JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 41 OF 2006

BEFORE: **THE HON. MR. JUSTICE PANTON, P**
THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MISS JUSTICE SMITH, J.A. (Ag.)

IN THE MATTER of an application by Carlton Dunkley for a Writ of Habeas Corpus Ad Subjiciendum

AND

IN THE MATTER of the Extradition Act

BETWEEN:	**CARLTON DUNKLEY**	**APPELLANT**
AND	**THE COMMISSIONER OF CORRECTIONS**	**1ST RESPONDENT**
AND	**THE DIRECTOR OF PUBLIC PROSECUTIONS**	**2ND RESPONDENT**

November 27- 28, 2007 & July 18, 2008

Patrick Atkinson and Mrs. Sharon Usim instructed by Usim Williams & Co. for the Appellant

Curtis Cochrane instructed by Director of State Proceedings for 1st Respondent

Donald Bryan Deputy Director of Public Prosecutions and Miss Melissa Simms, Crown Counsel for the 2nd Respondent

PANTON, P.

I have read in draft the judgments of Harrison, J.A. and Gloria Smith, J.A., (Ag.). I agree with their reasoning and conclusion, and I have nothing to add.

HARRISON, J.A:

1. The appellant, a Jamaican citizen, is in custody at the Horizon Remand Centre, Spanish Town Road in the parish of St. Andrew, pending his delivery to the United States of America to stand trial in relation to charges for conspiracy to import marijuana and conspiracy to possess with intent to distribute drugs into that country.

2. I have read the draft judgment of Smith J.A (Ag.) and am in agreement with her reasoning and conclusion. I propose simply to add a few comments of my own on the issue regarding the nexus between the appellant and the conspiracy to import and to possess the drugs with the intent to distribute them into the United States of America.

3. It has long been settled law that the agreement of two or more persons to do an unlawful act constitutes a conspiracy. In ***Rex v Brisac*** (1803) 4 East 164, Grose J. delivering the opinion of the court said, at p. 171:

> ". . . conspiracy is a matter of inference, deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose in common between them, and which hardly ever are confined to one place."

4. In ***Regina v Doot*** [1973] 2 WLR 532, Lord Pearson said:

> "A conspiracy involves an agreement expressed or implied. A conspiratorial agreement is not a contract, not legally binding, because it is unlawful. But as an agreement it has its three stages, namely (1) making or formation (2) performance or implementation (3) discharge or termination ..."

5. ***Liangsiriprasert v United States Government and another*** [1990] 2 All E.R. 866 is a decision of the Privy Council and the issue for the Board was whether the evidence disclosed a prima facie case of conspiracy against the appellant. Lord Griffiths said at 878:

> "Unfortunately in this century, crime has ceased to be largely local in origin and effect. Crime is now established on an international scale and the common law must face this new reality. Their Lordships can find nothing in precedent, comity or good sense that should inhibit the common law from regarding as justiciable in England inchoate crimes committed abroad which are intended to result in the commission of criminal offences in England. Accordingly, a conspiracy entered into in Thailand with the intention of committing the criminal offence of trafficking in drugs in Hong Kong is justiciable in Hong Kong even if no overt act pursuant to the conspiracy has yet occurred in Hong Kong. This then is a sufficient reason to justify the magistrate's order ..."

6. In ***Reg. v Murphy*** (1837) 8 C. & P. 297 Coleridge J. said in the course of his direction to the jury, at p. 311:

> "It is not necessary that it should be proved that these defendants met to concoct this scheme, nor is it necessary that they should have originated it. If a conspiracy be already formed, and a person joins it afterwards, he is

> equally guilty. You are to say whether, from the acts that have been proved, you are satisfied that these defendants were acting in concert in this matter."

7. In order to apply the principles enunciated in the above cases to the present case, it is necessary to determine what are the essential facts alleged in support of the charge of conspiracy.

8. The requesting State is relying on the affidavit evidence of a number of deponents but more so, upon the evidence of a co-conspirator, Jack Protzman. According to Protzman's affidavit, there was a plan to load approximately 6,000 pounds of marijuana which was to be imported into South Florida in the United States of America. This plan was made between Protzman, the appellant and one Denton Hall.

9. The evidence further revealed that both Hall and the appellant had met Protzman at the airport in Montego Bay on October 16, 2001. Protzman was taken to a hotel where he was checked in. They all went for lunch and it was during that time that they planned how the marijuana would be packaged and delivered; what should wrap the packages, and how the "boat to boat" transfer would take place at Lucea. The affidavit also revealed that a boat operator named "Mike" would deliver the marijuana packages in South Florida.

10. After the meeting of October 16, Protzman said he had remained in contact with Hall and the appellant regarding the pending importation and that during this time he spoke approximately eight times to the appellant by telephone.

11. The boat operator "Mike" travelled a month later to Jamaica on a boat, did the "boat to boat" transfer and received over 6000 pounds of marijuana which was transported and delivered in South Florida.

12. In my judgment, the sequence of events indicate that there was clear evidence which establishes a sufficient nexus between the appellant and other persons to commit the offences of conspiracy to import and to possess the marijuana with intent to distribute drugs into the United States of America. I would therefore dismiss the appeal.

SMITH, J.A. (Ag.)

The Background:

1. The appellant, Mr. Carlton Dunkley, a Jamaican citizen, is wanted to stand trial in the United States of America for conspiracy to import marijuana into the United States of America and conspiracy to possess marijuana with intent to distribute it in the United States of America.

2. The United States District Court for the Southern District of Florida issued a warrant for his arrest on the 13th day of November 2003.

3. On the 23rd day of December 2004, the appellant was arrested here in Jamaica, on a provisional warrant for extradition to the United States of America.

4. On the 1st March 2005, the Hon. Minister of Justice issued the Authority to Proceed, which facilitated the hearing of the committal proceedings, before the learned Resident Magistrate, for the Corporate Area

Criminal Courts. At the conclusion of those proceedings on the 31st day of May 2005, the appellant was ordered committed to custody, pending his extradition to the United States of America.

5. On the 14th June 2005, the appellant by way of a Fixed Date Claim Form, applied for a writ of habeas corpus to:

(a) discharge him from the custody of the Commissioner of Corrections; and

(b) declare that the Claimant's constitutional rights guaranteed by Section 16(3) (e) of the Constitution of Jamaica have been violated by the Learned Resident Magistrate's failure to follow the provisions of the Jamaica Extradition Act, Section 14(1) in ordering his removal from Jamaica.

This application was heard by the Full Court on the 29th and 30th of May 2006, and was dismissed.

6. The following original grounds of appeal were filed by the appellant.

Grounds of Appeal

(a) The Court erred in law in finding that the word testimony under Section 14(1) of the Extradition Act includes statements given on oath in the form of Affidavit, which is taken outside of curial proceedings; and

(b) That the documents submitted in support of the request for extradition did not disclose evidence sufficient to satisfy the requirements of the Extradition Act 1991 thereby enabling the learned Resident Magistrate to make an order for the Appellant/Claimant to be extradited to the United States.

(c) That the Court erred in finding that the Extradition Act 1991 has been complied with.

7. The following supplemental grounds of appeal were subsequently filed.

"(1) There was no sufficient evidence before the Magistrate of the Claimant being a party to any conspiracy to import or to possess drugs for distribution into the United States of America. In this regard the Court failed to weigh up the evidence and failed to evaluate the evidence as to whether it amounted to any such conspiracy as alleged in the Warrant of Committal.

(2) The Court erred when it failed to find that the terms of a plea bargain must be relevant to the weighing up process required by the Magistrate.

(3) The Supreme Court erred when it failed to properly evaluate whether the terms of the Extradition Act were followed in the case presented for his extradition before the Magistrate. The Court therefore erred in finding that the appellant's constitutional rights were not violated.

(4) The Supreme Court erred when it failed to evaluate the nexus between the charges on which extradition was sought and the evidence presented in support of the request for extradition."

8. Mr. Patrick Atkinson, for the appellant, indicated to the Court that he would consolidate and argue the original Grounds and Supplemental Grounds of Appeal in the following order:

(i) Grounds (a), (c) and Supplemental Ground (3);

(ii) Ground (b) and Supplemental Grounds (1) and (4) and

(iii) Supplemental Ground (2).

Grounds (a), (c) and Supplemental Ground (3)

Mr. Atkinson submitted that:

(1) Although the Constitution of Jamaica expressly provides for the removal of a person from Jamaica, it must be done under the Extradition Act of 1991. Section 14 of that Statute allows for evidential proof in extradition proceedings to be in accordance with the laws of Jamaica, as well as the admitting of documents which purport to set out testimony given on oath in an approved state if such documents are duly authenticated.

(2) The evidence on which the Warrant of Commitment against the appellant is based consists of affidavits and not testimony as is required by the Extradition Act. Therefore it is being sought to have the appellant removed from Jamaica outside the provisions of the law and this is therefore unconstitutional.

(3) "Testimony" means direct evidence or a transcript or record of such direct evidence given in court or under curial circumstances.

9. Mr. Bryan on behalf of the second respondent in his reply submitted that "testimony" as used under Section 14 (1) of the Act included not only evidence given in court under oath, but extended to statements given on oath out of court and included affidavits, which set out statements on oath out of Court. He argued that once an affidavit was duly authenticated it fell within the documents contemplated by Section 14 (1) (a) of the Act. He referred to the recently decided case of **Hartford Montique v The Commissioner of Corrections and the Director of Public Prosecutions** S.C.C.A. No. 96 of 2005, delivered March 8, 2007 in support of his submissions.

(10) Mr. Cochrane for the first respondent in his response to this ground adopted the submissions made on behalf of the second respondent.

(11) The question for the Court's determination on these Grounds is whether the provisions of section 14(1) (a) of the Extradition Act have been satisfied.

Section 14 of the Extradition Act stipulates as follows:

> "14. (1) In any proceedings under this Act, including proceedings on an application for *habeas corpus* in respect of a person in custody under this Act -
>
> (a) a document, duly authenticated, which purports to set out testimony given on oath in an approved State shall be admissible as evidence of the matters stated therein;

In **Hartford Montique v The Commissioner of Corrections and the Director of Public Prosecutions (supra).** Smith, J.A. considered the meaning of the word "testimony" and opined as follows:

> "An affidavit is a form of testimony on oath. The precise form in which the testimony of a witness is given on oath will vary according to the procedures of the jurisdiction. But in order for the authenticated document to be admissible it must purport to set out testimony on oath. The section does not affect the contents of the document. The process intended by the Legislature is the creation of a document, whether in or out of court. ... It has been said (in many cases) that the purpose of this section is to obviate the necessity of bringing witnesses from the requisitioning state. ... In my view the conclusion of the full court that affidavits duly attested are admissible under Section 14(1) (a) of the Act is correct."

That view was also approved by Harrison, J.A. when at page 41 of the same judgment, he declared:

> "In my view, depositions, affirmations and declarations are records of testimony and while statements on oath (affidavits) are extra-curial records they are nevertheless in solemn form. They are parts of a continuum of form of testimony and as such an affidavit would fall within the category of "testimony given on oath" as contemplated by Section 14(1) (a) of the Act."

In my judgment, the Court below was correct when it held that affidavits fall within the category of "testimony given on oath". The

appellant's submission that the Requesting State was seeking to have him removed from Jamaica, outside of the provisions of the law, is therefore without foundation or merit. Additionally, Section 16 (3)(e) of The Constitution specifically provides for the removal of persons outside of the jurisdiction to face trial once the Extradition Act has been complied with.

Ground (b) and Supplemental Grounds (1) and (4)

12. Mr. Atkinson submitted that:

(a) the learned Magistrate in deciding that the application for an order for extradition against the appellant failed to make any evidential finding as to whether the "evidence" was sufficient to reach a prima facie case with respect to the indictment preferred and in consequence thereof carried out a mere rubber stamping of the application; and

(b) the actual substance of the allegations in the affidavits (when one considers what is direct evidence) does not amount to a prima facie case of either conspiracy to import drugs into the United States of America and/or a conspiracy to possess drugs in the United States of America with intent to distribute, as was stated in the indictment preferred against the appellant.

In reply, Mr. Cochrane and Mr. Bryan for the respondents were at one when they submitted that, the documents presented in support of the request for

extradition for the Court's consideration, disclosed sufficient evidence to satisfy the requirements of the Extradition Act. They argued that the evidence of Mr. Jack Protzman in particular contained direct evidence of the involvement of the appellant in the conspiracies as charged.

13. It is my view, that the affidavit of Mr. Jack Protzman, is indeed critical to the determination of this issue and has to be considered fully. He deposed as follows:

> "I Jack Protzman, being duly sworn, depose and state as follows:
>
> (1) On November 29, 2001, I was arrested and subsequently pled (sic) guilty in the Southern District of Florida, for marijuana importation conspiracy in the court case ***United States of America v. Jack Protzman, et al.***
>
> 2). During the conspiracy for which I was arrested, I had contact with and (sic) individual residing in Jamaica named Carlton Dunkley. I met Dunkley in October of 2001 while I was in Jamaica.
>
> 3). During that time, I had contact with a boat captain I knew as "Mike" and later learned was a Federal Agent who was acting in an undercover capacity. As result of my negotiations with this undercover officer, I travelled to Jamaica on or about October 16, 2001. Upon arrival, two individuals, Denton Hall and Carlton Dunkley, met me at the airport in Jamaica. Hall and Dunkley took me to the El Greco Hotel where they had rented a room for me. After I checked in to the hotel, Hall, Dunkley and I went to lunch. During lunch, we planned for a load approximately 6,000 pounds of marijuana to be imported to South Florida. We discussed how the marijuana would be packaged and delivered. Hall and Dunkley discussed that the marijuana would be wrapped with commercial saran wrap and use beige

> tape to waterproof it on the outside. We further discussed that the dimensions of the packages would be twelve inches by twelve inches and not to exceed that. We finally discussed the rendezvous point of Lucea point off the coast of Jamaica for boat to boat transfer the marijuana to a boat operated by "Mike". During my discussions with Dunkley, I learned that he owns some small supermarkets in Jamaica and that he is involved in rental properties and that he also does promotions for entertainment.
>
> 4). I stayed in contact with Hall and Dunkley via telephone regarding the pending marijuana importation. During this time, I spoke approximately eight (8) times to DUNKLEY via telephone.
>
> 5) About a month later, "Mike" traveled on a boat and did a boat-to-boat transfer off the coast of Jamaica where he received over 6,000 pounds of marijuana. "Mike" then transported it into South Florida. I was subsequently arrested during the time "Mike" was going to deliver this marijuana to me in South Florida on November 29, 2001.
>
> 6) In May of 2003, I was shown a six-photo spread by S/A Sharon Lindskoog. I recognized one of those photos as that of Carlton Dunkley. Attached to this affidavit is a photo of person I recognized at (sic) Carlton Dunkley. I have initialed and dated the back of this photo."

It is clear from paragraph 3 of this affidavit that the appellant was involved in a plan to import marijuana into the United States of America. Furthermore, in his affidavit, Special Agent C. Michael Hendrick said that he acted as an undercover agent in the picking up of the marijuana and its subsequent delivery to Portzman in Florida. Both affidavits provide sufficient evidence implicating the appellant in the conspiracy charged. See ***Regina v Doot*** **[1973]** 2 W.L.R. 532 at p 549 where Lord Salmon stated that:

> "The crime of conspiracy is the creation of the common law.....In essence it consists of an agreement between two or more persons to do an unlawful act or a lawful act by unlawful means: ***Mulcahy v The Queen*** *(1868)* L.R. 306. This offence is complete as soon as the agreement is made. This is so because the law recognizes that once people go so far as to agree to act unlawfully there is a serious risk that they will carry out this agreement. The agreement is in itself made an offence in order to preserve the Queen's peace by preventing the offence which the conspirators have agreed to perpetuate before it reaches even the stage of attempt. This has been the basis of the law of conspiracy since the earliest times".

In the instant case, there was evidence which amounted to an "agreement", as contemplated in **R v Doot** (supra). An agreement was made between Mr.Protzman, Mr.Hall and the appellant, for them to import and distribute drugs into the United States of America. In that event, it is my view that the Court would have had to go on to consider whether or not there was sufficient evidence to amount to a prima facie case.

14. By virtue of the Extradition Act a hearing of this nature is governed by the provisions of Section 10(1) of the Act which stipulates that the Resident Magistrate shall hear the case in the same manner:

> "... 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 the jurisdiction."

Section 10(5) further provides that:

> "(5) 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 court of committal shall, unless his committal is prohibited by any other provision of this Act, commit him to custody to await his extradition under this Act. ..."

In my view, the foregoing provisions of the Act, stipulate that the Resident Magistrate's primary concern, was to determine whether or not, a prima facie case had been made out against the person sought for extradition and not a determination of the credibility of the witnesses.

15. Dukharan, J, in delivering the judgment, on behalf of the Full Court, stated at page 11:

> "The hearing thus protects the individual in this country from being extradited for trial for a crime in a foreign country unless prime facie evidence is produced that he or she had done something there that would constitute a crime mentioned in the treaty if committed here. It must be emphasized that his hearing is not a trial and no attempt should be made to make it one.
>
> What the Magistrate had before him were affidavits of persons who could speak to the claimant's participation in the conspiracies for which he was accused, that is, the possession, importation and

> distribution of marijuana into the United States. There was enough evidence for the magistrate to make out a prima facie case against the claimant."

In my judgment, the reasoning of the learned judge, was faultless and his finding that "there was no merit in this ground", was indeed correct and cannot be impugned.

16. **Ground 2 of the Supplemental Grounds of Appeal.**

Mr. Atkinson submitted that:

> "(a) the affidavits of critical persons in the case appeared to have been given as a result of offers of favour in plea bargain;
>
> (b) in order to decide if any weight at all could be ascribed to the contents of these affidavits, the learned magistrate should have had evidence concerning what was promised in any such plea bargain as an inducement or promise to the affiant; and
>
> (c) The learned Magistrate failed in his duty to weigh-up the evidence to judicially determine if any weight could be attached to the affidavits."

17. Mr. Cochrane, on behalf of the first respondent, submitted that plea bargaining was an issue which ought properly to be dealt with at the trial and not before the Resident Magistrate. He relied on the decision in the case of ***Desmond Brown v The Director of Public Prosecutions and Another*** S.C.C.A. No. 91 of 2000 delivered on April 2, 2004 at page 5, where it was stated that:

> "The question of interest to serve is a matter of credibility and therefore becomes a matter for the trial court when it comes to assess the credibility of the particular witness or witnesses."

18. Mr. Bryan, on behalf of the 2nd respondent, argued that this was not a matter with which an examining Magistrate should be concerned, as it related to the issue of credibility which was essentially an issue for the trial court. He referred to the cases of ***Desmond Brown v The Director of Public Prosecutions*** (supra) and ***R v Governor of Pentonville Prison ex parte Osman*** [1990] 1 WLR 277, in support of this submission.

19. The Full Court in determining this aspect of the case in its judgment stated:

> "The Resident Magistrate made a committal order based on the affidavit evidence he had before him. This was not a trial and all the Resident Magistrate needed to do was to find that a prima facie case had been made out against the Claimant. Certainly he must have considered the evidential value of the affidavit evidence he had before him before making his committal order".

It is my view that the focal issues to be considered by this Court on the final ground of appeal are:

> (a) How should the Resident Magistrate treat the evidence of a witness who may have an interest to serve; and
>
> (b) The Resident Magistrate's duty to weigh-up the evidence placed before the Court.

In the decision of **Hartford *Montique v The Commissioner of Corrections and Another*** (supra) the Court outlined the following instructive guidelines. Harrison, J.A., at page 56, of the judgment declared as follows:

> "...The Act makes no provision for a Resident Magistrate to make finding of facts. Section 10 of the Act mandates the Magistrate however, to hear extradition cases as if he or she were sitting at a Preliminary Hearing and he or she had to be satisfied that the evidence was enough to warrant the trial just as if the acts had been committed in Jamaica. It would be the Magistrate's duty therefore, to consider the evidence as a whole, and to reject any evidence which he considers worthless. In that sense it is his duty to weigh up the evidence. But it is not his duty to weigh the evidence...He was neither entitled nor obliged to determine the amount of weight to be attached to any evidence or to compare one witness with another. That would be for the jury at the trial. It follows that the Magistrate is not concerned with inconsistencies or contradictions, unless they were such as to justify rejecting or eliminating that evidence altogether. Nor, of course, was the Magistrate concerned with whether the evidence of an accomplice was corroborated and if there was a plea bargain in existence and if so what were its terms." [Emphasis mine]

On the bases of the above stated guidelines it is my view that the focal issues for consideration were adequately addressed by the Full Court, and I have no reason to differ from their conclusions.

Conclusion:

20. It is my view that the evidence adduced before the Resident Magistrate was sufficient to form a prima facie case against the appellant for

the offences of conspiracy to import marijuana into the United States of America and of conspiracy to possess marijuana, with intent to distribute in the United States of America.

Accordingly, the appeal should be dismissed and the order of the Full Court for the extradition of the appellant be affirmed.

PANTON, P.

ORDER:

The appeal is dismissed. The order of the Full Court for the extradition of the appellant is affirmed.