

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE FULL COURT

SUIT NO. M92 OF 2002

CORAM: THE HONOURABLE CHIEF JUSTICE

THE HONOURABLE MRS. JUSTICE HAZEL HARRIS

THE HONOURABLE MRS. JUSTICE ZAILA McCALLA

Regina vs The Director of Public Prosecutions
The Commissioner of Correctional Services
Exparte Trevor Forbes

Frank Phipps, Q.C. and George Soutar for the Applicant

Herbert Mckenzie for the Director of Public Prosecutions

Patrick Foster and Miss Analeisa Lindsay for the Commissioner of
Corrections

HEARD: October 22 and December 19, 2003

WOLFE, C.J.

The applicant moves the court for a writ of habeas corpus in respect of a committal order made by His Honour, Mr. Martin Gayle, Resident Magistrate for the Corporate Area Criminal Court, on the 24th day of July 2002. The order requires the applicant to be extradited to the United States

of America to stand his trial for extraditable offences committed while he resided in the United States of America.

The grounds of the application are :

- 1. (a) The charges found by the Grand Jury Indictment were not for offences cognizable in the Courts of Jamaica
- (b) There is a nullity in the proceedings in the United States of America where more than one conspiracy is charged in the respective counts of the Indictment.
- (c) There is no evidence before the Learned Resident Magistrate to prove the existence of the superseding indictment for which extradition is sought by the United States Government.
- 2. The document purporting to be the affidavit of Julie Hackenberry Savell grounding the application for extradition is incomplete and of no legal effect.
- 3(a) The alleged prohibited substance referred to in Julie Hackenberry Savell's affidavit as "marihuana" and in the respective Indictment as "marihuana" is not known to the laws of Jamaica as an offence.
- (b) The certificate of the Forensic Chemist referring to "marijuana"

has not been connected by evidence to the affidavit of Julie Hackenberry Savell and itself is not a substance prohibited in Jamaica and subject of a charge cognizable in Jamaica.

Mr. Phipps submitted that jurisdiction was wrongly assumed by the Learned Resident Magistrate. This is so because the Provisional Warrant of Arrest categorized the applicant both as a person accused of criminal offences and a convicted person. To compound this error the Authority to Proceed directs the Resident Magistrate to proceed on the Authority of the Provisional Warrant of Arrest which Mr. Phipps contends is defective.

This submission, with respect, is void of merit. The Provisional Warrant does not refer to the applicant as a convicted person. Having described the applicant as a person accused of committing criminal offences the Provisional Warrant in an effort to justify the arrest speaks of information having been presented to the Magistrate which would authorize him to issue a Warrant to arrest a person convicted of committing a corresponding offence in the Magistrate's Jurisdiction. It must be borne in mind that a committal order will not be made in respect of an offence which is not recognized by the laws of Jamaica.

In the event my approach is flawed there is clear authority that once the Authority to Proceed is received by the Magistrate the Provisional

Warrant ceases to be of any effect. Jurisdiction is assumed on the basis of the Authority to Proceed not on the Provisional Warrant.

See *Edwards v The Director of Public Prosecutions et al* (1994) 31 JLR. 526 at p. 527 dictum of Downer J.A.

The Provisional Warrant of Arrest is no more than an instrument authorizing the arrest of the accused or convicted person, pending the decision of the Minister to authorize or refuse the request.

In any event the procedure used would leave no one in doubt as to what category the applicant fell in.

Section 8(2) of the Extradition Act states –

“There shall be furnished with any request made for the purposes of this section by or on behalf of any approve state –

- (a) in the case of a person accused of an offence, a warrant of arrest issued in that state or
- (b) in the case of a person unlawfully at large after conviction of an offence a certificate of the conviction and sentence in that state and a statement of the part, if any, of that sentence which has been served.”

At the committal proceedings the warrant of arrest from the United States District Court was tendered in evidence and it clearly indicates the category of the applicant as a person accused of committing crimes which are extraditable.

Mr. Phipps, Q.C. next submitted that there was no evidence admitted in proper form before the Learned Resident Magistrate indicating the summary of the facts in the case within the jurisdiction of the requesting state.

In this regard the complaint is that the affidavit by Julie Savell in support of the request contains material alterations which have not been authenticated and was therefore in breach of Rule 30.3 (4) of the Civil Procedure Rules 2002 and ought not have been admitted in evidence.

Rule 30.3(4) states:-

“No affidavit containing any alterations may be used in evidence unless all such alterations have been initialed both by the deponent and the person before whom the affidavit was sworn.”

Section 14(2)(a) and (b) of the Extradition Act is instructive.

14(2) A document shall be deemed to be authenticated for 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 officer 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.

The affidavit of which counsel complains was duly certified by Lystra Blake, Associate Director, Office of International Affairs Criminal Division U.S. Department of Justice as is required by section 14 (2) (a) of the Extradition Act. The section makes such a document admissible.

In any event it is my considered opinion that the Civil Procedure Rules are not applicable to extradition proceedings. These proceedings are governed by the provisions of the Extradition Act. See Article VIII (5) of the Extradition Treaty Jamaica Gazette Extraordinary Thursday February 2, 1995

It was further urged on behalf of the applicant that the offences dealing with marijuana were not known to Jamaican Law. Suffice it to say that this submission was made in *Byles v The Director of Public Prosecutions et al* SCCA 44/96. Judgment delivered on October 13, 1997

and in *Grant v The Director of Correctional Services et al* S.C.C.A. 48/2001, Judgment delivered on November 7, 2002.

The amended affidavits of Peter T. Ansile, Forensic Chemist employed by the United States Department of Justice, Drug Enforcement Administration ("DEA") and Alexander Gangora, who is similarly qualified and employed, indicate that marijuana is also known as cannabis sativa and that the substance examined "was substance from which some or all of the resin had not been extracted".

This definition complies with the definition of ganja in the Dangerous Drugs Act of Jamaica.

The Grounds advanced on behalf of the applicant have all failed, I would therefore order that the motion be dismissed.

Harris J,

In this application, the Applicant seeks an order for the issue of a Writ of Habeas Corpus to secure his release from custody. An order for his committal under the Extradition Act 1991 had been made by his Hon. Mr. Martin Gayle.

On July 24, 2002 the Resident Magistrate ordered that he be extradited to the United States of America to answer charges on an indictment, containing 4 counts.

The grounds upon which he relies are as follows: -

- “ 1(a) The charges found by the Grand Jury Indictment were not for offences cognizable in the Courts of Jamaica;
 - (b) There is a nullity in the proceedings in the United States of America where more than one conspiracy is charged in the respective counts of Indictments.
 - (c) There is no evidence before the Learned Resident Magistrate to prove the existence of the superceding Indictment for which extradition is sought by the United States Government.
2. The document purporting to be the Affidavit of Julie Hackenburg Savell grounding the Application for extradition is incomplete and of no legal effect.
- 3(a) The alleged prohibited substance referred to in Julie Hackenberry Savell's Affidavit as “marihuana” and in the respective counts of the Indictment as “marihuana” is not known to the laws of Jamaica as an offence.
 - (b) The certificate of the Forensic Chemist referring to (Marijuana) has not been connected by evidence to the Affidavit of Julie Hackenberry Savell and itself

is not a substance prohibited in Jamaica and subject of a charge cognizable in Jamaica.”

An offence is extraditable, if it is one for which an accused is on a charge or convicted for an offence, which amounts to, or is equivalent to, an offence against the laws of Jamaica, if it had taken place in Jamaica.

For convenience, grounds 1(a) 3 (a) & (b) will be dealt with simultaneously. The charges preferred against the applicant in a superceding indictment: are one count of conspiracy to import marijuana, one count of conspiracy to distribute marijuana, and two counts of importing marijuana.

In dealing with the issue as to whether these charges were offences recognized by the laws of Jamaica, regard must be had to the Extradition Act. S 5 1(b). This section provides as follows:

“S5 (1b)-

In the case of an offence against the law of a treaty State –

- i) it is an offence which is provided for by the extradition treaty with that State; and
- ii) the act or omission constituting the offence, or the equivalent act or omission, would constitute an offence against the law of Jamaica if it took place within Jamaica, or in the case of an extra-territorial offence, in corresponding circumstances outside Jamaica.”

The charges contained in the indictment are for conspiracy to import, to distribute and for importing marijuana. Although the description of the offences in the indictment are not precisely that of the language of the laws of Jamaica, these charges are for offences akin to offences known to the laws of Jamaica. In dealing with issues of this nature *Wills J in Bellencontre 1891 2QB 122* declared: -

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

Mr. Soutar urged that marijuana is unknown to the laws of Jamaica as an offence. In *Byles v DPP & Director of Correctional Service, SCCA 44/96* Rattray P, concluded that the definition of ganja or marijuana in laws of Jamaica is not exhaustive of what ganja is, or means. He further added: -

“Particularly, is this so when the definition of ganja is one which includes and therefore in my view is not exhaustive”.

It was also declared by Rattray P, in *Byles v DPP & Anor (supra)* that the evidence of a chemist was sufficient to identify a substance, namely marijuana,

which he examined, to be one which falls within the definition of the Dangerous Drugs Act.

Affidavits sworn by Peter T. Ansile and Alexander Gangora, Forensic Chemists in the employ of the Drug Enforcement Administration of Justice demonstrate that they carried out tests on samples of substances submitted to them with respect to the case under review. Their findings revealed the presence of marijuana or cannabis sativa, from which some or all the resin had not been extracted. This clearly illustrates that the substances they examined fall within the purview of the Dangerous Drugs Act.

So far as ground (1) b is concerned, this is a procedural matter for determination by the Foreign Court when the Applicants appears for trial. It is not a matter which ought to be taken into account by this Court, or by the committing magistrate.

I now turn to the remaining grounds. Mr. Phipps' main complaint was that the documents before the magistrate had not been authenticated and consequently inadmissible in evidence. He urged that no reliance ought to have been placed on the Affidavit of Julie Hackenberry Savell which grounded the application for extradition, as, it contained material alterations which had not been authenticated and that this offends against Rule 30 3(4) of the Civil Procedure Rules 2000.

It is absolutely important to state at the outset, that, the Civil Procedure Rules are not applicable to extradition proceedings. The authenticity and admissibility of documents in these proceedings are governed by the Extradition Act, Section 14.

Section 14 (1a) & (2a) provides as follows:

- 14(1a) "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)
- 14(2a) 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 officer 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;"

The first requirement of the statute is that the document which purports to set out the testimony be certified by Judge, magistrate or officer of the court in or of the approved state, or an officer of the consular or diplomatic service. This stipulation was fulfilled, by virtue of Miss Savell's Affidavit being sworn before a United States Magistrate/Judge.

The second requirement is the authentication of the certified document by oath of a witness or official seal of the Minister of the requesting State. A

Certificate executed by the Secretary of State as well as one by an authentication officer of the State Department, Lystra Blake, with the seal of the State Department were duly affixed to the affidavit of Miss Savell.

It is clear that the certificate of Lystra Blake, an Associate Director Office of International Affairs of the United States Department of Justice, had authenticated the certified Affidavit of Julie Savell. The Affidavit, being duly certified in compliance with the provisions of the Extradition Act, was admissible in evidence.

Mr. Phipps had also complained that the Resident Magistrate lacked Jurisdiction by entertaining the proceedings, as, the Provisional Warrant described the applicant as an accused and a convicted person. None of the grounds filed supports this contention. However, even if the submissions were founded on grounds proposed by the Applicant, an Authority to Proceed issued by the Minister, laid the foundation for the commencement of the proceedings. The description of the Applicant as an accused or a convicted person, would in no way invalidate the proceedings before the Resident Magistrate, as, his jurisdiction had its genesis in the Minister's Authority to proceed and not in the Provisional Warrant.

The grounds relied upon by the Applicant are unsustainable. The Motion is dismissed.

McCalla, J.

The applicant Trevor Forbes is a Jamaican national. He was arrested on a provisional warrant issued by His Honour Mr. Martin Gayle, Resident Magistrate for the Corporate Area Criminal Court pursuant to request from the United States Government for his extradition. On July 24, 2002 the Resident Magistrate made a committal order against him.

An affidavit was filed by Julie Hackenberry Savell, on behalf of the requesting State, in support of the request for extradition of the applicant. In her affidavit she sets out the charges and the evidence in the case against the applicant.

She states that on August 5, 1999, a Federal Grand Jury sitting in Orlando, Florida issued an Indictment charging the applicant with the offences of conspiracy to import marijuana into the United States, conspiracy to distribute marijuana and importing marijuana into the United States. Thereafter, on May 24, 2001 a Federal Grand Jury sitting in Jacksonville, Florida issued a superceding indictment charging him with similar offences, the amount of marijuana stated as being 1000 kilograms or more.

The applicant now seeks an order that a Writ of Habeas Corpus be issued to the Commissioner of Correctional Services for him to be discharged from custody.

The grounds on which the application is based are set out in the applicant's Notice of Motion as follows:

1 (a) The charges found by the Grand Jury Indictment were not for offences cognizable in the Courts of Jamaica

(b) There is a nullity in the proceedings in the United States of America where more than one conspiracy is charged in respective counts of the indictment.

(c) There is no evidence before the learned Resident Magistrate to prove the existence of the superceding indictment for which extradition is sought by the United States Government.

2 The document purporting to be the affidavit of Julie Hackenberry Savell grounding the application for extradition is incomplete and of no legal effect.

3 (a) The alleged prohibited substance referred to in Julie Hackenberry Savell's affidavit as "marihuana" and in the respective counts of the indictment as "marihuana" is not known to the laws of Jamaica as an offence.

(b) The certificate of the Forensic Chemist referring to "marijuana" has not been connected by evidence to the

taken into custody in June 1999 and was tried in December 2001. We have considered all the relevant factors and principles as enunciated in *Reid v R* (1978) 27 W.I.R 254 and in our judgment it is manifestly in the interest of justice that a new trial be ordered.

Accordingly, the appeal is allowed, the conviction quashed and a new trial ordered. The appellant is remanded in custody.

States, (b) one count of conspiracy to distribute marijuana,
(c) two counts of importation of marijuana....

and a warrant of arrest dated May 24, 2001, issued by the
United States District Court of Florida...within the jurisdiction
of the United States of America.

NOW I HEREBY by this order under my hand and seal, signify
to you that such request has been made and require you to
proceed on the authority of the Provisional Warrant of Arrest,
provided that the conditions of the Extradition Act 1999,
relating to the issue of such warrant, are, in your judgment,
complied with" (emphasis supplied)

This court is being asked to resolve the following issues:

- a) whether the Resident Magistrate had jurisdiction to commit the
applicant having regard to his categorization as an accused as
well as a convicted person in the provisional warrant of arrest,
- b) whether the affidavit of Julie Hackenberry Savell is inadmissible
as being contrary to Jamaican law,
- c) whether the offences for which the applicant stands indicted in the
Unites States are offences under Jamaican law.

I deal firstly with the third issue on which counsel Mr. George Soutar made submissions. That same issue arose in the case of Dave Antonio Grant v The Director of Correctional Services et al S. C. C. A. No 48/2001. There, the matter was dealt with extensively in the judgment of Panton J.A. The subject matter of the offence charged was also "marijuana" and it was submitted that there was no evidence to prove that the drug was ganja as defined in Jamaican law. Additional evidence was presented and it was established that the subject matter of the charges was the same substance which is defined in the corresponding Jamaican law. In the instant case the additional evidence presented shows that the offences charged are known to Jamaican law.

Ground 3 (a) therefore fails.

The next issue to be determined is whether or not the Resident Magistrate had jurisdiction to commit the applicant. Mr. Frank Phipps, Q.C. relied on several passages from the judgment of Lord Hope of Craighead in the case of In Re Guisto H.L. 2003 in support of his submissions that strict compliance with the law is required in extradition cases. He argued that the Minister's authority to proceed referred to the provisional warrant of arrest and the warrant was defective as it referred to the applicant as an accused as well as a convicted person. This he said is fatal and goes to the jurisdiction of the Magistrate.

In the case of Prince Anthony Edwards v Director of Public Prosecutions and Director of Correctional Services (1940) 33 JLR 426 Downer

J. A. at page 534 had this to say:

“...once the ‘authority to proceed’ was received by the Resident Magistrate, the provisional warrant ceased to have effect, even if it was not spent.”

In light of the Edwards case (supra) notwithstanding the ambiguity in the provisional warrant of arrest, the Resident Magistrate had jurisdiction to commence committal proceedings. In any event, the request had been made for his extradition as an accused person and the authenticated documents show that he is wanted in that capacity. He was dealt with and committed by the Resident Magistrate as such.

I hold that the defect in the provisional warrant of arrest did not preclude the Resident Magistrate from dealing with the matter.

The final question concerns the admissibility of Julie Savell’s affidavit.

Mr. Phipps Q.C. referred to numerous alterations in her affidavit and submitted that if the affidavit were found to be inadmissible then all the documents and affidavits exhibited to it would also be inadmissible. He complains that the affidavit contains material alterations which have not been authenticated and

would therefore be in breach of our Civil Procedure Rules as well as the Resident Magistrate Court Rules.

Rule 30.3 (4) of the Civil Procedure Rules 2003 states:

“No affidavit containing any alteration may be used in evidence unless such alterations are initialed both by the deponent and the person before whom it is sworn”

Order 17 rule 4 of the Resident Magistrate Court Rules is to the same effect.

In response counsel Mr. McKenzie alluded to Section 14 of the Extradition Act, which states the following:

“14(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 in evidence of the matters stated therein;

(b) ...

(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 other officer 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) ...
- (c) ...”

The affidavit of Julie Hackenberry Savell, as it stands, forms a part of the documents which were admitted at the committal proceedings. I hold that these documents were authenticated, having been duly certified by Lystra Blake, Associate Director, Office of International Affairs, Criminal Division U.S. Department of Justice.

Contrary to the applicant's contention, the affidavit is admissible under Section 14 of the Extradition Act.

In my view there is no merit in any of the grounds on which the application is made and accordingly, I would dismiss the motion.

Wolfe, C. J.

The motion is hereby dismissed.