JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 40/2001

BEFORE: **THE HON. MR. JUSTICE HARRISON, J.A.**
THE HON. MR. JUSTICE WALKER, J.A.
THE HON. MR. JUSTICE SMITH, J.A.

BETWEEN	**CHARLES CLARKE**	**APPELLANT**
A N D	**THE DIRECTOR OF CORRECTIONAL SERVICES**	**1ST RESPONDENT**
A N D	**THE DIRECTOR OF PUBLIC PROSECUTIONS**	**2ND RESPONDENT**

Jacqueline Samuels-Brown for the Appellant
Susan Reid-Jones and **Peter Wilson** instructed by the Director of State Proceedings for the 1st Respondent.
Tricia Hutchinson for the 2nd Respondent

December 9,10, 11, 17, 19, 2003 and July 12, 2004

WALKER, J.A:

On December 19, 2003 having heard the arguments of Counsel we dismissed this appeal and promised to put the reasons for our decision in writing at a later date. We now do so.

The appeal was prompted by an order of the Full Court of the Supreme Court (Wolfe CJ, Granville James and Harrison JJ) dismissing a motion brought by the appellant. By that motion the appellant had instituted habeas corpus proceedings challenging the issuance of a warrant of committal by the Resident Magistrate for the Corporate Area

whereby the appellant was detained to await his extradition to the United States of America for trial on charges for drug related offences.

In support of this appeal the sole original ground that was filed read as follows:

> "That the Full Court misdirected itself in failing to hold the following: That the accusation against he Applicant is not made in good faith and in the interest of justice."

By the time the appeal came on for hearing before us permission was sought to argue four supplemental grounds which read as follows:

> "1. The evidence relied on by the requesting state does not support the charges for which the Appellant's extradition is sought and accordingly the Warrant of Committal is bad.
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> 2. The Appellant's Committal to be extradited to face trial for the conspiracy as alleged in the Indictment is wrong in law as the evidence supplied does not show that he was involved in any conspiracy from May, 1998 to April 2000. Rather the evidence alleges his involvement in cocaine dealings only between September 19 and 20 of 1998.
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> 3. The Magistrate erred in committing the Appellant to be extradited to face *"one count of aiding and abetting in the possession with intent to distribute cocaine"* as there are two such counts to the Indictment and it is indecipherable from the said Warrant of Committal which of the two it is intended that the Appeal (sic) should be extradited for and face trial.

4. The request for the Appellant's Extradition subsequent to his deportation amounts to an abuse of process and ought not to be allowed."

The application to argue these supplemental grounds of appeal was strenuously opposed by Counsel for the respondents who in their submissions relied on the decision of this court (Forte, Downer and Gordon JJA) in ***Vivian Blake v The Director of Public Prosecutions and Anor,*** Supreme Court Civil Appeal No. 107/1996 (unreported) judgment delivered July 27, 1998. In that case in considering a similar application to argue supplemental grounds of appeal, the majority of the court (Forte and Gordon JJA) concluded that on a true construction of section 63 (1) and (2) of the Criminal Justice (Administration) Act, 1991, those legal provisions did not permit such supplemental grounds to be argued on appeal. In his judgment Forte JA (as he then was) had this to say:

> "By section 63 (1) of the Criminal Justice (Administration) Act 1991 an application for a writ of Habeas Corpus **SHALL** state **ALL** the grounds upon which it is based (emphasis mine). Section 63(2) provides that where an application for a writ has been made, no such application may again be made whether to the same Court or to any other Court, **UNLESS** fresh evidence is adduced in support of the application. The intention of the section must be to prevent continuous applications otherwise applicants could withhold separate grounds and come to the court, time and time again on different grounds. By the Judicature (Appellate Jurisdiction) (Amendment) Act 1991 an appeal lay for the first time to the Court of Appeal in matters of habeas corpus, Section 21 (A) (2)

> gave to the Court of Appeal the power to exercise any powers of the court below or to remit the case to that court. It is mandatory by Section 63(1) of the Criminal Justice (Administration) Act 1991, that an applicant for writ of habeas corpus must state **ALL** the grounds upon which his application is based; and Section 63 (2) deprives him of any opportunity to apply again **UNLESS** he produces fresh evidence...The object of Sections 63 (1) and (2) must be to provide for one opportunity only, to challenge through the habeas corpus procedure, the decision of the Resident Magistrate to commit the person to prison to await his extradition. The section however, recognizes that where fresh evidence becomes available it may affect the original decision and consequently an applicant is given a further opportunity for the application to be considered on the basis of that fresh evidence. In the instant case the evidence sought to be adduced was not 'fresh evidence' and consequently, the appellant would have had no basis for bringing a new application before the Court. The new grounds sought to be argued, each refer to nine separate reasons why habeas corpus should issue, and were all matters not raised before the Full Court. In any event, the purported fresh evidence would only be supportive of some of the new grounds by way of legal opinion and not per se evidence that go to the fundamentals of the matters therein raised. In those circumstances, to have permitted new grounds to have been advanced at this stage, would in my view allow the appellant to do through the process of appeal, that which he was shut out from doing by virtue of sections 63(1) and (2) of the relevant Act (supra). It was for those reasons that I came to the conclusion that the motion for leave to argue those supplementary grounds should be refused."

On this aspect of the matter Gordon JA said:

"At the commencement of these proceedings, Mr. Hibbert, objected in limine to any application being made by Mr. Ramsay for leave to argue supplemental grounds of appeal. He based his objection on the provisions of section 63 (1) of the Criminal Justice Administration Act. This section was introduced by an amending Act, Act 18 of 1991 on August 20, 1991. The section reads:

> '63(1) An application for a writ of Habeas Corpus shall state all the grounds upon which it is based'.

Mr. Hibbert submitted that this provision obliged the applicant for a writ of Habeas Corpus to state all the grounds of his application and binds him to pursue those grounds before the Full Court and, if necessary before the Court of Appeal. The right to appeal was conferred by Section 21A of the Judicature (Appellate Jurisdiction) Act (Act 17 of 1991) which also was promulgated on August 20, 1991. Thus in two (2) enactments the right of appeal in Habeas Corpus matters was given and the applicant was obliged to state fully the grounds he would thereafter be obliged to pursue. Mr. Ramsay vigorously opposed Mr. Hibbert's objection but to no avail. By a majority we held Mr. Hibbert was correct in his submission. The appellant is obliged by the Act in Habeas Corpus proceedings to rely on the grounds upon which it is based at all levels, before the Full Court and before the Court of Appeal. These proceedings are entirely the creature of statute.

Section 11 (6) of the Extradition Act states:

> 'For the purposes of this section proceedings on an application for habeas corpus shall be treated as pending until any appeal in those proceedings is disposed of...'

> Appellate proceedings therefore are a continuation of habeas corpus in the appellate court. This section was added to the Act by Act 35 of 1991 and by Act 17 of 1991 of even date. Section 63(1) of the Criminal Justice Administration Act requires the applicant for a writ of habeas corpus to state all the grounds upon which the application is made.
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> Section 63 (2) states:
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> ' 63 – (2) Where an application for a writ of habeas corpus in a criminal cause or matter has been made by or in respect of any person, no such application may again be made in that cause or matter or in respect of that person whether to the same court or any other court unless fresh evidence is adduced in support of the application.'
>
> By virtue of Section 63 (supra) proceedings on appeal are a continuation of proceedings in habeas corpus commenced in the court below and are regarded as pending until the appeal is disposed of. An appeal does not qualify as an application made in that cause or matter which would allow for fresh evidence to be adduced."

In the result following the majority decision in ***Vivian Blake*** (supra) we did not allow Counsel for the appellant to argue supplemental ground No. 2. However, we permitted Counsel to argue supplemental ground No. 1 on the basis that this ground involved a jurisdictional point which was conceded by Counsel for the respondents, and we agreed, may be taken at any stage in proceedings before the court. Further, we determined that supplemental ground No. 4 could conveniently be subsumed and argued under the umbrella of the sole original ground of

appeal and we allowed for that to be done. Supplemental ground No. 4 was eventually abandoned by the appellant's Counsel.

Does the evidence relied on by the requesting state support the charges for which the appellant's extradition is sought?

The appellant is charged jointly with other named defendants on two counts of an indictment dated April 4, 2000. The charges are stated thus:

> "**COUNT ONE**
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> From in or about May, 1998, and continuing through the date of the indictment, in the Southern District of Texas and elsewhere, and within the jurisdiction of the Court,
>
> **CHARLES ANTHONY CLARKE**
> **aka Charlie aka Ronald Leonard aka**
> **Hussein Abdulwadid**
> **ROBERT MARK YOUNG**
> **RICHARD RUPERT YOUNG aka Devon Young**
> **RAFAEL RIVERA RODRIGUEZ**
> **NESTOR MIGUEL LUCCA**
> **aka nestor Miguel Cedeno, Nestor Cedeno,**
> **Robert Pellot**
> **LUCIO OSUNA aka Fernando**
> **EDUARDO ARELLANO aka Lalo**
> **LEONEL, LEON LOPEZ**
> **JOSE ROMEO DEPAZ-NIETO**
> **JOSE RAUL PIENDO –NIETO**
>
> defendants herein, did knowingly, intentionally unlawfully combine, conspire, confederate and agree with each other and others known and unknown to the Grand Jury, to possess with intent to distribute five (5) kilograms or more of a mixture or substance containing a detectable amount of cocaine, a Schedule II controlled substance.

In violation of Title 21, United States Code, Sections 841 (a) (1) and 841 (b) (1) (A) (ii), all in violation of Title 21, United States Code, Section 846.

COUNT TWO

On or about September 19, 1998, in the Southern District of Texas, and elsewhere, and within the jurisdiction of the Court.

CHARLES ANTHONY CLARKE
aka Charlie aka Ronald Leonard aka Hussein Abdulwadid
ROBERT MARK YOUNG
RICHARD RUPERT YOUNG aka Devon Young

defendants herein, did aid, abet and assist each other and others known and unknown to the Grand Jury, and did knowingly, intentionally and unlawfully possess with intent to distribute five (5) kilograms or more of a mixture or substance containing a detectable amount of cocaine, a Schedule II controlled substance. In violation of Title 21, United States code, Sections 841 (a) (1) and 841 (b) (1) (A) (ii), and Title 18, United States Code, Section 2."

THE EVIDENCE

Pedro Cesar Garcia, a Colombian national who lived on and off in the United States of America since the year 1991, swore that he sold and delivered cocaine to the appellant on September 18, 1998. The transaction was done at a residential location which Garcia stated as 4001 Tanglewilde, Apartment 404, Houston, Texas. In his affidavit evidence Garcia swore as follows:

" I can read, write and understand Spanish. I have reviewed this affidavit prior to signing it and I have been allowed to make corrections,

> additions or deletions. It has been read to me in Spanish by my attorney, Lourdes Roderiquez, who is fluent in Spanish and English and with whom I have no trouble understanding and communicating."

Courtney Cunningham, a half-brother of the appellant, swore that in about September, 1998 he along with two other persons went to the appellant's residence at 4001 Tanglewilde, No. 404, Houston Texas. There on the appellant's directions several boxes were collected and loaded into a BMW motor car. Thereafter the appellant and another man departed in that car with the boxes, the appellant having told Cunningham that the boxes were destined for delivery to "an 18 wheeler". It was the belief of Cunningham that these boxes contained drugs.

Michael Todd Lee, a special agent with the United States Federal Drug Enforcement Administration participated in a surveillance exercise on September 19, 1998. During that exercise he observed the appellant to depart and return several times to a residence at 4001 Tanglewilde, No.404, Houston, Texas. On one occasion the appellant and others were seen to load 6 cardboard boxes into a black 1987 BMW motor car after which the car carrying the appellant and two other men and the boxes was driven away to a location where it was parked next to a tractor trailer rig. The car remained at the rig for several minutes after which it was driven away. Thereafter, the rig was kept under surveillance by Lee

until it arrived in Baton Rogue, Louisiana where it was stopped by the local police. There the trailer was searched and in it was found, among other things, 54 kilograms of cocaine. This evidence was corroborated in every material particular by the evidence of another special agent of the Federal Drug Enforcement Administration, Stephen B. Tinsley.

Hugh Vernon Carter, a truck driver, swore that in the presence of the appellant 6 boxes of cocaine were transferred from a black BMW motor car into his truck, and that on the appellant's instructions he transported the boxes to Baton Rouge, Louisiana where he was intercepted and arrested.

Robert Dean Johnson, a truck driver, swore that on September 19, 1998 in Houston , Texas he and the deponent Hugh Vernon Carter loaded 6 boxes into a trailer truck then being operated by them. From Houston both of them, taking turns, drove the truck to just outside Baton Rouge, Louisiana, where they were stopped by the police for a traffic violation. There upon searching the truck and trailer the police found 54.5 kilograms of cocaine, and other goods packed into boxes inside the trailer section of the truck.

Wallace Cowart, an officer of the Baton Rouge Police Department assigned to the Highway Interdiction Unit of that Department, deponed that on September 20, 1998 he stopped a tractor trailer which was being driven at an excessive speed on Interstate 12 in Baton Rouge.

That tractor trailer was then being driven by Robert Dean Johnson and carried Hugh Vernon Carter, as a passenger. Upon being searched the tractor trailer was found to be carrying among other things 54 kilograms of cocaine packed in 6 boxes. A field identification swab test was done and resulted positively for cocaine. The cocaine was seized by him and later turned over to Sergeant Joseph Bosco who sealed it in his presence. Later the same day Sgt. Bosco transferred custody of the cocaine to the Baton Rouge Police Department Evidence Room.

Joseph John Bosco, a Sergeant of Police attached to the Baton Rouge Police Department and assigned to the Highway Interdiction Unit of that Department, gave evidence that on September 20, 1998 he received a call for assistance from Detective Cowart. Cowart had in the course of his duties stopped a red tractor trailer which upon search was found to be carrying 6 boxes secreted under a stack of wooden pallets. These boxes were unloaded and were found to contain in excess of 54 kilograms of cocaine, and other goods. Bosco said that he sealed the cocaine and later the same day transferred custody of the drug to the Baton Rouge Police Department Evidence Room.

James Brett Smith swore that he was a Patrol Sergeant attached to the Baton Rouge Police Department and assigned to the Evidence Division of that Department. On September 24, 1998, at the request of Sergeant Joseph John Bosco he transported from the Baton Rouge Police

Department Evidence Room to the Louisiana State Police Crime Laboratory for drug testing certain evidence believed to be cocaine. At the time of carrying out this exercise the seal on the evidence was intact and showed no signs of being tampered with.

Tara Milan, a forensic scientist attached to the Drug Section of the Louisiana State Police Crime Laboratory in Baton Rouge, swore that she conducted chemical analyses of substances contained in sealed packages which had been received in that Crime Laboratory and of which Cpl. Joseph Bosco of the Baton Rouge Police Department was the case officer. Her analyses were completed on December 10, 1998. In her expert opinion the substances analysed were cocaine of a total gross weight of 53.76 kilograms.

For the appellant, Mrs. Samuels -Brown submitted that there was no evidence adduced to prove that the substance found, and for which the appellant was charged, was cocaine. Evidence of a chemical examination was a pre-requisite to establishing the nature of the substance found and here there was no such evidence, she said. Further, Counsel argued that there was no nexus established between the appellant and the substance found. Finally, as to the first count of the indictment Mrs. Samuels- Brown argued that there was no evidence adduced in proof of the appellant's involvement in a conspiracy of the nature charged. Counsel submitted that such evidence as purportedly

came from the deponent, Garcia, was hearsay and, therefore, inadmissible. That was so, Counsel maintained, because Garcia did not speak English, that being the language in which his affidavit was recorded, and although the contents of his affidavit were read over to him by an interpreter, that interpreter did not, himself, swear an affidavit in verification of the authenticity of the function he performed.

We do not agree with these submissions of Counsel. Having carefully examined the evidence we find no flaw in the establishment of the nexus between the 6 cardboard boxes which the appellant was seen to load into the BMW motor car and subsequently transfer from that car to a tractor trailer on the same day i.e. September 10, 1998, and the 6 boxes which were found in that tractor trailer on the following day when the vehicle was intercepted by the Baton Rouge police and searched. Further, we find no hiatus in the nexus between the contents of those boxes and the substance that was subsequently examined by the analyst and found to be cocaine. In our opinion the chain of custody of the drug remained unbroken and provided cogent prima facie evidence of the charges preferred against the appellant. Where the affidavit of Garcia is concerned we adopt the stance taken by the court in ***R (Saifi) v Governor of Brixton Prison*** [2001] 1WLR 1134, a case on which Mrs. Samuels-Brown relied. We, too, incline to the view, without deciding the point, that the fact that a deposition is recorded in a language that is

foreign to the deponent and is unaccompanied by a certified translation may not necessarily lead to the evidence contained therein being inadmissible. This is so although, generally speaking, a certified translation is necessary. But we go further to say that in the present case, even without Garcia's input, we do not doubt that there was sufficient evidence adduced to make out a prima facie case for the appellant's extradition as requested.

Does the evidence reveal that "the accusation against the appellant is not made in good faith and in the interest of justice"?

This, indeed, was the sole ground on which the case for the appellant was argued before the Full Court. However, before this Court, and as an adjunct to her submission, Mrs. Samuels-Brown contended that the proceedings against the appellant amounted to an abuse of the process of the court. More precisely, Counsel submitted that such abuse lay in the delay in bringing these proceedings.

On this aspect of the appeal the arguments advanced on behalf of the appellant were, essentially, the same arguments that were advanced before the Full Court. It is, therefore, instructive to see how the matter was dealt with by that Court. In his judgment Wolfe CJ said:

> "The applicant contends that the requesting State acted in bad faith in that it knew of the alleged offence prior to the applicant being deported to Jamaica on January 23, 1998 (sic) and ought to have charged him prior to deportation rather than seek to extradite him now that he is settled in the land of his birth. The

question of bad faith was raised in the case of ***Vivian Blake v the Director of Public Prosecutions et al*** SCCA No. 107/96 M65/95. This was a case under the Extradition Act of 1991. Forte JA, as he then was, dealing with the question of Good Faith had this to say:

> 'This allegation must be determined on the presumption that countries that enter into extradition treaties for the return of prisoners or suspects from one country to another, for purpose either of ensuring the imprisonment of the convicted person, or the trial of the fugitive, do so honourably and with sincere intentions of acting according to the terms of the treaty. Consequently, any such allegation must be put forward on very strong grounds.'

Lord Russell CJ in Re Arton [1896] 1Q.B 108 pointed to the gravity and serious nature of an allegation of bad faith in a case of extradition.

> 'It has been pointed out by myself and my learned brothers during the argument that this is in itself a very grave and serious statement put forward, and one which ought not to be put forward, except upon very strong grounds, it conveys a reflection of the greatest possible kind, not only upon the motive and actions of the responsible government but also impliedly upon the judicial authorities of a neighbouring friendly power.'

Against the background of the dicta cited (supra), let me examine the evidence relied upon in support of this allegation of bad faith. The applicant deposes that in October, 1998, he was arrested in the State of Louisiana in the United States of America. He was finger printed and all his criminal records enquired into by the Federal Bureau of Investigations. He was detained in the State of Louisiana for four (4)

> months and then deported to Jamaica accompanied by Federal Marshals. The point is made that the alleged offences for which extradition is sought were all committed prior to his deportation and would have been known to the Federal Government at the time of deportation. He refers in particular to the affidavit evidence of Michael Todd Lee, a Special Agent, who deposed that he saw the applicant involved in a drug transaction on September 19, 1998. The argument is that the Federal Government in failing to charge him prior to his deportation, in the light of the available evidence, is demonstrating bad faith and in the interest of justice the application should be refused. The argument as to bad faith is seriously flawed. There is not one scintilla of evidence that at the time of deportation the Federal Authorities had information of his involvement . Even if they had and through negligence they allowed him to be deported without charging him, this would not be evidence of bad faith, bearing in mind the dictum of Forte JA and Lord Russell CJ, (supra). The evidence relied upon as bad faith must be cogent and compelling to displace the presumption of good faith alluded to in the authorities."

In similar vein and to the same effect was the judgment of Harrison J and, on his part, Granville James J agreed with both judgments. This court fully endorses this decision of the Full Court which we consider to be faultless. There was no evidence to show that the accusation against the appellant was not made in good faith in the interest of justice, nor was there any evidence of culpable delay on the part of the requesting state.

Accordingly, this ground of appeal fails, and with it the entire appeal.