THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT VINCENT AND THE GRENADINES

HIGH COURT CIVIL CLAIM NO. SVGHCV2009/189

BETWEEN:

DEXTER CHANCE
GARETH MCDOWALL
CARLOS SUTHERLAND

APPLICANTS

V

THE SUPERINTENDENT OF PRISONS
THE ATTORNEY GENERAL OF ST. VINCENT AND THE GRENADINES

RESPONDENTS

Appearances:

Mr. Alberton Richelieu, Ms. Kay Bacchus-Browne and Mr. G. Connell for the Applicants
Mr. Colin Williams DPP and Mr. C. Williams for the Respondents

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2009: July 31st
August 28th

JUDGMENT

BACKGROUND

[1] **JOSEPH, Monica J.:** This is an application for a writ of Habeas Corpus by the applicants presently detained at the Prisons, Kingstown, pursuant to warrants issued by the Learned Chief Magistrate Sonya Young under the Fugitive Offenders Act (Cap 126) (the Act) . Three extradition requests dated 9th December 2008, were addressed by the Governor of the British Virgin Islands to the Governor General of St. Vincent and the Grenadines. (The Governor General).

[2] The Governor General signed orders dated 26th March 2009 directing the Chief Magistrate to issue warrants for the apprehension of the applicants who are Vincentian nationals. The warrants were issued on 3rd March 2009 and executed on 25th April 2009. On 5th June 2009, the applicants were committed to prison to await their return to the British Virgin Islands to stand trial for the offence of importation of 61.21 kilograms of cocaine into the British Virgin Islands between 17th and 24th January 2008.

[3] At the hearing of the application Counsel for the applicants, having made submissions, requested of, and obtained from the Court time to reduce those submissions into type written form. On receipt of those typewritten submissions, there was included a point that not been raised in oral submissions. I indicated this through the Registrar's letter of 13th August 2009, addressed to counsel for both sides:

> ":Further to hearing of this matter on 31st July 2009 skeleton arguments filed on 5th August 2009, reads: Counsel for the claimants will at this stage rely on section 7 (3) of the Fugitive Offenders Act.."

[4] The Court, through the Registrar invited counsel from both sides to submit written submissions and authorities on this point by a stated date. Both counsel presented submissions. However, Mr. Williams registered a concern (rightly so I think) to the manner in which the point was raised. However, I think that it is not necessary to wait for a point to be raised by one side before the other side deals with it, where an Act provides for a procedural situation.

ISSUES RAISED ON BEHALF OF THE APPLICANTS;

1. Whether the order of committal to await extradition to Tortola made by Her Worship Magistrate Sonya Young in respect of the three applicants was reasonable and fair having regard to the evidence and procedural requirements in order to justify committal for trial.

2. Whether having regard to the Record of case, there was sufficient evidence to justify the committal order.

3. Whether the evidence of the identity of the applicants was so berefit of detail as to render it impossible for the Learned Magistrate to determine its sufficiency.

4. Whether the requesting state has breached its duty of candour and good faith, in failing to comply with Clause 6 (3) (a) and (b) of the London Extradition Scheme, where there is no affidavit and/or certification by the Attorney General, of the requesting state stating in his or her opinion that the record of the case discloses the existence of evidence by the requesting country to justify a prosecution.

5. That whether the Learned Magistrate having failed to find that London Extradition Scheme, is a treaty and there was no need for treaty in this matter, was an error of law which went to the core of the proceedings to determine whether there was sufficient evidence.

[5] I deal with the issues: the first issue: whether the order of committal to await extradition to Tortola made by Learned Chief Magistrate Sonya Young in respect of the three applicants was reasonable and fair having regard to the evidence and procedural requirements in order to justify committal for trial.

[6] Mr.Richelieu submitted that, in the circumstances of this case, the proper procedure was not followed and an error in law occurred on the part of Learned Chief Magistrate. Mr. Williams' submission was that the committal was fair and reasonable based on the evidence before the learned magistrate.

[7] The procedure that was followed in this case is outlined in the Act. The requesting country forwards a request to the Governor General who issues an authority to proceed to a magistrate in St.Vincent and the Grenadines. Upon receipt of an authority to proceed, section 11 authorizes the magistrate to issue a warrant of arrest. By section 12 a person arrested under a warrant of arrest must be brought before the magistrate. The magistrate as the court of committal has

like jurisdiction and powers as may be as a magistrate's court acting at a preliminary inquiry, including the power to remand in custody.

[8] Mr. Richelieu advanced these questions. One, whether the affidavit evidence of Chesley Balkaran made long after he was sentenced on 28th March 2008 can constitute a conspiracy against the three applicants. I do not think that the passage of time or a delay in obtaining evidence after the commission of an offence, (unless it is inordinate delay) would per se, be unfair to the applicants. It would be for the Court hearing the evidence to decide whether the evidence is sufficiently strong to lead to a conviction.

[9] Two, whether the evidence of conspiracy given by Balkaran would have such an adverse effect on the fairness of the proceedings that the court ought not to rely on it to establish a prima facie case. It is not for the Learned Magistrate to make a decision as to whether any evidence may or may not have an adverse effect. Her responsibility is to ascertain whether there is sufficient evidence to commit the applicants. R V Governor of Pentonville Prison (1986) 1 W.L.R. 470 page 1 at page 4 gives the guideline:

> "So far as he is concerned, their prejudicial effect is zero. His sole concern is whether there is sufficient evidence of guilt to justify committal."

[10] Three, whether when the court rules on that inadmissible evidence which in its very nature is prejudicial against the applicants it would have an adverse effect on the fairness of the decision to commit. Again, this would be for the trial Court to consider and make a determination. That is not for the learned magistrate. The role of the Chief Magistrate is to consider if the provisions of the Act have been complied with.

[11] Counsel identified what he considered to be assumptions made by Balkaran that implicated applicant Chance, and submitted that that evidence was prejudicial and also that it was inadmissible evidence. This again is not for the Learned Magistrate but for the trial court.

[12] All the questions posed are for a court of trial. The Learned magistrate was not trying the matter but was determining whether there is a sufficiency of evidence before her to commit the applicants to stand trial.

[13] I deal with the second and fourth issues together as they relate to the London Scheme for Extradition. The second issue has two limbs: the first limb relates to the Record of Case which expression appears in the Scheme. (The second limb relates to whether there was a sufficiency of evidence to justify the committal order which I shall deal with under the heading - sufficiency of evidence). The fourth issue relates to admissibility of evidence – certification.

LONDON SCHEME FOR EXTRADITION:

[14] The Chief Magistrate found that the Scheme "is not a treaty nor is it binding on any member of the Commonwealth and certainly not on St.Vincent." I think the text of the London Scheme for Extradition indicates what it really is. It is a plan of, or general guidelines for, a group of commonwealth countries with the aim of achieving a particular purpose or goal, which seems to be to use those guidelines as a model for the drafting of domestic legislation.

[15] The text of the London Scheme shows clearly that the document is not intended to be a Treaty (bilateral treaty or otherwise) in substance or form and the London Scheme does not have the force of law. Paragraph 22 of the Scheme (dealing with ancillary provisions), points to its purpose and reads:

"Each country will take, subject to its constitution, any legislative and other steps which may be necessary or expedient in the circumstances to facilitate and effectuate……(a) the transit through its territory….."

[16] Paragraph 1 of the Extradition Request from the Governor of the requesting country made reference to the "London Scheme for Extradition within the commonwealth as amended in November 2002 and the Fugitive Offenders Act, Cap. 126 of the Laws of St.Vincent and the Grenadines.

[17] The London Scheme for Extradition has no legal leg. If the Extradition Request had referred only to the London Scheme for Extradition without also referring to the Act, there would be no legal leg for the extradition request, which request would have been stillborn It is therefore quite clear that the requesting country was relying on the Act, while being open and candid that there was a discussed plan in existence referred to as the London Scheme for Extradition.

[18] The legal leg for the Extradition Request is the Act and it is critical for the requesting country to follow the provisions of the Act. There is no legal requirement for the requesting country to follow paragraph 6 of the London Scheme for Extradition. I see no error on the part of the learned Chief Magistrate.

ADMISSIBILTY OF EVIDENCE – CERTIFICATION:

[19] **On** the question of certification by the Attorney General of the requesting state: Mr. Richelieu 's submission was that there is no affidavit or certification by the Attorney General, stating that it was his opinion that the record of the case does not disclose the existence of evidence by the requesting country to justify a prosecution, and that is fatal to the case of the respondents. The case cited in support is Trinidad and Tobago Civil Appeal No. 119/2004 HCA 1404/2004, Commissioner of Prisons v Farouk Warris.

[20] Where extradition proceedings take place in Trinidad, certification as outlined in the Trinidad Extradition (Commonwealth and Foreign Territories) Act 1985 (No. 36 of 1985) (as amended by Act 12/2004) must be adhered to The judgment of the Court in Warris case is based on the amended provisions of section 19A (2)(a) of the Act 12/2004). By that 2004 Act, section 19 (1), (2) and (3) of the Trinidad Extradition Act was repealed and replaced by section 19A (1) to (5). As I understand it, the Court held that a failure to follow those certification provisions in extradition proceedings in Trinidad is fatal.

[21] The new section 19A (1) to (5) deals with admissibility of evidence and certification. The repealed section 19 (1) (2) and (3) provisions are similar to section 26 (1) (2) and (3) of the St. Vincent and the Grenadines Act. A look at both sections will reveal the difference in admissibility of evidence procedure. Section 14 of the Trinidad Act enacts:

> "Section 19 of the Act is repealed and the following sections are substituted:
>
> 19A (1) Subject to subsection (2), evidence that would otherwise be admissible under the laws of Trinidad and Tobago shall be admitted as evidence at an extradition hearing.
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> (2) The following evidence is admissible in proceedings under this Act, even if the evidence would not otherwise be admissible under the laws of Trinidad and Tobago:
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> (a) the contents of the documents contained in the record of the case or in supplementary evidence certified under subsection (5):
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> (5) A record of the case or supplementary evidence shall not be admitted unless-
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> (a) in the case of a person who is accused of an extraditable offence, a judicial or prosecuting authority of the declared Commonwealth.....that the evidence summarized or contained in the record of the case.....is in a form that would be admissible at the trial....."

[22] That section refers to the manner in which a record of case is admissible and for certification of a record in ~~the~~ Trinidad and Tobago. Our Act does not contain similar certification provisions to the Trinidad legislation. Documents presented to a court here in extradition proceedings, are admissible in accordance with section 26 (1) (2) (3) of our Act, (which section has been followed), and which enacts:

> (1) In any proceedings under this Act, including proceedings on an application for habeas corpus, in respect of a person in custody there under
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> (a) A document, duly authenticated, which purports to set out the evidence given on oath in another country, shall be admissible in evidence...
>
> (b) a document, duly authenticated,
>
> (2) a document shall be deemed to be duly authenticated for the purposes of his section.
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> (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.
>
> (b) and in any such case if the document is authenticated either by the
> (c) 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."

IDENTIFICATION:

[23] The third issue: Mr. Richelieu's submission was that the evidence of identity of the applicants was so bereft of detail as to render it impossible for the Learned Chief Magistrate to determine its sufficiency. It was Mr. Williams' submission that the Court is being invited to go behind the Learned Magistrate's finding of fact. Counsel advanced the argument that the applicants had never raised a

challenge to identity but that the argument centered around the signatures. He submitted that it is critical for doubts to be raised before the magistrate.

[24] I look at the approach taken by the learned Chief Magistrate who considered the evidence and stated:

> "The circumstances of this case necessitated the police to show photographs to the witness in order to obtain information as to the identity of the offenders. The use of photographs goes to the weight and sufficiency of the evidence rather than its admissibility' and also:
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> "The Court found that the quality of the evidence was good and a jury adequately warned could safely be left to assess the value of the evidence even though there was no other evidence to support it."

[25] This is a portion of the finding of the learned Chief Magistrate:

> "Chief Detective Murray's affidavit goes on to state that the three photographs were then shown to Balkran who identified the three persons as the same three persons he referred to as accomplices in his admission to the police. This was corroborated by the affidavit of Kenneth Jordon. I found that the important aspect of the identification in this case was two fold:
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> 1. That the accused persons before the court were in fact the persons charged in the BVI and
>
> 2. The accused persons were in fact the persons named, described and identified by the witness Balkran

[26] Continuing: The evidence of identity depended largely on the photographs which were shown to Balkran and his identification of same. Sergeant Junior Simmons confirmed in the witness box that the exhibits TM2, TM3 and TM4 looked like the photographs he had in fact given to Inspector Murray on request. He also identified each defendant in the dock and stated that he knew Dexter Chance and his parents quite well....

[27] The Learned Chief Magistrate continues: Be that as it may, the issue for the Court here is whether the photographs given to the Inspector by Sergeant Simmons were in fact the photographs shown and identified by Balkran. This court found identification sufficiently proven where Sergeant Simmons having identified the photographs as looking like the ones given to the Inspector, and the Inspector having corroborated this and explained how he sanitized them (and properly so) before he showed them to Balkran who subsequently identified them as his accomplices."

[28] Guidelines in the approach to be taken appear in R.V Governor of Pentonville Prison (1986) 1 W.L.R. 470 page 1 at p 4:

> "....It is a yardstick by which the magistrate in an extradition case, having decided what evidence is admissible in law, can judge whether a prima facie case has been raised. He cannot and should not attempt to foresee the precise course that a trial might take. Even if he could foresee that the judge, in the exercise of his discretion, would exclude the photographs altogether because of their prejudicial effect, he has no such discretion himself. He cannot exclude them from his own consideration. So far as he is concerned, their prejudicial effect is zero. His sole concern is whether there is sufficient evidence of guilt to justify committal.
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> As I understand it, the practice has been to admit identification by photograph since at least the turn of the century.....It has obvious advantages of convenience. If there was anything unsatisfactory about the identification by photographs in the present case, then that was a matter for the magistrate. It was for him to decide whether the identification by photographs was sufficient to establish a prima facie case and not for this court".
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> I do not see any error with the learned Chief Magistrate's approach to the matter of identification of the applicants.

TREATY ARRANGEMENTS:

[29] The fifth issue: whether the Learned Magistrate having failed to find that the London Extradition Scheme is a treaty and that there was no need for treaty in this matter, that that was an error of law which went to the core of the proceedings to determine whether there was sufficient evidence.

[30] It is necessary to consider if there is a Treaty arrangement between the requesting country and the requested country. Mr. Williams submitted that there was no treaty. Mr. Richelieu referred the Court to an extract from Carey J in R v Commissioner of Correctional Services exp Henry (1976) 24 WIR: 471 at 477 "I":

> "Extradition is a matter for domestic or municipal law. That is the law this court is called upon to apply, and by which it is bound. It is true that while statute will define the grounds of, and the procedure for the surrender of a fugitive there must be some treaty between the countries involved, creating special reciprocal duties for the surrender of a fugitive, but, to be enforced by the courts that treaty must be incorporated into municipal law so that the courts can conform with the terms of the treaty, and the fugitive or citizen made aware of his rights."

[31] That extract of general principle must be read in the context of the case where the Court reviewed the historical extradition process of Jamaica to determine whether there was a Treaty between Jamaica and the United States of America, and whether that Treaty had legal binding force. Having done so the learned judge had this to say at p. 478 "G":

> "I can now consider what are the subsisting legal binding current treaty arrangements between the United States of America and Jamaica. It was not disputed that in extradition proceedings there must be: (a) An Act i.e., Extradition Act; (b) a treaty; (c) an Order in council incorporating that treaty into the municipal law"

[32] Similarly, in the instant case, it is necessary to consider what are the subsisting legal binding current treaty arrangements (if any) between the British Virgin Islands and Saint Vincent and the Grenadines. I find there is no treaty arrangement between St.Vincent and the Grenadines and the British Virgin Islands. The subsisting legal arrangement between the two countries is the Extradition Act which differentiates between all commonwealth countries under section 3, (which section makes no mention of a treaty) and foreign countries listed in the schedules of section 4 (1) of the Act with which there may be treaty arrangements.

[33] Section 3 of the Act relates to commonwealth countries (which include counties for whose external relations another country is responsible) and provides:

> (1) Subject to the provisions of subsection (2), this Act applies to-
>
> (a) all commonwealth countries; and ....."

"commonwealth country" is defined as any country specified in the Schedule to the commonwealth Countries Act, (Cap 132) and includes any country or territory for whose external relations a Commonwealth country so specified is responsible. In the Schedule the United Kingdom is a specified country and is responsible for the external relations of the British Virgin Islands. The Virgin Islands is listed in Schedule 1 of the Extradition (Overseas Territories) Order 2002 No. 1823.

[34] Section 4 (1) of the Act provides for the application of the Act to foreign countries, (countries that are not commonwealth countries). Those foreign countries fall under three groups. The first group is the foreign countries specified in the Second Schedule to the Act. (Foreign countries that had arrangements relative to St. Vincent and the Grenadines prior to independence on 27th October 1979). The second group is the foreign countries that have concluded an extradition treaty after 27th October 1979 (after independence). The third group is a foreign country that is a party to a multinational international convention to which St.Vincent and the Grenadines is a party.

[35] Mr. Richlieu submitted that it is significant that in Civil Appeal 6/2006, Boatswain v. A.G. et al Gordon JA. read the Fugitive Offenders Act in conjunction with the Treaty between St. Vincent and the Grenadines and the United States of America, citing section 4(3) of the Act, and had this to say:

> "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."

[36] Mr. Richelieu submitted that the criteria have been satisfied to transform the London scheme into a bilateral treaty arrangement. I think Gordon J.A was explaining how the Act is to be construed where there is a treaty arrangement between St. Vincent and the Grenadines and a foreign country, that is, the United States of America.

[37] I have not been referred to, neither has my research revealed, any legislation outlining criteria for transforming schemes or plans into bilateral treaties. In the absence of any legislation, I do not accept that there has been a transformation of the London Scheme to a bilateral treaty. I find that there is no bilateral treaty.

LEGITIMATE EXPECTATION;

[38] The sixth issue: Mr. Richlieu's submission was that, based on the conduct of the requesting country, there was a legitimate expectation of the applicants that the London Scheme was the document being followed and relied on by the requesting country for their return, and it was unfair for the respondents to now put forward the Act as being relied on. I do not think that it is correct to say that it is only now being put forward that the Act is being relied on.

[39] A number of documents that were served on the applicants, referred to the Fugitive Offenders Act: The Extradition Request of the Governor of the requesting country refers to the Fugitive Offenders Act (Cap. 126); The Governor General's Authority to proceed to the Chief Magistrate, bears the following "issued under the Fugitive Offenders Act (Cap.126)". The applicants could have been in no doubt that the Act applied and was relied upon. The fact that, in addition, reference was made to the London Scheme does not invalidate the proceedings.

A SUFFICIENCY OF EVIDENCE:

[40] The seventh issue: Counsel for the applicants questioned the receipt by the Learned Chief Magistrate of viva voce evidence and affidavit evidence. Mr. Richelieu invited the Court, in exercising its supervisory investigative function, to screen the committal proceedings, to examine the nature of the evidence adduced to ascertain whether reasonable inferences were drawn from facts and that any inferences drawn were not based on speculation. Counsel submitted that sufficiency of evidence in law is based on the exercise of a judicial and responsible discretion not on whimsical discretion. It was his submission that there must be close scrutiny of the facts in order to determine sufficiency.

[41] The Learned Magistrate was required by section 12 of the Act to receive evidence and to exercise jurisdiction as nearly as may be as at a preliminary inquiry. I do not think that excludes oral evidence. Rather, it provides for an additional method of receiving evidence, that is, by affidavit evidence. Also, I do not think the fact that evidence was given both orally and by affidavit invalidated the proceedings.

[42] The Learned Chief Magistrate in deciding on sufficiency of evidence, and exercising her judicial mind, looks at the facts presented to ascertain whether a prima facie has been made out. The Learned Magistrate considers whether there is sufficient evidence for the applicants to answer, in the High Court. That is the consideration in R VGovernor of Pentonville Prison (1986) 1 W.L.R. 470 at p 4 "...His sole concern is whether there is sufficient evidence of guilt to justify committal". I think that the Learned Chief Magistrate approached the case correctly.

OPERATION OF SECTION 7 (3):

The Eight Issue:

[43] Mr.Richelieu submitted that section 7 (3) of the Act has not been complied with in that there has been no certificate from the Governor General presented to the Court to give the assurances required under that subsection, in respect of any offence committed before the applicants' return to the British Virgin Islands. His submission was that it is too late now to reveal if any arrangements have been made between the two countries.

[44] Counsel cited Mohammed and Dalvie v President of the Republic of South Africa et al Con. Court of South Africa. In that case, a committal was held invalid as there was no legislative provision and no certificate had been presented to the Court to indicate that there was an arrangement between South Africa and the United States of America.

[45] Section 7 of the Act enacts:

> (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 –
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> (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; or
> (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 subsection (3) may be 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 country and stating its terms shall be conclusive evidence of the matters contained in the certificate".

[46] Where a person is to be returned to the requesting country, subsection 3 provides that there must be a law in the requesting country or an arrangement with the requesting country for ensuring that he will not be dealt with in the requesting country of any offence committed before the return unless he is returned to St. Vincent and the Grenadines.

[47] Where there is a law, the law speaks. Where there is an arrangement between two countries, the evidential manner of establishing that arrangement in a Court is the presentation of a certificate from the Governor General. The aim of that stipulation in the law is to provide a reciprocal legal channel for a returning applicant to challenge the matter in Court if a returning accused considers that that right is ignored or infringed.

[48] In the instant case, I think there is that legal channel. The United Kingdom has responsibility for the external affairs of the requesting country and legislation was passed providing for the situation of a returning accused person. An Order in Council made on 16th July 2002 which came into force on 16th August 2002, signified under the hand of the Clerk of the Privy Council. That Order 2002 No. 1823 The Extradition (Overseas Territories) Order 2002, in Schedule 1, shows the Virgin Islands under Listed Territories, for the purposes of the Extradition Act 1989 as extended to the listed territories.

[49] The relevant provision appears under PART II RESTRICTIONS ON RETURN

Paragraph 6 (4) reads: "A person shall not be returned, or committed or kept in custody for the purposes of such return, unless provision is made by the relevant law, or by an arrangement made with the relevant country or British Overseas territory for securing that he will not, unless he has first had an opportunity to leave it, be dealt with there for or in respect of any offence committed before his return to it other than –

(a) the offence in respect of which his return is ordered;
(b) an offence, other than an offence excluded by subsection (5) below, which is by the facts in respect of which his return was ordered; or

(c) subject to subsection (6) below, any other offence being an extradition crime in respect of which the Governor may consent to his being dealt with.

(5) The offences excluded from paragraph (b) of subsection (4) above are offences in relation to which an order for the return of the person concerned could not lawfully be made."

[50] As I understand the operation of that provision: As St.Vincent and the Grenadines and the British Virgin Islands have similar provisions, I consider that legal provision has been made to satisfy the situation for securing that the applicants will not, "unless (they) have first been restored to or had the opportunity of returning to St. Vincent and the Grenadines be dealt with in that country for, or in respect, of any offence committed before his (their) return....." as provided in section 7 (3) of the Act.

[51] ORDER;

1. I hold that the committal of the Learned Magistrate was based on a sufficiency of evidence led before her.

2. I hold that the committal is valid.

3. I do not grant the application for writ of habeas corpus.

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Monica Joseph
High Court Judge Acting)
25th August 2009.