

SAINT VINCENT AND THE GRENADINES

IN THE COURT OF APPEAL

HCVAP 2009/018

BETWEEN:

**[1] DEXTER CHANCE
[2] GARETH MC DOWALL
[3] CARLOS SUTHERLAND**

Appellants

and

**[1] THE SUPERINTENDANT OF PRISONS
[2] THE ATTORNEY GENERAL OF SAINT
VINCENT AND THE GRENADINES**

Respondents

Before:

The Hon. Mde. Ola Mae Edwards	Justice of Appeal
The Hon. Mde. Janice George-Creque	Justice of Appeal
The Hon. Mr. Davidson Kelvin Baptiste	Justice of Appeal

Appearances:

Mr. Alberton Richelieu and Kay Bacchus-Browne for the appellants
Mr. Colin Williams, Director of Public Prosecutions for the respondents

2010: January 29;
May 31.

Civil Appeal – Extradition – Fugitive Offenders Act – Habeas Corpus Writ – whether the appellants were legally detained pursuant to the committal order made by the Chief Magistrate – whether the judge failed to appreciate the wide powers given to the High Court and the Committal Court – the role of the magistrate and judge – sections 12(4), 7 and 9 of the Fugitive Offenders Act – whether the provisions of the Act confine the powers of the magistrate to determine whether there is sufficient evidence to justify committal – whether it is unjust or oppressive to extradite the appellants – domestic law safeguards of requesting state – whether the appellants have discharged the burden that the accusation against them was not made in good faith or in the interest of justice – accomplice evidence – legitimate expectation – application of Clause 6(3) of the London Scheme –

The appellants, nationals of Saint Vincent and the Grenadines, ("Saint Vincent") are resisting extradition to the British Virgin Islands ("the BVI") where they are wanted to stand trial on a charge of importing cocaine into the Territory. On 26th March 2009 extradition

requests were made by the Governor of the BVI in respect of the appellants. Pursuant to those requests the Governor General of Saint Vincent directed the Chief Magistrate to proceed and an extradition hearing was held. The committal court heard seven witnesses and the critical evidence against the appellants was that of an alleged accomplice who was serving a prison sentence in the BVI. Subsequently the appellants were committed to prison to await return to the BVI to stand trial. The appellants applied to the High Court for Habeas Corpus but the application was refused on the grounds that the committal of the learned magistrate was based on a sufficiency of evidence and that the committal was valid. The appellants appealed this decision on the following grounds: (1) the learned trial judge misdirected herself in law when she found that the evidence was sufficient in law to justify that a prima facie case had been made out against the three appellants; (2) the learned trial judge failed to appreciate in law that in conducting its case the prosecution employed the provisions of the London Scheme and effectuated their reliance on the Scheme, it was therefore unfair for the prosecution to have recanted and submit that the London Scheme did not apply; (3) that the judge erred in law when she found that section 7(3) and (4) of the **Fugitive Offenders Act** had been satisfied even without the certificate from the Governor General and that the provisions of section 6 of the **British (Overseas Territories) Order 2002** of the BVI was sufficient to protect the restriction on the return of the appellants.

Held: dismissing the appeal:

1. That there is no merit in the ground that the learned judge misdirected herself when she found that a prima facie case had been made out against all three accused. It cannot be seriously advanced that there was no evidence to justify the conclusion of the learned judge or that her conclusion was plainly wrong. It is not therefore open to this court to contradict her conclusion or to depart from it.
2. That the London Scheme is not a treaty and does not have the force of law in Saint Vincent. It is a non-treaty informal arrangement among member states of the Commonwealth setting out a procedure for extradition between them.
3. That a legitimate expectation under clause 6(3) of the London Scheme cannot be sustained as there is no reasonable basis to found a legitimate expectation; no detriment would have been or could have been suffered by the appellants and no issue of unfairness falls to be considered. Further clause 6(3) does not exist in a vacuum, rather clause 5(4) is the operating clause and 6(3) only comes into play if the requesting state and Saint Vincent make arrangements pursuant to clause 6(1) under which clause 5(4) will be replaced by 6(3) or by other provisions agreed by the countries involved.

Attorney General of Hong Kong v Ng Yuen Shin [1983] 2 AC 629, 636 and **R (Bibi) v Newham London Borough Council** [2002] 1 WLR 237 at para 21 applied.

4. That a certificate by the Governor General under the London Scheme is not a legal requirement and even if one were required its absence would not in the

circumstances lead to a conclusion that it would be unjust or oppressive to return the appellants.

5. Section 7(3) of the Act clearly speaks to a situation in which the person sought to be extradited has committed an offence in the requesting state before his return under the Act other than the offences referred to in paragraphs (a), (b), (c). If the person sought to be extradited has not committed any such offence, section 7(3) is not engaged. There is no evidence nor is it contended by either party that the appellants committed an offence in the BVI to bring them within the contemplation of section 7(3). In the circumstances there is no basis for the appellants to complain that there is no provision made by the law of the BVI or by arrangement within that Territory within the contemplation of section 7(3) of the Act.
6. That where there is a law, the law speaks and legal provision has been made by sections 19 and 20 of the **Extradition Act 1989 (UK)** to satisfy the requirement of section 7(3) of the **Fugitive Offenders Act**, therefore the argument that section 7(3) was not complied with as there was no certificate from the Governor General giving assurances required under that subsection with regards to any offence committed before the appellants' return to the BVI fails. **(Per Edwards JA)**
7. That the provisions of the Act do not confine the powers of the magistrate solely to determining whether there is sufficient evidence to justify committal. The power of a committal magistrate to commit a person to custody pursuant to section 12(4)(a) of the Act to await their return is dependent upon the magistrate being satisfied of three distinct factors: (1) the offence to which the authority to proceed relates is a relevant offence; (2) the evidence against the accused person would be sufficient to warrant his trial for the offence if it had been committed within the court's jurisdiction and (3) the person's committal is not prohibited by other provisions of the Act.

Knowles Jr v United States of America & Anor [2006] UK PC 38 (The Bahamas) and **Gibson v United States of America** [2007] UK PC 52 applied.

8. The fact that the main evidence against the appellants is that of an alleged accomplice does not mean that the accusation against them was not made in good faith. There is no reason to believe that their extradition is either unjust or oppressive as the appellants have not provided the Committal Court or High Court with an evidential basis or factual foundation on the application for habeas corpus that it would be unjust or oppressive to return them.

Woodcock v Government of New Zealand [2003] EWHC 2668 (Admin) cited.

JUDGMENT

- [1] **BAPTISTE, J.A.:** Dexter Chance, Gareth Mc Dowall and Carlos Sutherland (“the appellants”) appeal against an order of Monica Joseph J. [Ag.] refusing their application for habeas corpus.

Background

- [2] The appellants are nationals of Saint Vincent and the Grenadines (“Saint Vincent”). They resist extradition to the British Virgin Islands where they are wanted to stand trial on a charge of importing 61.21 kilograms of cocaine into that Territory. On 26th March 2009 the Governor General of Saint Vincent issued an “authority to proceed” directed to the Chief Magistrate pursuant to three extradition requests made by the Governor of the British Virgin Islands in respect of the appellants. The warrants were executed and an extradition hearing held.
- [3] The committal hearing lasted for two days during which seven witnesses were heard and affidavit evidence with exhibits received. The critical evidence against the appellants was that of Chesley Balkaran an accomplice who was serving a prison sentence in Tortola, British Virgin Islands. No case submissions were made on behalf of each accused but they were overruled. A defence by way of duly authenticated affidavit evidence from each accused was then presented. The Chief Magistrate found that the three appellants were properly identified; the offence with which they were charged was a relevant offence under the **Fugitive Offenders Act of Saint Vincent**¹ (“the **Fugitive Offenders Act**”); the extradition was not precluded or prohibited by law; and a prima facie case was made out against all the appellants. They were accordingly committed to prison to await return to the British Virgin Islands to stand trial. The appellants applied to the High Court for habeas corpus. In refusing to grant the application the learned judge held that the committal of the learned magistrate was based on a sufficiency of evidence and that the committal was valid.

¹ Cap. 126

Arguments of Mr. Richelieu

- [4] Mr. Richelieu, learned counsel for the appellants, argued that the learned judge erred in failing to appreciate the wide powers given to both the High Court and the Committal Court and could not find that the appellants were legally detained. Mr. Richelieu contended that the learned trial judge never considered the following:
- (1) the speculative nature of the evidence;
 - (2) the prejudicial evidence of Balkaran and how it impacted on the fairness of the proceedings;
 - (3) the legal effect of the London Scheme for Extradition (the London Scheme) and whether due process was violated;
 - (4) whether the evidence was sufficient in law to establish a prima facie case;
 - (5) whether the provisions of section 9 of the Fugitive Offenders Act were addressed by the Chief Magistrate; and
 - (6) whether all those factors affected the procedural fairness of the proceedings to the extent of being unjust or oppressive, so as to prohibit extradition.
- [5] Mr. Richelieu also argued that the appellants had a legitimate expectation to rely on clause 6(3) of the London Scheme and contended that the absence of a certificate from the Attorney General pursuant to that clause was fatal to the proceedings. Mr. Richelieu pointed to the absence of a certificate from the Governor General pursuant to section 7(4) of the **Fugitive Offenders Act** and invited the court to find that this rendered the proceedings null and void.
- [6] Mr. Richelieu stated that the issue is whether the writ of habeas corpus ought to be issued where the appellants complain that their detention is unlawful in pursuance of the committal order made by the Chief Magistrate. Mr. Richelieu further stated that to test the lawfulness and validity of the detention, a true construction of the **Fugitive Offenders Act** is needed and in particular, whether the Chief Magistrate or the judge addressed the criteria set therein. Mr. Richelieu submitted that the provisions of the Act do not confine the powers of the

magistrate to determine whether there is sufficient evidence to justify committal. As I comprehend Mr. Richelieu's argument, in light of sections 7 and 9 of the **Fugitive Offenders Act**, the learned judge misapprehended the full breadth of the power of the court of committal and consequently erred in law by circumscribing the role of the Chief Magistrate to an inquiry as to whether there was sufficient evidence to commit the appellants.

- [7] As evidencing such error Mr. Richelieu pointed to the judge's reliance on the statement in **R v Governor of Pentonville Prison**² at paragraph 4 that "his sole concern is whether there is sufficient evidence of guilt to justify committal". Another instance pointed out by Mr. Richelieu was the judge's statement that "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".

The role of the Magistrate and the Judge

- [8] To put matters in perspective it is prudent to begin by considering the role of the committal magistrate in an extradition hearing and that of the judge in a habeas corpus application. The enquiry begins with section 12 of the **Fugitive Offenders Act**. Section 12(4) provides:

"where an authority to proceed has been issued in respect of the person arrested and the court of committal is satisfied, after hearing any evidence tendered in support of the request for the return of that person that the offence to which the authority relates is a relevant offence and is further satisfied

(a) where that person is accused of an offence, that the evidence would be sufficient to warrant his trial for that offence if it had been committed within the jurisdiction of the court; or

(b) ...

the court shall, unless his committal is prohibited by any other provision of this Act, commit him to custody to await his return thereunder. If the court is not so satisfied, or if the committal of that person is prohibited, the court shall discharge him from custody. In every case the court shall inform the

² [1986] 1 WLR 470

Governor General of the committal or refusal to commit as the case may be.”

[9] The power of a committal magistrate to commit a person to custody pursuant to section 12.4(a) of the Act to await their return is dependent upon the magistrate being satisfied of three distinct factors. These are: (1) the offence to which the authority to proceed relates is a relevant offence; (2) the evidence against the accused person would be sufficient to warrant his trial for the offence if it had been committed within the court’s jurisdiction; and (3) the person’s committal is not prohibited by any other provision of the Act. These factors are not disjunctive. A situation may arise where a relevant offence is established and the evidence against the accused is sufficient to warrant his trial but some provision of the Act prohibits his return on specific grounds and authorizes the magistrate not to commit him where any of those grounds exists. Section 12.4(a) certainly entertains such a possibility. This calls for a consideration of sections 7 and 9 of the Act.

[10] With respect to section 7 the relevant section for the purpose of this discussion is 7(1). It states:

“A person shall not be returned under this Act, or be committed to or be kept in custody for the purposes of such return, if it appears to the Governor General, the Court of Committal or to the High Court on an application for habeas corpus –

- (a) that the offence of which that person is accused or was convicted, is an offence of a political character;
- (b) that the request for his return, though purporting to be made on account of a relevant offence, is in fact made for the purpose of prosecuting or punishing him on account of his race, religion, nationality or political opinions; or
- (c) that he might, if returned, be prejudiced at his trial or punished or detained or restricted in his personal liberty, by reason of his race, religion, nationality or political opinions.”

[11] Section 7(1) of the Act is addressed to the Governor General, the Court of Committal and the High Court in their respective functions of not returning, not

committing or not keeping in custody for the purposes of return if it appears to them that any of the matters set out in paragraphs (a), (b) or (c) exists. Thus if the offence is of a political character, the prohibition on return, committing or keeping in custody is engaged. The prohibition is also engaged if the request for return is an artifice or a stratagem for the prosecution or punishment of the accused because of his race, religion, nationality or political opinion; notwithstanding that the request for his return is purportedly made on the ground of a relevant offence. Likewise if the accused might be prejudiced at his trial if he is returned, by reason of his race, religion, nationality or political opinions, or risks detention, punishment, or restriction of his liberty by reason of those extraneous matters, he shall not be returned, committed or kept in custody for the purposes of such return.

[12] Even if a magistrate is satisfied as to the sufficiency of evidence pursuant to section 12.4(a) of the Act, he is enjoined by section 7(1) not to commit if it appears that the conditions set out therein are present. This illustrates that the role of the magistrate in committal proceedings goes beyond finding whether there is sufficient evidence to warrant a committal. I therefore agree with Mr. Richelieu's submissions that the provisions of the Act do not confine the powers of the magistrate solely to determining whether there is sufficient evidence to justify committal.

[13] Section 9 of the Act now falls to be considered. It states:

"A person accused of an offence shall not be returned under this Act to any country if the Governor General, the Court of Committal or the High Court on an application for habeas corpus is satisfied that by reason of –

- (a) the trivial nature of the case;
- (b) the accusation against the fugitive not having been made in good faith or in the interests of justice;
- (c) the passage of time since the commission of the offence; or
- (d) any other sufficient cause,

it would, having regard to all the circumstances, be unjust or oppressive or too severe a punishment to return the fugitive."

Section 9 seems to be supplementary to and a fortification of section 7 in so far as it provides additional prohibitory grounds on the return of a person accused of an offence and it also shows that the role of the Committal Magistrate extends beyond finding whether there is a sufficiency of evidence.

- [14] Sections 7 and 9 of the **Fugitive Offenders Act** expressly authorize the High Court to enquire into specified aspects of the merits of the detention order which is challenged. Thus on an application for habeas corpus in extradition proceedings, the High Court can enquire into the substantial merits of the detention order and is not confined to a review of the formal validity of the order. These propositions are derived from the cases of **Knowles Jr v United States of America & Anor**³ (**The Bahamas**) and **Gibson v United States of America**⁴.

- [15] In **Gibson**, Lord Brown stated at paragraph 14:

“It is impossible nowadays to argue that on an application for habeas corpus the court is confined to a review of the formal validity of the detention order and cannot except by certiorari enquire into its substantial merits. Just such an argument indeed, was recently rejected by the Board in *James Knowles v The Government of the United States of America* [2006] UK PC 38 – see para. 14 of the Board’s opinion given by Lord Bingham of Cornhill.”

In **Knowles**, Lord Bingham gave three compelling reasons why such a proposition could not be accepted. First, it is contrary to sound Bahamian authority. Secondly, it is contrary to English authority of high standing. Thirdly, it is irreconcilable with sections 7 and 11 of the **Extradition Act of the Bahamas 1994** which expressly authorize the Supreme Court to enquire into specified aspects of the merits of the detention order which is challenged.

- [16] Mr. Richelieu had submitted that the learned judge ill-advised herself when she failed to consider that the Habeas Corpus Court is concerned with the legality of the action that has been taken rather than with the merits. That submission by Mr.

³ [2006] UK PC 38

⁴ [2007] UK PC 52

Richelieu is contrary to the established authorities of **Knowles** and **Gibson** and therefore cannot be sustained.

Appellants' burden

- [17] In **Knowles**⁵, the appellant relied on section 11(3)(b) of the **Extradition Act 1994** of the Bahamas and contended that having regard to the circumstances it would be unjust or oppressive to extradite him by reason of the time which had elapsed since the date of the alleged offences. Lord Bingham stated at paragraph 30:

“To bring himself within section 11(3)(b) a person must show injustice or oppression caused by the passage of time on the facts of the particular case: *R v Governor of Pentonville Prison, Ex p Narang* [1978] AC 247, 290. *R v Secretary of State for the Home Department, Ex p Patel* (1994) 7 Admin LR 56, 66.”

Although said in the context of passage of time Lord Bingham's statement would be apposite to a case in which an applicant in Saint Vincent and the Grenadines seeks to rely on any of the provisions of section 9 of the **Fugitive Offenders Act**. Here, the appellant relies on section 9(b) and (d). With respect to section 9(b) Mr. Richelieu contended that the accusation against the appellants was not made in good faith or in the interests of justice. Section 9(d) deals with “any other sufficient cause”.

- [18] To avail themselves of the prohibition on return ordained by sections 7 and 9 of the Act it is incumbent upon the appellants to establish the necessary foundation. With respect to section 7 of the Act, there is no dispute that the offence in question is not of a political character. The offence is importing cocaine. The appellants did not allege neither is there evidence that the request for their return is a stratagem for prosecuting or punishing them on account of their race, nationality, religion, or political opinions or that if returned they would be prejudiced at their trial on such grounds or punished, detained or restricted in their personal liberty on such grounds. The fact is that there was nothing before the magistrate or the judge to engage the operation of section 7 of the Act. It is not surprising that the magistrate expressly found that the extradition was not precluded or prohibited by

⁵ 2006 UK 2C 38

law. In the absence of an evidential basis or a factual foundation engendering the application of section 7 of the Act there would be no proper basis to complain that the section was not considered. Likewise with respect to section 9, in the absence of an evidential basis or a factual foundation there would be nothing to satisfy the Court of Committal or the High Court, on an application for habeas corpus that it would be unjust or oppressive or too severe a punishment to return the appellants. As a matter of interest, the learned magistrate noted that passage of time was raised by the appellants at the committal hearing but stated that there was expediency, not undue delay.

[19] In **Woodcock v Government of New Zealand**⁶ the High Court of England analysed delay in the context of extradition, paying regard to section 11(3)(b) of the **Extradition Act** of England and observed that section 11(3)(b) of the Act required its decision not upon whether, having regard to the passage of time, it would be unjust to try the accused, but rather whether it would be unjust to return him (albeit of course to return him for trial). In **Knowles**⁷, the Privy Council extracted and endorsed five propositions from **Woodcock**. Only the first three of which are germane to this matter: First the question is not whether it would be unjust or oppressive to try the accused but whether under the **1994 Act**, it would be unjust or oppressive to extradite him. Secondly, if the court of the requesting state is bound to conclude that a fair trial is impossible, it would be unjust or oppressive for the requested state to return him. But thirdly, the court of the requested state must have regard to the safeguards which exist under the domestic law of the requesting state to protect a defendant against a trial rendered unjust or oppressive by the passage of time (see paragraph 31 of Privy Council's judgment).

[20] Again, although the propositions were enunciated in the context of passage of time they are equally apt to and I would apply them in respect of section 9(b) and (d) of the **Fugitive Offenders Act**. Section 9 of the Act is not directed to the question whether it would be unjust or oppressive to try the appellants but whether

⁶ [2003] EWHC 2668 (Admin)

⁷ [2006] UK PC 38

under the Act; it would be unjust or oppressive to extradite them. If the court in Saint Vincent and the Grenadines is bound to conclude that a fair trial is impossible, it follows that it would be unjust or oppressive to return the appellants to the British Virgin Islands. But the court in Saint Vincent must have regard to the safeguards which exist under the domestic law of the British Virgin Islands to protect appellants against a trial rendered unjust or oppressive by reason of the accusation against them not having been made in good faith or in interests of justice; or for any other sufficient cause.

[21] Mr. Richelieu complained that the learned judge failed to appreciate factors taken within the context of section 9 of the Act which would create an adverse effect on the fairness of the proceedings as distinct from factors which would prejudice the trial which can be cured by the trial procedures. This complaint calls into question the true purport of section 9. Section 9 is directed to the question whether it would be unjust or oppressive to extradite the appellants in the circumstances mentioned therein. It was for the appellants, as the persons seeking to resist extradition, to bring themselves within the section. I find no merit in that complaint.

[22] In the circumstances of this case the appellants have not surmounted the uphill task of successfully challenging their extradition on the ground that the accusation against them was not made in good faith or in the interests of justice and thus it would, having regard to all the circumstances to be unjust or oppressive to return them. They were credibly accused of committing a serious crime in the British Virgin Islands. It must be in the interests of justice that they should be surrendered to answer for their alleged crime. The fact that the main evidence against them is that of an accomplice does not mean that the accusation against them was not made in good faith. There is no question here of regarding their extradition as either unjust or oppressive. Further, the appellants have not established any other sufficient cause, by which it would, having regard to all the circumstances be unjust or oppressive to return them.

Domestic law safeguards of requesting State

- [23] In **Knowles**, at paragraph 12, Lord Bingham addressed the two objectives sought to be reconciled by laws governing extradition both of which are of concern to states recognizing the rule of law. The first objective is to give effect to the principle that, in the ordinary way, persons in one state who are credibly accused of committing serious crimes triable in another should be surrendered to that other to answer for their alleged misdeeds. Lord Bingham stated that this is a principle which national authorities, including courts will seek to honour. The second objective is to protect those whose surrender is sought against such surrender in circumstances where they would, putting it very generally, suffer injustice or oppression. States ordinarily seek to provide some safeguards against the surrender of those within their borders in such circumstances.
- [24] The approach of the court towards the question whether it would be unjust or oppressive to return the fugitive having regard to the domestic law safeguards of the requesting state is amply illustrated by the case of **Gomes v Trinidad and Tobago**⁸. Gomes was a national of Trinidad and Tobago who was wanted by the Government of Trinidad and Tobago for trial on charges of possession of cocaine for the purpose of drug trafficking. He was arrested in the United Kingdom following an extradition request by Trinidad. He unsuccessfully argued before the District Judge at the extradition hearing that it would be unjust or oppressive to extradite him by reason of passage of time since his alleged offence.
- [25] In delivering its judgment, the House of Lords observed that **Woodcock** was concerned with extradition to New Zealand and evidence was adduced there of an approach in New Zealand very similar to that in England. **Knowles** concerned the extradition of a Bahamian to the United States. Lord Brown asked at paragraph 35: "What, however, of extradition to countries of whose judicial systems we know less and in which it is submitted, we should have less confidence? His Lordship stated: "Council of Europe countries in our view present no problem. All are subject to article 6 of the convention and should readily be assumed capable of

⁸ [2009] UK HL 21

protecting an accused against an unjust trial – whether by an abuse of process jurisdiction like ours or in some other way...Trinidad and Tobago should similarly be assumed to have the necessary safeguards against an unjust trial; the Privy Council is, after all, its final Court of Appeal."

[26] Saint Vincent and the Grenadines and the British Virgin Islands are constituent parts of the Eastern Caribbean Supreme Court. They have the same Court of Appeal and the Privy Council is their final appellate court. From the foregoing and applying the reasoning in **Gomes**, the courts in the British Virgin Islands do have the undoubted safeguards to protect the appellants from an unjust trial. As Lord Bingham stated in **Knowles** at paragraph 20: "A person resisting extradition to a friendly foreign state with a respected and sophisticated legal system will always find it hard to rely successfully on condition (c) in section 7(1)..." Lord Bingham was referring to section 7(1) of the **Extradition Act 1994** of the Bahamas, the equivalent of section 7(1) of the Act in Saint Vincent. Although made in reference to section 7, there is no reason in principle why Lord Bingham's statement should not apply to section 9 of the Act in Saint Vincent. I accordingly apply it.

[27] Where, as in the present case, the requesting and requested states subscribe to the rule of law and are members of the same court with the Privy Council as their final court of appeal, the test of establishing a risk of injustice will not be easily satisfied. The appellants in this case have not satisfied the test. It should readily be concluded that the Courts of the British Virgin Islands are capable of protecting the appellants against an unjust trial.

Grounds of Appeal

[28] Most of the grounds of appeal that were originally filed were struck out because of non-compliance with the rules governing the contents of the grounds of appeal. The grounds proceeded with could be succinctly stated as follows:

- (1) The learned trial judge misdirected herself in law when she found that the evidence was sufficient in law to justify that a prima facie case had been made out against the three appellants.

- (2) The learned trial judge failed to appreciate in law that in conducting its case the prosecution employed the provisions of the London Scheme and effectuated their reliance on the Scheme. It was therefore unfair for the prosecution to have recanted and submit that the London Scheme did not apply.
- (3) The learned trial judge erred in law when she found that sections 7(3) and (4) of the **Fugitive Offenders Act** had been satisfied, even though the certificate of the Governor General had not been obtained and that the provisions of section 6 of the **British (Overseas Territories) Order 2002** of the British Virgin Islands was sufficient to protect the restriction on the return of the Appellants.

I do not find any merit in the ground that the learned judge misdirected herself when she found that a prima facie case had been made out against all three accused. The learned judge pointed out that in deciding on the sufficiency of evidence and exercising her judicial mind, the learned magistrate looked at the facts presented to ascertain whether a prima facie case had been made out.

[29] The learned magistrate stated that her duty was to ensure that there was sufficient evidence to warrant trial if the offence had been committed within the jurisdiction of the court. The magistrate recognized that this duty involved the assessment of whether a reasonable jury properly directed could convict. The magistrate received viva voce and affidavit evidence and observed that section 26 of the **Fugitive Offenders Act** allowed the reception of duly authenticated written evidence from the requesting country.

[30] The magistrate found that the affidavit of Balkaran an alleged accomplice outlined the involvement of all the appellants with Dexter Chance being the alleged mastermind of the operation. Gareth Mc Dowall sourced Balkaran's alleged expertise, introduced him to Dexter Chance and took part in the discussions to have the cocaine imported. Carlos Sutherland allegedly concealed the cocaine aboard the Catamaran in which it was subsequently discovered in the British

Virgin Islands by the police. The magistrate also found that Balkaran's affidavit was clear and pointed to the involvement of all three persons in the importation of the cocaine. Further, the important aspect of the identification in this case was twofold: (1) that the accused persons were in fact the persons charged in the British Virgin Islands and (2) they were the persons named, described and identified by the witness Balkaran. The magistrate also heard the defence presented and concluded that this was a cogent case for extradition.

- [31] This is a case where both the magistrate and the judge held that the evidence was sufficient to justify committal. Clearly the learned magistrate examined the relevant legal principles in deciding whether a prima facie case had been made out against each appellant. The conclusion of the magistrate was a multi-factorial conclusion of fact. It cannot be seriously advanced that there was no evidence to justify the conclusion of the magistrate or the judge or that their conclusion was plainly wrong. It is not therefore open to this court to contradict their conclusion or to depart from it. Further the court's role in a habeas corpus hearing is somewhat limited. As Lord Reid said in **Armah v Government of Ghana**⁹: - "The court does not hear the case by way of appeal so as to reverse the magistrate's decision on fact or alter a discretion properly exercised."

Legitimate Expectation and the London Scheme

- [32] The appellants seek to found a legitimate expectation on the basis that the requesting state ("the British Virgin Islands") represented that it was relying on the London Scheme for extradition within the Commonwealth ("the London Scheme") and the **Fugitive Offenders Act** as shown in the extradition request and the authority to proceed. Mr. Richelieu complained that the British Virgin Islands could not resile from the provision of the London Scheme requiring certification of the Attorney General and a failure to certify was fatal to the proceedings based on the ground that the appellants had a legitimate expectation to rely on the London Scheme. Mr. Richelieu cited the following cases: **Lasalle v Attorney General**¹⁰;

⁹ (1968) AC 192

¹⁰ (1971) 18 WIR 371, 374

Schmidt v Secretary of State for Home Affairs¹¹; **Council of Civil Service Unions v Minister for Civil Service**¹². Counsel stated that all these authorities showed the way in which the concept of legitimate expectation has been used as a basis for importing natural justice and fairness in proceedings and submitted that whenever the legitimate expectation is violated this would lead to unfairness amounting to an abuse of process. I am however not of the view that these cases advance the appellants' case in any way.

- [33] The learned judge held that the London Scheme was 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. She accordingly concluded, quite rightly, that the London Scheme is not a treaty and does not have the force of law. In my view there is no merit in the contention that the learned judge misdirected herself in law in failing to appreciate the legal significance of the London Scheme.
- [34] Clause 6(3) of the London Scheme requires a certificate from the Attorney General of the requesting state that in his opinion the record of case discloses the existence of evidence under the laws of the requesting country sufficient to justify a prosecution. The appellants point to the absence of such a certificate from the British Virgin Islands. They argued that it would be unfair to them for the British Virgin Islands to resile from reliance on the London Scheme as they would be deprived of the benefit of clause 6(3).
- [35] It is important to make a few observations about clause 6(3). Clause 6(3) does not exist in a vacuum. It has to be read together with clauses 6(1) and 5(4). Clause 6(1) states that two or more countries may make arrangements under which clause 5(4) will be replaced by paragraph 2-4 of this clause (clause 6) or by other provisions agreed by the countries involved. Clause 5(4) provides that where a warrant has been endorsed or issued in accordance with 3(1) the competent judicial authority may commit the person to prison to await extradition if such

¹¹ (1969) 1 ALL ER 904

¹² (1985) AC 374

evidence as is produced establishes a prima facie case that the person committed the offence; and extradition is not precluded by law.

[36] It can be seen that clause 5(4) is the operating clause and 6(3) only comes into play if the requesting state and Saint Vincent make arrangements pursuant to clause 6(1) under which clause 5(4) will be replaced by 6(3) or by other provisions agreed by the countries involved. In the absence of such arrangement the operating clause remains 5(4) and it does not provide for any certificate by the Attorney General of the requesting state. There is no evidence of any arrangement displacing the applicability of clause 5(4). In the circumstances, on what basis could a legitimate expectation be engendered?

[37] In **Attorney General of Hong Kong v Ng Yuen Shin**¹³ Lord Fraser explained that the concept of legitimate expectation is capable of including expectations created by something that falls short of an enforceable legal right, provided they have some reasonable basis. If the public body has done or said nothing which can legitimately have generated the expectation that is contended for, the case must end there: **R (Bibi) v Newham London Borough Council**¹⁴.

[38] In my judgment, in so far as the appellants rely on clause 6(3) of the London Scheme, there would be no basis to found a legitimate expectation. Clause 6(3) may assume efficacy in futuro. At present it is just a statement of something which may happen. There is no certainty about it. No legitimate expectation could arise from it. No detriment would have been or could have been suffered by the appellants and no issue of unfairness falls to be considered. In the circumstances an argument based on legitimate expectation cannot be sustained.

Section 9(d) of the Fugitive Offenders Act and the London Scheme

[39] The “any other sufficient cause” provision in section 9(d) of the **Fugitive Offenders Act** would be wide enough to enable the appellants to import the London Scheme to support an argument that it would be unjust or oppressive to

¹³ [1983] 2 AC 629, 636

¹⁴ [2002] 1WLR 237 at para 21

return them if clause 6(3)(b) of the London Scheme were applicable. For reasons stated earlier the operating clause of the London Scheme would be clause 5(4) and not clause 6(3)(b). Even assuming that clause 6(3)(b) could be utilized, the court would still have to be satisfied that in all the circumstances it would be unjust or oppressive to return the appellants on the basis that the certificate of the Attorney General of the British Virgin Islands was absent.

[40] In arriving at its decision the court, no doubt, would consider the effect of the absence of the certificate by the Attorney General that in her opinion the record of the case discloses the existence of evidence under the law of the British Virgin Islands sufficient to justify a prosecution. The court would be mindful of the fact that “the sufficiency of evidence test” is the same test prescribed by section 12 of the **Fugitive Offenders Act** for the magistrate to commit the appellants. Further, the court would have regard to the fact that at the committal hearing the magistrate was satisfied that the evidence was sufficient to warrant the trial of the appellants for the offence if it had been committed in Saint Vincent.

[41] The court would also be cognizant of the fact that a certificate by the Attorney General is not a legal requirement. A further circumstance the court would be entitled to take into account is the existence of domestic law safeguards in the British Virgin Islands to protect the appellants from an unjust trial. From the foregoing an absence of a certificate from the Attorney General, even if one were required under the London Scheme, would not in the circumstances lead to a conclusion that it would be unjust or oppressive to return the appellants.

Application of Sections 7(3) and (4) of the Act

[42] In the habeas corpus proceedings Mr. Richelieu submitted that section 7(3) of the **Fugitive Offenders Act** had not been complied with as there was no certificate from the Governor General giving the assurances required under that subsection in respect of any offence committed before the appellants’ return to the British Virgin Islands. In reviewing section 7(3), the learned judge stated that where a person is to be returned to the requesting country, there must be a law in or an

arrangement with the requesting country for ensuring that he will not be dealt with in the requesting country for any offence committed before the return, unless he is returned to Saint Vincent. The learned judge pointed out that where there is a law the law speaks. Where there is an arrangement, the evidential manner of establishing that arrangement in a court is the presentation of a certificate from the Governor General.

[43] The judge found that the legal channel existed in **The Extradition (Overseas Territories) Order 2002** (Order in Council 2002 No. 1823). The relevant provision appears under Part 11 and deals with “Restrictions on Return”. That provision is similar to section 7(3) of the **Fugitive Offenders Act** of Saint Vincent. At paragraph 50 of her judgment the learned judge stated that Saint Vincent and the British Virgin Islands have similar provisions. The judge thus reasoned 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 other offence committed before his (their) return...” as provided in section 7(3) of the Act. I respectfully disagree with that reasoning as it does not follow that the existence of a corresponding provision satisfies the requirement of section 7(3) of the **Fugitive Offenders Act**.

[44] Mr. Richelieu submitted that the mere existence of a corresponding provision in the British Virgin Islands could not be sufficient, unless there is a law in the British Virgin Islands which makes express provisions to protect the appellants. In the alternative the learned judge's pronouncement at paragraph 50 of her judgment is a misstatement of the law and therefore unless the certificate of the Governor General exists the proceedings in this matter are null and void. Mr. Richelieu cited **Mohamed & Dalvie v President of the Republic of South Africa**¹⁵; and **Audrey Fletcher v Government of France**¹⁶.

¹⁵ (CCT 17/01) [2001] ZACC 18

¹⁶ Supreme Court of Gibraltar, Criminal Appeal No. 8 of 2007

[45] Section 7 of the **Fugitive Offenders Act** of Saint Vincent states:

“(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 –

- (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] Section 7(3) provides a prohibition on the appellants’ return to the British Virgin Islands; their committal to custody, or on their being kept in custody for the purpose of their return in the circumstances ordained by that subsection. Section 7(3) clearly speaks to a situation in which the person sought to be extradited has committed an offence in the requesting state before his return under the Act other than the offences referred to in paragraphs (a), (b) or (c). If the person sought to be extradited has not committed any such offence, section 7(3) is clearly not engaged. The proceedings were never conducted on the basis that such an offence was committed by the appellants. The issue was raised in the habeas corpus proceedings in the context of the absence of a certificate from the Governor General under section 7(4) of the Act. There is no evidence nor is it contended by either party that the appellants committed an offence in the British Virgin Islands to bring them within the purview or contemplation of section 7(3). In the circumstances there is no basis for the appellants to complain that there is no provision made by the law of the British Virgin Islands or by arrangement with that

country within the contemplation of section 7(3). Accordingly, no question can arise with respect to the absence of a certificate from the Governor General pursuant to section 7(4). It cannot be that in the absence of such a certificate the proceedings are null and void.

[47] In the circumstances I would order that the appeal be dismissed.

Davidson Kelvin Baptiste
Justice of Appeal

I concur.

Janice George-Creque
Justice of Appeal

[48] **EDWARDS, J.A.:** I have read the judgment of my learned brother Baptiste J.A. and I agree with his reasoning and the conclusions he has arrived at for most of the issues. My views differ somewhat concerning the basis for his conclusions on the final issue regarding the application of sections 7(3) and (4) of the **Fugitive Offenders Act**.

I am also expressing my observations on the London Scheme.

The London Scheme

[49] The learned trial judge was correct in rejecting the submissions of Mr. Richelieu who sought to transform the London Scheme into a bilateral treaty arrangement effective between the Virgin Islands and St. Vincent and the Grenadines by reliance on section 4(3) of the **Fugitive Offenders Act**. This provision refers to Extradition Treaties coming into effect between St. Vincent and the Grenadines and foreign countries after the commencement of the Act and makes provisions for the Act to apply to those foreign countries subject to modifications for giving effect to treaties. Section 2 of the **Fugitive Offenders Act**, Cap 126 defines “foreign country” to mean “any country (other than the Republic of Ireland) which is not a Commonwealth country and includes any country or territory for whose external relations a foreign country is responsible”. The Virgin Islands being an overseas

territory and a dependency of the Commonwealth country of the United Kingdom, is not a foreign country.¹⁷

[50] Moreover, the London Scheme did not come into effect after the commencement of the **Fugitive Offenders Act**. The London Scheme formerly known as “The Scheme Relating to the Rendition of Fugitive Offenders within the Commonwealth” was conceived at a meeting of the Commonwealth Law Ministers in London in 1966. This Scheme was based on the **Fugitive Offenders Act of 1881** (U.K.) which provided for the surrender of fugitive criminals between British possessions. The proposal for a multilateral treaty was rejected in favor of the Scheme that would provide a basis for reciprocal agreements among member states of the Commonwealth. The Scheme is a non-treaty informal arrangement which set out a procedure for extradition between Commonwealth countries; and it was understood that members of the Commonwealth would enact legislation consistent with the Scheme in expectation of reciprocity.¹⁸

[51] St. Vincent and the Grenadines and the United Kingdom were 2 of the 54 Commonwealth countries that were parties to the London Scheme in 1966. Prior to the **Fugitive Offenders Act** coming into force on 27th December 1989, the United Kingdom Acts known as the **Extradition Acts 1870 to 1935**, the Orders in Council made under the said Acts, and the **Fugitive Offenders Act 1970** (U.K.) applied to St. Vincent and the Grenadines.

[52] The **Fugitive Offenders Act** replaced that United Kingdom legislation except for the Orders in Council stipulated in the Second Schedule to the Act which have been saved by section 31 of the Act. Unlike section 3(1) of the **Barbados Extradition Act**¹⁹, which came into force on 2nd June 1980, the **Fugitive Offenders Act** did not state that it seeks to adopt “the principles relating to

¹⁷ Section 2 and the Schedule to the **Commonwealth Countries Act Cap 122** of the Revised Laws of St. Vincent and the Grenadines 1990

¹⁸ See **Bazos v Attorney General of Singapore**: www.ipsosfactoJ.com/archive/index.htm [1989] Part 7 Case 1 [HC,S'pore] at para 16; **John Scantlebury and others v Attorney General Barbados and another**: Appeal Nos. 18, 20 and 21 of 2007 (Barbados C.A.) at para 17; page 22 Manual on International Cooperation in Criminal Matters and Terrorism published by UNITED NATIONS OFFICE ON DRUGS AND CRIME, Vienna: at page 22.

¹⁹ Cap 189

fugitives within the Commonwealth as formulated by the Commonwealth Law Ministers at their conference in London in 1966.” The purpose of the **Fugitive Offenders Act** is expressed in the long title as “AN ACT to make new provision for the return from St. Vincent and the Grenadines of persons found therein who are accused of, or have been convicted of, offences in other countries and whose return is requested by such other countries and for matters related thereto.”

- [53] In the absence of any extradition treaty ties between St. Vincent and the Grenadines and the Virgin Islands, section 3(1)(a) of the **Fugitive Offenders Act** provides for extradition to the Virgin Islands. The affidavit of Sarah Benjamin which supported the Extradition Request states at paragraph 19 that “By virtue of Imperial Legislation No. 1823 of 2002, **The Extradition (Overseas Territories) Order 2002, the Extradition Act 1989 (UK)** was extended to the Virgin Islands (British).”

Was section 7(3) of the Fugitive Offenders Act Cap 126 satisfied?

- [54] The learned judge had to determine the issue raised by Mr. Richelieu about the absence of the Governor General's Certificate required by section 7(4) of the **Fugitive Offenders Act**. The learned judge observed at paragraph 47 of her judgment that the aim of section 7(3) and (4) “is to provide a reciprocal channel for a returning applicant to challenge the matter in Court if a returning accused considers that that right is ignored or infringed.” The judge identified section 6(4) of the **Extradition Act 1989 (UK)** as the legal channel available to a returning accused in the Virgin Islands and section 6 provides:

“6 (1) A person shall not be returned under Part III of this Act, or committed or kept in custody for the purposes of return, if it appears to an appropriate authority –

- (a) that the offence of which that person is accused or was convicted is an offence of a political character;
- (b) that it is an offence under military law which is not also an offence under the general criminal law;

(c) that the request for his return (though purporting to be made on account of an extradition crime) is in fact made for the purpose of prosecuting or punishing him on account of his race, religion, nationality or political opinions; or

(d) that he might, if returned, be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality or political opinions.

(3)...

(4) 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 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 disclosed by the facts in respect of which his return was ordered;

(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.”

[55] Thereafter, the learned judge concluded that St. Vincent and the Grenadines and the Virgin Islands have similar provisions and “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. The learned judge erred.

[56] I agree with Mr. Richelieu's submission that the fact that section 6(4) of the **Extradition Act 1989 (UK)** corresponds with section 7(3) of the **Fugitive**

Offenders Act does not satisfy the requirement in section 7(3) of the **Fugitive Offenders Act**. Section 7(3) embodies what is referred to as the “speciality rule or doctrine” in international extradition law; which prohibits a requesting country from trying an extradited individual for an offence other than the one for which he was extradited. Section 6(4) of the **Extradition Act 1989 (UK)** gives no such guarantee as it gives no undertaking that the appellants will not be tried for other offences other than the offence of importing 61.21 kilograms of cocaine into the island of Tortola in the Territory of the British Virgin Islands which is the offence specified in the Extradition Request.

[57] I am of the view that in the absence of any provision in the law of the Virgin Islands giving such guarantee, there must be a certificate from the Governor General confirming the existence of executive arrangements between the governments of St. Vincent and the Grenadines and the Virgin Islands, and establishing that such arrangements to satisfy the “specialty rule” are in place. In the absence of that certificate the appellants would have to be discharged in obedience to the unambiguous and clear mandate in section 7(3) of the **Fugitive Offenders Act** in my view.

[58] But this is not the end of the matter because Part IV, sections 19 and 20 of the **Extradition Act 1989 (UK)** which deals with treatment of persons returned, satisfies the “specialty rule”. These provisions **obviously** escaped the attention of the learned judge. Section 19 states as follows:

“19.(1) This section applies to any person accused or convicted of an offence under the law of a listed territory who is returned to that territory –

- (a) from the United Kingdom, under this Act as it has effect in the United Kingdom;
- (b) from any designated Commonwealth country or Ireland, under any law of that country corresponding with this Act;
- (c) from any British overseas territory, under this Act, or the Fugitive Offenders Act 1967^[2], as extended to

that British overseas territory or under any corresponding law of that British overseas territory.

(2) A person to whom this section applies shall not, during the period described in subsection (3) below, be dealt with in the relevant listed territory for or in respect of any offence committed before he was returned to that territory other than –

- (i) the offence in respect of which he was returned;
- (ii) any lesser offence disclosed by the particulars furnished to the country or British overseas territory on which his return is grounded; or
- (iii) any other offence in respect of which the Government of the country or Governor of the British overseas territory from which he was returned may consent to his being dealt with.

(3) The period referred to in subsection (2) above in relation to a person to whom this section applies is the period beginning with the day of his arrival in the relevant listed territory on his return as mentioned in subsection (1) above and ending 45 days after the first subsequent day on which he has the opportunity to leave that territory.

(4) Where a person to whom this section applies has been convicted before his return of an offence for which his return was not granted, any punishment for that offence shall by operation of this section be remitted; but his conviction for it shall be treated as a conviction for all other purposes.

(5) In this section "dealt with" means tried or returned or surrendered to any country or British overseas territory or detained with a view to trial or with a view to such return or surrender.

20.(1) This section applies to any person accused of an offence under the law of a listed territory who is returned to that territory as mentioned in section 19(1) above.

(2) If in the case of a person to whom this section applies either –

- (a) proceedings against him for the offence for which he was returned are not begun within the period of six months beginning with the day of his arrival in that territory on being returned; or

(b) on his trial for that offence, he is acquitted or discharged (whether conditionally or unconditionally), the Governor may, if he thinks fit, on the request of that person, arrange for him to be sent back free of charge and with as little delay as possible to the jurisdiction of the country or British overseas territory from which he was returned.”

[59] The appellants are accused of an offence under the law of the Virgin Islands which is one of the 13 territories listed in Schedule 1 to the Imperial Order No. 1823 of 2002. They therefore have the statutory assurance which section 7(3) of the **Fugitive Offenders Act** requires. Had the learned judge alluded to these provisions she would have arrived at the same conclusion and refuse the writ of habeas corpus. Consequently I would dismiss the appeal.

Ola Mae Edwards
Justice of Appeal