SAINT CHRISTOPHER AND NEVIS

IN THE COURT OF APPEAL

CIVIL APPEAL NO.18 OF 2003

BETWEEN:

[1] NOEL HEATH
[2] GLENROY MATTHEW

Appellants

and

GOVERNMENT OF THE UNITED STATES OF AMERICA

Respondent

Before:

The Hon. Mr. Albert Redhead — Justice of Appeal
The Hon. Mr. Adrian D. Saunders — Justice of Appeal
The Hon. Mr. Brian Alleyne, SC — Justice of Appeal

Appearances:

Dr. Henry Browne for the first Appellant
Mr. Edward Fitzgerald, QC and Mr. Parnell Campbell, QC for the second Appellant
Dr. Richard Cheltenham, QC with the DPP of St. Kitts, Mr. D. Merchant for the Respondent

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2003: September 17; 18;
October 21.
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JUDGMENT

[1] **SAUNDERS, J.A.:** The Government of the United States of America ("the USA") has sought the extradition of the Appellants in connection with drug offences committed in that country. Efforts have been made, since 1996, to have the men extradited from the Federation of St. Kitts and Nevis to the United States. This appeal represents Round 6 in the proceedings. It was argued on behalf of the USA that this Court, in view of all the events that have transpired, should order a Magistrate, without more, to commit the Appellants for trial in the United States. The Appellants, for a variety of reasons, contend that they should be discharged.

[2] Much of the background to this appeal can be gleaned from a perusal of the several judgments that previously have been delivered in this matter. In lieu of a lengthy recital of the underlying facts, I shall therefore very briefly describe what has given rise to this further segment of the proceedings.

[3] In 1996 the extradition proceedings came before Magistrate Haynes Blackman. In the course of the hearing the Magistrate ruled inadmissible vital bits of evidence, adduced by the USA, and contained in the transcripts of divers tape recordings. Upon the conclusion of the case for the USA, Dr. Fenton Ramsahoye QC, lead counsel for the Appellants, announced that the Appellants had no evidence to lead. The Appellants made a No Case Submission. The Magistrate upheld this submission and discharged the men. The USA then applied to the High Court for orders of certiorari and mandamus.

[4] The High Court Judge, Smith, J., granted the application of the USA. The Judge quashed the decision to discharge the Appellants and remitted the matter to the Magistrate so that the latter could resume and complete the hearing. The learned Magistrate refused so to do when the matter came back before him. The Magistrate grounded his refusal on the premise that the drawn-up order of the High Court had omitted formally to state that his original decision to discharge the fugitives had been quashed.

[5] The USA again filed proceedings in the High Court once more seeking orders of mandamus and certiorari. The High Court again granted the same. In the course of this, his second judgment, Smith, J. stated, among other things:

> "(19)…………If I make the order quashing the decision of the Senior Magistrate made on 26 January, 1999 and I now do so, the way would be pellucid for the Magistrate to get the Respondents back before the court for the purpose of having the law followed *which would mean that the Magistrate would be bound to commit the Respondents on the evidence*…..……..

(22)……………..the Magistrate is still to effect and carry out the order of this court made on 17 April 1998………..That order was that the Magistrate must, in effect, follow the law in this case, that is, to get the Respondents before the court, *consider the matter in the light of the judgment of the court delivered on 17 April, 1998 and commit the Respondents under the provisions of the Extradition Act, 1870* (my emphasis)".

[6] The two men appealed to their Lordships in the Privy Council from this decision of Smith, J. Several grounds were canvassed. The judgment of their Lordships, delivered by Lord Hutton, considered the grounds of appeal under four headings. One of them, namely the validity of the extradition hearing, is now of no relevance to this appeal. The other three were respectively:

[i] The ruling of the High Court that the magistrate erred in law in not committing the Appellants;
[ii] Section 14 of the constitution of St. Kitts and Nevis; and
[iii] Abuse of process.

[7] On the 19th June, 2002 the Privy Council dismissed the appeals. By the time their Lordships ruled however, Magistrate Blackman had retired from the Bench. Lord Hutton, noting that fact, concluded his judgment thus:

"……it will therefore be for the High Court to decide what the next step in the proceedings should be, but it is clearly desirable that the High Court and the parties should act with the utmost expedition."

[8] In December, 2002 the Appellants were notified that the remittal from the Privy Council was coming up before Baptiste, J. on 16th December, 2002. The Appellants promptly applied to the High Court for constitutional redress. They alleged that by reason of delay and the "inequality of arms", any further attempt to continue the extradition proceedings would be unfair, oppressive and unconstitutional. This application for redress was consolidated with the remittal and both were heard by the Judge on 16th December, 2002, 14th March, 2003 and 28th April, 2003 respectively. The learned Judge delivered his judgment on 9th July, 2003. He dismissed the application made under the constitution and, pursuant to the remittal, he ordered and directed the Senior Magistrate of District "A" Basseterre "to resume the hearing of the Extradition proceedings and commit

….[the Appellants]……under the provisions of section 10 of the Extradition Act 1870."

[9] The present appeal is against that order of Baptiste, J. The appeal was originally set down for hearing on 14th August, 2003 but, at the request of both sides, it was adjourned to 17th September, 2003. The grounds of appeal raise three broad questions, namely:

[1] Whether the tape recordings which form the substance of the cases against the Appellants and without which no prima facie case could have been made out were all inadmissible.

[2] Whether, by reason of the delay that has taken place, the men ought now to be discharged.

[3] Whether the Judge could properly order a magistrate, and in particular a Magistrate who had not heard the evidence, to commit the Appellants especially in light of the fact that the men have not had an opportunity to call witnesses or give evidence.

**Inadmissibility of the Tapes**

[10] The USA had applied, in the original proceedings before Magistrate Haynes Blackman, to have the impugned tape recordings, or the transcripts therefrom, admitted into evidence pursuant to sections 14 and 15 of the Extradition Act 1870. Those sections permit depositions or statements on oath, taken in a foreign state, and copies of such original documents, to be received into evidence at the extradition hearing provided they have been duly authenticated. It is common ground that if the tapes were inadmissible there could be no prima facie case made out against the men. The respective judgments of Smith, J., Lord Hutton and Baptiste, J. all implicitly or expressly sanctioned the admission of the tapes pursuant to sections 14 and 15 of the Extradition Act. No issue was then raised about the constitutionality of those sections of the Act. Counsel for the Appellants now submit in these proceedings that sections 14 and 15 of the Extradition Act run afoul of sections 10(1) and 14(C) of the St. Kitts and Nevis constitution because they permit a person to be extradited on "packaged evidence" generated outside the jurisdiction and which cannot be tested by cross-examination.

[11] Section 10 of the constitution guarantees citizens of St. Kitts and Nevis a fair hearing within a reasonable time by an independent and impartial Court. The section also prescribes essential safeguards to every person who is charged with a criminal offence. Section 14 of the constitution guarantees freedom of movement.

[12] At the outset of this appeal, Dr. Cheltenham for the USA submitted that the Appellants ought not to be allowed to argue this ground because the Privy Council had already examined and pronounced upon the lawfulness of the admissibility of the tapes in light of section 14 of the constitution. Dr. Cheltenham suggested that the Appellants were seeking to mount a renewed attack on an issue already determined in the USA's favour and that they should be estopped from arguing it afresh.

[13] Counsel for the Appellants responded that their Lordships had considered section 14 of the constitution in a much narrower light. While conceding that the point now being advanced was a new one, counsel urged that the Court should hear the argument because it raised issues of constitutional significance and fundamental justice. Moreover, there could be no prejudice to the USA.

[14] Having listened to the respective contentions, I agree that the Appellants should be precluded from arguing this ground, or rather, that the Court ought not to base its decision upon a consideration of this ground. There must be an end to litigation at some time. The issue of section 14 of the constitution was already argued before their Lordships of the Privy Council and no satisfactory explanation has been given here as to why the precise point now being made was not taken either before Smith, J. or before their Lordships. In such circumstances Courts are chary of permitting litigants to raise for the first time points that could and ought to have been taken in earlier proceedings. See: **The Tasmania** [1]. Should this Court now hear and decide this ground in the Appellant's favour, it will be placed in the

[1] (1890) 15 App Cas 223 @ 225

embarrassing position of having to arrive at a result in circumstances where a higher Court, albeit for different reasons, has already specifically expressed a contrary conclusion. For these reasons, in my view, the Court should decline to entertain this ground of appeal.

[15] In case I am wrong in this respect however, I nevertheless consider that the point being advanced does not in any event avail the Appellants. As was pointed out by a majority of the Canadian Supreme Court in **Canada vs. Schmidt**,[2] an extradition hearing is not a trial. It is simply a hearing to determine whether there is sufficient evidence of an alleged extradition crime to warrant the Government, under its treaty obligations, to surrender a fugitive to a foreign country for trial by the authorities there for an offence committed within its jurisdiction. An extradition hearing does not determine the guilt or innocence of the fugitive. The Magistrate is not required to weigh the evidence or to assess the credibility of witnesses.

[16] A careful reading of The Extradition Act itself would show that its drafters appreciated that the extradition proceedings could not completely mirror an ordinary preliminary inquiry into an indictable offence. How could it when the Act permits the admission of affidavit evidence? For this reason, section 9 of the Act requires the Magistrate to hear the extradition proceedings in the same manner, and have the same jurisdiction and powers, *as near as may be,* as if a preliminary inquiry were being conducted. The italicised words were carefully chosen and what they import is that there is a qualification to the procedure to be followed and the jurisdiction of the Magistrate to be assumed. The same must be as close as possible to that of a preliminary inquiry while nonetheless in compliance with the other sections of the Extradition Act and in particular with the provisions for the admission of duly authenticated affidavit evidence.

[17] The argument put forward here by counsel for the Appellants is not a novel one. It has been put forward in much the same manner in the Courts of Canada. It was

[2] (1987) 1 R.C.S. 500

argued there that similar provisions in the Canadian Extradition Act offended against Canadian Charter rights. That argument has been consistently rejected[3]. In one of the cases, **Re United States of America vs. Smith**[4], Houlden, J.A. supported the Court's reasoning with this quotation of a passage in Shearer, Extradition in International Law (1971), at pp. 154-5:

> In Great Britain and other Commonwealth countries where the Imperial Extradition Act, or legislation modeled on that Act, is in force, the jurisdiction and powers of the magistrate at the hearing of a request for extradition are the same "as near as may be" as though the fugitive had been accused of an indictable offence within the ordinary jurisdiction of the magistrate. The phrase "as near as may be" clearly has reference to the sections of the Act which allow reception into evidence of authenticated depositions, warrants, certificates and other judicial documents from foreign authorities. These documents and depositions, which would not otherwise be admissible, may be produced and received into evidence even if they do not satisfy the peculiar rules of evidence by English law or the strict requirements of the English law relating to oaths.

[18] Given the peculiar nature of extradition proceedings and in particular the fact that in such proceedings the guilt or innocence of the fugitive is not at stake, the full panoply of rights guaranteed to the citizen by section 10 of the constitution does not apply to such proceedings. It is my view that sections 14 and 15 of the Extradition Act can, properly and lawfully, coexist with section 10 of the constitution.

**Delay**

[19] The question of delay was fully addressed by their Lordships' Board when the matter was before them. While their Lordships regretted the delays that have bedeviled this matter, they also noted that the Appellants contributed very materially to the overall period of delay and that the Appellants have not been in custody since the decision of the magistrate on 28th October, 1996. The Board

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[3] See: Re United States of America and Smith 7 D.L.R. (4th) 12 & Vardy vs. Scottl (1977) 1 S.C.R. 293

[4] 7 D.L.R. (4th) 12

accordingly rejected the submission that the proceedings should be stayed for delay constituting abuse of process.

[20] The Appellants have again raised this issue of delay. Counsel cites the case of **Kakis vs. Government of the Republic of Cyprus**[5] and in particular the passage of Lord Diplock at page 638 where the learned Lord Justice stated that the passage of time to be considered is the time that passed between the date of the offence and the date of the extradition hearing. Counsel also referred to **Bell vs. The DPP**[6].

[21] In their judgment of 19th June, 2002, their Lordships gave a definitive ruling on the matter of delay. The Board rejected the submission that the proceedings should be stayed for delay constituting abuse of process. Lest this Court arrogate to itself the role of a body superior to their Lordships' Board, I think the only possibly relevant issue is whether, in light of all the surrounding circumstances, there has been such inordinate delay *since the judgment of the Board* as would entitle this Court to put a halt to the proceedings. In other words, if delay could be measured on a scale, one would have to say that up to the time of the delivery of their Lordship's judgment, the balance had not tilted in the direction in which the Appellants have urged us to find that it has. The question can only be whether between the time of that judgment and now the balance has so shifted.

[22] Their Lordships' decision was handed down on the 19th June, 2002. A period of several weeks elapsed before that decision was formally conveyed to the High Court of St. Kitts and Nevis. There then followed the lengthy Court vacation that ended about the middle of September. The remittal came on for hearing before Baptiste, J. on the 16th December, 2002. Further hearings were conducted on 14th March, 2003 and on 28th April, 2003. It is not clear, from a perusal of the record, as to why the matter was truncated in this manner. The learned trial Judge handed

[5] (1978) 2 A.E.R. 634
[6] (1985) 32 W.I.R. 319

down his decision on the 9th July, 2003. This appeal first came on for hearing on 14th August, 2003. I cannot accede to the view that there has been such delay attributable to the State as would warrant this Court in taking the view that there has now been a change in circumstances on this question. In so deciding I bear in mind the fact that there is one Judge only in the Federation of St. Kitts and Nevis responsible for both criminal and civil trials, and that the fugitives have remained on bail.

[23] Counsel for the USA has pointed us to a more fundamental reason why this Court ought not to entertain this ground of appeal. It is that section 10 of the constitution, which provides a right to a fair hearing within a reasonable time, cannot be relied upon by the Appellants. In the Canadian case of **Republic of Argentina vs. Mellino**[7], a large majority of the Canadian Supreme Court reaffirmed that section 11(b) of the Canadian Charter, stipulating the right to be tried within a reasonable time, has no application to extradition hearings. Similarly, the Courts of the United States have interpreted the Sixth Amendment of their constitution, which guarantees speedy trials, also as not applying to extradition proceedings. See: **Jhirad vs. Ferrandina**[8] and **Sabatier vs. Dabrowski**[9].

[24] It seems to me that at an extradition hearing care must be taken to focus on the precise purpose of the proceedings and not to broaden the Court's jurisdiction by considering whether the fugitive would receive a fair hearing in the requesting state. It is also to be emphasised that the guarantee afforded by section 10 of the constitution extends to a person *charged* with a criminal offence but the guilt or innocence of these Appellants is not in issue at this stage. As La Forest, J. stated in **Mellino's** case at page 353:

> Our courts must assume that ..[the fugitive].. will be given a fair trial in the foreign country. Matters of due process generally are to be left for the courts to determine at the trial there as they would be if he were to be tried here. Attempts to pre-empt decisions on such matters, whether arising

[7] 33 C.C.C. (3d) 334
[8] (1976) 536 F.2d 478 (2d Cir.)
[9] (1978) 586 F.2d 866 (1st Cir.)

> through delay or otherwise, would directly conflict with the principles of comity on which extradition is based………Should there be circumstances so substantial as to give rise to questions whether surrendering a fugitive would constitute a breach of fundamental justice, the extradition judge should bring them to the attention of the Executive: see: **Royal Government of Greece vs. Brixton Prison Governor et al**[10].

For all of the above reasons I would accordingly dismiss this ground of appeal.

**The decision to order a new Magistrate to commit the fugitives**

[25] At the conclusion of his judgment, Baptiste, J. ordered "that the Senior Magistrate of District "A" Basseterre is directed to resume the hearing of the Extradition proceedings and commit Noel Heath and Glenroy Matthew under the provisions of section 10 of the Extradition Act 1870". The men complain that the Judge was wrong to so order.

[26] I understood Counsel for the men to be submitting as follows: Firstly, the trial Judge, Baptiste, J., could not properly assume to himself a mandamus jurisdiction and order as he did. Secondly, the trial Judge could not properly order a new magistrate simply to commit the fugitives since that new magistrate would not have heard any evidence in the matter. Thirdly, even if the original magistrate had erred in not admitting the tapes and, assuming that with the tapes admitted, a *prima facie* case against the men has been made out, the Appellants must now be given an opportunity to lead evidence in rebuttal.

[27] As to the first of these points, I have to note that the order of Baptiste, J. is hardly any different from the order made by Smith, J. in the second of the latter's two judgments. See paragraph 5 above. That second judgment and the orders made therein were the subject of the appeal to their Lordship's Board. The appeal was dismissed. At paragraph 41 of Lord Hutton's judgment, "their Lordships reject[ed] the submission that the High Court was in error in ruling that on the evidence

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[10] (1969) 3 A.E.R. 1337 [HL]

before the magistrate he should have committed the Appellants to prison pursuant to section 10 of the 1870 Act." In the premises it is not for this Court to re-open that issue. I think it is clear that a *prima facie* case had been made out against the fugitives and that the USA had satisfied the onus placed upon it.

[28] The second point urged by the Appellants under this ground is tied up with the third. I agree with counsel for the USA that all that is left to be done in the extradition proceedings is of a ministerial nature, namely, the appropriate magistrate is required formally to conclude the extradition proceedings by ordering the committal of the fugitives. In light of what transpired before magistrate Hayes Blackman, I disagree that there is any additional right on the part of the Appellants to call witnesses or to give evidence. When called upon by the magistrate, the men, through their counsel, had clearly indicated that they had no evidence to lead. It is said that this decision was taken on the basis that the tapes were not being admitted and now that this has turned out to be a false premise, the Appellants should be given the opportunity they had initially eschewed. I do not accept that reasoning. There always was a risk that the magistrate's decision to throw out the evidence gleaned from the tapes could be reversed on appeal. The men voluntarily assumed the risk associated with not giving evidence. The point is that they had their chance to lead evidence and having declined to take advantage of that opportunity at the material time it would be inappropriate to offer them that prospect a second time.

[29] Recently, in **Tiwari vs. The State**[11] the Privy Council addressed the issue of a failure of a magistrate at a preliminary enquiry to afford an opportunity to an accused to call witnesses. Their Lordships considered whether such a failure rendered the committal a nullity with the consequence that a subsequent conviction after trial must be quashed. The Board agreed with the conclusion of de la Bastide, CJ, who, in **Matthews vs. The State**[12], had previously determined that

[11] (2002) 61 W.I.R. 452
[12] (2000) 60 W.I.R. 390

it did not necessarily follow that a subsequent conviction would thereby be rendered a nullity. The matter has to be looked at on a case by case basis. The right of an accused to call evidence at a preliminary enquiry is therefore not as fundamental as is made out by the Appellants. And if that is the case in such proceedings where the accused is charged with a criminal offence, it must be even less so at an extradition hearing where the fugitive is not so placed.

[30] For all the above reasons I would dismiss this appeal and affirm the order of the trial Judge.

**Adrian D. Saunders**
Justice of Appeal

I concur.

**Albert Redhead**
Justice of Appeal

I concur.

**Brian Alleyne, SC**
Justice of Appeal