the conspiracy is complete the moment the agreement is formed, it is not dead; it is alive as long as it is being carried out by the conspirators. Any overt act by the conspirators is only evidence of the conspiracy. The prosecution only need prove the conspiracy as described in the indictment and that the accused was engaged in it or prove such circumstances from which a jury may presume or infer his connection with it. The prosecution must be able to prove that the act in question done by the accused was done in furtherance of the conspiracy.

[153] It might be necessary at this point to refer to section 5 of the Act as certain of its provisions may be germane to this issue. It states in part:

(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-

(a) in the case of an offence against the law of a designated Commonwealth State-

(i) it is an offence…

(ii) …..

(b) in the case 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.

[154] There is no dispute that the US is a Treaty State or that the offence for which the applicant's extradition is being sought is an extraditable offence under the section, it being one covered by Article 11 of the Treaty. Possession and distribution of cocaine are substantive offences under the Dangerous Drugs Act, Jamaica. An agreement by two or more persons to commit an unlawful act is a common law conspiracy triable on indictment. The conspiracy alleged in the indictment would amount to an offence of an equivalent nature in Jamaica.

[155] It might be necessary and convenient to highlight here the gist of the affidavit evidence of CW-1 which the US attorney claims point to a conspiracy. The evidence of CW-1 outlines incidents beginning from November 10, 2007 where he claims David, effectively, sent an individual to Connecticut to collect drug proceeds and return. He also speaks to other times in November 2007

where David is alleged to have collected sums of money from trailer drivers in Newark New Jersey. These trailer drivers were operating trailers with Quebec Canada registration plates. These monies David placed in nylon roller bags and travelled with them on Amtrak trains to California. On November 12, 2007, en route to California David is alleged to have stopped in Kansas made a phone call after which a man took a bag to him which contained cash. David arrived in California with the bags of cash.

[156] After arriving in California David is alleged to have checked into a hotel, went to several stores and purchased cell phones and nylon roller bags. He later met with two Hispanic males and handed over a nylon roller bag alleged to contain thousands of US dollars allegedly as payment for drugs. One of the Hispanic males was later identified by CW-1 in a photograph shown to him. On the morning of November 15, 2007 David is supposed to have loaded the remaining nylon bags onto a small plane and took off. He landed the next day in Arizona. He is alleged to have booked into the Holiday Inn. There he met with an Hispanic male from whom he received 80 kilograms of cocaine. CW-1 claims to have been present. He also claimed to have seen David hand this male a bag containing $250,000 which was partial payment for the cocaine.

[157] Later it is alleged that David picked up a man called Francis at the airport in Phoenix, Arizona went to the municipal airport to check on his plane then back to his hotel. He then left with Francis back to his plane in an effort to see if he was being followed. According to CW-1 he became aware that David was suspicious of being surveyed by law enforcement. CW-1 alleges that he saw David called person or persons in Canada for assistance in concealing the cocaine he had in his hotel room.

[158] On November 17, CW-1 alleges he saw David meet the same Hispanic at the front of the hotel and collect an additional 30 kilograms of cocaine packaged in a black nylon roller bag. CW-1 alleged that as a result of the call to Canada

that he had heard David make on the 16, on the 18 November he saw an individual known to him at the time only as Internet meet with David at the hotel. Internet went to David's hotel room and collected 110 kilograms of cocaine, in three bags. He placed them in a jeep which he had driven to the hotel. Internet was given the key to David's vehicle which he drove away from the hotel. The reason for this according to CW-1 was to ascertain whether David's vehicle was being followed by law enforcement.

[159] According to CW-1 after Internet was gone for some period of time he observed a text message he sent to David which read "its done". After, receiving this message David drove away in the Jeep to an airport where he loaded the bags containing the cocaine onto a plane.

[160] It is alleged that David met with an individual in New Jersey whom he instructed to deliver the said cocaine to a Canadian registered tractor trailer driver to transport to Canada. David was later informed that in error only two bags of cocaine was handed over to the trailer driver. David personally went to collect the third bag and met with another trailer driver in New Jersey and handed him the third bag containing 30 kilograms of cocaine. In the meantime, prior to this, law enforcement officers with the assistance of one of David's accomplices had substituted this bag of cocaine for another substance. The trailer driver was intercepted en-route to Canada and the substituted substance seized. The driver was arrested.

[161] On November 29, 2007 David was arrested in a hotel in New Jersey. Both were charged for conspiracy to distribute 5 kilograms or more of cocaine based on the seizure of the 30 kilograms of cocaine. That 30 Kilograms of cocaine is the same which was in one of the bags Internet assisted in moving from David's hotel room to the jeep which he had driven to the hotel. The 30 kilograms of cocaine which was seized was subsequently analyzed by Charles Matkovich, a chemist with the US Drug Enforcement Administration who determined the

substance was cocaine hydrochloride. The affidavit of Charles Matkovich was before the Magistrate for consideration. In his affidavit agent Lynn also claimed that he conducted a field test on the substance which came up positive for the presence of cocaine.

[162] David was also under surveillance by agent Lynn. According to him, he had David under surveillance from New Jersey to Arizona. On November 16, 2007, he attempted to follow David from an airport in Arizona during which time he alleged that David engaged in erratic driving which suggested to him that he was attempting to detect law enforcement. He followed him to the Municipal airport where he saw his plane, then onto a hotel in Arizona where he observed him entering and exiting the Holiday Inn hotel. The rest of his affidavit regarding the documentary information he gleaned on the movement of the applicant during that period is hearsay and of limited value, except to indicate that agent Lynn did certain things or caused certain things to be done. His affidavit continued with the movement of David and the bag which had contained the cocaine which he had substituted for some other product.

[163] It behooves me to note and to caution that whilst this court does not expect every document to be sent by the Requesting State, one would expect that if documentary proof of an offence is referred to in the affidavit of a witness, then that proof would be attached to the affidavit of that witness and form part of the authenticated records before the court. Mere reference to their existence is not enough. Where the rules of evidence of the Requested State is applied it will be held to be hearsay and worthless. If it were the only evidence relied on by the Requesting State, then the risk is that the request will be denied. If the documents referred to by agent Lynn had been attached, there would have been no need to call the makers thereof because of the amendments to the Evidence Act.

[164] To continue with the evidence, CW-1 subsequently identified an individual

in a photograph as the person known only to him at the time as Internet. The name of the person in the photograph was withheld from CW-1. This said photograph was shown to the applicant on his arrest. It was a photograph of the applicant.

[165] I felt it necessary to outline as much of the gist of the affidavit evidence as possible since it was necessary for the Magistrate not only to consider the direct evidence of participation of the applicant but the circumstances of the offence in which it was alleged he participated. There is no complaint that the evidence was insufficient to prove that there was a conspiracy to possess and distribute cocaine. The question is whether the applicant did an act and if so whether his action was in furtherance of that criminal conspiracy.

[166] The applicant contended that this evidence was full of deficiencies. He complains firstly, that CW-1 gave no evidence to prove that Internet opened the bags or that he knew they contained cocaine. Secondly, there was no evidence the contents of the bags were tested and proven to be cocaine. Thirdly, CW-1 does not state by what means he was able to conclude that the bags that were loaded into the Jeep by Internet were the same bags that were loaded onto the plane by David. Fourthly, there is no evidence that Internet sent the text message referred to by CW-1. Fifthly, there is no evidence of any conversation between David and Internet from which guilty knowledge or intent could be drawn. Finally, CW-1 makes an assumption (without proper evidential basis) that Internet had arrived from Canada as a result of a phone call from David. It was submitted that it would appear absurd for someone to fly from Toronto to Arizona for the sole purpose of taking part in the switching of a motor vehicle.

[167] He also complained of the identification of the applicant seven months later by means of a photograph presented to him by agent Lynn. He argued that these circumstances of identification were questionable, for the following reasons:

(1) *There is no evidence that CW-1 knew Internet before 18th November 2007; nor was there evidence that CW-1 had any subsequent encounter with Internet, prior to identification; and so the issue of recognition would not arise.*

(2) *The evidence described by CW-1 is limited to the collection of bags and placing them in a Jeep by Internet, all of which could have happened in the space of a few minutes, there being no evidence of the length of time CW-1 had Internet in his view.*

(3) *The identification was by photograph.*

(4) *There was no evidence of any fair identification procedure being conducted, such as the compilation of an album of photographs.*

(5) *There was a lapse of time of some seven months between the alleged crime and the identification.*

[168] A Magistrate acting pursuant to section 10 sub-section 5 of the Act would have to satisfy herself that in all the circumstances, there was sufficient evidence to go to trial for conspiracy if the offence had taken place in Jamaica and the accused was being tried in Jamaica. The committing Magistrate is mandated to hear the case in the same manner, as nearly as may be, as if he were sitting as an examining justice and as if the person were brought before him charged with an indictable offence committed within his jurisdiction.

[169] The Magistrate is therefore obliged to hear the case as if he was conducting an inquiry to determine whether there was a prima facie case for committal to the circuit court for trial on an indictment. See the case of **Boyd v Commissioner of Correctional Services and another** SCCA No. 47/2003 (unreported) delivered February 18, 2004, judgment of Cooke JA. If the matter was one which, on the evidence before her, the Magistrate, sitting as an examining justice, would not have committed to circuit court for trial for an

indictable offence, she ought not to commit for extradition. Section 43 of the Justice of the Peace Jurisdiction Act sets out the criteria for committal, where it states inter alia;

> *…such evidence is sufficient to put the accused party upon his trial for an indictable offence, or if the evidence given raised a strong or probable presumption of the guilt of such accused party…*

[170] In **Boyd** Cooke JA approved the statement of Lyell J in **Regina v Governor of Brixton Prison and another, Ex-parte Armah** [1966] 3 WLR 23 where he held that a "strong or probable presumption" required no more than the establishment of a prima facie case. This is based on a finding that there was the presence of such evidence that if it were not contradicted at the trial a reasonable jury may convict. Lyell J was there referring to section 25 of the English Indictable Offences Act 1848 which was identical to that formulation set out in section 43 of the Justice of the Peace Jurisdiction Act.

[171] The standard by which a Magistrate sitting as an examining justice in an extradition case is required to act in respect of the evidence is therefore, that provided for in section 43 of the Justice of the Peace Jurisdiction Act. In finding whether a prima facie case exist upon which to put the accused to trial questions of credibility in committal proceedings are not normally a matter for the committing Magistrate to consider. See the Privy Council's decision in **Brooks v DPP and others** (1994) 31 JLR 16.

[172] This begs the question as to what test the learned Magistrate was obliged to apply in this instant case and in the application of that test what should her approach have been? Learned Queens Counsel submitted that the proper test was that laid down in the **United States of America v Ferras** [2006] 2 SCR 77 and **R v Governor of Pentonville Prison and another, Ex-parte Osman** [1989] 3 All ER 701. He argued that in the instant case the learned Magistrate had failed to apply either test and as a result relied on evidence that ought to have been

rejected as worthless and/or implausible. He said also, that having regard to the insufficiency of the evidence the Magistrate erred in making an order for the extradition of the Applicant. His complaints may be summed up thus:

1. *In the present case the learned Resident Magistrate declined to engage in a weighing up (**Osman**) or a limited weighing (**Ferras**) of the evidence to determine whether there was a plausible case. The learned Resident Magistrate said that where there is some evidence of the offence it was not for her to withdraw the case from the jury. This is not the test that ought to be applied.*

2. *If the approach of the learned magistrate was erroneous, the Court must consider whether, applying the right approach, the extradition order should have been made. That the evidence brought against the applicant fell far below the threshold of plausibility.*

[173] In **Ex-parte Osman** the Court of Appeal considered the test to be applied by the Magistrate in reviewing the evidence to determine whether to make an order of committal in extradition proceedings. In that case the court opined at page 721:

> ***In our judgment, it was the magistrate's duty to consider the evidence as a whole, and to reject any evidence which he considered worthless. In that sense, it was his duty to weigh up the evidence. He was neither entitled nor obliged to determine the amount of weight to be attached to any evidence or to compare one witness with another. That would be for the jury at the trial.***

[174] The question of what was the proper test was also considered by the Canadian Supreme Court in **Ferras.** There the court held, at paragraph [9] that:

> ***The extradition judge's role and the test for committal have been described in a variety of ways, including a 'prima facie' case, a 'sufficient case', a 'good' case, an 'adequate' case, a case providing 'reasonable grounds' for extradition, and a case 'justifying' extradition. But the basic premise has***

remained constant. A judge cannot order extradition unless there is evidence of conduct that would justify committal for a trial in Canada.

[175] The court further stated at paragraph [26]:

…The principles of fundamental justice applicable to an extradition hearing require that the person sought for extradition must receive a meaningful judicial determination of whether the case for extradition prescribed by s. 29(1) of the Extradition Act has been established – that is, whether there is sufficient evidence to permit a properly instructed jury to convict. This requires an independent judicial phase, an independent and impartial judge and a judicial decision based on an assessment of the evidence and the law.

[176] The court made further observations on the proper approach to be adopted and said at paragraph [54]:

Challenging the justification for committal may involve adducing evidence or making arguments on whether the evidence could be believed by a reasonable jury. Where such evidence is adduced or such arguments are raised, an extradition judge may engage in a limited weighing of evidence to determine whether there is a plausible case. The ultimate assessment of reliability is still left for the trial where guilt and innocence are at issue. However, the extradition judge looks at the whole of the evidence presented at the extradition hearing and determines whether it discloses a case on which a jury could convict. If the evidence is so defective or appears so unreliable that the judge concludes it would be dangerous or unsafe to convict, then the case should not go to a jury and is therefore not sufficient to meet the test for committal.

[177] If I am to understand clearly and accept the reasoning of the court in **Boyd, Ex-parte Osman** and **Ferras**, I could only conclude that a Magistrate hearing a matter for extradition must firstly ensure that an offence has been committed. In this regard the Magistrate will be assessing whether or not the elements of that offence exists on the evidence. If it does, the Magistrate will then be obliged to assess whether there is sufficient evidence to show that the offence

for which extradition is being sought was indeed committed by the accused. In that regard she would be weighing up the evidence not weighing the evidence. The former is an assessment of sufficiency the latter is an assessment of quality.

[178] In my view there was sufficient evidence on which the Magistrate could conclude that there was a conspiracy to possess and distribute cocaine in the Requesting State, based on the affidavit evidence of the activities of David and his accomplices. The question which arises is whether and what part did the applicant play, if any. Was the evidence of CW-1 sufficient to raise a prima facie case that the applicant was present and part of an agreement to possess and distribute cocaine, or did he do an act or acts in furtherance of this conspiracy?

[179] There is evidence of David's movements. There is evidence he was moving cocaine. There is evidence of his erratic driving suggestive of concerns he was being surveyed. There is evidence that this concern resulted in a phone call to Canada. There is evidence of the arrival of Internet in Arizona. There is evidence of him arriving at the same hotel in which David was staying. There is evidence he was in David's room. There is evidence of "something more" than mere presence in David's room. He handled the bags containing cocaine by taking them from the room and placing them into the vehicle in which he had driven to the hotel. There is evidence that David took this vehicle whilst he took David's vehicle and drove away. There is evidence of the text message "it is done", of which the meaning to be attached is best left to a tribunal of fact. There is evidence David drove the vehicle Internet arrived in away from the hotel. There is evidence that one of these same bags containing cocaine was eventually intercepted by US law enforcement officers on its way to Canada.

[180] Can it be said that the actions of the man called Internet were such that if the evidence of it were not contradicted at trial a reasonable jury may convict? In my view, though some may consider that this is not the strongest of cases, it cannot be said that the Magistrate erred when she said there was "some

evidence". In saying this, I take her to mean that although the Requesting State failed to present all the evidence it had they presented some of it and the some presented was sufficient to raise a prima facie case. She could have meant nothing else. Contrary to the view of learned Queens Counsel, this indicates that the Magistrate adopted the proper approach and weighed up the evidence. Whilst it was not her duty to weigh the evidence she did weigh up the evidence. The Magistrate having weighed up the evidence was correct to view it as sufficient evidence on which a right minded jury, if it were not contradicted at trial, might find the applicant guilty of the charge.

[181] There was a complaint that there was no evidence of how Internet could have known the contents of the bag. He had for a short time custody and control of bags allegedly containing cocaine. The inference to be drawn from the affidavit of CW-1 is that the persons in the room knew the bags contained cocaine, but in any event the question of willful blindness would be one for the jury.

[182] I accept that the contents of the affidavit of agent Lynn as regard the documentary evidence of the applicant's arrival in Arizona, rental of a car and booking into a hotel was of little evidentiary value before the Magistrate. Nevertheless, it is not unusual for prosecutors to present, at preliminary inquiries, only so much of the evidence as would raise a prima facie case and to adduce further evidence at the trial.

THE QUESTION OF THE IDENTIFICATION OF THE APPLICANT

[183] Lord Gifford complained that the identification of the applicant was weak, worthless and unreliable. He submitted that the Magistrate ought to have followed the guidelines in the cases on identification and rejected the identification of the applicant as improper and weak. He quoted the guidelines in **R v Turnbull** [1977] 1 QB 224**,** which are now so well known that I need not repeat them here. He also cited the Jamaican Court of Appeal in **Donald Francis**

v R SCCA No. 83/2004 (unreported) delivered June 19, 2009, where it was said that even in recognition cases the Judge must engage in a rigorous analysis of the evidence of the identifying witness based on the guidelines in **Turnbull.**

[184] He also cited **R v Noel Williams**, Privy Council Appeal No. 11 of 1996 delivered March 13, 1997, where it was held that where the witness did not know the suspect well, an identification parade was the proper means of identifying the suspect. Lord Gifford ultimately relied quite forcefully on the case of **Puerto Rico (Commonwealth**) **v Hernandez** (No.2) [1973] F.C. 1206, 1N.R.46, a judgment of the Federal Court of Canada.

[185] In that case the extradition Judge applied a test of "probably guilty" and concluded that the evidence did not show that the respondent was probably guilty. The issue was one of identity. The case for the state depended on the correctness of the identification of the sole eyewitness who had, what amounted to a fleeting glance at the accused, in difficult circumstances. The Federal court approved the extradition judge's conclusions.

[186] On the question of the identification of the applicant in the instant case, the note of the Magistrate's decision is in this vein:

> *In respect of the photograph my purpose is to determine whether the person being requested is the person whose photograph appears in the authenticated documents. The investigating officer said Mr. Giguere accepted that the photograph was of himself and he signed thereto. I am satisfied that the person arrested is the person before the court.*

[187] With regard to the sufficiency of the evidence the note of decision states;

> *In the circumstances the evidence of CW1 is that he did certain things and those acts amount to involvement in a conspiracy. It is*

for me to determine whether the acts in question amounted to a conspiracy. A person can join a conspiracy at anytime as long as it can be shown that he joined the conspiracy, knowing what it was. He can join in the middle. That is sufficient. He lent his assistance. Based on the evidence of CW1 Mr. Giguere was acting as part of a conspiracy. Based on the circumstances of the matter he would be committed to stand trial on the evidence.

[188] The question for this court is whether on the material before the magistrate taken as a whole it was a gross error of judgment to commit. As said by the court in **Hernandez**, evidence to justify commitment and not conviction is sufficient. It is not necessary that the evidence be elevated to proof beyond reasonable doubt as would be required at trial to sustain the charge or secure a conviction. Evidence required to hold an accused to stand his trial required only that a prima facie case be made out.

[189] In this case the evidence of CW-1 is that the applicant was known to him as Internet. It is clear from the affidavit that this person was known to the witness prior to November 18, 2007. The witness was someone himself involved for years in the narcotic trade. Whilst the identification of the applicant by photograph may not have been of the best means by our standards, the ability of the witness to see and recognize the applicant as the person who arrived at the hotel and moved the bags can be inferred from his evidence.

[190] As stated by McLachlin J in **Kindler v Canada** (1991) 2 SCR 779, extradition law is unique to all domestic legal systems and is based on reciprocity, comity and respect for differences in the other jurisdictions. It means that extradition law must necessarily accommodate factors foreign to our domestic laws.

[191] Ultimately, questions involving the length of time the incident took,

distance and the length of time for which the applicant was known to the witness can best be left to the trial court. See **Herbert Henry et al v The Commissioner of Corrections and another** SCCA Nos. 62, 63, 64, 65, 66, 67/ 2007 (unreported) delivered July 4, 2008 (at page 54 on this point). The issue of fairness in the manner of his identification is also best left to the procedures of the courts in the Requesting State. This case is distinguishable from **Hernandez**. Since I take the view it was a recognition case, the opportunity for recognition was not fleeting and neither was it made in difficult circumstances. I do not think I need to go into questions regarding whether some other procedure akin to identification parade should have been held, since in the circumstances of this case none could have been held until the applicant was held and the applicant could not have been held until he was identified.

[192] It is clear from the Magistrate's reasons that after ensuring that the correct person was before her, she went on to weigh up the evidence presented, finding firstly that there was a conspiracy and that there was evidence that he did certain acts. Secondly, that those acts amounted to assisting in a criminal conspiracy, that he was part of the conspiracy and that the circumstances of the case as presented to her, warranted a committal.

[193] It cannot be said that the Magistrate was wrong in taking this approach. This ground fails.

IS IT UNJUST OR OPPRESSIVE TO EXTRADITE THE ACCUSED?

[194] It was submitted that it would be unjust and oppressive to extradite the applicant given the passage of time since the alleged offence was committed; that at this distance it would be impossible for him to recall what he was doing on this particular day, at this particular time and therefore he would be prejudiced in conducting an adequate defence against the charges, leading to unfairness in his trial. The applicant argued that there had been a delay of over 3 years during which time he lived openly and freely in Canada and travelled extensively.

[195] Under Section 11 of the Act the Supreme Court has the power to order the discharge of a fugitive if it appears that by reason of the passage of time since he is alleged to have committed the offence or to have become unlawfully at large it would, taking all the circumstances into account be “unjust or oppressive to extradite him”.

[196] This section of the Act is similar to the UK legislation. It does not require this court to determine whether it was unjust or oppressive to try the accused but only to consider whether it would be so unjust or oppressive to extradite him for trial. It is for the accused to show, on a balance of probabilities that it would be unjust and oppressive to extradite him by reason of the passage of time. If he so succeeds, in the absence of a reasonable explanation for the delay, he is to be discharged.

[197] In **Kakis v Republic of Cyprus** [1978] 1 WLR 779, the House of Lords, considered the meaning of the words “unjust or oppressive”. Lord Diplock stated at page 782:

> ***Unjust” I regard as primarily directed to the risk of prejudice to the accused in the conduct of the trial itself, “oppressive” is directed to hardship to the accused resulting from changes in his circumstances that have occurred during the period to be taken into consideration; but there is room for overlapping, and between them they cover all cases where to return him would not be fair.***

[198] The Court considered **Kakis** in the case of **Kociukow v District Court of Bialystok III Penal Division** [2006] EWHC 56 (Admin). In that case a Polish national was ordered extradited from the UK to Poland after six years in connection with a robbery and attempted robbery. During those six years he had lived openly and lawfully in the UK. The Court was of the view that there was a real risk of prejudice to the defence by the passage of time. There had been no indication as to the nature of the evidence against the accused. The court expressed concern as to the risk of a wrong conviction if the case depended on

identification evidence. The court also took the view that since the accused was not to be blamed for the delay it would be unjust to extradite him in those circumstances. The court further held that the lack of any explanation for the delay on the part of the Requesting State was relevant to its decision.

[199] In **Walter Gilbert Byles v The DPP** SCCA No. 44/96 (unreported) delivered October 13, 1997, the appellant was alleged to have committed certain offences in the US between1986-1988. A warrant of arrest was issued for him in the US on 7th July 1988 and the relevant extradition request came on 27th September 1993. The Jamaican Court of Appeal in discharging him approved **Kakis**, stating at page 20 that:

> ***…the effect of the passage of time would be 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 view, having regard to all the circumstances of this particular case that it would be unjust and oppressive to extradite the Appellant.***

[200] In **Desmond Brown v DPP** SCCA No. 91/00 (unreported) delivered on April 2, 2004, the Court of Appeal said that if the passage of time is to give cause for the release of a fugitive the Court must substantiate the injustice or oppression alleged. It added that the Court must satisfy itself that the circumstances indicate that the trial itself may be tainted with unfairness due to the passage of time.

[201] The fact that an accused has lived openly for a number of years is relevant in my view only to the question of whether he was a fugitive or not. It cannot be relevant to whether there is a decision to charge or not and when that decision is taken. That factor standing alone is not suggestive of injustice or oppression. It depends on the circumstances of the case, the nature of the evidence and the possibility of a fair trial.

[202] In this case the applicant would have no difficulty in answering the charge despite the passage of time. Three years is not an inordinate delay. Furthermore, even if one considers the delay up to the point of this hearing, although it appears to be a long time, in the circumstances of the case and the offence alleged is not so old or so stale as to make it impossible for the applicant to mount a proper defence. Although the affidavit evidence referring to the existence of documentary evidence is of no evidential value at this stage it does however, serve to give notice to the applicant of what it is proposed to call against him. The evidence, unusually so, is also quite specific as to time and place and activity relied upon to ground the charge. It is not as if the defence would have to depend on documents which no longer exist or the oral evidence of witnesses whose recollections have faded. It does not seem to me likely that the integrity of the trial would be compromised by the passage of time or that the domestic law of the requesting state would fail to provide procedural safeguards.

[203] There is nothing inherent in the domestic law of the Requesting State that would cause this court to conclude that the applicant will not get a fair trial. There is no risk of prejudice to the accused in the conduct of trials in the US. The issue was considered by the judicial board of the Privy Council in the case of **Knowles v Government of the United States and another** (2006) 69 WIR 1. The Board considered the decision of **Woodcock v Government of New Zealand** [2004] 1 All ER 678. It was held in that case that the courts of the Requested State had a duty to have regard to the safeguards under domestic law of the Requesting State to protect an accused against a trial rendered unjust or oppressive by the passage of time. It also noted that there was no “rule of thumb” to determine whether any particular passage of time has rendered a fair trial impossible and there is no cut off point beyond which, as a result of a passage of time, extradition cannot take place because it would be unjust or oppressive.

[204] These types of matters have a statutory limitation period in the Requesting State which had not expired at the time of the grand jury indictment. Broadly considered, the matter is one left at the discretion of the court. The Requesting State has an advanced and sophisticated legal system, where due process is usually followed. I am not concerned that the passage time (even in the absence of an explanation) will result in an unfair trial in those courts. There are undoubtedly cases which are so old and stale that that any reasonable person would say it is unjust and oppressive to return the accused for trial. This case cannot be viewed in that light. This ground also fails.

GOOD FAITH

[205] Although this was not substantively argued there was a complaint in ground 3 and in the applicant's affidavit that he considered his apprehension in Jamaica rather than in Canada to have been done deliberately, that it had caused him hardship and had prejudiced his ability to secure a fair trial. This in my view is an allegation of bad faith on the part of the Requesting State.

[206] There is no evidence the Requesting State acted in bad faith. The fact that the applicant was apprehended in Jamaica rather than in Canada or any other country is not prima facie evidence of bad faith. In **R v Governor of Pentonville Prison & Another, Ex-parte Lee** [1993] 3 All ER 504 Ognall J said at page 509:

> ***It is of course right to observe that the law of extradition proceeds upon the fundamental assumption that the requesting state is acting in good faith and that the fugitive will receive a fair trial in the Courts of the requesting state. If it were otherwise, one may assume that our Government would not bind itself by treaty to such a process.***

[207] Forte JA in **Vivian Blake** referring to the above statement of Ognall J said at page 6:

> ***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.***

He took the view that against that presumption an allegation of bad faith must be put forward on very strong ground.

[208] There is no provision in the Act that states that a person must be apprehended in his own country. Section 6 of the Act states:

> *6. Subject to the provisions of this Act, a person found in Jamaica who is accused of an extradition offence in any approved State or who is alleged to be unlawfully at large after conviction of such an offence in any such State, may after conviction of such an offence in any such State, may be arrested and returned to that state as provided by this Act.*

Any suggestion that he was deliberately apprehended in Jamaica because of compliance issues is unworthy and without merit.

[209] The application for Writ of Habeas Corpus is denied.

ORDER

G. SMITH J

Application for writ of habeas corpus dismissed. No order as to costs.