IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE FULL COURT

SUIT NO. M60/95

BEFORE: THE HON. MR. JUSTICE CHESTER ORR
THE HON. MR. JUSTICE PAUL HARRISON
THE HON. MR. JUSTICE GRANVILLE JAMES

REGINA
VS

DIRECTOR OF PUBLIC PROSECUTIONS
DIRECTOR OF CORRECTIONAL SERVICES
EX PARTE NEWTON FITZGERALD BARNES

IAN RAMSAY INSTRUCTED BY ENOS GRANT FOR APPLICANT.

LLOYD HIBBERT, Q.C. AND HERVIN SMART FOR DIRECTOR OF PUBLIC PROSECUTIONS.

LAXTON ROBINSON, INSTRUCTED BY DIRECTOR OF STATE PROCEEDINGS FOR DIRECTOR OF CORRECTIONAL SERVICES.

HEARD: 2nd, 3rd, 4th, 5th and 6th October, 1995 and 12th March, 1996

JUDGMENT

HARRISON J.

The applicant Newton Fitzgerald Barnes, a Jamaican national is applying for a writ of habeas corpus to issue for his release from a committal order that he be extradited to answer charges on indictment preferred against him in the District Court for the Middle District of Florida, in the United States of America. Her Hon. Miss M. Hughes, Resident Magistrate for the parish of St. Andrew, issued her provisional warrant of arrest on the 14th day of November, 1992 and on the 12th day of July 1995, at the conclusion of a hearing, ordered that he be held in custody in accordance with the provisions of the Extradition Act 1991.

The applicant was charged in the name of George Barnes on an indictment containing thirty nine counts as a result of a hearing by the Grand Jury when a warrant was issued on the 2nd day of May 1983 for his arrest. The evidence

against the applicant is contained in the affidavits of James Joseph Erp, Robert Keith Purvis and Alvin Robert Walters, each sworn to on the 29th day of April 1991, and the affidavits of Leslie Albert Freitag and Donald E. Dowd, both sworn to on the 30th day of April 1991. The allegations are that the applicant was one of a group of persons who conspired to and smuggled the drug, marijuana, from Jamaica to United States of America during the period 1978 to 1983. In the spring of 1981 Purvis, met George Barnes and consequently by arrangement, Freitag flew an aircraft owned by Erp, Purvis and Freitag, to an airstrip on the north east coast of Jamaica, where Barnes loaded the aircraft with 700 lbs of marijuana. Freitag flew the marijuana to Florida where it was unloaded and sold. Freitag, in June 1981, flew to an airstrip in Black River, in Jamaica, Barnes loaded the aircraft with 850 lbs. of marijuana which Freitag flew to Florida where it was unloaded and sold. Walters, a Jamaican national living in Miami, Florida, U.S.A. and a cruise ship steward was concerned in smuggling marijuana, along with Erp and others, from Jamaica to the United States of America for the years 1979 and 1980.

Barnes who had not been paid by Erp for the marijuana supplied, contacted Walters to collect the said payment from Erp. - Walters said he spoke to Erp and collected in the Spring of 1981, "$35,000 or $40,000" from Erp and paid over this amount to Newton Barnes. Months later, Newton Barnes again asked Walters to collect from Erp money for another marijuana shipment. Walters spoke to Erp who refused to pay. Walters so advised Barnes. In June of 1982, Barnes met Erp, Purvis and Freitag, in Miami, Florida and planned another marijuana shipment. As a result an aircraft was again flown to Jamaica by one Emery Arthur, who flew the marijuana from Jamaica to Ocala, Florida, on the instructions of Erp, instead of Lake County, Florida where Purvis and Freitag were awaiting his return. The marijuana, 980 lbs, was unloaded and sold by Erp. Walters identified the applicant, Newton Barnes in 1987, from a Florida driver's licence photograph of the applicant, as the said Barnes to whom

he had paid the said money received from Erp. Walters knew the applicant to operate the Barnes Construction Co. In April 1991, Erp, Freitag, Purvis and Walters had all been convicted of offences involving the said smuggling of marijuana from Jamaica to United States of America, served their sentences and were then on parole.

In his affidavit filed in support of the application, the applicant, consistent with his deposition given at the hearing before the said Resident Magistrate, denied that he is or is known as George Barnes or that he was involved in any marijuana smuggling transaction, or that he knew Erp, Purvis or Freitag. He admitted knowing Walters, with whom he was involved in foreign currency transactions only and not marijuana smuggling. He denied that he had requested of Walters and that Walters had collected any money from Erp and paid to him. He conceded that he owned Barnes Construction Co. and held a Florida driver's licence. He said that he heard, in 1983, that Walters expressed animosity towards him, that he is innocent of the charges and consequently seeks the writ of habeas corpus.

The grounds argued in support of the issue of the said writ are, that at the time these proceedings were commenced against the applicant, the treaty of 1991 between Jamaica and the United States of America had not been published in the Gazette and as a consequence had not been incorporated into municipal law; that the court should not accept as credible the affidavit evidence of Erp, Purvis, Freitag and Walters, all of who deponed years after the indictment was drawn up and did so in return for the "reward" of serving shorter sentences; that there was no evidence of the definition of "marijuana" or that it was the same as "ganja", as defined by the Dangerous Drugs Act; that proof of the substance "marijuana" cannot be effected by the evidence of a person who used, smelled or handled it, but if equated to 'ganja', it must be proven by scientific means within the provisions of the latter Act, and therefore the rule of double criminality was not satisfied; that there was no evidence of a conspiracy involving the applicant and the statement of Walters cannot in law supply

it, and that there was no evidence of identification; that there was no evidence of the observance of the rule of speciality nor any certificate of arrangement as required by section 7 of the Extradition Act; and that in all the circumstances it would be unjust and/or oppressive to extradite the applicant.

Mr. Ramsay for the applicant argued that there was no evidence of identification of the applicant linking him with the George Barnes with whom the three witnesses Erp, Purvis and Freitag were involved in the trafficking of marijuana, nor did the witness Walters in identifying the photograph of the applicant say he was George Barnes, and that the evidence of the witness Dowd that Walters told him so was hearsay and inadmissible. He submitted further that there no evidence nor record from the United States of America that "marijuana" is ganja, and one should not look at the dictionary meaning, and which even if it was, requires scientific proof in Jamaica - vide section 7 of the Dangerous Drug Act; or if one pleads guilty no further proof is required - Bird v Adams [1972] CLR 174, R v Chatwood et al [1980] 1 All ER 467 and Coleman v R., R.M.C.A. No. 22/94 delivered on the 12th day of July 1994; that the assertions of the witnesses do not amount to evidence of a conspirator in proof of an offence of conspiracy involving the applicant, but merely that of accomplices which does not facilitate proof, R. v D.P.P. Exparte David Morally (1975) 14 JLR 1, R. v Governor of Pentoville Prison, Exparte Osman [1990] 1 WlR 277; that there is no proof of importing the substance marijuana nor of the offence of conspiracy and the case against one Roy McFarlane refers to a conspiracy with the said witnesses for the relevant period and curiously did not name Barnes as involved; that seeing that the liberty of the subject is the concern in extradition cases, the courts have required that proof be strict - R v. Governor of Brixton Prison, Ex parte Otchere [1963] C.L.R. 43. He continued, that the United States of America having made a request on the 14th day of August, 1991, the Minister's authority to proceed issued on the 2nd day of December, 1992 was null and void and therefore the siad Resident Magistrate had no jurisdiction because the order under section 4 of the Extradition Act, which comes into operation on publication

in the Jamaica Gazette to incorporate it into municipal law, was not published until the 2nd day of February 1995, after the affirmative resolutions of the 15th day of August and the 13th day of September, 1991; that no certificate of arrangment, independent of the treaty, was issued as required by section 7 (3) of the Act to satisfy the rule of specialty. He concluded that due to the long delay since the alleged offences were committed in 1981 to 1982, and the indictment preferred in 1983 to the date of the applicant's arrest in 1993, and the lack of good faith, namely, the inadequate preparation of the record, inter alia, the applicant will be handicapped, by the unavailability of witnesses. Accordingly, by section 11 of the Extradition Act, it would be unjust and oppressive to extradite the applicant.

Mr. Hibbert submitted that the affidavits of Erp, Purvis and Freitag and Walters disclosed that they were concerned in a marijuana smuggling operation, between Jamaica and the United States of America involving one George Barnes, in the construction business; that Freitag visited Jamaica twice in 1981 and met George Barnes who loaded the marijuana onto the aircraft; that in 1982 Freitag and Erp met George Barnes, that Purvis met George twice, in 1981 and 1982; that Walters who identified the applicant from a Florida driver's licence was asked by a man he met as "Newton Barnes" to collect money for two shipments of marijuana and that he made to Erp in the Spring of 1981 and June 1981. He did so and handed it to Newton Barnes; the court could therefore draw the inference that George Barnes was the applicant Newton Barnes. There was therefore sufficient evidence of identification of the applicant before the Resident Magistrate.

He argued further that "marijuana" is not a term of art - but a name by which ganja is called; it is a word used interchangeably, see Introduction to Forensic Science by H.J. Halls and the New Shorter Ocford Dictionary Vol. 1 page 1060; that though the certificate by the analyst under the Dangerous Drugs Act factilitates proof, any scientist or other expert, or admissions and assertions by anyone who deals or uses

the drugs over a period, may provide satisfactory evidence that the substance is a prohibited drug such as marijuana, **Bird v Adams, R. v. Chatwood,** supra; that no certificate is forthcoming of proof of substance because no marijuana was detained; that the description of the witnesses who handled, the substance is prima facie evidence of the substance being marijuana; that the applicant is a co-conspirator, and though involved later in a part of the conspiracy, his act and utterances to Walters to collect money and his receipt of such money is a part of the common plan; that the statements of Erp, Purvis, Freitag and Walters in their affidavits of 1991 are statements of accomplices and evidence against the applicant; that the order reciting the fact of a treaty between Jamaica and the United States of America, and made under section 4 of the Extradition Act is a "regulation" which under section 31 of the Interpretation Act is required to be published, and was published on the 27th day of June 1991; that the affirmative resolutions were passed on the 15th day of August and the 13th day of September 1991, and the matter was commenced either by the Minister's authority to proceed, issued on the 2nd day of December 1992 or the issue of the Resident Magistrate's provisional warrant; that on the 2nd day of December 1992, the said order was effective and did not require any further publication - **Prince Edward v D.P.P. et al - Supreme Court Civil Appeal No. 43/94** dated 7th November, 1994; the treaty was incorporated in the municipal law. He continued, that no certificate is required to show that arrangements were made as referred to in section 7 (3) of the Act, to satisfy the rule of specialty, because article 14 of the treaty itself provides that safeguard, **Royal Government of Greece v. Brixton Prison Governor et al [1969] 3 All E.R. 1773;** that the non-production of evidence of the definition of marijuana and the use of affidavits of accomplices cannot be regarded as bad faith; the delay since the indictment was issued in 1983 and the request from the United States of America in 1991, seeing that the investigation involved several persons, and the certainty of the identification of the applicant was not evident until 1987, is reasonable and cannot be regarded as unjust and oppressive.

Mr. Robinson argued that in extradition proceedings hearsay evidence is admissible - **R. v. Governor of Pentoville Prison, ex parte Kirby [1979] 2 All ER 1094;** that to satisfy the double criminality rule the Court should look at the method of proof of the substance marijuana in the requesting state and using the wide construction and viewing the conduct described in the affidavits, scientific proof is unnecessary, but using the narrow approach, one looks at the ingredients and scientific proof is necessary **Governor of Canada et al vs Aronson [1989] 2 All ER 1025;** he conceded that scientific proof was required; that under section 4(1) of the Extradition Act the publication by the Minister of the order affirming the treaty has the effect of making the treaty a part of municipal law and the resolutions affirming the treaty have no legislative effect, **R. v. Commissioner of Corrections et al, Ex parte Prince Edwards, Suit M151/93** dated 24th March, 1994 (Full Court), and even if the order was not published, the Resident Magistrate's jurisdiction is not affected because his powers are derived from the authority to proceed; that the specialty rule is satisfied by the treaty which incorporates the arrangement with a foreign state for the surrender to that state of fugitive criminals - Halsbury's, 4th Edition Vol. 18, paragraph 203, (note 4). He concluded that "extradition treaty" is not defined but means an arrangement with a foreign state with respect to the surrender to that state of fugitive criminals.

Section 10 of the Extradition Act, 1991, empowers the Resident Magistrate, "...the court of committal...", to,

> "...hear the case in the same manner, as nearly as may be, as if he were sitting as an examining justice and as if that person were brought before him charged with an indictable offence committed within his jurisdiction", section 10 (1), and imposes a duty on.."

the said court to determine whether or not the offence is an indictable offence and if the evidence tendered at the said hearing,

> "..would be sufficient to warrant his trial for that offence if the offence had been committed in Jamaica.." section 10(5) (a).

The extraditable offence of conspiracy is one of the offences with which the applicant Newton Barnes is charged. The indictment alleged that the said offence was committed "...from in or about September, 1978, and continuing thereafter through in or about April, 1983...".

The evidence of conspiracy against the applicant is contained in the affidavits of James Erp, Leslie Freitag and Robert Purvis, each sworn to in April 1991. Erp deposed that, in 1978, he became involved in a marijuana smuggling operation between Jamaica and Florida, and that he "met another Jamaican... who ... supplied me with marijuana. His name was George Barnes." Erp referred to two trips to Jamaica "in 1981, once in spring and later in about June 1981." Another witness, Alvin Walters, who was named by Erp, as involved in the said operation, admitted his said involvement "from 1979 through 1982..." and deposed that he "met an individual who introduced himself to me as Newton Barnes in late 1980 or early 1981..." sought his help in collecting money from Erp "for a marijuana shipment." Another witness, Donald Dowd, a special agent of the Federal Bureau of Investigation of the United States of America obtained in 1987, a photograph of Newton Barnes from a driver's licence issued in Florida, United States of America. Walters identified the person in the photograph as the Newton Barnes, whom he had met and dealt with. This was the driver's licence photograph of the applicant. The applicant admitted being the holder of such a foreign driver's licence.

There is ample evidence from which a conspiracy could be inferred, and from which the applicant could be found as being identified and involved in, albeit not from its inception. The utterances of a conspirator, in the course of furtherance of the said conspiracy is evidence against the other conspirators. Seeing that the conspiracy having allegedly ended in 1983, the statements of Erp, Freitaz and Purvis made in 1991, cannot qualify as statements of co-conspirators, but as that of accomplices. This evidence, though uncorroborated is admissible evidence against the applicant, and the tribunal, at a trial is required to warn itself of the danger of acting on the uncorroborated evidence of an accomplice - see the unreported case of **R. v. Commissioner of Correctional Services et al, ex parte Prince Anthony Edwards, Suit no. M151/93**, at p. 13. I do not agree with the submission of counsel for the applicant that there is no evidence of the identification of the applicant with "George Barnes", and hold that there was sufficient material before the Resident Magistrate to satisfy

the provisions of section 14 of the Act and from which she could draw the inferences that she did.

The evidence of the substance being marijuana, is contained in the said affidavits. Each witness admitted that he was concerned in the business of trafficking the substance marijuana, a prohibited drug, from Jamaica to the United States of America. Admissions by a defendant that a substance is a prohibited drug or a plea of guilty have been accepted by the court to ground a conviction without any further proof, see **Bird v. Adams [1972] C.L.R. 175 and R. v. Chatwood et al [1980] 1 All ER 467, approving Bind v. Adams.** In the case of **Peter Coleman v. Reg., R.M.C.A. No. 22/94** delivered on the 12th day of July 1994 (unreported), the appellant pleaded guilty to a charge of possession of and dealing in ganja; on appeal, his conviction was affirmed. Carey J.A., said at page 2,

> "The best person to know what he has, is the appellant, From the outset he admitted he had ganja. Where a defendant pleads guilty, there is no obligation on the prosecution to prove anything."

The affidavit of Ernest D. Mueller, Asst. United States Attorney, an expert on the criminal laws of the United States of America, recites,

> "In order to prove in court that the substance imported was in fact marijuana, the United States may utilize reliable circumstantial evidence. In this case the testimony of three persons familiar with marijuana, who saw it, smelled it, and in some instances used it, taken together with the circumstances under which the marijuana was delivered is evidence of the type acceptable to the United States courts on this issue."

Whereas the said admissions are admissible and bind each of the witnesses Erp, Freitag and Purvis individually, and would be admissible against each other as co-conspirators, they being accomplices to the applicant, do not bind the applicant; the admissions are mere statements of a witness in the case against the applicant, requiring further proof of the nature of the substance, marijuana.

The dictionary meaning of ganja, "...A strong preparation of marijuana..." - The New Shorter Oxford English Dictionary, Vol. 1, is helpful to identify the substance marijuana, as ganja, as it is known in Jamaica. "Cannabis" is also defined as "marijuana" and "ganja" -

see Blackston's New Gould Medical Dictionary, 2nd Edtn. One cannot however rely on such texts in Jamaica in order to prove the nature of the substance. The Dangerous Drug act defines "ganja" as including,

> "..all parts of the plant known as cannabis sativa from which the resin has not been extractd and includes any resin obtained from that plant, but does not include medicinal preparations made from that plant,"

IN R. V. George Green (1969) 14 EIR 205, the appellant succeeded on appeal from a conviction of cultivating ganja becasue the analyst could not definitively say that the plants exhibited were not staminate plants, (male plants), and were pistillate plants (female plants). The Dangerous Drugs Act, at the time of appeal defined "ganja" as including "all parts of the pistillate plant from which the resin had not been extracted..." The analyst stated that both the staminate and the pistillate plants contained the prohibited resin constituent. However, only that of the pistillate plant was then prohibited under the law.

A scientific analysis, as distinct from a botanical classification is therefore required in proof of the substance ganja, in the Jamaican courts; the certificate of the analyst is admissible under the Act. Circumstantial evidence, is therefore quite insufficient proof of the nature of the substance "ganja". I find that, in the circumstances of this case, the Resident Magistrate did not have before her sufficient proof, that, "marijuana" is "ganja", as defined in the Dangerous Drugs Act - See also R. v. Director of Prisons et al ex parte David Morally (1975) 14 J.L.R. 1.

The effect of this absence of evidence is that, the "overt acts" which are ingredients of Count One of the indictment for conspiracy are not supported because of this deficiency.

One has to examine also, counsel's argument that the Resident Magistrate had no jurisdiction to make the order that she did, because the publication of the order to bring the treaty into operation, in domestic law, was ineffective, and consequently the Minister's order to proceed under section 8 of the Extradition Act was null and void.

The said Act provides for the application of treaties between the parties, to domestic law. Section 4(1) of the Act reads,

> "4-(1) Where any extradition treaty has been made with any foreign state, whether before or after the commencement of this Act, the Minister may, by order, declare that the provisions of this Act shall apply in respect of such foreign State....."

In the said case R. v. Commission of Corrections et al., Ex parte Prince Edwards, supra, it was said, at page 7,

> "On the 11th day of June 1991, in the exercise of his power under section 4 (1) of the Act, the Minister of Justice issued the Extradition (Foreign States) Order, 1991, published in the Jamaica Gazette Supplement, Proclamations, Rules and Regulations dated the 27th day of June 1991. The said Order, read, inter alia,
>
> 'The provisions of the Act shall apply in respect of the foreign State specified in the Schedule hereto.
>
> **Schedule**
>
> The United States of America.....'

The use of the Order in Council is an effective method to bring a treaty into operation in domestic law as it affects one's nationals, without further recourse to Parliament or employing a full recital of the treaty in the statute - vide Regina v. Wilson [1877] 3 Q.B.D. 42."

I adopt the above as applicable to the circumstances in this case, with the further deference to the Court of Appeal in Supreme Court Civil Appeal no. 43/94 Prince Edwards v. D.P.P. et al delivered on the 7th day of November, 1994. Section 4(4) provides that,

> "(4) An order under this section shall be subject to affirmative resolution"

The affirmative resolutions were tabled, in the House of Representatives on the 15th day of August, 1991, and in the Senate on the 13th day of September, 1991.

"Regulations" in the Interpretation Act, includes "orders". Section 31(1) of the said Act reads,

> "31-(1) All regulations made under any Act or other lawful authority and having legislative effect shall be published in the Gazette and unless it be otherwise provided shall take effect and come into operation as law on the date of each publicaiton" (emphasis added.)

However, there is a reservation on its effect on publication. Section 30 (2) reads,

> "30 -(1).....
>
> (2) The expression 'subject to affirmative resolutions' when used in relation to any regulations shall mean that those regulations are not to come into operation unelss and until affirmed by a resolution of each House of Parliament." (emphasis added.)

The said order published by the Minister on the 27th day of June 1991, satisfied the requirements of section 31(1) of the Interpretation Act. It did not however "come into operation as law" on that date. Its operation was postponed, it was in abeyance, as law, awaiting the affirmative resolutions. When the resolutions were affirmed the order was then brought into force. The order therefore came into force on the 15th day of September, 1991. The Minister's authority to proceed, issued on the 2nd day of December, 1992, was therefore valid and of full effect, giving jurisdiction to the Resident Magistrate to act. The further publication of the order on the 2nd day of February was therefore superfluous. The applicant's complaint in ths respect therefore fails.

The rule of specialty is a restriction on the terms of surrender in protection of the fugitive offender.

Section 7(3) of the Act reads,

> "7-(3) A person shall not be extradited to an approved State or committed.... for the purposes of such extradition, unless provision is made by the law of that State, or by an arrangement made with that State for securing, he will not -
>
> (a) be tried or detained with a view to trial for in respect of any offence committed before his extradition under this act other than -
>
> (i) The offence in respect of which his extradition is requested.
>
> (11) any lesser offence proved by the facts proved before the court of committal.....
>
> (iii) .....

(4) Any such arrangement as is mentioned in subsection (3) may be an arrangement made for the particular case or an arrangemnt of a more general nature; and for the purposes of that subsection a certificate issued by or under the authority of the Minister confirming the existence of an arrangement with any approved State and stating its term shall be conclusive evidence of the matters contained in the certificate."

Mr. Ramsay argued that a certificate issued by the Minister is required under the provisions of the above section, and the "arrangement" referred to is in addition to the treaty. I am not able to agree.

The United Kingdom statutes on extradition are helpful. The Extradition Act, 1870 (U.K.), amended, reads,

"1 .....

2. Where an arrangement has been made with any foreign state with respect to the surrender to such state of any fugitive criminals, Her Majesty may, by order in Council, direct that such Act shall apply in the .....

Every such order shall recite and embody the terms of the arrangement .....

Every such order shall be laid before both Houses of Parliament within six weeks after it is made.....

3. The following restrictions shall be observed.....

1. A fugitive criminal shall not be surrendered to a foreign state unless provision is made by the law of that state, or by arrangement that the fugitive criminal..... be detained or tried in that foreign state for any offence committed prior to his surrender other than the extradition offence proved by the facts on which the surrender is grounded:....."

Halsbury's Laws of England, 3rd Edition, Vol. 16, on extradition, with reference to the said Extradition Acts 1870 to 1935, reads, in paragraphs 1151 and 1153 , inter alia,

"1151 .....

The Extradition Acts do not apply in the case of a foreign state unless Her Majesty so directs by Order in Council.....

1152 Orders in Council
Where an arrangement has been made with any foreign state with respect to the surrender to that state of any fugitive criminals, the Order in Council applying the Extradition Acts to that state....

> may be restricted to fugitive criminals, who are in ..... the part of Her Majesty's dominions specified in the order.... The order must recite or embody the terms of the arrangement .... Every order must .....
> An Order in Council is conclusive evidence that the arrangement therein referred to complies with the requirements of the Acts....."

Both the 1870 (U.K.) Act and paragraph 1151 of Halsbury's Laws of England, referred to, embody the provisions of section 4 (application of the provisions of this Act to foreign States) and section 7 (General instructions on extradition) of the Extradition Act, 1991 (Jamaica). However, where in the said section 4, the wording is "where any extradition treaty has been made...", in the United Kingdom statute, it reads, "Where an arrangement has been made...". Clearly wherever in the said United Kingdom statutes, the word "arrangement" is used, the provisions of an extradition treaty are being referred to. In the Extradition Act 1991 (Jamaica) "extradition treaty" is synonymous with "agreement" - section 2; the only occasion on which the word "arrangement" is untilized is in section 7, specifically dealing with restrictions on extradition. The phrase "Any such arrangement as is mentioned in subsection (3) ...", when examined, is in the same terms as Article XIV (Rule of Specialty) of the Extradition treaty between Jamaica and the United States of America. "Arrangement", in my view, in section 7 means "treaty arrangemtnt." The Extradition Act 1991, incorporated the provisions of and superseded the Extradition Acts 1870 to 1932 and the Fugitive Offenders Act previously operated between countries for the return of fugitive offenders "from one part of Her Majesty's dominion to another." Most of these dominions became Commonwealth countries, Section 3 of the Extradition Act gives the Minister power to designate that the Act shall apply to such countries as a designated Commonwealth State. No treaty is contemplated as necessary between such states. A certificate of arrangement under section 7 may well be necessary between such. - States - in the absence of a treaty stipulating the said restriction on extradition.

The certificate of the Minister is therefore merely an optional procedure to facilitate proof of the restrictive provision. Article 14 of the treaty, being a part of the domestic law of Jamaica, is the means

of proof. In **Government of Greece vs Brixton Prison [1969] 3 All ER 1337,** the Greek Government appealed a writ of habeas courpus granted by the Divisional Court in the fugitive's favour. The latter argued that there was no assurance that the safeguards against detention and trial for offences other than that on which he was extradited would be honoured by the Greek Government. He was here adverting to art. 7 of the Extradition treaty between the United Kingdom and Greece, which is similar in terms to Art 14 of our treaty as reflected in section 7(3) of the Act. The House of Lords rejected the fugitive's argument. Lord Reid, said, at page 1339,

> "...art 7 of our extradition treaty with Greece, provides that a person whose surrender has been granted -
>
> > "...shall in no case be detained or tried.. for any other crime, or on account of any other matter than those for which the extradition shall have taken place'
>
> So it would be a clear breach of faith on the part of the Greek Government if the fugitive was detained in Greece otherwise than for the purpose of serving his sentence, and it appears to me to be impossible for our courts or for your Lordships sitting judically to assume that any foreign Government with which Her majesty's Government had diplomatic relations may act in such a manner...."

Lord Morris of Borh-Y-Gest, said, at page 1341,

> "It was said that Section 3(2) of the Act is only honoured if there is an effective 'arrangement' and that there could be no assurance that art-7 of the treaty would be a safeguard. In my view, this is not an acceptable contention...it ought not to be for the court to assume or infer that the treaty would not be honoured."

The deponent Ernst. D. Mueller, Asst. U.S. Attorney, obliquely referred to that State's respect of the safeguarding terms of the treaty when he said, "...if the courts of Jamaica should conclude that Barnes is not extraditable on one or more of the charges contained in Counts one, twenty-five, twenty-six, twenty-seven, or thirty nine, the Treaty contemplates taht Jamaica would grant extradition for those which are found to be extraditable offences and deny extradition only for those offences which are not found to be extraditable.

The said certificate, referred to in section 7(4) of the Act is not, in my view a necessary requirement the absence of which would nullify the

proceedings against the applicant. I agree with Mr. Hibbert's submission in this respect.

Section 11 of the Act provides,

> "(1) Where a person is committed to custody... the court of committal shall inform him,... of his right to make an application for habeas corpus.....
>
> (2) .....
>
> (3) On any such application the Supreme Court may, without prejudice to any other power of the Court, order the person committed to be discharged from custody if it appears to the Court that -
>
> (a) .....
>
> (b) by reason of the passage of time he is alleged to have committed the offence or to have become unlawfully at large, as the case may be;.....
>
> It would, having regard to all the circumstances, be unjust or oppressive to extradite him"

The applicant is alleged to have himself committed these offences during the period 1981 to 1983, although the conspiracy is alleged to have commenced from 1978. The indictment was issued in May 1983. There was inaction for a period of eight (8) years, until April 1991 when the affidavits of Erp, Freitag, Purvis and Walters, were sworn to. In August 1991, the United States Government requested his extradition. The provisional warrant was issued in November, 1992, the Minister's authority to proceed, in December 1992, and the applicant was arrested in January 1993. The period of time that elapsed from the date of the offences to the date of request for his extradition is ten (10) years. This court has to consider the question of "passage of time", under the provisions of section 11, supra, as it concerns delay.

The deponent Donald Dowd stated that, in 1984 "Walters began to co-operate with law enforcement and was interveiwed by me at length". and told him that "George Barnes" was the applicant Newton Barnes, and of the circumstances of their meeting and association; that in 1987 he obtained a photograph of the appliant from a driver's licence issued to him in Florida, United States of America, in which year the said Walters identified the

applicant. Between 1984 and 1987 there was a delay of three (3) years and a further delay of four(4) years between 1987 and 1991. There is no expressed explanation, on the record, for those delays. The applicant seeks to project an alibi and faulty identification, as a defence. If that is so, it may well, as his counsel argues, create a difficulty in mounting such proof, after such an extended passage of time.

In R. v. Governor of Pentoville Prison, ex parte Kirby [1979] 2 All E.R. 1094, the Divisional Court, considered the exercise of its discretion under section 8(3) (b) of the Fugitive Offenders Act, 1967 (U.K.) which is in identical terms to section 11(3) (b) of the Extradition Act (Jamaica), in respect of the passage of time constituting delay. Crocm-Johnson, J. at page 1102, said,

> "The offences covered a period from December 1969 to October 1970 ..... A lot of time has certainly gone by..... We allowed an affidavit to be read ..... explaining the delay which has taken place in bringing these proceedings .... Unquestionably on the affidavit .... the investigation proceeded ... at a somewhat leisurely pace ..... It is now over 6½ years since the earliest offence, and that certainly is to be regarded as a somewhat long time. But when one comes to consider section 8(3) (b), ... the really over-riding point is this question; would it in all the circumstances be unjust or oppressive to return the applicant after whatever the passage of time may have been?
>
> This is to be looked at widely and simply dealt with in the discretion of the court. There may be cases where the offences are simply so stale and so old that anybody would say that it was unjust or oppressive to return."

The court however refused the application for habeas corpus. On the ground of delay, in the circumstances of the case, in that the evidence on the basic facts were not in dispute, and the financial transactions grounding the charges were largely agreed. Therefore the applicant's defence that those facts may be as alleged, but he was not acting dishonestly thereby, could be dealt with by him despite the passage of time; this was largely an interpretation of law.

In the instant case, the earliest offences were allegedly committed

in 1978, which is approximately seventeen (17) years ago. The applicant is alleged to have committed the offences fourteen (14) years ago. That is an inordinately long time ago. There is no explanation tendered with the record explaining the reasons for the successive periods of delay. That, by itself, may not in all cases be sufficient to convince a court not to extradite an applicant. However in the instant case no facts are agreed, the material facts are in dispute. They involve issues of identification and the defence of alibi.

In the circumstances of this particular case, I am of the view that it would be unjust and oppressive to return the applicant. I would discharge the applicant. Habeas corpus should issue.

I agree.

James J.

I agree. Writ of Habeas Corpus to issue. Order that Newton Barnes be released.

Orr. J.