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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE FULL COURT

SUIT NO. M120 OF 2002

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Judgment Book

**CORAM: THE HONOURABLE CHIEF JUSTICE
THE HONOURABLE MRS. JUSTICE HARRIS
THE HONOURABLE MRS. JUSTICE MCCALLA**

REGINA VS COMMISSIONER OF CORRECTIONAL SERVICES

THE DIRECTOR OF PUBLIC PROSECUTIONS

EXPARTE MARK ANTHONY DAVIS

Frank Phipps Q.C. and Miss Norma Linton Q.C. for the Applicant

Patrick Foster and Miss Analeisa Lindsay for the Commissioner of Corrections

Herbert McKenzie for the Director of Public Prosecutions

HEARD: October 21 and December 19, 2003

WOLFE, C.J.

On September 19, 2002 His Honour Mr. Martin Gayle, Resident Magistrate in the Corporate Area Criminal Court ordered a warrant of committal pursuant to the Extradition Act, against the Applicant Mark Anthony Davis, a citizen of Jamaica who had previously resided in the United States of America.

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This application is for a Writ of Habeas Corpus on the following grounds –

- (i) That the Provisional Warrant of Arrest dated July 31, 1998 is wholly defective as the warrant incorrectly describes the applicant as a convicted person.
- (ii) That the Learned Resident Magistrate erred in granting the warrant of committal in respect of the offences charged as there is no independent witness.
- (iii) That the evidence contained in the Affidavits of the witnesses is insufficient to prove the charges contained in the indictment.

Grounds two and three were abandoned by Mr. Phipps Q.C.

The burden of Mr. Phipps submission is that the Provisional Warrant of Arrest issued on the 31st day of July 1998 categorised the applicant as a convicted person. The authority to proceed dated 15th June 2000, which refers to the applicant as being accused of the offences of (a) possession with intent to distribute a controlled substance (marijuana), (b) conspiracy to possess with intent to distribute a controlled substance (marijuana), required the Learned Resident Magistrate to proceed on the authority of the Provisional Warrant of Arrest.

In fact the applicant had not been convicted as was stated in the Provisional Warrant of Arrest.

The original request and subsequent requests made it clear, beyond the shadow of a doubt, that the applicant was wanted to stand trial in the United States of America for offences he had allegedly committed.

Mr. Phipps submitted that the authority to hold the committal proceedings is based on the authority to proceed as signed by the Minister. In the instant case, Mr. Phipps argued, the Minister authorized the Learned Resident Magistrate to proceed on the basis of the Provisional Warrant. The consequence was fatal, in that the Provisional Warrant wrongly categorized the applicant as a convicted person.

In this regard Mr. Phipps contended that the Magistrate lacked jurisdiction to hold the committal proceedings. In support of this submission he cited and relied on In *Re Guisto (FC) H.L. 2003* in which Lord Hope of Craighead said:-

“The question which lies at the heart of the appeal is a question of jurisdiction. Was it within the jurisdiction of the Judge to make the committal order when the facts show that the appellant is a convicted person and not, as the Secretary of State wrongly asserted and the judge wrongly assumed when she made the order, a person accused who has yet to stand trial in the United States”.

The instant case is readily distinguished from the case cited. In the instant case the Authority to proceed correctly categorized the applicant as a person accused. The Learned Magistrate in his warrant of committal referred to the applicant as a person accused of crimes. All the diplomatic notes make it abundantly clear that the applicant is a person accused of crimes. It is only in the Provisional Warrant of Arrest dated July 31, 1998 that the applicant is referred to as a convicted person.

In *Edwards vs The Director of Public Prosecutions and Director of Correctional Services 31 JLR 526* Downer J.A. said :-

“Once the ‘authority to proceed’ was received by the Resident Magistrate the provisional warrant ceased to have effect, even if it was not spent”.

The Learned Judge of Appeal further opined “There was jurisdiction once there was a valid ‘authority to proceed’ and the fugitive was before the Resident Magistrate”.

It is clear from the circumstances of the instant case that it cannot be properly contended that the Minister who signed the Authority to proceed wrongly asserted that the applicant was a convicted person or that the Learned Resident Magistrate wrongly assumed that the applicant was a convicted person when he issued the warrant of committal.

I cite with approval the dictum of Lord Bridge of *Harwick in Regina v Governor of Ashford, Exp. Rostlethwaite* [1988] A.C. 924 at p. 946.

“In approaching the main issue two important principles are to be borne in mind. The first is expressed in the well known dictum of Lord Russell of Killowen C.J. in *re Arton* (No. 2) [1896] 1 Q.B. 509, 517 where he said:

In my judgment these treaties ought to receive a liberal interpretation which means no more than that they should receive their true construction according to their language, object and intent.

I also take the judgment in that case as good authority for the proposition that in the application of the principle the Court should not, unless constrained by the language used, interpret any extradition treaty in a way which would ‘hinder the working and narrow the operation of most salutary international arrangements’.

The second principle is that an extradition treaty is ‘a contract between two sovereign states and has to be construed as such a contract. It would be a mistake to think that it had to be construed as though it were a domestic statute. *Regina v Governor of Ashford Remand Centre, Ex parte Beese* [1973] W.I.R. 969, 973 per Lord Widgery C.J. in applying this second principle, closely related as it is to the first, it must be remembered that the reciprocal rights and obligations which the high contracting parties confer and accept are intended to serve the purpose of bringing justice to those who are guilty of grave crimes committed in either of the contracting states. To apply to extradition treaties the strict canons appropriate to the construction of domestic legislation would

often tend to defeat rather than to serve this purpose'.

For these reasons I would order that the motion be dismissed.

Harris, J.

In these proceedings the Applicant seeks an order for a Writ of Habeas Corpus with respect to an Order for his committal by His Honour Mr. Martin Gayle, under the Extradition Act, 1991.

The Government of the United States of America through the Western District Court of New York sought the return of the Applicant, a Jamaican citizen to the United States.

In an affidavit sworn by the applicant on October 2, 2003, he averred that he was arrested on a Provisional warrant of Arrest on March 17, 2000 which warrant stated that he had been convicted for two offences. It was his further averment that prior to his arrest, he resided in the United States of America and while resident there, he had never been convicted for any offence nor had any warrant been issued for his arrest by the United States Government.

The main affidavit in support of the request for extradition, sworn by George C. Burgasser, states, among other things, that on June 21, 1996 a Federal Grand Jury sitting in Buffalo, New York, issued an indictment charging the applicant with 2 offences. Superceding indictments laying charges against him were subsequently issued.

On July 31, 1998, the learned Resident Magistrate issued a provisional warrant for the arrest of the Applicant. In this Provisional Warrant, he was described as a convicted person. An Authority to proceed under the Extradition Act was transmitted to the learned Resident Magistrate by the Minister of National Security and Justice on June 6, 2000 and on May 3, 2001 extradition proceedings commenced. On September 19, 2002 the learned Resident Magistrate issued a Warrant of Committal for the Applicant.

It is against this background that the applicant seeks the relief. The grounds on which he places reliance are as follows: -

- (1) That the Provisional Warrant of Arrest dated July 31, 1998 is wholly defective as this warrant incorrectly describes him as a convicted person.
- (2). That the learned Resident Magistrate erred in granting the Warrant of Committal in the offences in which he is scheduled to face as these were not made by independent witnesses.
- (3). That the evidence contained in the Affidavits of the witnesses is insufficient to prove the charges in the indictment.

Grounds 2 & 3 are treated as abandoned as no submissions were made in respect of these. Therefore, the only ground for consideration is ground 1. The thrust of Mr. Phipps's complaint is that the proceedings before the

learned Resident were invalid for want of jurisdiction, they being grounded on a defective Provisional Warrant.

The issue which falls for determination is whether the learned Resident Magistrate was seized of power to exercise the jurisdiction granted to him by the Extradition Act, notwithstanding a misdescription of the Applicant's status in the Provisional Warrant. It is therefore apt to make reference to Sections 8 (1), 9(1)(a) & (b) of the Act.

Section 8 (1) of the Act states:

(1) "Subject to the provisions of this Act relating to provisional warrants, a person shall not be dealt with under this Act except in pursuance of an order of the Minister (in this Act referred to as "authority to proceed") issued in pursuance of a request made to the Minister by or on behalf of an approved State in which the person to be extradited is accused or was convicted."

This provision clearly demonstrates that Extradition proceedings cannot be pursued except in accordance with an Order of the Minister. Such an Order is by virtue of his Authority to Proceed.

Section 9(1a) & (1b) of the Act provides:

9 1(a) "On receipt of an authority to proceed, by a magistrate within the jurisdiction of whom such person is or believed to be; or

(1b) without such an authority, by a magistrate upon information that such person is in Jamaica or is believed to be on his way to Jamaica, so, however,

that the warrant, if issued under this paragraph, shall be provisional only.”

The section outlines the procedural steps to be adopted touching the issuance of a warrant for the arrest of a person accused or convicted of an extraditable offence. It empowers a Resident Magistrate to issue a warrant for the arrest of a person charged with, or convicted of an extraditable offence. This he may do whether or not he is furnished with an Authority to proceed from the Minister.

However, having issued a Provisional Warrant, he would not be authorized to embark upon Extradition Proceedings until the receipt of the Authority of the Minister to Proceed, as, the Provisional Warrant is merely a process to facilitate the arrest of the party whose extradition is requested. The decision to commence extradition proceedings resides with the Minister. He may or may not elect to authorize proceeding against a party. The Authority to Proceed is the foundation on which the Magistrate's jurisdiction is founded. That instrument identified the Applicant as an accused person. It being the structure on which the Resident Magistrate's jurisdiction was anchored, once issued, the Provisional Warrant was rendered redundant.

The fact that Authority to Proceed makes reference to the Provisional Warrant, would in no way vitiate the extradition proceedings, nor would it affect the validity of the Authority to Proceed.

Mr. Phipps sought to rely on a number of cases, none of which was of assistance to him. Special emphasis was however placed by him, on the case of *In Re Guisto*, April 3, 2003 House of Lords.

In *Re Guisto*, (supra) the requesting state had sought the Appellant's return "for the execution of his sentence", thus illustrating that he was a convicted person. The Secretary of State wrongly described him in an order to proceed as an accused person. A District Judge erroneously proceeded on the premise that he was an accused person and made an order for his committal.

The circumstances of the case under review are remarkably different. Although the Applicant was described as a convicted person in the Provisional Warrant, the Authority to Proceed referred to him as an accused person. The evidence before the Resident Magistrate identified him as an accused person and the Resident Magistrate would have dealt with him as such. The Order for his committal describes him as an accused person.

The jurisdiction of the Resident Magistrate to hear and determine extradition proceedings is grounded in the Minister's Authority to proceed and not the provisional warrant. It is clear that the Resident Magistrate had acted within his jurisdiction by conducting the proceedings. Consequently,

the description of the Applicant, in the Provisional Warrant, as a convicted person is not fatal to his Committal.

The motion is dismissed.

McCalla, J.

On the 19th December 2002, His Honour Mr. Martin Gayle, Resident Magistrate for the Corporate Area Criminal Court made a committal order under the Extradition Act against Mark Anthony Davis, a citizen of Jamaica.

Mr. Davis now seeks to move this court for a Writ of Habeas Corpus in respect of that committal.

In his affidavit sworn to on October 2, 2002, in support of the application, Mr. Davis sought to rely on three grounds, but at the hearing, grounds two and three were abandoned and the sole ground on which he now relies is:

“that the provisional warrant of arrest dated July 31, 1998 is wholly defective as this warrant incorrectly describes me as a convicted person.”

The facts are not in dispute and may be summarized as follows:

Mr. Davis, a citizen of Jamaica who previously resided in the United States of America was arrested on a provisional warrant on the 17th

March 2002, in the parish of St. Ann, Jamaica as a result of a request from the United States of America in extradition proceedings.

The documents on which reliance is placed show that Mr. Davis is wanted in the United States to stand trial on federal narcotics charges. He is the subject of criminal charges in the United States District Court of New York, for certain drug-related criminal offences. In 1996 that Court issued a warrant for his arrest.

Relevant certified authenticated documents were forwarded to the Director of Public Prosecutions in support of the extradition request and on July 3, 1998, His Honour Mr. Martin Gayle issued a provisional warrant for the arrest of Mr. Davis. The relevant paragraph of the warrant states inter alia:

“Whereas it has been shown to the undersigned, one of her Majesty’s Resident Magistrates for the Corporate Area that Mark Davis aka Mark Carlton Davis, aka David C. Banks is convicted of extradition ... as per indictment No. 96 - CR - 179 - E filed on November 21, 1996 in the United States District Court...” (emphasis supplied)

The applicant was arrested on the provisional warrant and at the committal hearing the authenticated documents, as well as the provisional warrant, to which objection was taken on the applicant’s behalf, were admitted in evidence.

On June 15, 2000, the Minister of National Security issued his "authority to proceed" on the authority of the provisional warrant of arrest against the applicant who is accused of the offences of possession with intent to distribute a controlled substance (marijuana) and conspiracy to possess with intent to distribute a controlled substance (marijuana) .

It is accepted that the Magistrate's jurisdiction to hold committal proceedings is derived from the Minister's "authority to proceed".

The sole issue for determination is whether or not the Resident Magistrate had jurisdiction to commit the applicant having regard to the divergent categorization of the applicant as a convicted person in the provisional warrant of arrest and as an accused person in the "authority to proceed."

Section 8 (2) of the Extradition Act states:

"There shall be furnished with any request made for the purpose of this section by or on behalf of any approved State-

- (a) in the case of a person accused of an offence a warrant for his arrest issued in that State; or
- (b) in the case of a person unlawfully at large after conviction of an offence, a certificate of the conviction and sentence in that State..."

Mr. Frank Phipps, Q.C. cited and relied on the case of **In Re Guisto** (FC) H.L. 2003. He quoted several passages from the judgment. At paragraph 5, Lord Hope of Craighead states thus:

“In accordance with requirements which have long been recognized as an essential part of achieving justice in extradition law, the details that have to be provided in support of a request for extradition differ according to whether the fugitive criminal is an accused person who has still to face trial or is a convicted person whose extradition is sought for the purpose of ensuring that he serves his sentence.”

He submitted that the judgment makes it clear that the case of a fugitive criminal must fall into one or other of the two categories mentioned in section 8 (2) of the Extradition Act.

Mr. Phipps Q.C. pointed out that the “authority to proceed” was issued on the basis of the provisional warrant at a point in time when no documents had been submitted. He urged that the Magistrate had no jurisdiction to commit as there had not been strict compliance with the law.

Mr. McKenzie, conceding that the provisional warrant of arrest refers to the applicant as a convicted person, submitted that it is an error which is not fatal.

Further, Counsel made reference to the supporting documentation which all pointed to the status of the applicant Davis as being an accused person.

Once the "authority to proceed" was issued, he argued, the provisional warrant no longer had any legal effect. Mr. McKenzie cited the case of **Prince Anthony Edwards vs Director of Public Prosecutions and Director Correctional Services**, (1934) 31 JLR 532 in support of his submissions and quoted from a passage at page 534 of the judgment of Downer, J.A. that:

"...once the "authority to proceed" was received by the Resident Magistrate, the provisional warrant ceased to have effect even if it was not spent."

Mr. McKenzie sought to distinguish the case of **In Re Guisto** (supra) on the basis that all parties had proceeded erroneously as to the status of the applicant in that case.

The thrust of Mr. Foster's submissions on behalf of the second defendant was that the evidence tendered related to the "authority to proceed" and the provisional warrant was a mere instrument or administrative device which brought the accused before the court.

He pointed out that the Magistrate committed the applicant within the parameters of the "authority to proceed" and argued that in the case of **In Re Guisto** the jurisdiction of the court was flawed because of the error contained in the order to proceed.

Miss Linton in response submitted that the "authority to proceed" must have been granted to proceed on the basis of the provisional warrant of arrest which described the applicant as a convicted person.

The authenticated documents tendered in evidence at the committal hearing show no ambiguity in the request for extradition of the applicant as an accused person. The Resident Magistrate derives his jurisdiction from the "authority to proceed" and that authority is in respect of the applicant as an accused person.

The case of Prince Anthony Edwards in the passage quoted above clearly states that once the "authority to proceed" is received, the provisional warrant ceases to have effect. It was stated in In Re Guisto that the order to proceed sets the parameters, and the District Judge had no jurisdiction to deal with the case outside of those parameters.

It is clear from the authorities that the requesting State must say in which category a person whose extradition is requested belongs.

Mr. Foster has referred to the provisional warrant as being "a mere instrument or administrative device," which brought the accused before the court. Even if this is so, in my opinion any warrant on which a citizen is being apprehended should state clearly whether he is being deprived of his liberty as a convicted or an accused person.

I am not unmindful of another passage quoted by Mr. Phipps Q.C. from the case of In Re Guisto stating that:

"It is a fundamental point of principle that any use of the procedures that exist for depriving a person of his liberty must be carefully scrutinized."

However, although the provisional warrant incorrectly refers to the applicant as a convicted person, in this case it is abundantly clear that the request was for his extradition as an accused person.

The authenticated documents support that position. The Resident Magistrate having received the authority to proceed, committed him as an accused person and on the authority of the Prince Anthony Edwards case (supra), he had jurisdiction to do so.

I agree with the submission that the case of In Re Guisto is distinguishable from the present case. In the circumstances of the instant case the incorrect categorization of the applicant in the provisional warrant of arrest is not fatal.

Accordingly, I would order that the Motion be dismissed.

Wolfe C. J.

The motion is hereby dismissed.