

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 DERRICK WATKIS MITCHELL APPELLANT

A N D UNITED STATES GOVERNMENT
(R. V. KEEPER OF GENERAL
PENITENTIARY PRISON
EX PARTE DERRICK WATKIS MITCHELL) RESPONDENT

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

Patrick Robinson, Miss D. Little and
Brian Wallace for Respondent

July 30, 31; October 9, 10;
November 26, 27; December 20, 1990

ROWE P.:

This appeal raises two points of great importance. Firstly, can a litigant who has made an application to the Full Court for a writ of habeas corpus ad subjiciendum by virtue of the provisions of Section 11 of the Extradition Act 1870, properly join to that application a Motion seeking redress under Section 25 of the Constitution of Jamaica and secondly, were the proceedings before the Full Court a criminal cause or matter from start to finish from which no appeal lies to this Court.

These proceedings have meandered through the Courts in desultory fashion. Notice of Motion dated May 31, 1990 was filed on behalf of the appellant seeking relief set out therein. Every part of that Notice of Motion is important and it is set out hereunder:

" TAKE NOTICE that the Applicant's application for leave to apply for an Order that a Writ of Habeas Corpus ad Subjiciendum, having been dismissed by Mr. Justice Courtney Orr on the 30th day of May 1990, the Full Court of the Supreme Court will be moved on the 18th day of June 1990 at 10:00 o'clock in the forenoon on behalf of DERRICK WATKIS MITCHELL at present detained in the General Penitentiary Prison, Kingston, Jamaica:-

- (1) For an Order or such Writ as it may order to issue, or such direction as it 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 Applicant fundamental rights contained in those provisions have been, and are being, and is likely to be contravened in relation to him in that, his present detention by the Keeper of the General Penitentiary, Kingston, Jamaica, does 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.
- (2) For an Order that a Writ of Habeas Corpus should issue directed to the Keeper of the said General Penitentiary to have the body of DERRICK WATKIS MITCHELL aforesaid before the said Court at King Street, Kingston, Jamaica, 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 31st days of May 1990, and the exhibits attached thereto, copies of which said Affidavits and exhibits are served herewith. 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 subparagraph 1 of the Affidavit of Wentworth Charles sworn to on the 25th day of May 1990 hereinbefore mentioned.

AND ALSO for an Order granting bail pending the hearing and determination of this application.

Dated the 31st day of May 1990":

The Full Court, (Malcolm, Bingham, Patterson JJ.) heard the Motion between July 10-13 1990 and dismissed it. The Minute of Order signed by all three judges record:

"Motion Dismissed".

Notice of Appeal was filed immediately and the matter came on for hearing before this Court on July 30. Counsel for the respondent filed and commenced to argue three preliminary objections. In the course of the argument on the ground that this Court has no jurisdiction to hear the instant appeal it being a decision from the Full Court in an application for habeas corpus arising out of extradition proceedings, respondent's Counsel submitted that on his instructions paragraph 1 of the Notice of Motion was not argued and had been abandoned. This led to a sharp conflict between opposing Counsel and resulted in the appeal being adjourned to await the judgment of the Full Court.

Upon the resumption of the appeal, on October 10, 1990, this Court remitted the case to the Full Court with a direction that they consider and make a finding on paragraph (1) of the Notice of Motion having regard to the provisions of Section 25 of the Constitution. This we did as we were of the view that the Full Court, had, in error, treated paragraph (1) of the Notice of Motion as having been abandoned. On the reference, that Court in a rather enigmatic judgment, repeated portions of the earlier judgments of two of the judges and concluded:

"Our ruling is and was that the Order to Proceed directed to the Resident Magistrate was signed by the proper officer".

Counsel on both sides interpreted the above sentence to be a determination of paragraph (1) of the Notice of Motion sufficient to invoke the jurisdiction of this Court, all other things being equal.

Patterson J. had raised the question as to whether the appellant had invoked the jurisdiction of the Court under Section 25 of the Constitution when at page 42 of the judgment he wrote:

"The Full Court sat in exercise of its jurisdiction (conferred by the Judicature (Civil Procedure Code) Law) to hear an application for a writ of habeas corpus and its jurisdiction was invoked by the applicant Derrek Watkins Mitchell in exercise of his right. The jurisdiction of the Full Court as a Constitutional Court sitting to consider redress in relation to a breach of the fundamental rights and freedoms of the individual under Chapter III of the Jamaica Constitution, was not invoked. Indeed, the rules governing such an application were not adhered to".

The Judicature (Constitutional Redress) Rules 1963 provide two methods by which applications may be made to the Supreme Court pursuant to Section 25 of the Constitution. If the complaint is that any of the claimant's fundamental rights and freedoms "has been, or is being" contravened in relation to him, then the application may be made by Motion. If on the other hand the complaint includes a claim in relation to future conduct, in addition to past and present wrongs, then the application must be by writ. In the instant case the allegations were that the appellant's fundamental rights and freedoms "have been, and are being and is likely to be contravened" in relation to him. No application was made to the Full Court to amend the Motion to delete the claim for redress for future conduct and we refused the application to amend as in our view a claim for constitutional redress under Section 25 cannot be joined to an application for habeas corpus under Section 11 of the Extradition Act, and accordingly no useful purpose would be served in granting the amendment.

It may be that the application to the Full Court was conceived in haste because the documents presented to the Full Court were confusing to say the least. Paragraph 2 of the Notice of Motion was supported by an affidavit of Wentworth Charles dated May 25, 1990 which clearly identified the proceedings as being grounded in Section 11 of the Extradition Act. The final sentence of that paragraph, however, commenced with the words: "The constitutional ground" and we therefore held that there was a sufficient reference to paragraph 1 of the Notice of Motion to enable the appellant to urge that he could rely on Charles' affidavit in support of the said paragraph 1. It is axiomatic that care should be taken to invoke in proper form

the extra-ordinary remedy provided by Section 25 of the Constitution and that a Court should be left in no doubt that such a jurisdiction has been invoked.

The writ of habeas corpus is a process by which a person who is confined without legal justification may secure release from his confinement. The wrong-doer is not thereby punished, but the person imprisoned procures his release and is then at liberty to pursue his remedies against the wrong-doer in the ordinary way - see Wade & Phillips, Constitutional Law, 8th Ed. at 491. In Jamaica the procedure for hearing an application for habeas corpus ad subjiciendum is regulated by Section 564K-564T of the Judicature (Civil Procedure Code) Law which sets up a special regime for the speedy resolution of a matter which peculiarly relates to the liberty of the subject. No provision is made in the rules for the joinder of this prerogative writ with a cause of action as defined in the Code and indeed one purpose of the writ is to enable the person, upon release, to seek to punish the wrong-doer for the unlawful detention, through an action for false imprisonment or malicious prosecution. A writ of habeas corpus may not be fettered by a restraining Order of the Court that the prisoner may not bring an action for false imprisonment as a condition of the release - see Ex parte Hill [1827] . . . 3 C. & P. 225: 172 E.R. 397.

Provision is made in Sections 4 and 5 of the Judicature (Civil Procedure Code) for actions previously commenced by writ and a variety of proceedings formerly commenced by bill, or information or cause petition in the Court of Chancery or by a citation or otherwise in the Court of ordinary to be instituted by proceedings called an "action". Other proceedings were not affected and their

forms of procedure were expressly saved. Action is defined in Section 2 of the Code to mean "civil proceedings commenced by writ and shall not include criminal proceedings by the Crown". The prerogative writ of habeas corpus was never commenced by writ or by any of the process referred to in Section 4 of the Code. And whereas other prerogative "writs" e.g. Certiorari and Prohibition, were statutorily transformed to "orders", the writ of habeas corpus has retained its original form.

The remedy provided by Section 25(2) of the Constitution is governed by the (Constitutional Redress) Rules and redress thereunder must necessarily be of a civil nature as distinct from criminal proceedings. These Rules make no provision for the joinder of proceedings under Section 25(2) with any other proceedings whatsoever. Section 25(4) envisages that Parliament will enact rules from time to time governing the procedure to be followed in the Supreme Court exercising jurisdiction for purposes of Section 25(2) to enable the Court to perform the wide jurisdiction conferred by that section. There seems to be no warrant for joining proceedings under Section 25(2) with any other proceedings. In any event it has been judicially determined that an application for habeas corpus under Section 11 of the Extradition Act is in a criminal cause or matter notwithstanding that the proceedings are civil in form - see U.S. Government v. Bowe [1989] 3 W.L.R. 1256 at 1275. It would indeed be incongruous for criminal proceedings under Section 11 of the Extradition Act to be joined with civil proceedings under Section 25(2) of the Constitution. The fact that both sets of proceedings may be commenced by Motion does nothing to affect the character of the proceedings.

The second question raised in the preliminary objection which calls for determination is whether the proceedings before the Full Court were from beginning to end, proceedings in a criminal cause or matter with the consequence that the attempt to raise a separate constitutional issue in paragraph 1 of the Notice of Motion was ineffective for all purposes. I go directly to the decision of the Privy Council in U.S. Government v. Bowe (supra). In the Bahamas there are Constitutional provisions similar to those which exist in Sections 25, 15(1)(j) and 16(3)(e) of the Jamaican Constitution. Section 19(1)(g) (Bahamas) corresponds with Section 15(1)(j) (Jamaica); Section 25(1) (Bahamas) with Section 16(3)(e) (Jamaica); Section 28(1) and 28(2) (Bahamas) with Section 25(1) and 25(2) (Jamaica); Section 104(1) (Bahamas) with Section 25(3) (Jamaica).

After citing the relevant sections of the Bahamian Constitution, Lord Lowry in giving the opinion of the Board in U.S. Government v. Bowe (supra) said at p. 1278 of the Report:

- "1.
2. Both article 19(1) and article 25(2)(b) contemplate the lawfulness of extradition and extradition proceedings. The fugitive may argue that only lawful action is protected from the article 28 jurisdiction, but this argument and, it would appear, the reasoning of the majority in the Court of Appeal give no effect whatever to the proviso to article 28(2):

'provided that the Supreme Court shall not exercise its powers under this paragraph' (emphasis added) 'if it is satisfied that adequate means of redress are or have been available to the person concerned under any other law'.

"when he ignored the opportunity to test the constitutionality or the legality of the proceedings in the Supreme Court by way of Habeas Corpus as laid down in the Statute. The advantage sought is that by this method there would be an appeal as of right to this Court and thereafter to Her Majesty in Council".

Having stated the problem and the possible consequences if the Court acceded to the appellant's contentions, the majority decision went on to point out the futility of the process. They said:

"Even if the amendment had been granted there was ample power in the Supreme Court to prevent abuse of its process if it was satisfied that a resort to habeas corpus and relief under section 10 of the Fugitive Offenders Act were adequate means of redress under other law".

Forte J.A. expressly approved this latter statement in Junious Morgan v. The Attorney General, S.C.C.A. 9/88.

In our view it is clear that a person who is committed to prison under Section 10 of the Extradition Act and having been advised under Section 11 of that Act of his right to apply for a writ of habeas corpus, makes such an application, it is fallacious for him to attempt to seek simultaneous redress under Section 25 of the Constitution. That device does not have the effect of transforming the character of the proceedings from a criminal cause or matter from beginning to the end. On that basis too, we are of the view that no appeal lies to this Court.

We hold therefore that the Full Court could not grant any redress to the appellant under paragraph 1 of the Notice of Motion as an application under Section 25 of the Constitution could not properly be joined to an application

- "3. It was fallacious reasoning to import article 28 merely because the arrest and proposed extradition of the fugitive involved interference with his freedom of movement".

This third proposition of Lord Lowry fits neatly into the submission of Mr. Robinson that an applicant may not have recourse to a so-called Constitutional Motion seeking a writ of habeas corpus when he is simultaneously seeking a similar remedy under the provisions of the Extradition Act.

This Court has consistently held that it would be an abuse of the process of the Court to permit an application under Section 25 of the Constitution for redress in circumstances where there is a remedy under the Extradition Act or the Fugitive Offenders Act. In Thompson v. D.P.P., S.C. Misc. App. 1/87 - the majority of the Court held that the Full Court was right to refuse to amend the Notice of Motion brought by the appellant to enable him to seek a declaration that his fundamental rights had been, were being or were likely to be contravened in breach of Section 15(1)(j) of the Constitution. Wright and Downer JJ.A. said:

"In the particular circumstances of this case it would mean that the law having specifically provided the effective procedure of habeas corpus to test the legality of committal proceedings, the fugitive could ignore that important protection of the law and resort to the original jurisdiction of the Supreme Court and allege that his fundamental rights have been breached. By such a device the fugitive would be entitled to come to this court on appeal to say that his arrest and the committal proceedings were in contravention of his fundamental rights and freedoms