

**EASTERN CARIBBEAN SUPREME COURT
SAINT LUCIA**

**IN THE HIGH COURT OF JUSTICE
(Civil)**

CLAIM NO.: SLUHCV2020/301

BETWEEN:

SEBASTIAN MARCUS DAY

Applicant

and

**THE HONOURABLE ATTORNEY GENERAL
THE DIRECTOR OF THE BORDELAIS CORRECTIONAL FACILITY**

Respondents

Before:

The Hon. Mde. Justice Kimberly Cenac-Phulgence

High Court Judge

Appearances:

Mr. Horace Fraser for the Applicant

Mr. Rene Williams with Mrs. Brender Portland-Reynolds for the Respondents

2020: August 14, 18.

JUDGMENT

- [1] **CENAC-PHULGENCE, J:** This decision concerns an application for the issue of a Writ of Habeas Corpus Ad Subjiciendum filed by the applicant, Mr. Sebastian Marcus Day (“the applicant”) on 17th July 2020 and amended on 7th August 2020, each accompanied by an affidavit in support of Evelyn Day, the applicant’s sister.

Background Facts

- [2] The applicant was arrested on 4th November 2019, pursuant to a Warrant of Arrest issued by the Senior Magistrate on 30th October 2019. On 6th November 2019, he was granted bail subject to conditions and was subsequently released.

[3] A request for the applicant's extradition had been made to the Government of Saint Lucia by the Government of the United States of America. The basis of the request was a Felony Warrant of Arrest issued against the applicant by the Circuit Court for Volusia County, Florida wherein he was charged with the following offences:

Counts 1-25: possession of 10 or more images in any form of child pornography wherein the content of at least one image contained a child who is younger than 5 years old, or sadomasochistic abuse involving a child, or sexual battery involving a child, or sexual bestiality involving a child, or any movie involving a child regardless of the length and regardless of whether the movie contains sound, contrary to Florida Statute 827.071(5) and 775.0847(2) and (3).

[4] By a decision delivered on 15th July 2020, the learned Senior Magistrate ordered that the applicant be committed to be surrendered to the United States of America pursuant to section 12(2) of the **Extradition Act**¹ and the applicant was committed to the Bordelais Correctional Facility to await extradition.

The Application

[5] The grounds of the application to issue a writ of habeas corpus are that the committal was bad in law and a nullity as:

- (i) There was no identification evidence linking the person named in the request/warrant with the applicant (The Identification Issue);
- (ii) The offences are not extradition crimes within the meaning of the **Extradition Act** in that (a) possession of pornographic material is not listed in the schedule of the **Extradition Act** as an extradition crime in accordance with section 3(a); and (b) possession of pornographic material is not an extradition crime in accordance with section 3(b) of the Act as such an offence in the State of Florida in the United States of America

¹ Cap. 2.10, Revised Laws of Saint Lucia 2013.

attracts a fine upon conviction and not a term of imprisonment of 12 months or more (The Extradition Crime Issue);

- (iii) Possession of pornographic material is not an offence known to the Laws of Saint Lucia. Section 14(1) of the **Computer Misuse Act**² provides for offences of possession of pornographic material for the purpose of distribution and facilitating viewership of such material. There is no offence listed in the section that criminalises possession of pornographic material simpliciter (The Offence Not Known to Law of Saint Lucia Issue);
- (iv) In the case of **Stanley v Georgia**,³ the Supreme Court of the United States of America struck down legislation which purported to charge the applicant with possession of pornographic material as being unconstitutional, as being a violation of the first and fourteenth amendments of the Constitution of the United States of America. The extradition request was therefore made on a non-existing or invalid charge and is therefore a nullity (The Constitutionality of Florida Statute Issue).

The Role of the Court on this application

- [6] It is important to examine the role of the court on applications for the issue of a writ of habeas corpus before proceeding to look at the grounds of the application. The writ of habeas corpus remains of the highest constitutional importance, for by it, the liberty of the subject is vindicated and his release from any manner of unjustifiable detention assured.
- [7] The Court's role is essentially limited to determining whether the magistrate abused her discretion in ordering the committal of the applicant. In cases relating to extradition and the return of fugitive offenders, it has been held that there is power in the superior court to review the case as it appeared before the magistrate, not only to look at the evidence before the magistrate, but to consider whether any magistrate, properly applying his mind to the question, could

² Cap. 8.14, Revised Laws of Saint Lucia 2013.

³ (1969) US 557.

reasonably have come to the conclusion that a strong and probable presumption of guilt had been made out, which would justify the magistrate in making the committal order.⁴

- [8] In the Court of Appeal decision of **Dexter Chance et al v Superintendent of Prisons et al**,⁵ Baptiste JA, at paragraph 4, stated that ‘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.’

Discussion and Analysis

Applicable law Issue

- [9] Although not stated as a ground in his application, counsel for the applicant, Mr. Horace Fraser (“Mr. Fraser”), in his written submissions filed on 13th August 2020, contended that the respondents, at paragraph 17 of their affidavit in response, state that these proceedings are being conducted on the basis of an extradition treaty between Saint Lucia and the United States of America, which he submits is erroneous. It would appear that his basis for saying so is that treaties are executed between the executive branch of countries, but Parliament has to give legal effect to such treaties. He goes further to say that despite the existence of a treaty between Saint Lucia and the United States of America, it is the **Extradition Act** which governs the extradition proceedings.
- [10] Counsel for the respondents, Mr. Rene Williams (“Mr. Williams”), in oral submissions, argued that the **Extradition Treaty** between the Government of Saint Lucia and the Government of the United States of America signed in 1996 (“the **Extradition Treaty**”) has been given the force of law in Saint Lucia by the **Mutual Assistance (Extension And Application To USA) Regulations** in 1999

⁴ Schtraks v Israel [1964] AC 556.

⁵ SVGHCVP2009/0018 (delivered 31st May 2010, unreported).

and that there is no conflict between the **Extradition Treaty** and the **Extradition Act**. The **Extradition Act** applies subject to the **Extradition Treaty** provisions.

Discussion

[11] It is clear that Mr. Fraser has not given due regard to the provisions of the relevant legislation. The **Extradition Act** was passed in 1986 and came into effect in 1993. The long title of the **Extradition Act** states as follows: ‘An Act relating to fugitives in Saint Lucia from the criminal law of other States and to fugitives from the criminal law of Saint Lucia in other States.’

[12] It is necessary to set out the full text of section 38 of the **Extradition Act**. That section states as follows:

“38. Applying Part 1 under extradition treaty

(1) In this section “extradition treaty” means a treaty, convention, agreement or arrangement between states relating to the surrender of fugitives or that contains a provision relating to the surrender of fugitives.

(2) **Where an extradition treaty between Saint Lucia and a foreign State comes into effect after the commencement of this Act, Part 1 applies to that foreign State subject to such limitations, conditions, exceptions or qualifications as are necessary to give effect to that treaty or to the provisions thereof relating to the surrender of fugitives.**

(3) If Part 1 applied to a foreign State described in subsection (2) before the making of an extradition treaty by Saint Lucia with that state and the extradition treaty affected or amended an earlier extradition treaty with that State that extended to Saint Lucia, Part 1 applies to that foreign State thereafter subject to that earlier extradition treaty as affected or amended by the later extradition treaty.” (my emphasis)

It is clear from this section that where an extradition treaty exists, extradition proceedings are to be conducted in accordance with Part 1 of the **Extradition Act** subject to the such limitations, conditions, exceptions or qualifications as are necessary to give effect to the treaty or to provisions dealing with surrender of fugitives. The **Extradition Act** itself contemplated that there might, in the future,

exist an extradition treaty between Saint Lucia and a foreign State and seeks to give effect to such treaty.

[13] By virtue of regulation 5 of the **Mutual Assistance (Extension and Application to USA) Regulations 1999** made pursuant to section 35 of the **Mutual Assistance in Criminal Matters Act**,⁶ the **Extradition Treaty** between the Government of Saint Lucia and the Government of the United States of America signed in 1996 as set out in schedule 2 of the regulations was given the force of law in Saint Lucia. It therefore means that in extradition proceedings, the **Extradition Act** and the **Extradition Treaty** must be read together as governing such proceedings.

[14] The applicant relies on the High Court case of **Dexter Chance et al v The Superintendent of Prisons et al** which was upheld by the Court of Appeal.⁷ However, in that case, it was held that the London Scheme was not a treaty and did not have the force of law in Saint Vincent. It was a non-treaty informal arrangement among member states of the Commonwealth setting out a procedure for extradition between them so that a certificate by the Governor General under the London Scheme was not a legal requirement and even if it were required, its absence would not, in the circumstances, have led to a conclusion that it would be unjust or oppressive to return the appellants. In the case at bar, the **Extradition Treaty** under consideration has the force of law in Saint Lucia and it matters not that it was given such force in the **Mutual Assistance (Extension and Application to the USA) Regulations** made pursuant to section 35 of the **Mutual Assistance in Criminal Matters Act**.

⁶ Cap. 3.03, Revised Laws of Saint Lucia 2013.

⁷ SVGHCVP2009/0018 (delivered 31st May 2010, unreported).

- [15] In the case of **Cecil Boatswain v The Superintendent of Prisons et al**,⁸ Bruce-Lyle J at paragraph 7 summed up the relationship between the **Extradition Act** and the **Treaty**. He said:

“It is again necessary to examine the current realities of the Fugitive Offenders Act and the conditions and limitations imposed on it by the relevant Extradition Treaty. The Act by its very terms was not meant to be read in isolation. It explicitly subjects itself to the terms and conditions of the operative extradition treaties -see Section 4(3) and 4(4) of the said Act.

...

The language of the Act therefore dictates deference to any limitations, modifications or conditions contained in the relevant Extradition Treaties.” (my emphasis)

The Identification Issue

Applicant's submissions

- [16] Mr. Fraser contends that the Attorney General failed to identify the applicant as the person named as Sebastian Marcus Day in the papers requesting the person who answers to that name to be extradited to the United States of America according to sections 100 and 101 of the **Evidence Act**.⁹ The Attorney General failed to connect the person named in the extradition request with the applicant.
- [17] He challenges the Senior Magistrate's decision where she found as a matter of law that extradition proceedings are not criminal proceedings and do not fall within section 99(a) or (b) of that Act. He argues that this reasoning is flawed as the **Evidence Act** applies to all tribunals that conduct hearings. He refers to the definitions of “Court” and “proceedings” and concludes that extradition proceedings are committal proceedings being conducted in the criminal jurisdiction of the Magistrate's Court and therefore section 100 of the **Evidence Act**, which he submits is mandatory, applies to all aspects of the proceedings.
- [18] Mr. Fraser further submits that the failure of the Attorney General to adopt any identification procedure as set out in section 100 of the **Evidence Act** is fatal and

⁸ SVGHCV2006/0130 (delivered 18th May 2006, unreported).

⁹ Cap. 4.15, Revised Laws of Saint Lucia.

renders the act of identification “dock identification”. In the same breath, he says that the non-application of any identification procedure has rendered the act of identification not identification evidence within the meaning of the **Evidence Act** because of the failure by the Attorney General to link the applicant with the fugitive whose extradition is sought.

[19] Counsel submits that the respondents’ reliance on the evidence of Sergeant Leroy Charles at paragraphs 6, 19 and 20 of his affidavit, and a photograph and a document bearing information purporting to be linked to the applicant is not evidence of identification. He contends that given the nature of the act of identification in the case at bar (by name), it was mandatory for the investigating officer to have held a confrontation permitting the officer investigating the matter in the United States of America to link the person requested for extradition with the applicant. The act of identification therefore remains unverified by the Police within the meaning of section 100 of the **Evidence Act** and therefore must be excluded. He says what is required is that the investigating officer come to Saint Lucia to facilitate the confrontation.

[20] Counsel further submits that the extradition must be conducted in accordance with the laws of Saint Lucia and the proceedings must be conducted as though the respondent was charged with offences contrary to the laws of Saint Lucia. He argues that the respondents’ contention that the photograph of the applicant was submitted into evidence unchallenged totally ignores the fact that section 100 of the **Evidence Act** makes evidence inadmissible where the section has not been complied with.

Respondents’ submissions

[21] Counsel for the respondents submits that the evidence relied on in relation to identification speaks to the fact that the Felony Warrant of Arrest refers to the named applicant who was born on 5th July 1993. A copy of the applicant’s United States passport and photograph forms part of the documents exhibited and

referred to in the application for extradition and which was admitted into evidence unchallenged. The affidavit of Sergeant Leroy Charles at paragraphs 18-21 exhibited to the affidavit of the Honourable Attorney General also details that this information was cross-checked against information contained in Saint Lucia's Immigration Department and Registry of Civil Status.

[22] The respondents contend that section 100 of the **Evidence Act** is not applicable to extradition matters and therefore the steps taken to identify the applicant were sufficient for the purpose of the extradition proceedings. They argue that section 99 of the **Evidence Act** states that this division (being Division 7) only applies to criminal proceedings. They argue further that the definition of criminal proceedings in the **Evidence Act** shows that extradition proceedings are not criminal proceedings for the purposes of the Act. The respondents submit that the applicant was not being 'prosecuted for an offence' nor was he 'committed for an offence'. Mr. Williams also submitted that in any event section 100(1) of the **Evidence Act** requires identification evidence to be produced by 'the prosecutor' and in these proceedings before the magistrate there is no prosecutor and therefore no requirement for an identification parade to be held.

[23] The respondents say that the case of **Dexter Chance v the Superintendent of Prisons**¹⁰ on which the applicant relies can be distinguished as it was decided on particular legislation, namely, the Fugitive Offenders Act of Saint Vincent and the Grenadines, section 12(4). However, they say even if **Dexter Chance** is applicable, the evidence provided would be sufficient to commit the applicant to trial for the offences as required by section 12(2) and (3) of the **Extradition Act**.

[24] The respondents rely on **Alie Baptiste v Commissioner of Police**¹¹ where Price-Findlay J summarised the task of the magistrate as follows:

"The task of the Magistrate remains to determine whether sufficient evidence exists as would in a domestic case justify a committal for trial; he

¹⁰ SVGHCVP209/0018 (delivered 31st May 2010, unreported).

¹¹ GDAHCV2009/0470 (delivered 2nd May 2012, unreported).

does not have to approach the matter as he would approach an actual trial in the Magistrate's Court" per Buxton LJ in RE AL-FARWAZ."

- [25] The respondents contend therefore that section 100 of the **Evidence Act** is not applicable to extradition proceedings and that the learned Senior Magistrate's ruling at paragraph 13 of her decision was correct. Mr. Williams pointed to article 6 of the **Extradition Treaty**, which requires that evidence of the identity of the person sought be before the Court and contends that this was done.

Discussion

- [26] In order to properly deal with this ground, it is important to discuss the nature of extradition proceedings. Extradition is the formal procedure for requesting the surrender of someone from one country to another, when the person needs to: (a) be prosecuted; (b) be sentenced for a previous conviction or (c) serve a sentence already imposed.

- [27] Saunders JA, as he then was, in **Noel Heath v Government of United States of America**¹² said as follows:

"As was pointed out by a majority of the Canadian Supreme Court in **Canada v Schmidt** an extradition hearing is not a trial. It is simply a hearing to determine whether there is sufficient evidence of an alleged extradition crime to warrant the Government under its treaty obligation to surrender a fugitive to a foreign country for trial by the authority there for an offence committed within its jurisdiction. **An extradition hearing does not determine the guilt or innocence of the fugitive, the magistrate is not required to weigh the evidence or to assess the credibility of witnesses.**"

...

"The argument put forward here by counsel for the Appellants is not a novel one. It has been put forward in much the same manner in the Courts of Canada. It was argued there that similar provisions in the Canadian Extradition Act offended against Canadian Charter rights. That argument has been consistently rejected³. In one of the cases, **Re United States of America vs. Smith**³ [7 DLR (4th) 12], Houlden, J.A. supported the Court's reasoning with this quotation of a passage in Shearer, *Extradition in International Law* (1971), at pp. 154-5:

¹² SKBHCVP2003/0018 (delivered 21st October 2003, unreported) at paragraphs 16-17.

In Great Britain and other Commonwealth countries where the Imperial Extradition Act, or legislation modelled on that Act, is in force, the jurisdiction and powers of the magistrate at the hearing of a request for extradition are the same “as near as may be” as though the fugitive had been accused of an indictable offence within the ordinary jurisdiction of the magistrate. The phrase “as near as may be” clearly has reference to the sections of the Act which allow reception into evidence of authenticated depositions, warrants, certificates and other judicial documents from foreign authorities. These documents and depositions, which would not otherwise be admissible, may be produced and received into evidence **even if they do not satisfy the peculiar rules of evidence by English law or the strict requirements of the English law relating to oaths.**” (my emphasis)

- [28] It is clear that section 100 of the **Evidence Act** which forms part of Division 7 requires an identification parade to be held. Section 99, however, states that that Division dealing with identification evidence relates only to criminal proceedings. ‘Criminal proceedings’ is defined in section 2 of the **Evidence Act** as: (a) a prosecution in a court for an offence; or (b) proceedings for the commitment of a person for trial of an offence.
- [29] Although extradition proceedings are generally classified as criminal proceedings, for the purposes of section 100 of the **Evidence Act** it cannot be said that they are criminal proceedings as contemplated. There is no evidence of identification being produced by a prosecutor, nor are the proceedings concerned with the committal of a fugitive for the purpose of trial. The extradition process is to commit a person to be surrendered to a requesting state by determining whether, if the offence had been committed in Saint Lucia, there would be sufficient evidence to justify the committal of that person for trial. A magistrate in this jurisdiction could certainly not commit a person for trial in the United States of America or any other jurisdiction for that matter.
- [30] I note that Mr. Fraser suggested that the extradition proceedings are akin to a preliminary enquiry. However, one major difference is that in preliminary inquiries the magistrate is required to determine whether the evidence assembled by the

Crown against an accused person is sufficient to proceed with a trial, whereas in extradition hearings, the magistrate is to determine whether there is sufficient evidence as would justify a committal for trial in Saint Lucia but he does not have to approach the matter in the same way as he would an actual trial in the magistrate's court. The relaxation of the rules relating to admissibility of affidavit evidence subject only to the requirement for proper authentication of the documents demonstrates, to my mind, that the contemplation is not that the strict provisions of the **Evidence Act** apply in extradition proceedings.

[31] What is required by article 2(a) of the **Extradition Treaty** is that documents, statements, or other types of information which describe the identity and probable location of the person sought is to accompany an extradition request. That is in an effort to ensure that the person referred to in the request and the person before the Court are the same person. On the face of the record as produced to this Court, there is nothing which suggests that the learned magistrate would have been confronted with any information that the person named in the request was not the person who appeared before the Court in November 2019. There is nothing to suggest that the applicant ever indicated that he was not the person identified in the request and whose documents (passport and birth certificate) had been produced to the Court. The learned Senior Magistrate at paragraph 14 of her decision stated: 'Further, it seems to me that the Extradition Act calls for a procedure, which ha[s] already been carried out to the satisfaction of the Court in relation to the identification, that being the initial application for the execution of a Warrant of Arrest...'

[32] I agree with the submissions of the respondents. The suggestion by Mr. Fraser that the investigating officer would be required to come to Saint Lucia to conduct a confrontation for the purposes of satisfying section 100 of the **Evidence Act** fails to appreciate the true nature of extradition proceedings.

- [33] I am therefore of the opinion that the learned Senior Magistrate was correct in deciding that section 100 of the **Evidence Act** was inapplicable to the proceedings before her and this ground therefore fails.

The Extradition Crime Issue

- [34] Grounds (ii) and (iii) will be addressed together.

Applicant's submissions

- [35] Mr. Fraser submits that in accordance with section 3(a) of the **Extradition Act** an extradition crime has to be a crime described in the schedule to the Act. The schedule does not list possession of pornographic material as an extradition crime. He says that the learned Senior Magistrate avoided this issue in her written decision.
- [36] Mr. Fraser also challenges the Senior Magistrate's decision at paragraphs 21-30 thereof. He argues that the applicant put copies of the statute before the court which clearly indicated that the offences in relation to which the extradition request was made did not attract a prison sentence, yet the magistrate choose to rely on the evidence of John Disinger who erroneously said that the offence attracted a prison sentence exceeding 15 years.
- [37] Mr. Fraser submits that the charges in the warrant founded on sections 827.071(5) and 775.0847(2) and (3) of the Florida Statute do not constitute extradition crimes within the meaning of section 3 of the **Extradition Act**, which requires that an extradition crime must carry a maximum penalty of a term of 12 months imprisonment or more.
- [38] Mr. Fraser argues that, should the applicant be convicted of the offences for which he has been charged, he would be subject to a fine and not a term of imprisonment of 12 months or more. He argues that the penal sections in relation to a conviction under sections 827.071(5) and 775.0847(2) and (3) are sections

775.082, 775.083 and 775.084 and that these sections provide for the imposition of a fine given the particular circumstances of the applicant.

Respondents' submissions

- [39] The respondents accept that the offence of possession of child pornography is not listed in the Schedule referred to in section 3 of the **Extradition Act**. However, the **Extradition Treaty** does not list extraditable offences. Article 2 of the **Extradition Treaty** defines 'extraditable offence' as one which is punishable by imprisonment for a term of more than one year in both States. The respondents argue that given that the regulations which gave the **Extradition Treaty** the force of law came into effect in 1999 after the **Extradition Act**, the regulations as the later law must prevail. Mr. Williams suggested that although section 6 of the regulations provides that where there is any inconsistency or conflict between the Treaties referred to in regulations 4 and 5 and the **Mutual Legal Assistance in Criminal Matters Act** or the **Proceeds of Crime Act**, the treaties shall prevail to the extent of the inconsistency or conflict, and did not specifically mention conflict with the **Extradition Act**, this does not in any way suggest inapplicability of the **Extradition Treaty** to extradition proceedings. In fact, he suggested there were not many conflicts between the Treaty and the **Extradition Act**.
- [40] In relation to the applicant's submission that in addition to not being listed in the Schedule to section 3 of the **Extradition Act**, the offences with which the applicant has been charged do not carry a sentence of imprisonment for which the maximum penalty in that country or state is death or imprisonment for a term of 12 months or more, the respondents submit that questions of foreign law must be proven by expert evidence. They refer to the Court of Appeal decision of **Ronald Green et al v Maynard Joseph**¹³ where Pereira CJ quoting from Dicey and Morris said that foreign law must be proved by expert evidence and cannot be proved by merely putting the text of a foreign enactment before the court nor merely by citing foreign decisions or books of authority. Such materials can only be brought before

¹³ DOMHCVAP2012/0012, delivered 11th March 2013, unreported at paragraph 37.

the court as part of the evidence of an expert witness since without his assistance the court cannot evaluate or interpret them.

[41] The respondents argue that counsel for the applicant never objected to the evidence of Mr. Disinger and therefore the uncontroverted evidence is that Mr. Disinger has been practicing at the Florida Bar for nearly twenty years and is therefore qualified to give evidence on the laws of Florida.

[42] The respondents therefore submit that the material submitted by counsel for the applicant as proof that the offence with which the applicant has been charged does not carry a term of imprisonment but rather a fine cannot be relied upon and could only have been introduced by way of his own expert on Florida law. The respondents make the point that in the proceedings before the learned Senior Magistrate, most of this evidence was not challenged by the applicant and there was no request for cross-examination of the witnesses, all of whom were made available.

Discussion

[43] An examination of section 3 of the **Extradition Act** and article 2 of the **Extradition Treaty** do not to my mind suggest any conflict. Section 3 defines 'extradition crime' as:

“an offence however described that, if committed in Saint Lucia,
(a) would be a crime described in the Schedule; or
(b) would be a crime that would be so described were the description to contain a reference to any intent or state of mind on the part of the person committing the offence or to any circumstance of aggravation, necessary to constitute the offence,
and for which the maximum penalty in that country or state is death or imprisonment for a term of 12 months or more.”

[44] Article 2 of the Extradition Treaty defines an extraditable offence as follows:

“1. An offence shall be an extraditable offence if it is punishable under the laws in both Contracting States by deprivation of liberty for a period of more than one year or by a more severe penalty.

2. An offence shall also be an extraditable offence if it consists of an attempt or a conspiracy to commit, aiding or abetting, counselling or procuring the commission of, or being an accessory before or after the fact to any offence described in paragraph 1.”

[45] The only difference between the two provisions is that the treaty provision does not refer to a schedule of offences. It does not in any way conflict with what is in the **Extradition Act** and simply expands the category of extradition crimes or offences beyond those stated in the **Extradition Act**. This must be viewed in the context of section 38(2) of the **Extradition Act** which requires that where an extradition treaty exists such as in this case, Part 1 of the Act which is where extradition crime is defined applies subject to such ‘limitations, conditions, exceptions or qualifications’ as are necessary to give effect to the treaty or its provisions relating to the surrender of fugitives. Therefore, it is to the **Extradition Treaty** that one must look to determine what is an extradition crime/offence.

[46] I accept the respondents’ submissions that any attempt to rely on foreign law must be proved by way of expert evidence and that the applicant has not produced such to the Court. The applicant wishes the court to embark upon interpretation of the Florida Statute to come to the conclusion that he has. This is not an exercise for this Court. I would note however, as pointed out by the learned Senior Magistrate in her decision at paragraph 23, that the very statute which Mr. Fraser commends to the Court in support of his contention that the penalty for the offences with which the applicant has been charged would be a fine, states that a person convicted of such offences may be sentenced to pay a fine ‘in addition to any punishment described in section 775.082’. She opined and I think rightly so that the sections referred to by Mr. Fraser also seem to provide for sentences of imprisonment.

[47] Before the learned Senior Magistrate, the respondents relied on the affidavit of Mr. John Disinger in support of the request for extradition of Sebastian Day. In that affidavit Mr. Disinger deposed at paragraphs 2 and 3 that he graduated from Stetson University College of Law in 2001 and from 2010 to the present he has

been employed by the Office of the State Attorney of the 7th Judicial Circuit in Florida, as an Assistant State's Attorney. His duties include prosecuting persons charged with criminal violations of the laws of Florida and he deposed that during his practice as an Assistant State's Attorney, he has become knowledgeable about the criminal laws and procedures of Florida. He also states that as an Assistant State's Attorney for the 7th Judicial Circuit, Florida, he is responsible for the preparation and prosecution of criminal cases. Mr. Disinger states that, based on his training and experience, he is an expert in the criminal laws and procedures of the State of Florida. Mr. Disinger therefore had, in my view, the qualifications to render him an expert on Florida law.

- [48] The learned Senior Magistrate found that there was sufficient evidence for her to conclude that the offence with which the applicant had been charged carried a penalty of imprisonment of one year or more. She accepted the evidence of Mr. Disinger. That was the only evidence before her as to the law in the State of Florida and it was unchallenged.

Offence not known to the laws of Saint Lucia

Applicant's submissions

- [49] Mr. Fraser contends that the offence pursuant to which the fugitive is charged must be an offence known to the laws of Saint Lucia. He submits that section 14 of the **Computer Misuse Act** does not criminalise possession simpliciter of pornographic material as the sections of the Florida Statute do. What section 14 criminalises is the possession for the purpose of distribution and facilitating viewership of such material.
- [50] Mr. Fraser finds fault with the fact that the Senior Magistrate seemed to have accepted at paragraphs 34 and 35 of her decision that there was a similarity between the offences under the Saint Lucian and Florida Statutes. He says she accepted the Attorney General's submission that the pornographic images found on the applicant's computer were stored in a shared folder which was accessible

to others and the evidence of detective Chastity Burke that the files were downloaded and stored. He argues that the Senior Magistrate's reasoning was flawed as the applicant was not charged under the Florida Statutes with any offence of possession of pornographic material with a view to distributing or sharing with others as is required under the **Computer Misuse Act**. He was charged with mere possession of pornographic material which is not recognised as an offence under the **Computer Misuse Act**.

Respondent's submissions

- [51] The respondents submit that the terminology and classification of the offence need not be identical. They argue that possession of the offensive material is a requirement of both the Florida Statute and the **Computer Misuse Act** of Saint Lucia. The respondents rely on the case of **State of Washington v Johnson**¹⁴ where Justice Wilson made clear that the court does not require exact identity between the offence charged in the requesting State and the Saint Lucian offence. The focus is on the criminal conduct of the person whose extradition is sought.
- [52] The respondents submit that the evidence of Detective Chastity Burke which was before the learned Senior Magistrate was clear that the applicant had photographs of children engaged in sexual acts with adults stored on his computer and further that the applicant stored these images in a shared folder which was accessible to others. They refer to section 14(1)(c) of the **Computer Misuse Act** which speaks to possession of indecent photographs of children 'with a view to such photograph being distributed or shown by himself or herself to any other person.' The respondents refer to the case of **R v Dooley**,¹⁵ a case in which the appellant was found to have indecent images of children stored in a shared folder accessible to others. There, the court was of the view that one of the critical questions for the jury was whether at least one of the reasons why the defendant left the images in the shared folder was so that others could have access to the images in it.

¹⁴ [1988] 1 SCR 327 at p 341.

¹⁵ [2006] 1 WLR 775.

- [53] The respondents submit that based on the available evidence, the applicant could be convicted in Saint Lucia if charged pursuant to section 14(1)(c). They also point out that, given the evidence presented before the learned Senior Magistrate, section 14(1)(b) could also be relevant which makes it an offence to distribute or show indecent photographs of a child. The respondents say the fact that other persons were able to view the files is strong evidence at least of the applicant's motives to allow them to do so.

Discussion

- [54] The approach in dealing with extradition acts and treaties was discussed by Lord Steyn, then sitting as a member of the Judicial Committee of the Privy Council in **Cartwright and anor v The Superintendent of Her Majesty's Prison and anor**¹⁶ at paragraphs 14 and 15 where he said the following:

"In extradition law the court must adopt a balanced approach. Throughout extradition law there are two principal threads. First, in exercising powers of extradition courts of law must, as Isaacs J observed, be vigilant to protect individuals from the overreaching of their rights by the government. Justice to the individual is always of supreme importance. Secondly, the Board considers that it is imperative of legal policy that extradition law must, wherever possible, be made to work effectively. There was some controversy about this point. It is, therefore, necessary to explain the position.

"Crime and criminals have always traversed national boundaries. But in the modern world advances in technology and means of communication have enormously increased this phenomenon, notably in the fields of financial crimes, drugs offences and terrorism. It is, therefore, of great importance that extradition law should function properly. For the appellants, Mr. Fitzgerald Q.C. accepted on the authority of *Government of Belgium v Postlethwaite and Others* [1988] AC 924, AT 946h-947B, that extradition treaties, being contracts between sovereign states, should be purposively and liberally construed. But he argued that a different approach is necessary in regard to domestic extradition legislation. He made a comparison with criminal statutes and submitted that an approach of strict construction is necessary. The Board would reject this submission. Even in regard to criminal statutes the presumption in favour

¹⁶ 8 [2004]UKPC 10.

of strict construction is nowadays rarely applied. There has been a shift to purposive construction of penal statutes: see *Cross, Statutory Interpretation*, 3rd ed., 1995, 172-175. **In any event, it is a well settled principle “that a domestic statute designed to give effect to an international convention should, in general, be given a broad and liberal construction” : *Samick Limes Co Ltd v Owners of The Antonis P.Lemos* [1985] AC 711, AT 731. The same must be true of a statute passed pursuant to a bilateral treaty.** Moreover, in *In re Ismail* [1999] 1 AC 320 the House of Lords in a unanimous judgment commented on the need to bring suspected criminals, who have fled abroad, to justice through the extradition process. In that case I observed (at 327A):

‘There is a transnational interest in the achievement of this aim. Extradition treaties, and extradition statutes, ought, therefore, to be accorded a broad and generous construction so far as the texts permit it in order to facilitate extradition.’

As the final court of The Bahamas the Board is in no doubt that it must adopt, where the Extradition Act 1994 permits it, a purposive or dynamic interpretation to make extradition work effectively.” (my emphasis)

[55] Article 2(3)(a) of the **Extradition Treaty** states:

“3. For the purposes of this Article, an offence shall be an extraditable offence—

(a) **whether or not the laws in the Contracting States place the offence within the same category of offences or describe the offence by the same terminology;**” (my emphasis)

Section 2(2) of the **Extradition Act** states:

“(2) This Act is remedial and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its purposes.”

[56] Gordon JA in the Court of Appeal decision of **Cecil Boatswain v The Superintendent of Prisons et al**¹⁷ opined as follows:

“The term “offence” in section 7 (3)(a) **does not mean the technical and slavish following of the form of words as set forth in the indictments handed down against the appellant.** Rather I hold that it means the activities which ‘offend’ the laws of the requesting state as broadly described in the request made to Saint Vincent and the Grenadines.” (my emphasis)

¹⁷ SVGHCVAP2006/0006 (delivered 13th November 2006, unreported) at para 22.

- [57] The above authorities speak to the approach which is to be had in deciding whether on the evidence provided it is sufficient to warrant the applicant's trial for the offence if it had been committed in Saint Lucia. The offence in Saint Lucia need not be identically worded. It is the conduct which must be examined to see whether it would be an offence in Saint Lucia whether called by the same or another name.
- [58] The learned Senior Magistrate accepted the evidence of Detective Chastity Burke, a detective with the Internet Crimes against Children Unit-Child Exploitation Unit which conducts investigations involving internet crimes against children to include collection and distribution of child pornography. In Detective Burke's affidavit, she details the investigative methods which she employed which shows that as part of her investigation she used law enforcement undercover computer software to monitor file sharing networks for individuals possessing and or sharing files containing child pornography. She makes specific reference to the applicant's computer IP address and to the file sharing/downloading of files which contained child pornography which was the basis of an application for a subpoena. After further surveillance of the applicant's residence, a search warrant was prepared and executed, and several items were taken including a laptop computer and hard drives.
- [59] The learned Senior Magistrate was correct to have found that the offences with which the applicant had been charged were extradition crime/offences. The Senior Magistrate found that there was sufficient evidence to satisfy the requirements of section 14(1)(b) and (c) of the **Computer Misuse Act** and concluded that such evidence was sufficient to justify the applicant's committal to stand trial for these offences in Saint Lucia and therefore ordered that the applicant be surrendered to the requesting State, the United States of America. I can see no reason to disagree with her findings in this regard. Grounds (ii) and (iii) of the applicant's application therefore fail.

Constitutionality of Florida Statute Issue

Applicant's submissions

- [60] Mr. Fraser contends that the sections of the Florida Statute pursuant to which the applicant was charged are bad in law, unconstitutional and therefore non-existent. He relies on the case of **Stanley v Georgia** where the court found that the mere private possession of obscene matter cannot constitutionally be a crime.
- [61] The learned Senior Magistrate in her decision said at paragraph 20 that, in her view, matters involving determination of constitutional issues are not typically dealt with in courts of summary jurisdiction and that such considerations are best dealt with in the trial court. Mr. Fraser in response argues that the Magistrate was not being asked to interpret the Constitution of the United States of America but was being asked to have regard to what was the law of the requesting State.

Respondents' submissions

- [62] Mr. Williams for his part argues that alleged constitutionality of the Florida statute is a question of foreign law and there must be proof of such foreign law on expert evidence which the applicant has failed to produce. The respondents further contend that legal challenges in relation to the Florida Statute are not challenges which this Court can entertain. The applicant is not being prosecuted in Saint Lucia for the alleged offences under the Florida Statute to determine his guilt or innocence and therefore it is not for this Court to question affidavit evidence which is before it in relation to the veracity or not of the laws of Florida. They further submit that it is sufficient for this Court to find that the request for the execution of the Felony Warrant of Arrest is prima facie lawful and not unconstitutional.

Discussion

- [63] The case of **Stanley v Georgia** is said to have invalidated all state laws that forbade the private possession of materials judged to be obscene on the grounds

of the first and fourteenth amendments. It has also been said that the case established an implied right to pornography. However the right to privacy to pornography is not absolute. In the 1990 case of **Osborne v Ohio**¹⁸, the Supreme Court upheld a law which criminalised the mere possession of child pornography. In **Osborne**, the case of **Stanley v Georgia** was distinguished on the basis that in **Stanley** it was possession of pornography by adults; **Osborne** involved child pornography.

[64] I raise the above solely to illustrate the dangers of doing what Mr. Fraser suggests which is that this Court should accept **Stanley v Georgia** as representing the state of the law in the United States. That is a matter of foreign law and a matter which has to be proven by expert evidence.¹⁹ There was no evidence of foreign law by way of expert evidence and therefore the court cannot have regard to a simple statement of counsel of what he supposes the state of the law is in the United States as regards the offences with which the applicant has been charged.

[65] Clearly, the Senior Magistrate was correct that such an issue should be dealt with at the trial and not on extradition proceedings and that matters involving determination of constitutional issues are not typically dealt with in courts of summary jurisdiction. Unless it is clear that the charges would be a clear violation of the applicant's constitutional rights, the court ought not to entertain argument on the basis of a single case put forward by the applicant. This ground therefore fails.

Conclusion

[66] In **Dexter Chance**, the Court of Appeal stated that the power of a committal magistrate to commit a person to custody to await their return is dependent upon the magistrate being satisfied of three distinct factors. They are: (a) the offence to which the authority to proceed relates is a relevant offence; (2) the evidence

¹⁸ 495 U.S. 103 (1990).

¹⁹ Ronald Green et al v Maynard Joseph et al DOMHCVAP2012/0001.

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.

[67] I am of the view based on the foregoing discussion that all three factors identified in **Dexter Chance** have been satisfied. In the premises, the application for the issue of a writ of habeas corpus is refused with no order as to costs.

Kimberly Cenac-Phulgence
High Court Judge

By the Court

Registrar