JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 47/2003

BEFORE:	**THE HON. MR. JUSTICE FORTE, P.** **THE HON. MR. JUSTICE PANTON, J.A.** **THE HON. MR. JUSTICE COOKE, J.A. (Actg.)**	
BETWEEN:	**DELROY BOYD**	**APPELLANT**
AND	**THE COMMISSIONER OF CORRECTIONAL SERVICES**	**1ST RESPONDENT**
AND	**THE DIRECTOR OF PUBLIC PROSECUTIONS**	**2ND RESPONDENT**

Lord Gifford Q.C., & Hugh Thompson, instructed by Gifford, Thompson & Bright for the appellant

Katherine Francis & Kevin Page instructed by Director of State Proceedings for the 1st respondent, & Herbert McKenzie, Crown Counsel for the 2nd respondent

November 5, 6, 7, 2003 & February 18, 2004

COOKE, J.A. (Actg.)

When the hearing of this appeal commenced, the appellant, a Jamaican citizen, was in custody at the Tower Street Adult Correctional Centre pending his delivery to the United States of America to stand trial in that country. He was there because of the following sequence of events.

(i) By diplomatic notes dated the 24th April, 2002 and the 24th September, 2002 the United States requested the provisional arrest of the appellant for the purpose of his extradition to that State to stand trial on two counts:

(a) conspiracy to possess with intent to distribute cocaine and marijuana; and

(b) conspiracy to import cocaine and marijuana.

(ii) The Jamaican Government on the 7th of October 2002 authorized proceedings in respect of the request.

(iii) The appellant having been duly arrested, a Resident Magistrate for the Corporate Area after a hearing, issued a warrant of committal whereby he was to be placed in custody prior to his surrender to the United States. This was on the 20th November 2002.

(iv) The appellant then sought to move the Full Court to issue a writ of habeas corpus ad subjiciendum. He failed as his application to the Supreme Court was dismissed on the 11th June 2003.

It is against the decision of the Full Court that the appellant took issue in this court. He succeeded. The appeal was allowed. The order of the Full Court was set aside and a writ of habeas corpus was issued. Costs were awarded to the appellant.

Four grounds of appeal were filed. The first three were each different formulations of the central complaint which was that the evidence tendered by way of affidavits did not establish a prima facie case against the appellant. Accordingly, the appellant could not be extradited. The fourth ground was not pursued.

Was there a prima facie case?

Before this question can be answered, it is necessary to refer to The Extradition Act and the Justices of the Peace Jurisdiction Act. Section 5 of The Extradition Act as is material is in these terms:

> "**5.– (1)** For the purposes of this Act, any offence of which a person is accused or has been convicted in an approved State is an extradition offence, if -
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> (a) in the case of an offence against the law of a designated Commonwealth State -
>
> (i) it is an offence ...
>
> (ii) ...
>
> (b) 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."

There is no debate that the United States is "a treaty State". For the purposes of this case the concluding words of 5(1)(b)(ii) falls for consideration. These are: "or, in the case of an extra-territorial offence, in corresponding circumstances outside Jamaica." 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. See ***Liangsiriprasert v United States Government and another*** [1990] 2 All E.R. 866. This was a judgment of the Judicial Committee of the Privy Council. It is sufficient to refer to part of the headnote at p. 867 which accurately sets out the principles enunciated by their Lordships' Board:

> "There was nothing in precedent, comity or good sense which prevented the common law from regarding as justiciable in England inchoate crimes committed abroad which were intended to result in the commission of criminal offences in England since an overt act was not necessary to found the jurisdiction and to wait until some overt act was performed in pursuance of the conspiracy would defeat the preventative purpose of crime of conspiracy. Accordingly, 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 pursuant to the conspiracy. Applying a common law rule, it followed that a conspiracy entered into in Thailand with the intention of committing a criminal offence of trafficking in drugs in Hong Kong was justiciable in

> Hong Kong even if no overt act pursuant to the conspiracy had occurred in Hong Kong."

Section 10(1) of The Extradition Act states as follows:

> "**10-(1)** A person arrested in pursuance of a warrant issued under section 9 shall, unless previously discharged under subsection (4) of that section, be brought as soon as practicable before a magistrate (in this Act referred to as "the court of committal") who shall hear the case in the same manner, as nearly as may be, as if he were sitting as an examining justice and as if that person were brought before him charged with an indictable offence committed within his jurisdiction."

Section 9 deals with the warrant for arrest and need not detain us. It is imperative to refer to section 43 of the Justices of the Peace Jurisdiction Act, since section 10(1) of The Extradition Act provides that the magistrate should function as an "examining justice" and section 43 of the Justices of the Peace Jurisdiction Act sets out the criterion in this regard.

Thus the approach of the magistrate in extradition proceedings is the same as if he was deciding whether or not there should be a committal to the Circuit Court. If the magistrate would not on the evidence before him have committed X to stand trial at the Circuit Court then he should not make an order leading to the extradition of X. The criterion in section 43 for committal is where:

> "... such evidence is sufficient to put the accused party upon his trial for an indictable offence, or if the evidence given raised a strong or probable presumption of the guilt of such accused party ...".

This formulation is identical to that set out in section 25 of the English Indictable Offences Act 1848. In ***Regina v Governor of Brixton Prison and another Ex Parte Armah*** [1966] 3 WLR 23 Lyell J at page 35H expressed the view that the words "strong or probable presumption of guilt" were intended as an "exposition" of the word "sufficient". In other words there is but one criterion. With this we agree. In this case Edmund Davies, J (as he then was) said at page 31 that "a strong or probable presumption" required:

> "No more than that a prima facie case must be established, and by that is meant only that there must be such evidence that if it be uncontradicted at trial a reasonable minded jury may (not probably will) convict upon it."

This we accept as a correct statement as to the criterion to be employed by an examining Justice or Justices as well as a magistrate performing his/her function within section 10(1) of The Extradition Act.

And now to the evidence. There were two affidavits which spoke to the participation of the appellant in an illegal drug organization. One was that of Nehru Shadrack Newton. Reproduced hereunder are the relevant paragraphs of that affidavit:

> "1. I am twenty seven years of age. I am a legal resident of the Bahamas. I have known Boyd since 1999.
>
> 2. I am the nephew of Samuel Knowles (hereinafter Knowles) and I worked for my uncle trafficking narcotics since 1994. My initial role in my uncle's drug organization was to assist with the transportation of cocaine and marijuana from Jamaica to the Bahamas. I

later assisted Knowles in the operations of the drug organization after Knowles was arrested and sent to prison in the Bahamas.

3. Sometime in 1999, Knowles started purchasing marijuana from Delroy Boyd. Boyd was a cheaper source of supply for marijuana. Boyd later became the person in Jamaica that would receive and store cocaine for Knowles.

4. In April of 2000, Knowles and I traveled to Jamaica and met with Boyd at Boyd's home in Westgate Hills, Montego Bay, Jamaica. I stayed at Boyd's house while Knowles and Boyd traveled to the location where Boyd stored the cocaine for Knowles. Knowles and Boyd were gone approximately thirty (30) minutes. Knowles later told me that only Boyd, Knowles and an individual only known as "Indian" know the location of the drug stash house.

5. In November of 2000, I was instructed by Knowles to travel to Jamaica and tell Boyd to release three (3) bags of cocaine to Rafael Martinez. Knowles had called Boyd from prison in the Bahamas and told Boyd to give me what ever I wanted. Boyd released three (3) bags of cocaine to Julian Russell and Russell gave the bags of cocaine to Martinez."

The other affidavit was that of Carllan Nakie Cambridge. The relevant paragraphs are also reproduced. The "PLUMMER" mentioned is the appellant:

"1. I am twenty seven years of age. I am a legal resident of the Bahamas. I have known "PLUMMER" since 1998.

2. Since 1997, I have worked for Samuel Knowles (hereinafter Knowles) in the trafficking of marijuana and cocaine. My role in the Knowles drug trafficking organization was to assist with the transportation of cocaine and marijuana

from Jamaica to the Bahamas via high performance speedboats. The cocaine and marijuana would then be transported into the United States. The following paragraphs describe part of my participation in the Knowles drug trafficking organization and describe the participation of "PLUMMER" in the Knowles drug trafficking organization.

3. In December of 1998, I traveled as a crewmember on a blue, four-engine speedboat from the Bahamas to the Mammy Bay area of Jamaica in order to pick up 2,800 pounds of marijuana. Upon arriving in Jamaica, I met "PLUMMER" on the beach. "PLUMMER" told me that the 2,800 pounds of marijuana would be ready for pick up the next day. The following day, an individual known to me as Greg Smith and several others, their names I cannot recall, delivered the 2,800 pounds of marijuana to the blue four engine speedboat. I assisted in transporting the marijuana from Jamaica to Freeport, Bahamas. Knowles paid me $60,000 United States Dollars for assisting in transporting the marijuana to the Bahamas.

4. In November of 1999, I piloted a speedboat from the Bahamas to the Falmouth area of Jamaica. I stayed in Jamaica for approximately three weeks. Prior to leaving Jamaica in December of 1999, I met "PLUMMER" in the Falmouth area of Jamaica and he gave me 2,500 pounds of marijuana to transport back to the Bahamas. "PLUMMER" transported the marijuana in a white van.

5. I made several attempts to leave Jamaica with the marijuana but was unable to do so. The engines on the speedboat that I had traveled to Jamaica in were only two hundred horse-power engines. These engines were not powerful enough to transport the 2,500 pounds of marijuana, fuel and other supplies I had on the boat. After three unsuccessful

> attempts to leave Jamaica with the marijuana, I had to return the marijuana to "PLUMMER".
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> 6. In the late part of 2000, Knowles instructed me to travel to Jamaica to pick up 500 kilograms of cocaine and transport the cocaine back to the Bahamas. I traveled to Jamaica via commercial airline. I stayed in Jamaica for approximately ten days preparing the speedboat that was already in Jamaica. Prior to leaving Jamaica, I met "PLUMMER" on a beach in the Port Antonio area of Jamaica and he gave me the 500 kilograms of cocaine. I transported the cocaine to the Bahamas. Knowles paid me $80,000 United States Dollars for transporting the cocaine to the Bahamas."

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 critical question. In the affidavits of Newton and Cambridge there is only one sentence that mentions the United States. This is to be found in paragraph 2 of the Cambridge affidavit. It reads:

> "The cocaine and marijuana would then be transported into the United States."

The Full Court appears to have placed telling significance on that sentence. Here is how it dealt with this aspect:

> "From the affidavits of Newton and Cambridge it seems quite clear that they were involved in international narcotics trafficking as integral parts of a criminal organization. From their affidavits there is ample evidence to show that the applicant subsequently joined this organization. Bearing in mind the duration and nature of Cambridge's involvement it might well be expected that he would

> have actual knowledge of the scope of the drug operations. Consequently his assertion that the drugs supplied by the applicant would be shipped to the Bahamas and then transported to the United States of America cannot be, without more, written off as mere speculation, his words when taken at face value represent an assertion of facts and as such are capable of being accepted by a tribunal of fact."

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.

Mr. McKenzie on behalf of the 2nd respondent adverted to paragraph 6 of the affidavit of Karen E. Gilbert. She was an Assistant United States Attorney for the Southern District of Florida. This paragraph reads:

> "6. Numerous seizures of cocaine, marijuana and currency have resulted from this investigation. In November of 1997, law enforcement seized 480 kilograms of cocaine from Boyd and his co-conspirators. In that importation, the cocaine was loaded onto a go-fast boat in the Bahamas and traveled to Jupiter, Florida."

At the hearing by the Resident Magistrate the contents of this paragraph had no evidential value. I find it more than curious that if the Requesting State

was possessed of the information contained in this paragraph, evidence to that effect was not offered in its proper form. It is not enough for the court of committal to be told of potential evidence.

In paragraph 4 of the Newton affidavit there is evidence that Knowles who is the mastermind, travelled to Jamaica in April 2002, and met with the appellant. This was in connection with illicit drugs. Based on this meeting, Miss Katherine Francis sought to argue that Knowles as the head of the illegal drug operation would have discussed with the appellant the full scope of the illegal drug operation which of course would have had the United States as the final destination for the drugs. Here again there is no evidential basis for this submission. There is no evidence to indicate that the appellant was other than a supplier of drugs to Knowles. There is no evidence to suggest other than that all the appellant was interested in was to be paid for the drugs he provided to Knowles.

Lord Gifford's submission that there is no prima facie case that the appellant was a party to any conspiracy to import drugs into the United States is well founded. The committal court was in error in issuing its warrant of committal on the 20th November 2002. The Full Court was also in error in dismissing the then applicant's motion for the issuance of a writ of habeas corpus.

It is for these reasons that the court at the conclusion of the hearing allowed this appeal.