IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

MISCELLANEOUS - SUIT NO. M 119 OF 1999

IN THE FULL COURT

BEFORE: THE HONOURABLE CHIEF JUSTICE
THE HONOURABLE MR. JUSTICE THEOBALDS
THE HONOURABLE MRS. JUSTICE MCCALLA

IN THE MATTER of an Application by KEVEN JOSEPH DESCHENES for a Writ of Habeas Corpus and Subjicendum

AND

IN THE MATTER of the Extradition Act Regina v. Commissioner of Corrections

AND

The Director of Public Prosecutions

Mr. Canute Brown for the Applicant
Miss Lorna Shelley for the Director of Public Prosecutions
Miss Nicole Foster for the Director of State Proceedings

Heard: **October 27, 28, December 16, 1999.**

WOLFE, C.J.

By virtue of an Authority to Proceed signed by the Minister of National Security and Justice the Honourable K. D. Knight on the 11th day of May, 1999, pursuant to a request made to him on behalf of the Commonwealth of Canada for the surrender of Michael Morissette

otherwise called Kevin Joseph Deschenes, who is accused of the offence of murder and for whom a warrant of arrest was issued on May 10, 1989 at Montreal, District of Montreal, Canada, an extradition warrant was issued for the arrest of the said Michael Morissette, otherwise called Keven Joseph Deschenes, the applicant herein. The warrant was executed on the applicant on the 8th day of July, 1999, by Constable Anthony Toby at the Half Way Tree Police Station in the parish of St. Andrew.

After a hearing held on the 1st day of September, 1999, His Honour Mr. Martin Gayle, Resident Magistrate for the Corporate Area Criminal Court issued a Warrant of committal and ordered that the Applicant be held in custody for the purpose of extradition in accordance with the Extradition Act of 1991.

The Applicant now moves the Full Court of the Supreme Court of Judicature in Jamaica for a Writ of Habeas Corpus to issue for his release from the Order of Committal.

The following are the grounds upon which the Applicant seeks relief.

1. The evidence tendered by the requesting State in the committal proceedings was insufficient to warrant putting him on trial for the offence alleged in the Warrant of Arrest in that the evidence of indentification of the person alleged to have committed the offence was of a very poor quality and there is a mistake in identity or wrongful identification.

Particulars

(i) The Requesting State relies on the evidence of one eye witness Danny Dion who had, at most a "fleeting glance" of the assailant from a distance of some 60 to 75 feet whilst on a second floor balcony of a building.

(ii) Witnesses who deponed to have seen the assailant and who were on a level lower than Danny Dion and in close proximity to the scene of the incident failed to identify the assailant from photographs shown to them by the police.

(iii) The assailant was not known to the witnesses before the day of the incident.

In the Premises the accusation against the applicant is not made in good faith and in the interest of justice it would, having regard to all the circumstances, be unjust to extradite him.

2. The evidence adduced before the Learned Resident Magistrate was insufficient to put the Applicant on trial if the offence for which he is charge (sic) were to be tried in Jamaica, in that there must be proof, a burden to be discharged by the prosecution, that the person whom it is alleged was shot and visibly injured on the 29th day of April, 1989 is the same person described as Dominique Ricci upon whose body autopsy was performed by a Dr. Jean Hould on the 1st day of May, 1989, The

failure to establish that nexus is fatal to the case of the Requesting state, the accusation against the applicant is not made in good faith and in the interest of justice it would, having regard to all the circumstances, be unjust to extradite him to the State of Canada.

3. The offence for which the applicant is being sought by the State of Canada is alleged to have been committed on the 29th day of April 1989. By reason of the passage of time since then, it would, having regard to all the circumstances, be unfair and oppressive to extradite him to that country.

Let me deal first with ground 3, where the complaint is that the passage of time between the commission of the offence and the order for committal is so long that it would be unfair and oppressive to extradite the applicant.

Common sense would dictate that no person who is a fugitive from justice can properly pray in aid the passage of time. By fleeing the country to take up residence in another country where his whereabouts are unknown he has denied himself of a speedy determination of the matter. If a court were to hold that the passage of time in these circumstances availed a fugitive from justice, then it would be opening the flood gates. Criminals would commit crimes, flee the scene of the crime and go into hiding to return after a long time has passed without being made answerable for their misdeeds.

Mr. Brown sought to rely on the decision in ***Gilbert Byles v. D.P.P. and the Director of Correctional Services*** SCCA No. 44/96 Judgment delivered on October 13, 1997 (unreported).

Byles' case is easily distinguished from the instant case. There is no evidence that Byles was a fugitive from justice. As the Learned President said -

> "Mr. Byles openly lived and carried on his business in Jamaica . . . . . He is not in the position of someone who is a citizen of the United States of America and having committed a criminal offence has fled the jurisdiction to take refuge in Jamaica."

The Applicant is a citizen of the Commonwealth of Canada, who is accused of committing a criminal offence in the land of his birth and has now come to reside in Jamaica under a false name, albeit he does not admit that he is operating under a false name. It is true he has been carrying on business in Jamaica, openly, but not to the knowledge of the Canadian Government. He has concealed his identity by adopting a new name.

In ***Kakis v. Government of the Republic of Cyprus and others*** (1978) 2 All ER 634 at p 368 Lord Diplock said:

> "So one must look at the complete chronology of events I have summarised above and consider whether the happening of such of those events as would not have happened before the trial of the accused in Cyprus if it had taken place with ordinary promptitude has made it unjust or oppressive that he should be sent back to Cyprus to stand his trial now."

The applicant in my view is the author of the delay which he seeks to rely on. He concealed his whereabouts and sought to evade arrest.

Relying on Lord Diplock's dictum in Kakis' Case(supra) I am satisfied that in the circumstances of the instant case it would not be unjust or oppressive to return the applicant to Canada to stand trial.

This ground therefore fails.

Ground 1

This ground complains that the evidence relied upon by the requesting state was insufficient to establish a prima facie case. It is contended by the applicant that the identification evidence was of a very poor quality, a mere "fleeting glance".

Section 10 (5) of the Extradition Act stipulates:

> "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."

The offence for which the applicant is charged is murder. There is no dispute that pursuant to section 5(1) of the Extradition Act the offence with which the applicant is charged is an Extradition offence.

The question which arises is whether the evidence adduced before the Resident Magistrate -

> "would be sufficient to warrant his trial for that offence if the offence had been committed in Jamaica."

Section 43 of the Justices of the Peace Jurisdiction Act lays down the circumstances under which an examining justice may commit an accused person to stand trial -

> "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 . . ."

The evidence adduced before the Learned Resident Magistrate and which tends to implicate the applicant in the commission of the offence is contained in the authenticated affidavit of Danny Dion who said he was at home when he heard gunshots. He looked outside and saw a white Jeep Cherokee, pulling into the shell station located on the corner of Christophe-Colomb and Jarry Streets. The vehicle drew up to the victim's car and the driver of the white jeep Cherokee who was armed with a gun, fired two shots at the victim who was seated in the driver's seat of his automobile.

That same day he gave a statement to the police and a description which described the assailant as -

> "a man about 30 years of age, mustache, (sic) long hair, wearing a white short sleeved vest."

The incident occurred at about 5.00 p.m., still daylight.

The witness viewed the incident from a distance of about 60-75 feet from the vehicles. He had a high angle view of the vehicles. He observed the driver for approximately one to one and one-half minute. The incident lasted approximately three minutes. He viewed the incident from the balcony of his 2nd floor apartment.

On June 2, 1989 from a group of photographs, Mr. Dion recognized one as the individual who was driving the Cherokee Jeep and fired at the victim.

The police contend that the photograph chosen by Mr. Dion is that of the applicant.

Would this evidence be sufficient to commit an accused to stand trial in Jamaica? Is it a mere fleeting glance, in which case, as the authorities suggest, the case ought not to be left to the consideration of the Jury.

I am convinced that the evidence as it stands is a matter for the jury to say whether or not the witness Dion is correct when he identifies the applicant, albeit, by photograph as the man who shot the victim.

Accordingly, I hold that there is evidence upon which the Committal Court could have been satisfied as to the sufficiency of the evidence to warrant the trial of the applicant if the offence had been committed in Jamaica.

Mr. Brown further submitted that there was no nexus established between the man who had been shot and the body upon which the Post Mortem examination was performed.

The submission has its genesis in the decision of the Court of Appeal of Jamaica in ***R v. Florence Bish (1978) 16 JLR 106*** where it was laid down that there must be evidence to show that the injured person and the person upon whose body the post mortem was conducted are one and the same person.

It is a fact that there is no evidence creating the nexus spoken of in Bish's case (supra), but there are decisions of the Court of Appeal of Jamaica in which Bish's case has been distinguished, ***See v Douglas Chrstie(1989) 26 JLR 233 and R v Carl Sterling (1990) 27 JLR 521***.

In Sterling's case the Crown failed to adduce any evidence that the person shot and the person upon whose body the post mortem examination was performed were one and the same person.

Gordon, J.A. delivering the judgment of the Court, on appeal, said:

> "Where, as in this case, there is evidence that a man is shot and injured and he dies thereafter in the same day, then in the absence of evidence to the contrary a jury may infer that he died as a result of the gunshot injury he sustained. The fact that Bertram Kelly died as a result of the gunshot injury inflicted on him by the applicant could be and was proved by inference from the circumstances."

Gordon, J.A. relied on the dictum in R v. Onufrejczyk (1955) 1 All E.R. 247.

> "In a criminal case the fact that the murdered man was killed like any other fact, can be proved by circumstantial evidence which leads only to that one conclusion of fact."

The evidence in the instant case is that the applicant was seen to shoot at the driver of a vehicle, whilst the driver was seated at the steering wheel. (See Evidence of Linda Teoli, Ginette Morin, Lysianne Collins).

Danny Dion who witnessed the shooting, later identified, by photograph, the gunman who it is alleged is the applicant.

Retired police officer Jacques Auger, of the Montreal Urban Community Police Department, has deposed that on the 19th day of April, 1989, he along with Detective Sergeant Maurice DEMERS attended the scene at the corner of Christophe-Colomb and Jarry Street, in Montreal, where Mr. Dominique RICCI had just been shot to death. He found on the deceased a business card bearing the name Michael Morissette with his home phone number written on the back. He identified the deceased as Dominique RICCI by way of a photograph kept on police file.

On the basis of the summary of the evidence I am satisfied that section 10 (5)(a) of The Extradition Act has been satisfied i.e., "the evidence would be sufficient to warrant his trial for the offence of murder if the offence had been committed in Jamaica".

There is evidence upon which a jury could properly find that the man shot in the car was Dominique RICCI and that he died as a result of gunshot wounds received at the hand of the applicant, Michael Morissette otherwise called KEVIN JOSEPH DESCHENES.

Accordingly, I would order that the motion seeking an Order of Habeas Corpus be dismissed.

THEOBALDS J. - I agree

MCCALLA J - I agree

WOLFE C.J.

Motion dismissed.