SAINT VINCENT AND THE GRENADINES

IN THE COURT OF APPEAL

CIVIL APPEAL NO.6 OF 2006

BETWEEN:

CECIL BOATSWAIN

Appellant

and

[1] THE SUPRINTENDENT OF PRISONS
[2] THE ATTORNEY GENERAL

Respondents

Before:

The Hon Brian Alleyne SC	Chief Justice [Ag.]
The Hon. Mr. Michael Gordon, QC	Justice of Appeal
The Hon. Mr. Denys Barrow, SC	Justice of Appeal

Appearances:

Mr. Arthur Williams with Mr. Richard Williams and Mr. Bertram Stapleton for the Appellant
Mr. Camillo Gonsalves Senior Crown Counsel with Mr. Colin Williams, Director of Public Prosecutions, for the Respondents

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2006: October 10;
November 13.

JUDGMENT

[1] GORDON, J.A.: On May 11th, 2006 the High Court heard an application for Habeas Corpus under the Fugitive Offenders Act, Cap 126 of the Laws of Saint Vincent and the Grenadines (hereafter 'the Act') filed on behalf of the appellant. The appellant had been committed to custody pursuant to an order made by the learned Chief Magistrate on May 4th 2006 to await his return to the United States of America (USA) pursuant to a request from the Government of the USA made to the Government of Saint Vincent and the Grenadines in respect of certain alleged drug trafficking offences.

[2] The learned trial Judge held that the learned Magistrate's committal was based on a sufficiency of evidence led before her and that the committal was valid and thus refused the application for Habeas Corpus. It is from that decision of the trial judge that the appellant has appealed.

[3] There are eleven grounds of appeal set out in the appellant's notice of appeal which resolve themselves into the following issues:

(a) that all of the evidence relied on by the magistrate save and except the direct evidence of Roger Burlingame was inadmissible under the provisions of the Act;

(b) the evidence of the alleged crime in the Burlingame affidavit comprised only hearsay evidence and so should have not been admitted by the magistrate;

(c) there was no evidence that the appellant would not be charged with any offence other than the offences in respect of which his return under the Act was requested;

(d) that the evidence of the chain of custody of the drugs allegedly smuggled into the USA was deficient.

Issues (a) and (b) will be dealt with together as 'the evidence issue', issue (c) will be referred to as 'the specialty issue' and issue (d) will be referred to as 'the chain of custody issue'.

The evidence issue

[4] Section 26 of the Act reads in part as follows:

> "26. (1) In any proceedings under this Act, including proceedings on an application for habeas corpus, in respect of a person in custody thereunder-
>
> (a) a document, duly authenticated, which purports to set out the evidence given on oath in another country, shall be admissible in evidence;…
>
> (2) A document shall be deemed to be duly authenticated for the purposes of this section-

(a) in the case of a document purporting to set out evidence given as aforesaid, if the document purports to be certified by a judge or magistrate of the appropriate court and is the original document containing or recording that evidence, or a true copy of that document;…

And in any such case the document is authenticated either by the oath of a witness or the official seal of a Minister of the country or the Governor or other officer administering any dependency.

(3) In this section, "oath" includes affirmation or declaration; and nothing in this section shall prejudice the admission in evidence of any document which would be admissible in evidence apart from this section."

[2] The evidence led before the learned magistrate comprised a single affidavit sworn to by a Roger Burlingame, an attorney at law employed as an Assistant United States Attorney in the Criminal Division of the United States Attorney's office for the Eastern District of New York, before a 'United States Magistrate Judge'. Attached to the Burlingame affidavit were a number of exhibits amongst which were 5 documents described on their faces as affidavits. Each of these documents were "signed and sworn to" before a Notary Public.

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[3] The foundation of the appellant's argument is that if, as he posited, the 5 exhibits referred to in the previous paragraphs were not, in and of themselves, admissible, then the Burlingame affidavit consisted almost solely of hearsay evidence and as such could not found the committal of the appellant by the learned magistrate. There are two propositions in that argument that need to be addressed, namely whether the 5 exhibits are admissible in their own right and whether, if they are not so admissible, reliance was properly placed on them by the learned magistrate.

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[4] As good a starting point as any is the learning to be derived from Noel Heath and another v The Government of the United States of America[1], a case from the jurisdiction of Saint Christopher and Nevis, decided by this court, wherein Saunders JA, as he then was, said the following at paragraphs 15 et seq.

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"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

[1] St. Christopher and Nevis, Civil Appeal No. 18 of 2003 delivered October 21, 2003
[2] (1987) 1 R.C.S. 500

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.

"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.

"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 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[3], 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."

[3] 7 D.L.R. (4th) 12

[5] Section 9 of the Extradition Act of Saint Christopher and Nevis is in pari materia with section 12 of the Act. Sub-section (1) and (2) of the Act read as follows:

> "(1) A person arrested in pursuance of a warrant under section 11 shall, unless previously discharged, be brought as soon as practicable before a magistrate's court (hereinafter referred to as a "court of committal")
>
> "(2) For the purpose of proceedings under this section a court of committal shall have the like jurisdiction and powers as nearly as may be, including the power to remand in custody or on bail, as a magistrate's court acting at a preliminary enquiry."

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[6] In re Espinosa[4] the applicant was committed to await extradition on charges of conspiracy to possess and import marijuana into the United States of America. There was an affidavit of the Florida state attorney responsible for the prosecution of those involved in the offences. That affidavit deposed to other affidavits of admitted accomplices speaking of the applicant's role. Before the stipendiary magistrate it was contended that there was no proper certification or authentication of the affidavits of the accomplices and in addition that the affidavits of the accomplices had not been sworn before a competent authority in the United States, being sworn before a Notary Public who merely witnessed the signature of the maker of a statement. It was held by the Queen's Bench Divisional Court refusing the application for habeas corpus that the court accepted that in Florida in criminal matters a notary public accepts the oath of the maker of a statement that the contents of the statement are true. The court further held that section 15 (2) of the Extradition Act 1870 provides that to be duly authenticated the certification of the affidavit of the Florida state attorney must be by a judge, magistrate or officer of the foreign state. No formal incantation is necessary. It was clear from the affidavit of the Florida state attorney that he had seen the original affidavits of the accomplices. Copies of those affidavits had been properly certified and were admissible.

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[4] October 1986 Criminal Law Review 684

[7] On the basis of section 3 of the Evidence Act Cap 158 of the Laws of Saint Vincent and the Grenadines (importation of English law of evidence) and section 30 of that Act (honouring of decision given on an issue of foreign law) I gain substantial assistance from this case in the Vincentian context and I gratefully adopt the learning in Espinosa.

[8] What further emerges clearly from Heath and Espinosa is that proceedings for committal under the Act and committal for trial pursuant to a preliminary inquiry are, or may be similar, but not necessarily in all respects. For example, it is clear that a person may be committed under the Act on the basis of only affidavit and no viva voce evidence.

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[9] A further element of difference is to be derived from the terms of the Act read in conjunction with the Extradition Treaty between Saint Vincent and the Grenadines and the United States of America. Section 4 (3) of the Act reads as follows:

> ""(3) Where an extradition treaty concluded between Saint Vincent and the Grenadines and a foreign country comes into effect after the commencement of this Act, the provisions of this Act shall apply to that foreign country subject to such conditions, exceptions, limitations and modifications, if any, as are necessary to give effect to that treaty or to the provisions thereof relating to fugitive offenders."

The extradition treaty between Saint Vincent and the Grenadines and the United States of America was concluded after the passage of the Act and Article 6 (3) of that treaty reads as follows:

> "3. A request for extradition of a person who is sought for prosecution shall also be supported by:
> (a) a copy of the warrant or order of arrest, if any issued by a judge or other competent authority of the Requesting State;
> (b) a document setting forth the charges; and,
> (c) such information as would provide a reasonable basis to believe that the person sought committed the offence for which extradition is requested."

[10] I am satisfied, therefore that the learned magistrate did have before her evidence that provided a reasonable basis for her to believe that the person sought, the appellant, committed the offence for which extradition was requested. The learned magistrate relied on the authority of Oskar v The Government of Australia and others [5] to hold that by virtue of the inclusion of the five documents described as affidavits as exhibits in the Burlingame affidavit, the authentication by the magistrate judge of that latter affidavit authenticated them individually. I do not believe Oskar goes so far. In any event, given my reasoning above, I see no need to rely on Oskar.

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[11] This decision would not be complete without the consideration of the case of R v Governor of Pentonville Prison ex parte Kirby[6], a case prayed in aid by learned counsel for the appellant. In that case, decided by the Divisional Court of the Queen's Bench in England, the applicant raised a number of points on the admissibility of evidence. Croom -Johnson J. who delivered the judgment of the court, which included Lord Widgery C.J., referred to section 7 of the Fugitive Offenders Act 1967 of England sub-sections (1) and (2) whereof were in like language to section 12 (1) and (2) of the Act. Croom-Johnson J then proceeded to consider sub-section (5) of section 7 which reads as follows, so far as relevant:

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> "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 return of that person, that the offence to which the authority relates is a relevant offence and is further satisfied—
>
> (a) where that person is accused of the offence, and the evidence would be sufficient to warrant his trial for that offence if it had been committed within the jurisdiction of the court;... the court shall commit him to custody to await his return thereunder."

[12] The learned judge then continued "Both the procedure laid down in section 7 (2) and the standard of proof implied in section 7 (5) (a) clearly contemplate that it is English rules of evidence which have to be applied in the course of the committal proceedings. Section 7(5) (a) specifically refers to the evidence being sufficient to

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[5] [1988] 1 All ER 183
[6] [1979] 1 WLR 541

warrant the defendant's trial as though the offences had been committed in England. One cannot see what other rules of evidence could be applied in such proceedings." The crucial distinguishing feature between that case and the instant one is that there is no equivalent in the Act to section 7 (5) (a). Rather, the burden on the Crown is as stated in Heath.

The Specialty issue

[13] Grounds 7 and 8 of the appellant's grounds of appeal read as follows;

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> "7. There was no or no satisfactory evidence that the appellant would not be charged with any offence other than the offence in respect of which his return under the Fugitive Offenders Act is requested.
> "8 That the requirements of S. 7 of the Fugitive Offenders Act was not satisfied"

Section 7, subsections (3) and (4) of the Act (the relevant parts of section 7) read as follows:

> "(3) A person shall not be returned under this Act to any country, or be committed to or kept in custody for the purposes of such return, unless provision is made by the law of that country, or by arrangement with that country, for securing that he will not, unless he has first been restored to, or had the opportunity of returning to, Saint Vincent and the Grenadines, be dealt with in that country for or in respect of any offence committed before his return under this Act other than-
>
> (a) the offence in respect of which his return under this Act is requested;
>
> (b) any lesser offence proved by the facts proved before the court of committal;
>
> (c) any other offence, being a relevant offence, in respect of which the Governor General may consent to his being so dealt with
>
> (4) Any such arrangement as is mentioned in sub-section (3) may be an arrangement made for a particular case or an arrangement of a more general nature; and for the purposes of that subsection a certificate of the Governor General confirming the existence of an arrangement with any other country and stating its terms shall be conclusive evidence of the matters contained in the certificate."

[14] Learned counsel for the appellant stated that the requirement of section 7 (3) of the Act is mandatory save where there is an arrangement with the other country to like effect and a certificate of the Governor General is given to that effect. He

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argued that the failure of the prosecution to prove this fact was fatal to their case in that, absent such proof, there was no jurisdiction in the magistrate to order extradition of the appellant. Learned counsel anticipated that learned counsel for the respondents might counter his argument by reference to Article 14 of the Extradition Treaty entered into between the United States of America and Saint Vincent and the Grenadines signed in August 1996

[15] Article 14 of the Extradition Treaty reads as follows:

> "Article 14
> Rule of Specialty
>
> 1. A person extradited under this Treaty may not be detained, tried, or punished in the Requesting State except for:
>
> (a) the offense for which extradition has been granted or a differently denominated offense based on the same facts on which extradition was granted, provided such offense is extraditable, or is a lesser included offense;
>
> (b) an offence committed after the extradition of the person; or an offence for which the executive authority of the Requested State consents to the person's detention, trial, or punishment. For the purpose of this subparagraph:
>
> (i) the Requested State may require the submission of the documents called for in Article 6; and
>
> (ii) the person extradited may be detained by the Requesting State for 90 days while the request is being processed. This time period may be extended by the Requested State upon request of the Requesting State.
>
> 2. A person extradited under this Treaty may not be extradited to a third state for an offence committed prior to his surrender unless the surrendering State consents.
>
> 3. Paragraphs 1 and 2 of this Article shall not prevent the detention, trial, or punishment of an extradited person, or the extradition of that person to a third State, if:
>
> (a) that person leaves the territory of the Requesting State after extradition and voluntarily returns to it; or
>
> (b) That person does not leave the territory of the Requesting State within 10 days of the day on which that person is free to leave."

[16] Counsel for the appellant argued that the language of Article 14 of the Treaty was drafted in terms of the English Fugitive Offenders Act 1989 rather than the 1967Act on which the Act is based and as such is broader in scope than the language in the Act. According to counsel, what could result is that the appellant, once delivered to the authorities in the United States of America, could be tried for an offence or offences different from those for which he was extradited. A counter-punch was delivered by counsel for the respondents by pointing to section 4 (3) of the Act set out at paragraph 12 above. Floating like a butterfly counsel for the appellant ducked and pointed out that "conditions, exceptions, limitations, and modifications" did not include 'extensions'

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[17] "Excessively restrictive", "obstructionist", 'strict" are some of the epithets used by the respondents' counsel to describe this approach by counsel for the appellant. The former referred us to the case of In re Ismail[7] where Lord Steyn, at page 326 and 327 said the following:

> "Next there is the reality that one is concerned with the contextual meaning of "accused" in a statute intended to serve the purpose of bringing to justice those accused of serious crimes. There is a transnational interest in the achievement of this aim. Extradition treaties and extradition statutes, ought, therefore, to be accorded a broad and generous construction so far as the texts permit it in order to facilitate extradition."

[18] In a subsequent case Lord Steyn, then sitting as a member of the Judicial Committee of the Privy Council expanded on this approach. In Cartwright and anor v The Superintendent of Her Majesty's Prison and anor[8] at paragraphs 14 and 15 he said the following:

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> "In extradition law the court must adopt a balanced approach. Throughout extradition law there are two principal threads. First, in exercising powers of extradition courts of law must, as Isaacs J observed, be vigilant to protect individuals from the overreaching of their rights by the government. Justice to the individual is always of supreme importance. Secondly, the Board considers that it is imperative of legal policy that extradition law must, wherever possible, be made to work effectively. There was some

[7] [1999] 1 AC 320
[8] [2004]UKPC 10

controversy about this point. It is, therefore, necessary to explain the position

"Crime and criminals have always traversed national boundaries. But in the modern world advances in technology and means of communication have enormously increased this phenomenon, notably in the fields of financial crimes, drugs offences and terrorism. It is, therefore, of great importance that extradition law should function properly. For the appellants, Mr. Fitzgerald Q.C. accepted on the authority of *Government of Belgium v Postlethwaite and Others [1988] AC 924, AT 946h-947B*, that extradition treaties, being contracts between sovereign states, should be purposively and liberally construed. But he argued that a different approach is necessary in regard to domestic extradition legislation. He made a comparison with criminal statutes and submitted that an approach of strict construction is necessary. The Board would reject this submission. Even in regard to criminal statutes the presumption in favour of strict construction is nowadays rarely applied. There has been a shift to purposive construction of penal statutes: see *Cross, Statutory Interpretation*, 3rd ed., 1995, 172-175. In any event, it is a well settled principle "that a domestic statute designed to give effect to an international convention should, in general, be given a broad and liberal construction" : *Samick Limes Co Ltd v Owners of The Antonis P.Lemos* [1985] AC 711, AT 731. The same must be true of a statute passed pursuant to a bilateral treaty. Moreover, in *In re Ismail* [1999] 1 AC 320 the House of Lords in a unanimous judgment commented on the need to bring suspected criminals, who have fled abroad, to justice through the extradition process. In that case I observed (at 327A):

> 'There is a transnational interest in the achievement of this aim. Extradition treaties, and extradition statutes, ought, therefore, to be accorded a broad and generous construction so far as the texts permit it in order to facilitate extradition.'

As the final court of The Bahamas the Board is in no doubt that it must adopt, where the Extradition Act 1994 permits it, a purposive or dynamic interpretation to make extradition work effectively."

[19] In my opinion, to construe the Act and the Treaty as urged by counsel for the appellant would do violence to a purposive construction of them both and might, as suggested by counsel for the respondents make them wholly ineffective. The term "offence" in section 7 (3) (a) does not mean the technical and slavish following of the form of words as set forth in the indictments handed down against the appellant. Rather I hold that it means the activities which 'offend' the laws of

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the requesting state as broadly described in the request made to Saint Vincent and the Grenadines. I therefore hold that the rule of Specialty is observed in this case and this ground of appeal fails.

The chain of custody issue

[20] As was pointed out in paragraph 7, an extradition hearing, though similar to other types of process, is of its own genus. The quotation from the Noel Heath case therein set out is apposite here.

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[21] The evidence of the chain of custody is as follows: Tina Marie Lapera, an officer with the United States Customs Service working at John F. Kennedy Airport found a white powdery substance on Monica McCall which tested positive for the presence of cocaine in a field test; she arrested McCall; she also performed a search of Rose Cadle and found a white powdery substance which also tested positive for the presence of cocaine in a field test; "Following the discovery of the cocaine, McCall and Cadle were placed under arrest and Special Agent John Condon of the United States Immigration and Customs Enforcement assumed control of the investigation"[9]; John Condon performed various duties in respect of this investigation "including obtaining the narcotics seized from Monica McCall and Rose Cadle after their arrival at John F. Kennedy International Airport on July 25, 2004 and forwarding those narcotics, which I placed in four sealed packages marked as JK13CEO4JK0236, exhibit #1 and JK13CEO4JK0236 exhibit #2 for testing at the United States Drug Enforcement Agency's Northeast Laboratory"[10]; Maureen M Craig, a senior Forensic chemist with the United States Drug Enforcement Agency's Northeast Laboratory, "received two sealed packages marked JK13CEO4JK0236, exhibit #1, Lab # 166405 and JK13CEO4JK0236 exhibit #2 Lab # 166406 that was submitted to the Northeast Laboratory by

[9] Paragraph 6 of affidavit of Tina Marie Lapera (p 349 of record)
[10] Paragraph 3 of affidavit of John Condon

Special Agent John Condon"[11]; Ms Craig tested the contents of the packages and found them to contain cocaine hydrochloride with a purity level of 77 and 78 percent respectively.

[22] I am satisfied that the evidence proffered of the chain of custody is "sufficient to put the accused on his trial."[12] This ground of appeal fails.

[23] In sum, therefore, I would dismiss the appeal of the appellant and confirm the order of the trial Judge in refusing the application for Habeas Corpus.

Michael Gordon, QC
Justice of Appeal

I concur.

Brian Alleyne, SC
Chief Justice [Ag.]

I concur.

Denys Barrow, SC
Justice of Appeal

[11] Paragraph 4 of affidavit of Maureen M. Craig
[12] Section 150 Criminal Procedure Act, Cap 125, Laws of Saint Vincent and the Grenadines