

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT MISCELLANEOUS APPEAL NO. 3/90

BEFORE: THE HON. MR. JUSTICE ROWE, PRESIDENT
THE HON. MISS JUSTICE MORGAN, J.A.
THE HON. MR. JUSTICE GORDON, J.A. (AG.)

BETWEEN DEREK WATKIS MITCHELL APPELLANT
A N D UNITED STATES GOVERNMENT RESPONDENT

Berthan Macaulay Q.C. and Wentworth Charles
for the Appellant

Patrick Robinson and Miss Denier Little for
the Respondent

Lloyd Hibbert, Deputy Director of Public Prosecutions,
Samuel Bulgin, and Miss Carol Malcolm for the Crown

July 30; October 9 and 10, 1990

RCWE P.:

In July this year an application was heard by the Full Court on a Notice of Motion by the appellant herein in which he sought relief in paragraph (a) for an Order or such Writ as the Court may order or such direction as the Court may consider appropriate to give, for the purpose of enforcing and securing the provisions of Section 15(1) and Section 16(1) of the Constitution in that the appellant's fundamental rights contained in those provisions have been, and are being, and are likely to be contravened in relation to him, in that, his present detention by the Keeper of the

General Penitentiary in Jamaica did not fall within the exceptions contained in Section 15(1)(j) and Section 16(1)(e) of the Constitution, pursuant to Section 25(1) and Section 25(2) of the Constitution.

There was a second application for relief in paragraph (b) which was for an Order that a Writ of Habeas Corpus should issue directed to the Keeper of the General Penitentiary to have the body of the appellant aforesaid before the Court immediately after the receipt of such Writ to undergo and receive all and singular such matters and things as the Court shall then and there consider of concerning him in that behalf upon the grounds set forth in the Affidavits of Wentworth Charles, Attorney-at-Law, sworn to on the 25th and the 31st days of May 1990, and the exhibits attached thereto and served along with the Notice of Motion.

In that same paragraph (b) was contained the following sentence:

"The Constitutional ground is that the existing law, that is the U.K. Extradition Act 1870, deemed to be law for the purposes of Section 15(1) and Section 16(3) of the Constitution by virtue of Section 4(1) of the Jamaica (Constitution) Order-In-Council 1962, has been breached, in the manner appearing in paragraph 8 sub-paragraph 1 of the Affidavit of Wentworth Charles sworn to on the 25th day of May 1990 hereinbefore mentioned."

At the end of the hearing the Full Court dismissed the Motion. What we have filed in the Record before the Court of Appeal is a photocopy of a Minute of Order signed by the Judges and that Minute of Order simply says: "Motion dismissed."

We regard this practice of putting forward a copy of the Minute of Order as the "Judgment" of the Court as improper. It appears in this case that had a proper Formal Order been drawn up and filed, it would indicate clearly what it was that the Court had decided. However, we are able to interpret this Minute of Order by virtue of the fact that there are written Judgments of the Court below. In those written Judgments the Judges took the view that there was only one ground which was being argued on behalf of the appellant and that is the one contained in the second paragraph of the Notice of Motion and which related to the application for Habeas Corpus simpliciter.

It has been settled through a series of cases starting with McCann v. United States of America [1971] 12 J.L.R. 565, that there is no appeal to this Court from the refusal of the Full Court to order Habeas Corpus and Mr. Macaulay for the appellant does not seek to argue to the contrary. He said, however, that the application under paragraph (a) of his Notice of Motion was a live issue throughout the case; that the particulars were properly given and that somehow the Judges misdirected themselves in inferring from the conduct of the case that the constitutional ground had been abandoned. He made reference to a number of passages in the Judgments in support of his submissions and we think the most telling of them is the one which appears at pages 41 and 42 of the Judgment of Patterson J. where the learned judge said:

"Mr. Macaulay closed his reply by asking the Court to make an order that (1) a writ of habeas corpus go and direction that the prisoner be discharged under S. 25 of the Constitution, (2) the same writ of habeas corpus be issued pursuant to S. 11 of the Extradition Act, and (3) costs be ordered against the United States of America Government - the requesting State."

We would like to refer to the way in which the Notice of Motion was drafted because therein it appears to us lay the seeds of confusion. What was put forward as the second of the Orders sought, contained the sentence to which I have already referred and which sought to say what was the constitutional ground. When this sentence is properly interpreted, it becomes clear that it cannot refer to the Order sought on the second or extradition ground, but rather, it can only have relevance to the Order sought under the constitutional or first ground.

Although the facts relied upon by the appellant in relation to the first ground was also referable to the second ground, we cannot find from the Record, which includes in this case the Judgments of the three Judges, any clear statement from which it can be inferred that Mr. Macaulay had abandoned or intimated that he wished to abandon the claim for relief under the constitutional ground. We find therefore that the Judges below misdirected themselves when they held that the constitutional ground had been abandoned. We quote from each Judgment. Malcolm J. said at page 8 of the Judgment:

"That apart, no other area touching on the Constitution was in substance stressed in argument by Mr. Macaulay, so I too along with my brethren interpreted this as tantamount to an abandonment."

Bingham J. said at page 24 of the Judgment:

"In this regard such allegations as set out in the Notice of Motion can be deemed to have been abandoned for the reasons stated."

And finally Patterson J. said at page 42 of the Judgment:

"The applicant did not argue or in any way make submissions in support of the first order sought in his notice of motion. I formed the view that he had abandoned that part of his application and accordingly, it stood dismissed."

As the state of mind of each of the Judges in the Court below was that the constitutional ground was not being pursued, they did not go on to make any judicial determination of the question raised in the first paragraph or the constitutional part of the appellant's Motion and that being the case there is no determination on that portion of the Motion upon which the Court of Appeal can be asked to make a review.

Finding as we do that the issue in paragraph (a) of the Notice of Motion was live at the end of the hearing, the proper disposition of this matter is that it ought to be remitted to the Full Court with a direction that they consider and make a finding on paragraph (a) of the Notice of Motion having regard to the provisions of Section 25 of the Constitution. We so order.