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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE FULL COURT

CLAIM NO.2003 HCV 2138

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Judgement Book

CORAM: THE HONOURABLE MRS. JUSTICE ZAILA McCALLA

THE HONOURABLE MR. JUSTICE MAHADEV DUKHARAN

THE HONOURABLE MR. JUSTICE LLOYD HIBBERT

IN THE MATTER OF THE EXTRADITION ACT

AND

IN THE MATTER OF THE EXTRADITION ORDER MADE BY THE RESIDENT

MAGISTRATE FOR THE CORPORATE AREA HOLDEN AT HALF WAY TREE

AND

IN THE MATTER OF THE JAMAICA CONSTITUTION ORDER IN COUNCIL

BETWEEN BERKLEY HEPBURN CLAIMANT

AND THE DIRECTOR OF CORRECTIONAL SERVICES 1ST DEFENDANT

AND THE DIRECTOR OF PUBLIC PROSECUTIONS 2ND DEFENDANT

Lord Anthony Gifford Q.C. and Mrs. Jacqueline Samuels-Brown appear for Claimant

Mrs. Suzanne Reid-Jones appears for the Director of Correctional Services

Mrs. Georgiana Fraser appears for the Director of Public Prosecutions

Heard: 1st April and 28th May, 2004

McCalla, J.

The Claimant, Berkley Hepburn is a Jamaican national. At present he is incarcerated at the Tower Street Adult Correctional Centre.

A Committal Order was made against him by His Honour Mr. Martin Gayle, Resident Magistrate for the Corporate Area Criminal Court, pursuant to a request for his extradition by the United States Government.

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

The sole ground argued at the hearing was:

“As a matter of law the learned Resident Magistrate erred in ordering my extradition to the United States as there was no evidence that I had committed any offence for which I was liable to extradition to the U.S.A. The evidence adduced at its highest revealed an offence committed in and/or against Jamaica and/or the Bahamas.”

The request for the Claimant’s extradition is supported by the affidavit of Karen Gilbert, an Assistant U.S. Attorney for the Southern District of Florida. In her affidavit she sets out the events leading up to the request. At paragraph 18 she states that:

“As a result of the investigation into the narcotics activities of Berkley Hepburn and his co-conspirators, evidence was presented to a grand jury in the Southern District of Florida. On March 15, 2002, the grand jury returned the third superseding indictment naming Hepburn and 10 others, charging Hepburn with conspiracy to possess with intent to distribute cocaine and marijuana, and conspiracy to import into the United States, from a place outside thereof, cocaine and marijuana.”

She deposed further that on March 15, 2002, the “superseding indictment” was

returned by the grand jury to a United States Magistrate Judge for all individuals named, including the Claimant and on June 17, 2002 Berkley Hepburn was located in Jamaica and provisionally arrested at the request of the United States Government.

The evidence relied on by the United States to ground the request is to be found in affidavits of Nehru Shadrack Newton and DEA Special Agent Michael A. Dinnall.

In his affidavit Nehru Newton states that he is a resident of the Bahamas and the nephew of Samuel Knowles. He states that he has known Berkley Hepburn since 1994 and has worked for Samuel Knowles since 1994, trafficking narcotics. His initial role was to transfer narcotics from Jamaica to the Bahamas.

At paragraph 3 of his affidavit he states:

“Sometime in 1994, HEPBURN took receipt of one thousand (1,000) kilograms of cocaine at his home in Papine, Kingston, Jamaica. I attempted to stay with HEPBURN at Papine, but was told that I could not, because HEPBURN was keeping the cocaine.”

Paragraph 4:

“On June 21 or 23, 2001, a cocaine shipment of fourteen hundred (1,400) kilograms of cocaine arrived in Jamaica from Colombia. Julian RUSSELL, HEPBURN and I assisted with sorting the cocaine at the Waterloo Guesthouse in Black River, Jamaica. I was present when HEPBURN came to the Waterloo Guesthouse and picked up the cocaine in a white van.”

In his affidavit Michael Dinnall deposed to the surveillance of the home of Delroy Boyd and the execution of search warrants on the 22nd January 2001 at Boyd's home. A vehicle registered in Berkley Hepburn's name was found parked inside Boyd's garage.

At paragraph 8 he states:

“On 02.01.01 at approximately 6:30 a.m., members of the Jamaica Constabulary Force Narcotics Division (JCFND) executed a Search Warrant at the residence of Berkley Alexander HEPBURN, located at 2 Papine Market Road, Kingston 6, Jamaica.”

His affidavit continued that he was present at an interview during which Berkley Hepburn stated that he had known Samuel Knowles for over five years and had transported Knowles to various places on occasions when he visited Jamaica. A relationship developed between himself and Knowles during that period and he has bought vehicles for Knowles and registered them in his (Hepburn's) name. Hepburn also stated that five bikes had also been purchased in Miami and shipped to Jamaica in his name.

The affidavit speaks further to Hepburn's activities concerning other vehicles. Michael Dinnall also deposed that a search warrant was executed at the residence of Lancelot Wright who told him that he had purchased a motor vehicle from the Claimant.

In a second affidavit given by Nehru Newton he deposed to the circumstances in which he met the Claimant. From paragraph 3 onwards he states that:

“I first met HEPBURN at Vivian KHANI'S residence in Kingston, Jamaica. HEPBURN was a full time gardener at KHANI'S residence in Jamaica. In 1994 Samuels KNOWLES began to use KHANI'S residence as a place to store large quantities, between twelve hundred (1,200) and two thousand (2,000) pounds of marijuana. Because Hepburn was at the KHANI'S residence daily, in 1994, KNOWLES began to use HEPBURN as a security guard for the marijuana. On occasion, Hepburn would also help in the movement of narcotics. HEPBURN was quiet and unassuming and would report to KNOWLES regarding those individuals who visited KHANI'S residence. Also, HEPBURN would advise KNOWLES if the police came by, if any suspicious activity was taking place, or if anyone had called for KNOWLES.

KNOWLES' Colombian cocaine sources of supply had the telephone number to the residence and often called the residence as a way of contacting Knowles. HEPBURN was a conduit between KNOWLES and other drug traffickers from

Colombia and Jamaica. HEPBURN's primary function became overseer of the drugs, both marijuana and cocaine being stored at the residence.

HEPBURN also kept at Khani's residence large sums, between one hundred thousand dollars (\$100,000.00) and two hundred thousand dollars (\$200,000.00) of U.S. currency belonging to Knowles. This U.S. currency was used as bribe money and for emergency expenses.

In 1995, the first large shipment of cocaine KNOWLES received from Colombia was stored at KHANI'S residence; also being stored at the time was a shipment of marijuana. KHANI's residence was used to store cocaine and marijuana until 2000. As recently as 2000, HEPBURN continued to be involved as a drug trafficking associate of KNOWLES. In 2000, KNOWLES had another drug associate take over from HEPBURN.

The bulk of the marijuana and cocaine that was stored at Khani's residence and other places in Jamaica by KNOWLES and his drug associates was intended for ultimate distribution in the United States."(emphasis supplied)

Lord Gifford Q.C. submitted that the evidence presented is not sufficient to establish a prima facie case that the Claimant committed an extraditable offence.

He submitted further that in order to justify the extradition of the Claimant admissible evidence would have to be adduced which, if true, would prove that the Claimant was part of a conspiracy which was directed at and the objective of which was the importation of drugs into the United States of America..

He contended that the evidence adduced in support of the request for extradition is limited in fact to an allegation that the Claimant had been in possession of cocaine and marijuana in Jamaica and at its highest, indicates that the criminal organization intended to transport drugs from Jamaica to the Bahamas.

Lord Gifford argued that Newton's second affidavit does not show that the Claimant was aware of or was party to any movement of the drugs outside Jamaica or that he was a party to importation of drugs into the United States.

He relied on the case of Delroy Boyd and Commissioner of Correctional Services and the Director of Public Prosecutions Supreme Court S.C.C.A. No. 47/2003. He

made reference to the facts of Boyd's case and in particular to page 4 of the judgment where Cooke, J.A. (Ag.), as he then was, having examined the relevant sections of the Extradition Act, states:

“It is agreed that on a proper construction of these words, the effect is that the alleged conspiracies of which it is said that the appellant is a party only become extraditable offences if the result of those conspiracies would be a commission of criminal offences in the United States of America. It has to be shown that the appellant was involved in a conspiracy, the object of which was the importation of drugs into the United States.”

In that case, in considering the principles which govern the common law rules relating to conspiracies, His Lordship made reference to a paragraph in the headnote of the case of Liangsiriprasert v United States Government and another (1990) 2 ALL ER 866, a judgment of the Judicial Committee of the Privy Council, which stated that a conspiracy entered into abroad to commit a crime in England was a common law crime triable in England in the absence of any overt act taking place in England.

Thereafter, the learned Judge of Appeal made reference to Section 10(1) of the Extradition Act and stated that the approach of the Magistrate in extradition proceedings is the same as if he were deciding whether or not there should be a committal to Circuit Court.

In Boyd at page 9 of the judgment Cooke, J. A. referred to the affidavits which implicated the appellant in an illegal drug organization and states thus:

“There is undoubtedly, evidence that the appellant was involved in a conspiracy to import marijuana and cocaine into the Bahamas from Jamaica. But was he a party to a conspiracy to the importation of those same drugs into the United States? This is the crucial question.”

He made reference to the sentence in the affidavit of Cambridge in which

the United States was mentioned, as under:

“The cocaine and marijuana would then be transported into the United States.”

The Full Court had found that Newton and Cambridge were involved in international narcotics trafficking and that Boyd had joined that organization. The Full Court had also relied on the statement of Cambridge that the drugs supplied by Boyd would be shipped to the Bahamas and then transported to the United States of America. It had found that the statement represented assertions of facts capable of being accepted by a tribunal. Cooke, J.A. at page 10 continued that:

“If Cambridge had actual knowledge of the scope of the drug operation, it does not follow that the appellant was privy to that scope. What the evidence in the affidavits reveals is that the appellant was a supplier of illicit drugs which were destined for the Bahamas. Interestingly, nowhere in the judgment of the Full Court was it sought to impute to the appellant knowledge of the scope of the drug operations. The Full Court seemed to have concluded that since the appellant was a party to “international narcotics trafficking” he must necessarily be aware of the ultimate destination of the drugs. This is an unwarranted leap. There is no evidential basis upon which such an inference can be drawn”

In the instant case, in neither the first affidavit of Newton nor the affidavit of Michael Dinnall is there any reference to the United States with regard to the drug related activities of the Claimant. Mrs. Fraser submitted that Boyd's case is distinguishable on the facts and she placed reliance on the last paragraph of the second affidavit given by Newton where he said that:

“The bulk of the marijuana and cocaine that was stored at Khani's residence and other places in Jamaica by KNOWLES and his drug associates was intended for ultimate distribution in the United States.”

Mrs. Fraser argued that on the above statement Newton was an admitted party to a criminal conspiracy to the intended distribution of the drugs; that having regard to Mr. Hepburn's position as guardian of the drugs, he played a significant role in the furtherance of the wider conspiracy. She said that the assertions by Mr. Newton are capable of a factual interpretation that Hepburn had knowledge, actual or constructive.

Lord Gifford responded that the Claimant's case on the facts is stronger than Boyd's case. He said that there is no evidence that the Claimant was a party to any further movement of the drugs from their storage place.

He relied on Boyd's case in arguing that the statement in the last paragraph of Newton's second affidavit (referred to above), is not evidence that the Claimant was party to a conspiracy aimed at the United States.

I am in agreement with Lord Gifford that Boyd's case establishes that in order to establish a prima facie case, the evidence must show that the Claimant had knowledge that the drugs were intended for importation and distribution into the United States. Having carefully examined the evidence adduced in this case, I am of the view that it is insufficient to ground the interpretation urged by Mrs. Fraser. Consequently, the Claimant's motion for issuance of a writ of Habeas Corpus to the Director of Correctional Services must be granted.

Dukharan, J.

I have read the judgment of McCalla, J and agree with her reasoning and conclusion that the motion for insurance of a Writ of Habeas Corpus must be granted.

Hibbert, J.

I have read the judgment of Mrs. Justice McCalla and agree with her reasoning and conclusion that in the circumstances of this case application should be granted.

McCalla, J.

The order of the court is that the application is granted and a Writ of Habeas Corpus is to be issued to the Director of Correctional Services for the Claimant to be released from custody.