Judgment Book

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN FULL COURT

SUIT NO. M.120 OF 1996

BEFORE: THE HON. MR. JUSTICE LLOYD ELLIS
THE HON. MR. JUSTICE LANGRIN
THE HON. MISS JUSTICE BECKFORD

REGINA

VS.

DIRECTOR OF PUBLIC PROSECUTIONS
DIRECTOR OF CORRECTIONAL SERVICES
EXPARTE RORY GORDON.

Dennis Daly Q.C. & Ian Ramsay for Applicant
Lloyd Hibbert Q.C. & Miss Shelly for Director of Public Prosecutions
Lackston Robinson & Miss Allaise Johnson for Director of Correctional Services.

Heard: January 21, 22 & May 15, 1997

ELLIS, J.

I have read the judgment of Langrin J on the Motion for Habeas Corpus. The judgment is attractive of my complete agreement and there is nothing that I could add.

LANGRIN, J.

This is an application by Rory Gordon, a Jamaican national for a writ of Habeas Corpus to issue for his release from an Order of Committal under the Extradition Act 1991 that he be extradited to answer charges on indictment preferred against him in the Circuit Court of the Seventeenth Judicial Circuit, Broward County, Florida. Her Honour, Miss Marcia Hughes, Resident Magistrate for the parish of St. Andrew on the 25th November 1996 issued her Warrant of Committal at the conclusion of a hearing and ordered that he be held in accordance with the provisions of the Extradition Act 1991.

The applicant is charged with two counts of armed burglary, one count of armed kidnapping, two counts of robbery with a deadly

weapon, four counts of armed sexual battery as a principal in the first degree. Each count of armed kidnapping and armed sexual battery is punishable by life imprisonment.

A summary of the allegations shows that on December 15, 1993 the applicant and his co-defendant randomly entered the home of an eighteen year old woman in Broward County, kidnapped her at knife point, forced her into her car and drove her around town. They then brutally raped her, including various forms of vaginal penetration, and forced oral sex. Further, they drove her to a location, abandoned her there and then threatened to harm her if she tried to report the crime.

I now turn to the grounds upon which the application is founded. They are as follows:

1. That the evidence of identification tendered by the Requesting State was inadmissible by Jamaican law and by virtue of Section 10(5) of the Extradition Act 1991. That accordingly on a critical issue, the Requesting State has failed to make out a prima facie case against the applicant.

2. That alternatively, the evidence of identification tendered by the requesting State was insufficient to warrant the trial of the applicant for the alleged offences if those offences had been committed in Jamaica, as required by Section 10(5) of the Extradition Act 1991.

3. That the Extradition Treaty between Jamaica and the United States of America was not incorporated into municipal law until the 2nd day of February 1995, by publication in the Gazette of the Ministerial Order subject to affirmative Resolutions of Parliament as required by Sections 30 and 31 of the Interpretation Act. That accordingly the Minister's Authority to Proceed herein under the Extradition Act 1991 given on the 8th day of August, 1994 was null and void.

GROUND 1

This ground is concerned with the admissibility of the Identification evidence tendered by the Requesting State.

Mr. Dennis Daly Q.C. submitted that the evidence of identification of the plaintiff in so far as it related to the photograph allegedly identified by the complainant did not render the photograph admissible in evidence under Jamaican Law because the photograph though labelled an exhibit was not identified and certified i.e. sworn to as required by our law. He referred the Court to Section 428 of the Judicature (Civil Procedure Code) which states as follows:

> "428. Every certificate on an exhibit referred to in an affidavit, signed by the officer before whom the affidavit is sworn, shall be marked with the short title of the cause or matter."

Counsel for the applicant argued that the affidavit of Karla King contains the evidence of identification and was sworn before a Notary Public in the State of Florida who did not purport to be an officer of the Court in the approved State. He points to Exhibit N which bears no certification as officer of Court.

Mr. Lloyd Hibbert Q.C., Counsel for the Respondents met these arguments squarely by submitting that by reason of Section 14 of the Extradition Act the affidavit of Karla King is admissible in any proceedings under the Act. He further submitted that the photograph marked KK dated 4th April, 1994 formed a part of affidavit of King and was duly authenticated and therefore properly receivable in evidence by virtue of Section 14(1) if the Act.
Additionally the affidavit of King with attached photograph was exhibited in proceedings in the U.S.A. when Anne Alper gave a deposition before Justice Kaplau, Circuit Court Judge. Further and in addition the documents were certified by all, being in a bundle under seal of the Attorney General and Secretary of State of the U.S.A.

Section 14-(1) of the Extradition Act provides as under:-

> "14-(1) In any proceedings under the 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) .....

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

(a) in the case of 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 officer of the Court in or of the approved State in question or an officer of the diplomatic or consular service of that State ....

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

(c) .....

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.

All the documents including the affidavits of Karla King in relation to identification of the applicant were received in evidence in proceedings in the approved State of the U.S.A. Additionally they were duly authenticated having been certified and sealed by the relevant authorities of the requesting State. These affidavits formed part of a bundle referred to as certified and sealed by the Department of State of the United States of America.

On this ground the applicant has failed.

This now leads me to the second ground.

GROUND II

This ground is concerned with the sufficiency of the evidence relevant to Identification. Counsel for the applicant submitted that the requesting state must ensure the manifest fairness of the identification avoiding any risk of erroneous identification.

Reference was made to the absence of caution consistent with the Judges Rules as well as the lack of advice to the applicant to have Counsel.

Section 10 of the Extradition Act deals with proceedings for committal. The relevant subsection is stated as under:

"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

(c) .....

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 is so prohibited, the Court of Committal shall discharge him from custody."

The applicant relied on a number of cases relating to the strength or weakness of photographic identification evidence in a trial. These cases are all distinguishable from the instant case. In a Court of Appeal decision Robert John Maynard & Others 1979 L.R. 309, it was held that although an identification by photograph not followed by an identification parade has plainly dangers analogous to the dangers of a dock identification; nevertheless such evidence is admissible provided the trial Judge warns the jury to disregard it unless it accords with the principle laid down in Turnbull (1976) 63 Cr. App. R. 132 - for everything depends upon the jury's view of the strength or weakness, as the case may be of the particular identification.

I accept Mr. Hibbert's submission that there is no requirement for caution to be administered by the police officer before showing the applicant the photograph. Equally significant is the absence of any evidence of unfairness relating to the identification evidence. In any case the question of fairness is a matter for jury.

The role of the Resident Magistrate is limited to hearing the evidence tendered in support of the request for the extradition of the applicant and determine whether:

(i) the offence is extradictable offence

(ii) the evidence would be sufficient to warrant his trial if the offence had been committed in Jamaica.

This is so far reasons for convenience, efficiency and the saving of time. The Resident Magistrate then must stay within the confines of her jurisdiction. All that the Resident Magistrate needs is to establish a prima facie case. Once a prima facie case has been established then the Resident Magistrate will commit. In the case of Alves v. Director of Public Prosecutions (1992) 4 ALL E.R. 787 the House of Lords adopted a flexible approach. The Magistrate should reject any evidence which he regarded as wholly worthless. If, however, the prosecution evidence was such that its strength or weakness depends on the view taken of its reliability the magistrate was entitled to act upon the evidence in deciding whether to commit.

The Learned Resident Magistrate had clearly taken that view of the evidence and that was a conclusion to which she was entitled to come on the facts. The Resident Magistrate is not concerned with proof of the facts or the possibility of other relevant facts or the likelihood of any defence. These are matters for trial in the foreign state.

On this ground also the applicant has failed.

I now turn to the third and final ground.

GROUND III

This ground is concerned with the question whether the provisions of the Extradition Treaty between Jamaica and the United States were incorporated into municipal law.

The relevant provisions of Section 4 of the Extradition Act provide as follows:

> "4-(1) Where any extradition treaty has been made with any foreign State, whether before or after the commencement of this Act, the Minister may, by order, declare that the provisions of this Act shall apply in respect of such foreign State, subject to such exceptions, adaptations or modifications, as the Minister, having due regard to the terms of such treaty, may deem expedient to specify in the order for the purposes of implementing such terms.

> (2) As regards any treaty or agreement made prior to the commencement of this Act in relation to the extradition of fugitive offenders, all instruments made under any enactment (whether in Jamaica or in the United Kingdom) to give effect in Jamaica to the provisions of any such treaty or agreement, if in force at the date of commencement of this Act shall continue to have effect as if made under this Act until other provision is made pursuant to subsection (1).
>
> (3) The Minister may from time to time by order, compile and publish in the Gazette a list of foreign States with which extradition treaties or agreements binding on Jamaica are in force; and, without prejudice to any other form of proof of the existence of such a treaty or agreement, such a list shall, in any proceedings, be conclusive evidence that an extradition treaty or agreement is in force between Jamaica and each foreign State named in the list.
>
> (4) An order under this section shall be subject to affirmative resolution."

The provisions of the Act apply to the United States of America vide Section 4 subsections (1) and (3) of the Act and the Extradition (Foreign States) Order 1991. While the Order is dated 11th June, 1991 it was published in the Jamaica Gazette Supplement on 27th June, 1991. The affirmative resolutions were tabled in the House of Representatives on the 15th day of August, 1991 and in the Senate on the 13th day of September, 1991.

It is also significant to note that the Act was dated on the 14th March 1991 but it did not come into operation on 8th July, 1991.

Mr. Ramsay, Learned Counsel for the applicant made the following submissions:

The Order made under Section 4 of the Act brings into effect the provisions of the Treaty between the United States and Jamaica as it applies the Extradition Act to the foreign States in terms of the treaty.

(2) That order cannot be published in the Gazette under Section 31 of the Interpretation Act so as to give it legislative effect before its condition precedent is satisfied namely the affirmative resolution.

(3) Equally, before the Act itself comes into force any purported order made thereunder is a nullity.

(4) In the result the proceedings flowing from the Minister's authority to proceed given under the 1991 Act are null and void, hence habeas corpus will be available.

Under the Interpretation Act "Regulations" includes 'orders'. Section 31(1) of the same act states as under:

> "31.-(1) All regulations made under any Act or other lawful authority and having legislative effect shall be published in the Gazette and unless it be otherwise provided shall take effect and come into operation as law on the date of such publication."

Section 30(2) provides as follows:

> "30-(2) The expression "subject of affirmative resolution" when used in relation to any regulations shall mean that those regulations are not to come into operation unless and until affirmed by a resolution of each House of Parliament."
>
> (emphasis supplied)

The Order which was published on 27th June 1991 complied with the provisions of Section 31(1) of the Interpretation Act. However, as stipulated in Section 30(2) the order did not come into operation until the 15th day of September 1991 when the affirmative resolution was approved by the Senate. The reasoning which supports the conclusion is essentially positive and straight forward. The Extratition Act provides that the Order shall be subject to affirmative resolution. The legislature must have intended that the provisions of the Act shall apply to the foreign State in relation to the treaty as soon as both the House and Senate approved the affirmative resolution. What else could 'subject to affirmative resolution' mean? Accordingly, the validity of the Order depends on whether or not the resolution was approved. That being so, the applicant cannot complain of any invalidity. It is plain that there is no requirement for the

resolution to be published. Nothing therefore turns on the Ministerial Order which was published in the Gazette on 2nd February, 1995 nor the fact that an Order was published before the Act came into force.

The Minister's authority to proceed signed by him on the 8th August, 1994 was therefore valid and provided the legal basis for the learned Resident Magistrate to adjudicate.

This ground also fails.

Accordingly the application for habeas corpus fails and I would dismiss it.

It now only remains for me to thank Counsel on both sides for their helpful submissions and to say that I agree to the Order proposed by Ellis J.

BECKFORD J.

I also have had an opportunity to read the judgment of Langrin J and I agree fully with it.

The Motion for Habeas Corpus is therefore dismissed.

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Ellis J.

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Langrin J.

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Beckford J. (Miss)