IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

SUIT NO 2004 HCV/1198

IN THE MATTER OF an application for Bail for NORRIS NEMBHARD under the Extradition Act 1991

IN CHAMBERS

Messrs. Wentworth Charles and Douglas Thompson for the Applicant

Miss Gaile Walters and Miss Caroline Williamson for the Director of Public Prosecutions.

Brooks, J.

Heard: 4th & 7th June, 2004

The police on or about the 21st April 2004 took Mr. Norris Nembhard into custody. On the following day a provisional warrant of arrest issued pursuant to the Extradition Act was executed in respect of Mr. Nembhard. He has been in custody since his arrest. An application for bail was made on his behalf on the 17th May. It was however refused by the Learned Resident Magistrate for the Corporate Area Criminal Court.

Mr. Nembhard now applies to this court for bail. The Director of Public Prosecutions is opposing the application.

The issues to be decided are as follows:

1. Does this court have jurisdiction to hear this application?

2. Does the Bail Act apply to persons taken into custody pursuant to the Extradition Act?

3. Did the Learned Resident Magistrate correctly exercise his jurisdiction in refusing bail to Mr. Nembhard?

I shall address each question in turn.

Does this court have jurisdiction to hear this application?

There is clear authority that the court does have an inherent jurisdiction to hear this application. In R. v. Spilsbury [1898] 2 Q.B. 615 Lord Chief Justice Russell of Killowen at p. 622 described the jurisdiction as follows:

> "This inherent power to admit to bail is historical, and has long been exercised by the courts..."

That inherent jurisdiction has not been curtailed or circumscribed, to use the language of the Lord Chief Justice, by the Extradition Act. His comments were made in the context of the Fugitive Offenders Act, which was one of the forerunners of our present Extradition Act. It must also be borne in mind that the court of committal (in this case the Resident Magistrate's Court) is by section 10 (2) of the Extradition Act given the power to remand in custody or release on bail a person arrested on a warrant issued pursuant to the Extradition Act.

Does the Bail Act apply to persons taken into custody pursuant to the Extradition Act?

The major impact of the Bail Act is that persons charged with an offence or offences are entitled to bail unless certain circumstances existed. (See section 3 (1).)

The nature of extradition proceedings is such that the detainee is not charged with an offence committed in this country, but rather an offence against the law of the state requesting extradition. No such distinction however is recognized in the Bail Act. It may be noted by way of contrast that although by Section 4(1) of the United Kingdom Bail Act 1976, persons affected by proceedings under that country's Extradition Act are specifically excluded from the right to bail; no such exemption appears in our own Bail Act.

Indeed, our Extradition Act requires the court of committal to "hear the case in the same manner as nearly may be, as if he were sitting as an examining justice and as if (the person arrested) were before him charged with an indictable offence committed within his jurisdiction." (See section 10(1).)

In support of the application, Mr. Charles on behalf of Mr. Nembhard, has submitted that Mr. Nembhard has a Constitutional right to be granted bail and that right should not be defeated by any possible lacuna. Similarly he argued that if there was any defect in the nature of the form used for the application, (which is required by part 58 of the Civil Procedure Rules

2002(the CPR)) it is not fatal to the application. In support of the latter submission he cited the case of Eldemire v. Eldemire (1990) 38 W.I.R. 234. Miss Walters on behalf of the Crown in her response recognized the possible difficulty concerning the applicability of the Bail Act but did not seek to take any procedural point. She was content to deal with the substantive issues raised by the application.

It is to be noted that the Learned Resident Magistrate, when he heard the application for bail, treated the matter as if the Bail Act applied. His reasons for refusal were in terms consistent with reasons for refusing bail as stipulated in Section 4 of the Bail Act. His reasons are also embodied in the form required by the regulations under the Bail Act.

It is my view, and I so find, that since persons who are in custody pursuant to the Extradition Act, are not specifically excluded from the provisions of the Bail Act, and the court of committal is to treat that person as if he were charged with an offence within the ordinary jurisdiction of that court, that the Bail Act does apply to persons in Mr. Nembhard's situation. By section 10 of the Bail Act a defendant who has been refused a grant of bail by a Resident Magistrate may appeal to a judge in chambers. An application such as the present falls within the purview of Part 58 of the CPR.

Did the Learned Resident Magistrate correctly exercise his jurisdiction in refusing bail to Mr. Nembhard?

My task now is one of review of the decision of the Learned Resident Magistrate as is recognized by Rule 58 of the CPR. As I understand the law in respect of applications such as these, it is for Mr. Nembhard to show that (a) the Learned Resident Magistrate erred in principle in considering the application, (b) special circumstances as shown on the facts were not considered by the Magistrate or (c) special circumstances have arisen since the refusal which ought to be favourably considered. I now turn to the substance of the present application.

Mr. Charles first complained that, of the Diplomatic Note from the requesting state, the information leading to the provisional warrant and the provisional warrant itself, none mentioned any situation of urgency justifying the issue of a provisional warrant of arrest. He submitted that a situation of urgency is required for such a warrant by the provisions of Article X of the Extradition Treaty between the Governments of Jamaica and of the United States of America.

I am of the view however that that complaint touches and concerns the issue of whether Mr. Nembhard is in lawful custody. That is an issue to be dealt with in an application for *habeas corpus* and may not be dealt with in this

application for bail. Indeed the application for bail indicates an acceptance that Mr. Nembhard is in lawful custody.

I find support for that position in the case of R v Governor of Pentonville Prison ex. p. Gilliland [1984] Crim.L.R. 229 (cited by Mr. Charles), Government of Federal Republic of Germany v Sotiriadis [1975] A.C. 1 at pp 29-30 as well as the case of The United States of America v Gaynor and anr. [1905] A.C. 128 (P.C.).

Mr. Charles then criticized the first of the two reasons given by the Learned Resident Magistrate for denying Mr. Nembhard bail. This first reason was "the possibility of flight risk". Mr. Charles first complained that every case in which the court grants bail there is a possibility of the accused person failing to surrender to custody.

In recognition of this fact, he argued, the court is provided with powers under the Bail Act. These powers include the power to have travel documents surrendered and that of making a "Stop Order" (to prevent him leaving the island through air and sea ports).

Additionally, Mr. Charles pointed to the fact that Mr. Nembhard in his affidavit has deposed that he has not travelled outside of Jamaica for several years and has not travelled to the United States for some twenty-four years. In addressing this aspect Miss Walters for the Crown submitted that the evidence is that Mr. Nembhard is a man of means and as such was able to

travel to any place in the world that he wished. He certainly was not restricted to travelling to the United States she said.

The second reason given by the Learned Resident Magistrate for refusing bail to Mr. Nembhard is the nature and gravity of the offence and the seriousness of the allegations. Mr. Charles' complaint in this regard was that the Learned Resident Magistrate "wrongly concluded that the offence was serious beyond other cases which come before him for offences such as murder where bail is granted". Mr. Charles continued to say that the Learned Resident Magistrate, "failed to recognise that the offence is merely one of conspiracy and that in his jurisdiction that offence is charged where the substantive offence such as trafficking or dealing cannot be proved". I regret that I cannot agree with Mr. Charles that this charge, which attracts a relatively severe penalty, is deserving of the epithet of "mere". Nor can I agree that because some other person, for whatever reason, is granted bail on other serious charges, that Mr. Nembhard should be granted bail because the charge against him is considered less serious.

In assessing these reasons given by the Learned Resident Magistrate this court must determine what evidence was available to him to enable him to so decide. Unfortunately however and perhaps this was dictated by the manner in which Mr. Nembhard came to be arrested, there is very little indication as

to what evidence in support of the charges was available to the Learned Resident Magistrate at the application for bail.

Mr. Nembhard, at paragraph sixteen of his affidavit deposed that at the hearing of the application for bail the representative of the Director of Public Prosecution objected on the following bases:

"(a) That I was a "flight risk";

(b) The nature and seriousness of the offence"

That clearly does not assist this court in its current exercise. What would be more helpful is the reason given in support of those objections.

An affidavit was filed in opposition to this present application. It was sworn to by Senior Superintendent Carl Williams. It however failed to provide any information as to what was placed before the Learned Resident Magistrate. What it did purport to say deserves no further mention in this judgment save to say that it was long on hearsay and very short on first-hand evidence.

The only other evidence, which it is clear that the Learned Resident Magistrate had available to him at the relevant time, was:

(a) The Diplomatic Note from the government of the United States of America; and

(b) The Information sworn to by the same Senior Superintendent Carl Williams, which grounded the request for the provisional warrant of arrest by which Mr. Nembhard was taken into custody.

The latter merely encapsulates the former. The former indicates that Mr. Nembhard has been indicted in the U.S. District Court for the Middle District of Florida. The indictment charges, according to the Diplomatic Note, one count of conspiracy to distribute a quantity of a mixture or substance containing cocaine and a quantity of a mixture or substance containing marijuana " knowing or intending that such substance would be unlawfully imported into the United States" or its waters.

The Note goes on to state that the offence charged is a felony under the laws of the United States and punishable by more than one year of imprisonment. The Note provides no evidence to support the charge but promises that the evidence will be provided if the fugitive (Mr. Nembhard) is arrested. At the time of the hearing of the bail application the evidence had still not been provided and it is apparently even now, still outstanding.

In the absence of such evidence is there anything else that the Learned Resident Magistrate had before him, which provided circumstances upon which he could properly deny bail under S. 4 (1) (a) of the Bail Act?

It is my view that despite the absence of the supporting evidence the Learned Resident Magistrate could properly take into account the nature of the proceedings in considering that there are "substantial grounds" for believing that Mr. Nembhard would fail to surrender to custody. It is accepted that those are not the Learned Resident Magistrate's words but that is the

conclusion to which he has implicitly arrived. This is so since he has used the terminology of S. 4 (2) of the Bail Act upon which, among other things, a decision on S. 4 (1) (a) of the said Act (which uses those words) is based. The Extradition Treaty, by which each of the governments mentioned above have agreed to turn over to the other persons within the jurisdiction of the requested state, must also have been within the contemplation of the Learned Resident Magistrate as he considered the application.

The Learned Resident Magistrate would in my view, have been entitled to consider, as he apparently did, that Mr. Nembhard would be discharged from custody unless an "Authority to Proceed" was received from the appropriate Minister within a specific time. I say that he apparently did consider this factor as I am informed by learned counsel appearing here that the Learned Resident Magistrate has set the date of the 23rd June 6, 2004 as the date for the authenticated documents to be provided by the requesting state. This would be the last date authorised by the Extradition Treaty of the period during which Mr. Nembhard's detention would remain lawful.

I confess that it is not without some reluctance that I have come to the view that there was a proper basis for the decision of the Learned Resident Magistrate. Certainly my conclusion would have been different were the proceedings other than for extradition.

Once I find that there was a proper basis for the Learned Resident Magistrate to have come to his decision, my jurisdiction in this hearing, being one of review, does not allow me to substitute my own view as to what the decision in those circumstances should have been. I therefore am obliged to refuse the present application.

Mr. Charles has also highlighted the medical condition of Mr. Nembhard. He has submitted that based on Mr. Nembhard's Diabetes Mellitus, Hypertension and recent surgical operation to repair a rotator cuff tear, his health is being significantly affected by his incarceration.

I find however that the medical condition must have been advanced by counsel at the time of the application before the Learned Resident Magistrate and would have been taken into account by him in considering the application. In any event I accept the submission by Miss Walters that the medication that Mr. Nembhard's doctor says Mr. Nembhard needs to have can be administered to him at the remand centre.

Conclusion

In conclusion therefore I find as follows:

1. This court has an inherent jurisdiction to hear applications for bail in respect of extradition matters.

2. The hearing, where there has been a previous refusal by a Resident Magistrate, is by way of review of the decision of that judicial officer.

3. An applicant for bail in extradition proceedings is entitled to the benefit of the provisions of the Bail Act. Certainly that is the premise on which this matter has proceeded.

4. There was no evidence, unique to this case, to support the assertion before the Learned Resident Magistrate that Mr. Nembhard would flee if granted bail and/or the claim of the seriousness of the allegations. The nature of this type of proceeding in itself, along with the nature of the charges and the penalty on conviction could however be sufficient for the Learned Resident Magistrate to find that Mr. Nembhard may fail to surrender to custody if granted bail.

5. I am not permitted to substitute my own conclusion on the facts if in fact the Learned Resident Magistrate exercised his discretion on a proper basis.

The application for bail is therefore refused. In the circumstances each party is to bear its own costs.