JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 100/04

BEFORE: **THE HON. MR. JUSTICE HARRISON, P.**
THE HON. MR. JUSTICE SMITH, J.A.
THE HON. MRS. JUSTICE HARRIS, J.A. (AG.)

BETWEEN	**SHERVIN EMMANUEL**	**APPELLANT**
AND	**THE COMMISSIONER OF CORRECTIONAL SERVICES**	**1ST RESPONDENT**
AND	**DIRECTOR OF PUBLIC PROSECUTIONS**	**2ND RESPONDENT**

Frank Phipps, Q.C., Wentworth Charles & Miss Kathryn Phipps instructed by Wentworth Charles & Co., for the Appellant

Annaliesa Lindsay, Assistant Attorney-General & Carlene Larmond instructed by Director of State Proceedings for the first Respondent

Lisa Palmer, Ag. Dep. Director of Public Prosecutions & Tara Reid, Crown Counsel instructed by the Director of Public Prosecutions for the Crown

5th, 6th, 7th, 8th , 15th December 2005 & 8th March 2007

HARRISON, P.

This is an appeal from the decision of the full court of the Supreme Court on the 19th of October 2004 refusing the issue of habeas corpus for the discharge of the appellant from custody. We heard the arguments herein and

gave our oral judgment on 15th December 2005 affirming the decision of the full court. We promised to give our expanded reasons subsequently. We regret the delay in doing so. These now are our reasons.

On the 10th of April 2004 the Resident Magistrate for the Corporate Area Criminal Court issued a warrant of committal for the extradition of the appellant to stand trial in the United States of America.

The evidence reveals that the appellant was a member of a group of persons who unlawfully transported cocaine from South America to the United States of America through Jamaica and the Bahamas.

A grand jury indictment and warrant dated the 12th December 2002 issued out of the United States District Court Southern District of Florida. The appellant and others were charged with several offences. The offences read:

1. Conspiracy to import at least five (5) kilograms of mixture and substance containing cocaine in violation of Title 21, US Code Sections 952(a,) 960(b) (1)(B) and Title 18 US Code section 2 (Count 1);

2. Attempting to import into the U.S. from a place outside thereof at least five (5) kilograms of a mixture and substance containing cocaine, in violation of Title 21, US Code, Section 952 (b) (1)(B) and Title 18 US Code section 2 (Count 2);

3. Possession on a U.S. vessel with the intent to distribute at least five (5) kilograms of a mixture and substance containing cocaine, in violation of Title 46, US Code 1903 (A) and (g), Title 21, US Code Sections 960(b) (1) (B) and Title US Code, section 2 (Count 3);

4. Importation into the U.S. from a place outside thereof of at least five (5) kilograms of a mixture and substance containing cocaine, in violation of Title 21, US Code, Sections

952(a) and 960 (B)(1)(B) and Title 18 US Code, Section 2 (Count 4);

5. Importation into the United States from a place outside thereof of at least five (5) kilograms of a mixture and substance containing cocaine, in violation of Title 21, US Code, Sections 952(a) and 960 (B)(1)(B) and Title 18 US Code, Section 2 (Count 5).

An Extradition Treaty signed on the 14th of June 1983 relating to extraditable offences exists between Jamaica and the United States of America.

In a Diplomatic Note, addressed to the Ministry of Foreign Affairs and Trade, dated July 25, 2003, the United States Government requested the extradition of the appellant for trial in respect of the charges listed above.

The offences contained in the indictment dated the 12th of December 2002 are extraditable offences pursuant to section 5(1)(b) of the Extradition Act ("the Act") being offences:

(i) provided for by the treaty; and

(ii) are acts which would constitute offences against the laws of Jamaica if it took place in Jamaica.

Section 5(1) of the Extradition Act regulates the designation of extradition offences in matters arising as between Jamaica and other Commonwealth States (section 5(1)(a)) and as between Jamaica and "a treaty State" (section 5(1)(b)). The United States is one such "treaty State" by virtue of the said Extradition Treaty.

With regard to section 5(1)(b)(i), Article II(1) of the treaty correspondingly provides that an offence shall be extraditable if it is punishable

under the laws of both contracting states to the treaty by imprisonment or some other form of detention for a period exceeding one year or, by any greater punishment. Article II(2)(a) further states that the offences of conspiring attempting to commit, aiding or abetting, counseling or procuring the commission of any of the offences falling under Article II(1), shall also constitute extraditable offences under the Treaty.

On the 25th of August 2003 the Resident Magistrate for the Corporate Area issued his provisional warrant for the arrest of the appellant based on the information presented. In his opinion the appellant was accused of offences which corresponded with offences in the United States of America as required by section 9 (1) of the Act. The provisional warrant was executed on November 21, 2003 and the appellant taken into custody by Detective Corporal Brown of the Jamaica Constabulary Force. Subsequently, on February 4, 2004, the Minister of Justice issued his authority to proceed pursuant to section 8(1) of the Act thereby authorizing the Resident Magistrate to proceed with the appellant's committal hearing. Having reviewed the evidence filed by the American authorities in support of their extradition request, the learned Resident Magistrate issued a warrant of committal dated the 10th of April 2004, committing the appellant into custody to await his extradition to the United States.

On May 17, 2004, the appellant applied to the Supreme Court for a writ of habeas corpus. On October 19, 2004, the Full Court of the Supreme Court issued its decision rejecting the appellant's application.

Before us in the Court of Appeal the following grounds of appeal were argued:

"1. **Unfair hearing**
The structure of the case against the Applicant was the result of a grand jury indictment. Nowhere in the proceedings was it revealed to the appellant what evidence was presented to the grand jury. This non-disclosure resulted in unfairness to the appellant at every stage of the proceedings as he was deprived of the facilities for answering the charges against him.

The affidavits with evidence exhibited through Atkinson in proof of the allegations against the applicant are all dated after the grand jury indictment. This evidence could not have been the basis for the decision of the grand jury and in the circumstances the committal for extradition for trial on this indictment was illegal and unconstitutional.

2. **Inadmissible evidence**
The Full Court was in error when it found that the evidence of tape recorded telephone conversations were admissible at the committal proceedings. That there was no evidence before the Resident Magistrate of the alleged telephone conversation since neither the tapes, the transcript of the tapes, or the telephone records were ever tendered in evidence [see affidavits of Turnquest and Woodside at pages 86 and 123 respectively]

3. **Jurisdiction**
There was no evidence in the respective affidavits that was proof that the applicant was in any way involved in conduct referable to the jurisdiction of the courts of the United States of America. The evidence presented could only indicate that the applicant was a supplier of cocaine from Jamaica to the Bahamas without knowledge of any other ultimate destinations.

4. **Offences cognizable in Jamaica**

(a) The charges in counts 2, 3, 4, and 5 are for aiding and abetting based on activity allegedly committed in Jamaica and therefore not extraditable. [See Para. 15 of Atkinson's affidavit at page 24.] A charge of aiding and abetting is only justifiable (sic) in the jurisdiction where the act took place. This must be distinguished from a charge of conspiracy where the overt acts committed abroad are justifiable (sic) in the jurisdiction where they were intended to result in a crime.

(b) The offences as charged in the authority to proceed are not offences known to the laws of Jamaica. A charge of importing drugs into the USA is not cognizable in the Jamaican jurisdiction, as distinct from importing drugs into Jamaica.

5. **Identification**

No proper identification of the applicant as the person referred to in the relevant affidavits as wanted in the USA to answer charges in a grand jury indictment. There is no nexus between applicant and the photographs exhibited to the affidavits.

6. **Misdirection**

The Full Court misdirected itself on the facts in the case and drew conclusions not warranted by the evidence.

7. **ORDER SOUGHT**

That a Writ of Habeas Corpus should issue, directed to the Commissioner of Correctional Services, to have the body of **SHERVIN EMMANUEL** before the said Court at King Street, Kingston to undergo and receive all such matters as the Court shall consider concerning him, and BE DISCHARGED from the Custody of the Commissioner of Corrections."

It was argued in ground 1 that the hearing was unfair because of non-disclosure of the evidence presented to the grand jury. We find that non-disclosure as a general rule may create unfairness in a criminal trial. However, section 8(2) of the Act, circumscribed the ambit of the material to be supplied at the hearing for committal. It reads inter alia:

> "8. (2) There shall be furnished with any request made ... on behalf of any approved State –
>
> (a) in the case of a person accused of an offence, ...
>
> evidence sufficient to justify the issue of a warrant for his arrest under section 9."

and section 9 reads inter alia:

> "(1) A warrant for the arrest of a person accused of an extradition offence, or alleged to be unlawfully at large after conviction of such an offence, may be issued -
>
> (a) on the receipt of an authority to proceed, by a Magistrate, ..."

Section 8(2) therefore clarifies what documents should be furnished by the requesting State, namely -

> (1) In the case of a person accused of an offence, the warrant for his arrest issued in that State; together with
>
> (2) the particulars of the person whose extradition is being requested; as well as
>
> (3) the facts upon which and the law under which the person stands accused; and

> (4) the evidence sufficient to justify the issuing of a warrant for his arrest in Jamaica under section 9 of the Act.

These documents would subsequently provide the evidence on which the Resident Magistrate would deliberate in the committal hearing. Hence, section 10(5) provides that:

> "(5) 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 extradition of that person or on behalf of that person, that the offence to which the authority relates is an extradition offence and is further satisfied –
>
> > (a) where the person is accused of the offence, that the evidence would be sufficient to warrant his trial for that offence if the offence had been committed in Jamaica; ...
>
> the court of committal shall, unless his committal is prohibited by any other provision of this Act, commit him to custody to await his extradition under this Act..."

Section 14 describes the evidence relevant to such proceedings. It allows the document duly authenticated, which purports to set out testimony given on oath in an approved State to be admissible as evidence of the matters stated therein.

Section 14 of the Act reads:

> "**14.** – (1) In any proceedings under this Act, including proceedings on an application for *habeas corpus* in respect of a person in custody under this Act –
>
> (a) a document, duly authenticated, which purports to set out testimony given on oath in an

approved State shall be admissible as evidence of the matters stated therein;

(b) a document, duly authenticated, which purports to have been received in evidence, or to be a copy of a document so received in any proceedings in an approved State shall be admissible in evidence; and

...

shall be admissible as evidence of the conviction or evidence of the issuance of a warrant for the arrest of the accused, as the case may be, and of the other matters stated therein.

(2) A document shall be deemed to be duly authenticated for the purposes of this section –

(a) in the case of a document which purports to set out testimony given as referred to in subsection (1)(*a*), if the document purports to be certified by a judge, magistrate or officer of the Court in or of the approved State in question or an officer of the diplomatic or consular service of that State to be the original document containing or recording that testimony or a true copy of that original document;

(b) in the case of a document which purports to have been received in evidence as referred to in subsection (1) (*b*) or to be a copy of a document so received, if the document purports to be certified as aforesaid to have been, or to be a true copy of, a document which has been so received; or

...

> and in any such case the document is authenticated earlier by the oath of a witness or by the official seal of a Minister of the approved State in question."

There is no requirement in the Act or the treaty that the proceedings before the grand jury be disclosed at the committal hearing. Neither does this Court nor the examining magistrate have any jurisdiction to enforce any such production of the grand jury hearings in any event.

The case of ***Walter Gilbert Byles v The Director of Public Prosecutions and Director of Correctional Services*** (1997) 34 J.L.R. 471 aptly summarizes the legal position on this point. In ***Byles,*** Counsel for the appellant presented an argument similar to that advanced by Counsel for the appellant in the present case. She asserted that:

> "... the evidence against ***Byles*** was contained in affidavits subsequent in time to the indictment and therefore would not constitute the facts upon which ***Byles*** was accused."

Rattray, P., in delivering the judgment on behalf of the Court of Appeal issued the following response to that submission:

> "The Resident Magistrate's jurisdiction to hold committal proceedings arises out of the Minister's Authority to Proceed. She must embark upon the proceedings having received that authority. She cannot go behind the authority to determine whether it is properly issued. Her purpose in the committal proceedings was to determine whether there was sufficient evidence on which she could properly commit. This evidence is to be found in the affidavits and such viva voce evidence as was given before her at the hearing on behalf of the person in respect of whom the extradition is sought. ... The affidavits were

> forwarded in support of the request and the fact that they post-date the indictment does not invalidate the evidence in the affidavits which are in respect of incidents which predate the indictment and formed the subject matter of these accusations."

The documents therefore which would contain the "evidence tendered in support of the request for the extradition of that person" for the purposes of section 10(5) and in compliance with section 8(2), are to be found in the bundle of documents containing the affidavit of Karen Atkinson.

The affidavit of Karen Atkinson, an Assistant United States District Attorney for the District of Southern Florida dated the 12th of December 2003 with supporting documents, was certified by the Associate Director of the Department of Justice. Exhibited to the affidavit of Karen Atkinson relevant to the appellant were:

(i) the affidavit of Sgt. Tyrone Turnquest of the Royal Bahamas Police Force. He knew the voice of and knew the appellant by sight. He listened to telephone interception and he recognized the voice of the appellant as described in those conversations.

(ii) The affidavit of Sgt. Wayne Woodside of the same police force. He is the one who intercepted, with written authorization, the telephone conversations recorded in respect of the appellant. He identified the voice of the appellant and played it for Sgt. Turnquest who on listening to the voice conversation identified the voice of the appellant because it was acknowledged by those in the conversation, both by his name and his nickname "Blackboy".

(iii) The affidavit of Sgt. Tyrone Turnquest of the Royal Bahamas Police Force dated 18th December 2003.

The supplemental affidavit of Miss Atkinson dated 23rd January 2004 had attached to it, as an exhibit, the affidavit of Mr. Ian Musgrove. He was a convicted person having pleaded guilty to the offences contained in the same indictment and he was awaiting sentence. He had known the appellant for four years up to 2004. He identified the photograph of the appellant and he also heard and identified the appellant's voice in the tape recordings.

The Affidavit of Ian Musgrove, as Wolfe C.J. of the Full Court puts it, "contains unequivocal evidence which, if believed, makes it clear beyond reasonable doubt that the applicant had knowledge that the cocaine was being transported into the United States of America".

Section 10(1) of the Act requires that the Resident Magistrate conduct the committal hearing:

> "...as if he were sitting as an examining justice and as if that person were brought before him charged with an indictable offence committed within his jurisdiction"

Where the Magistrate sits "as an examining justice" in respect of a person charged with an indictable offence in this jurisdiction, his appraisal and treatment of the evidence before him would be guided by section 43 of the Justices of the Peace Jurisdiction Act. The section provides that the examining Justice may commit a person to stand trial in the Supreme Court where the evidence is:

> "...sufficient to put the accused party upon his trial for an indictable offence, or if the evidence given raised a

> strong presumption or probable presumption of the guilt of such an accused party..."

In essence then, he is not required to conduct an examination of the evidence as would be undertaken at the trial stage of the matter.

The standard for the assessment of the evidence in preliminary enquiries under section 43 of the Justices of the Peace Jurisdiction Act therefore translates into the standard applicable for the assessment of evidence placed before a Magistrate in a committal hearing under section 10 (1) of the Extradition Act.

Given the contents of Ian Musgrove's affidavit and the chain of identification arising out of that affidavit as well as the affidavits of Sergeants Woodside and Turnquest, filed in support of the extradition request, we find that the Resident Magistrate was entitled to determine that there was sufficient evidence on which he could properly commit the appellant and that the Full Court was correct in upholding that finding.

The affidavit of Miss Atkinson sworn to before a Chief United States Magistrate Judge, and dated 12th December 2003 was certified by one Lystra Blake, Associate Director of the Office of International Affairs in the United Sates Department of Justice. She said that though copies of the original document are maintained in the official file in the United States Department of Justice, in Washington D.C. , the original document which relates both to the affidavit and to the photograph was exhibited to the affidavit.

In her certification dated January 13, 2004, Miss Blake recited that attached was the original affidavit of Miss Atkinson along with the supporting

documents annexed thereto. Immediately following her mention of the "supporting documentation" annexed to Miss Atkinson's affidavit, Miss Blake goes on to certify that "true copies of the original documents are maintained in the official files of the United States Department of Justice in Washington D.C.". This asserts that the documents exhibited to Miss Atkinson's affidavit, were copies of the documents on file at the United States Department of Justice and the documents on file at the Department of Justice were in turn true copies of the original documents. Miss Blake is therefore certifying as a United States diplomatic official that the documents at the Department of Justice, at which she is an official, while they are not the original documents themselves, are true copies of those originals and may therefore be safely relied upon as authentic copies of the original documents. Reliance on these documents would therefore be more than reasonable because it follows that if copies are made of true copies of original documents, then those copies are themselves true copies of the originals. The result therefore is that the copies of the affidavits mentioned in and filed in support of Miss Atkinson's affidavit are true copies of the originals for the purposes of section 14 of the Extradition Act.

Miss Blake was herself certified in her capacity as Associate Director of the Office of International Affairs at the U.S. Department of Justice, by a certificate issued by the Attorney General of the United States. The said certificate bears the signature of the Attorney General and the seal of the U.S. Department of Justice. The Attorney General's certificate was in turn certified by a certificate,

issuing out of the U.S. Department of State, bearing the signature of the then Secretary of State and the seal of the Department of State.

The same process was repeated in respect of Miss Atkinson's supplemental affidavit sworn to before a United States Magistrate Judge and dated January 23, 2003 along with the affidavit of Ian Musgrove exhibited thereto.

The fact that the affidavit of Miss Atkinson post-dated the grand jury hearing, (see the ***Byles*** case, supra) is irrelevant. Section 8 determines specifically what must be produced to the Magistrate. The affidavit conforms with the statutory requirement.

The Full Court in our view was quite correct in accepting and acting on the evidence tendered before the examining Magistrate and therefore there is no merit in this ground.

Ground 2 complained that the tape recorded conversation attachment to Karen Atkinson's affidavit that was received in evidence was inadmissible.

There is a solid chain of identification created through the affidavits of Sergeant Woodside, Sergeant Turnquest and Ian Musgrove. Sergeant Woodside stated under oath that, with proper authorization, he personally intercepted and recorded various telephone conversations. These taped recordings were played by Sergeant Woodside to Sergeant Turnquest who had spoken with and interacted personally with the appellant on numerous occasions in the past. He was able to identify the appellant's voice and so he stated in his affidavit.

Sergeant Turnquest's affidavit evidence was admissible as identification evidence of the voices recorded on the tapes, as that of the appellant.

The taped recordings were also played to Ian Musgrove, a man who had known the appellant for four years prior to date of his affidavit. He stated in his affidavit not only that he recognized the appellant's voice in a number of the conversations, but that he also recognized the appellant's voice along with his own, in conversations he personally had with the appellant in the past. He stated in his affidavit:

> "8. During the period of July 29-July 31, 2002 I had a series of phone conversations with Shervin Emmanuel who was calling my phone in South Florida (305-610-4611). I have listened to recordings of these calls and identify my voice and Emmanuel's voice on the recording. In these conversations, Emmanuel asked me to bring or send money to him in Jamaica in order to cover transportation costs to move cocaine from Jamaica to the Bahamas.... In the calls Emmanuel said he wanted the money in U.S. currency. Emmanuel told me that they were coming tonight and he (Emmanuel) had to have everything in place. I knew that Emmanuel was asking for money to pay for transporters and supplies to get a large load of cocaine from Jamaica to the Bahamas. When Emmanuel discussed 'juice' for the entertainers, I knew he meant fuel for the boats to transport the cocaine. We did not use the words cocaine, boats or fuel but used code words instead."

This ground of appeal however, challenged the admissibility of the evidence contained in the aforementioned affidavits. The existence of the tapes was questioned because neither the actual tapes containing the recordings, nor transcripts of those recordings were ever placed before the Court at the

committal hearing. This attack is especially aimed at the affidavits of Sergeants Woodside and Turnquest.

Sergeant Woodside affirmed his affidavit evidence before a United States Magistrate Judge. Attached to that affidavit and marked as 'Government Exhibit C', was the written authorization issued under the hand of the Bahamian Commissioner of Police, after consultation with the Honourable Attorney General of the Bahamas, permitting the Drug Enforcement Unit, in which Sergeant Woodside served as an officer, to employ listening devices "to be used to enable the conduct of an investigation by the Officer–in-charge of the Drug Unit and any subordinate officers into the commission of illegal drug trafficking crimes." Sgt. Wayne Woodside stated in his affidavit that he was personally involved in the interception and recording of the said telephone calls. Sergeant Turnquest likewise declared in his affidavit that the said taped recordings were played in his presence.

As we noted in our determinations under Ground 1, we find these affidavits of the voice identification to have been duly authenticated and therefore admissible in accordance with section 14 of the Act. The trial court in the United States may, if it wishes, refer to the original taping at the trial. In that respect therefore, the Full Court was also correct in upholding the admissibility of the aforementioned affidavits. This ground also fails.

Grounds 3 and 4(a) complain of lack of jurisdiction in the Jamaican courts in a matter in which the appellant, charged with aiding and abetting which

presupposes that he was present aiding and abetting, in circumstances where there is no evidence that he was ever in the United States of America. We admit that the classic example of aiding and abetting requires the presence of the offender who is alleged to be aiding and abetting. In extradition offences however, by definition, aiding and abetting contemplates extraterritorial activity and therefore the traditional meaning of aiding and abetting is rightly extended.

Ian Musgrove was charged along with the appellant and several other persons in the said December 12, 2002 indictment. By the time he deponed to his affidavit, dated January 23, 2004, he had already pleaded guilty to the charges leveled against him in the indictment and was merely awaiting sentencing. In his affidavit, he deponed to the appellant's alleged involvement in unlawful drug trafficking activities in which he himself was also a participant. Relevant portions of his affidavit are reproduced below:

> "1. I am a naturalized citizen of the United States. I was born on October 16, 1996 in Freeport Bahamas.
>
> 2. I was arrested on December 16, 2002, in Puerto Rico for the charges in the indictment 02-80192-CR-HURLEY/VITUNAC(s). I plead guilty to counts I, VI and VII of the indictment and am awaiting sentencing. I have the nickname of 'Music Man'.
>
> 3. I have known Shervin Emmanuel for approximately four years. I have talked to him on the telephone on numerous occasions and spoken to him in person over the years. Attached to this Affidavit is a photograph of the individual I know as Shervin Emmanuel. (Att. A)
>
> 4. I have lived in the South Florida area for over twelve years.

5. I became acquainted with Shervin Emmanuel and Nat Knowles through my music business. I came to know Austin Knowles and I know that Shervin Emmanuel is Austin Knowles' brother-in-law. I know that Shervin Emmanuel is a boat captain.

...

8. During the period of July 29-July 31, 2002 I had a series of phone conversations with Shervin Emmanuel who was calling my phone in South Florida (305-610-4611). I have listened to recordings of these calls and identify my voice and Emmanuel's voice on the recording. In these conversations, Emmanuel asked me to bring or send money to him in Jamaica in order to cover transportation costs to move cocaine from Jamaica to the Bahamas. He said he needed the money to pay for the shipment from down South which I knew, based on my previous experiences with Emmanuel, meant cocaine from Columbia. He talked about needing 'juice' and 'stands' for the concert. We discussed that I should have around $65,000 from the sale of the marijuana to bring to him. He said he needed the 'juice' for the entertainers who were coming up and more 'juice' for when they were going back. In the calls Emmanuel said he wanted the money in U.S. currency. Emmanuel told me that they were coming tonight and he (Emmanuel) had to have everything in place. I knew that Emmanuel was asking for money to pay for transporters and supplies to get a large load of cocaine from Jamaica to the Bahamas. When Emmanuel discussed 'juice' for the entertainers, I knew he meant fuel for the boats to transport the cocaine. We did not use the words cocaine, boats or fuel but used code words instead.

...

10. On July 31, 2002 while leaving the United States for Jamaica I was stopped and U.S. authorities found the money I had hidden in my suitcase to take to Shervin Emmanuel to pay to transport the cocaine. The total was approximately $61,800. I was allowed to continue my trip. When I got to Jamaica, I saw Shervin Emmanuel and showed him the documents

> regarding the seizure of the money in the United States.
>
> ...
>
> 11A. In late October 2002, I became aware that another load was being brought over to South Florida by the Knowles organization. I was to make sure it was delivered to the owners and sell Knowles' part of the load and send the money to the Bahamas. I received a telephone call from Shervin Emmanuel prior to picking up the cocaine. He told me to deliver one of the boxes of cocaine to an individual known as 'Dozier' who lived in the South Florida area. Emmanuel gave me a Florida telephone number to reach this individual. I picked up two boxes of cocaine from Marlon Hepburn around October 31, 2002 in the Broward or Dade County area. One box contained approximately forty (40) kilos of cocaine I was to sell for Austin Knowles' organization. The other box contained between 38-40 kilos of cocaine. I delivered this box of cocaine to 'Dozier' in South Florida pursuant to instructions from Shervin Emmanuel. Marlon Hepburn kept some of the cocaine to sell and pay for some of the transportation of the cocaine. The remaining cocaine was delivered to the owners." (Emphasis added)

As previously noted, the Resident Magistrate before whom this evidence was placed, had only to be satisfied that that evidence was sufficient to raise a strong or probable presumption of the appellant's guilt – (Section 43 of the Justices of the Peace Jurisdiction Act.) The contents of Mr. Musgrove's affidavit, particularly paragraph 11A, provided highly persuasive evidence that the appellant was indeed aware that the cocaine transported between Jamaica and the Bahamas, was ultimately destined for the United States. Cocaine was delivered in South Florida, USA on the instructions of the appellant and money $61,800 was

intercepted when being brought by Musgrove from the USA to the appellant in Jamaica.

In support of this submission Counsel for the appellant cited the following reference from ***Archbold Pleading, Evidence and Practice in Criminal Cases*** (43rd edition) paragraph 29-4 at page 2695, which states as follows:

> "Presence, in this sense may be either *actual or constructive.* It is not necessary that the party should be actually present, an eye-witness or ear-witness of the transaction: he is, in construction of law, present, aiding and abetting, if, with the intention of giving assistance, he is near enough to afford it, should occasion arise ... But he must be near enough to give assistance: ***R v Stewart*** (1818) R. & R. 363: and the mere circumstance of a party going towards a place where an offence was to be committed, in order to assist to carry off the property, and assisting in carrying it off, would not make him an aider and abettor, unless, at the time of the taking, he is within such a distance as to be *able* to assist in it: ***R v Kelly*** (1820) R. & R. 421; 1 Russ. Cr., 12th ed., p. 140."

This ground sought to draw a line of distinction between the circumstances leading to the approach adopted by the Privy Council in ***Liangsiriprasert v United States Government and another*** [1990] 2 All E.R. 866 and the facts of the present case, with regard to the treatment of offences the acts of which were performed outside of the physical territory of the State requesting extradition. In that case, the Privy Council determined that a conspiracy, hatched outside of the United States of America and of which the appellant was a part, to import illegal drugs into the United States from Thailand through Hong Kong,

was justiciable in the United States owing to the fact that the conspiracy was to have effect ultimately in the United States.

Counsel for Mr. Emmanuel sought to distinguish the facts of ***Liangsiriprasert*** (*supra*) from those in the present case by asserting that ***Liangsiriprasert*** was concerned with a conspiracy which would ultimately have culminated inside the United States, while the present matter dealt with aiding and abetting the relevant acts of which were committed outside of the United States. Although the results would have manifested themselves within the territorial limits of that country, nevertheless, the traditional formulation of aiding and abetting contemplates presence in proximity to the locus of the unlawful acts allegedly aided and abetted, as an important ingredient in securing a valid grounding of the charge. That being so, the justiciability of aiding and abetting is confined to the jurisdiction of the State within whose territory the alleged acts giving rise to the relevant charges of aiding and abetting transpired.

In our view, while ***Liangsiriprasert*** (*supra*) is certainly factually distinguishable from the present case, nevertheless both are reconcilable. The ratio contained in ***Liangsiriprasert*** demands a broader application of the principle in extradition cases. It mandates that a more expansive approach be adopted regarding the definition of the principles involved in offences arising out of extradition matters in order that the common law might be better able to effectively resolve the undeniable challenges posed by the nature and dimensions of cross-jurisdictional crime. Lord Griffith in delivering the decision

on behalf of the Court in ***Liangsiriprasert v. United States Government and another*** (supra) at pages 872 -873 and page 878 states the reasoning behind the approach taken:

> "As a broad general statement it is true to say that English criminal law is local in its effect and that the common law does not concern itself with crimes committed abroad. The reason for this is obvious: the criminal law is developed to protect English society and not that of other nationals, who must be left to make and enforce such laws as they see fit to protect their own societies.... It was for this reason that the law of extradition was introduced between civilised nations so that fugitive offenders might be returned for trial in the country against whose laws they had offended.
>
> ...
>
> Unfortunately in this century crime has ceased to be largely local in origin and effect. Crime is now established on an international scale and the common law must face this new reality. Their Lordships can find nothing in precedent, comity or good sense that should inhibit the common law from regarding as justiciable in England inchoate crimes committed abroad which are intended to result in the commission of criminal offences in England. Accordingly, a conspiracy entered into in Thailand with the intention of committing the criminal offence of trafficking in drugs in Hong Kong is justiciable in Hong Kong even if no overt act pursuant to the conspiracy has yet occurred in Hong Kong. " (Emphasis added)

The same approach was likewise employed by the House of Lords in ***Re: Al-Fawaaz, Re: Eiderous and another*** [2002] 1 All ER 545. In that case the Court was, like the Privy Council in ***Liangsiriprasert*** (*supra*), faced with a conspiracy, on facts which were quite distinguishable from those in ***Liangsiriprasert***. Firstly, the appellant was charged with a conspiracy to

murder and secondly, the conspiracy was slated to be executed against U.S. nationals located in various countries around the world *not* including the United States of America. Thus, unlike the circumstances in ***Liangsiriprasert,*** the relevant conspiracy was never intended to have eventually culminated inside of the United States itself. Counsel for ***Al-Fawaaz*** therefore, attempted to fetter the justiciability of the conspiracy by binding it to the concept of territorial jurisdiction. He asserted that as neither the birthplace nor the intended situs for the execution of the conspiracy were within the physical confines of the United States, the conspiracy could not be classified as an "extradition crime" for the purposes of the English Extradition Act, 1870.

The Extradition Treaty between the United States and Great Britain provided that an offence was to be extraditable under the Treaty once it qualified as an extradition crime under the laws of England. In order to determine whether an offence so qualified, reference ultimately had to be made to the 1870 Act which defines an "extradition crime" as "a crime which if committed in England or within English jurisdiction would be one of the crimes described in the first schedule" to the Act. Giving a narrow construction to the phrase "within English jurisdiction" Counsel argued that the phrase exclusively pertained to the physical jurisdiction of England.

Noteworthy is the reasoning behind the approach adopted by the House of Lords in resolving the issue. Lord Slynn in his Judgment in ***Re: Al-Fawaaz, Re: Eiderous and another***, (supra) at page 555 explains that:

> "When the 1870 Act was passed crimes were no doubt largely committed in the territory of the state trying the alleged criminal but that fact does not, and should not, mean that the reference to the jurisdiction is to be so limited. It does not as a matter of the ordinary meaning of the words used. It should not because in present conditions it would make it impossible to extradite for some of the most serious crimes now committed globally or at any rate across frontiers. Drug smuggling, money laundering, the abduction of children, acts of terrorism, would to a considerable extent be excluded from the extradition process. It is essential that that process should be available to them. To ignore modern methods of communication and travel as aids to criminal activities is unreal. It is no less unreal to ignore the fact that there are now many crimes where states assert extra-territorial jurisdiction, often as a result of international conventions."

As a result, by giving a purposive interpretation to the provisions of the Extradition Act and thereby, the Treaty, the House of Lords resolved that the relevant instances of conspiracy were not confined by the territorial limitations proposed by counsel.

Thus, in both cases, each with quite different fact patterns, the ultimate result was the same - the meaning of conspiracy, within the context of its perceived perimeters of operation, was extended so as to accommodate the unique features and challenges posed by crimes which span multiple jurisdictions, as well as the purpose behind the various extradition treaties and statutes created to combat the sort of criminal activity which traverses numerous territories. The rationale in this approach to extradition treaties and cases was

also summarized by Lord Bridge of Harwick in ***Reg. v. Governor of Ashford, Ex p. Postlewaite*** [1988] A.C. 924 at p. 946:

> "In approaching the main issue two important principles are to be borne in mind. The first is expressed in the well known dictum of Lord Russell of Killowen C.J. in ***In re Arton*** *(No. 2)* [1896] 1 Q.B. 517 where he said:
>
> > 'In my judgment these treaties ought to receive a liberal interpretation, which means no more than that they should receive their true construction according to their language, object, and intent.'
>
> I also take the judgment in that case as a good authority for the proposition that in the application of the principle the court should not, unless constrained by the language used, interpret any extradition treaty in a way which would hinder the working and narrow the operation of the most salutary of international arrangements. The second principle is that an extradition treaty is a contract between two sovereign states and has to be construed as such a contract. It would be a mistake to think that it had to be construed as though it were a domestic statute: ***Reg. v Governor of Ashford Remand Centre Ex Parte Beese*** [1973] 1 W.L.R. 969 at 973, per Lord Widgery C.J. In applying this second principle closely related as it is to the first, it must be remembered that the reciprocal rights and obligations, which the high contracting parties confer and accept are intended to serve the purpose of bringing to justice those who are guilty of grave crimes committed in either of the contracting states. To apply to extradition treaties the strict canons appropriate to the construction of domestic legislation would often tend to defeat rather than to serve this purpose."

It therefore follows that while we admit that the classic example of aiding and abetting presupposes presence as a component element in establishing a

charge of aiding and abetting, nevertheless, applying the same spirit behind the reasoning employed in ***Liangsiriprasert*** (*supra*) and ***Re: Al-Fawaaz*** (*supra*) we find that the perimeters of aiding and abetting are rightly extended in the context of extradition cases. This expansive approach has regard to the unique features and dimensions of inter-jurisdictional offences as well as the purpose behind the extradition treaty between the United States and Jamaica, namely "to serve the purpose of bringing to justice those who are guilty of grave crimes committed in either of the contracting states".

Consequently, it is our view that the alleged acts of aiding and abetting of which the appellant in this case stands accused, formed part of a chain of events which culminated within the United States. As such the relevant acts of aiding and abetting, charged in Counts 2, 3, 4 and 5 of the U.S. indictment dated December 12, 2002 are within the juridical jurisdiction of the United States of America.

The Full Court followed the dictum in the case of ***Al Fawaaz*** (supra) and took the view that when the Extradition Act was passed in 1870 it really did not recognize the sense of the technological advances, but, because of international convention, that restricted meaning should no longer be followed. Treaties involved in extradition matters should be given a wide functional interpretation. We are of the view that aiding and abetting committed by the appellant had its effect in the United States of America and therefore provided a link in the chain

of the activity in respect of the persons accused in this indictment. This ground also fails.

In Ground 4(b) it was argued that the offences as charged and the authority to proceed were not known, in that the Minister failed to identify the corresponding offences in terms recognizable by the appellant in Jamaica.

Section 8 of the Extradition Act recites the Minister's authority to proceed. Subsection (1) states that with the exception of the issuing of provisional warrants under section 9(1)(b) of the Act, no person is to be dealt with under the Act "except in pursuance of an order of the Minister (in this Act referred to as 'authority to proceed')". Section 8(2) as previously noted, details the documents which are to be filed by a State in support of an extradition request and subsection (3) concludes the section by providing that:

> "On the receipt of such a request the Minister may issue an authority to proceed, unless it appears to him that an order for the extradition of the person concerned could not lawfully be made, or would not in fact be made, in accordance with the provisions of this Act."

Nowhere in this section or under any other provision in the Act is the Minister required in his authority to proceed, to translate offences framed in terms of foreign law in a requesting State's indictment, in terms of Jamaican law.

The Extradition Act authorizes a Resident Magistrate to issue two types of arrest warrants under section 9, a warrant of arrest where he has already received the Minister's authority to proceed - Section 9(1)(a) and a provisional

warrant, which is an arrest warrant issued in the absence of an authority to proceed – section 9(1)(b). Section 9(2) then goes on to state the pre-condition for the issuing of *both* types of warrants under section 9(1). It provides that:

> "(2) A warrant of arrest under this section may be issued upon such information as would, in the opinion of the magistrate, authorize the issue of a warrant for the arrest of a person accused of committing a corresponding offence or, as the case may be, of a person alleged to be unlawfully at large after conviction of an offence, within the jurisdiction of the Magistrate."

It therefore becomes apparent that even in instances where the Minister has already issued his authority to proceed, it is up to the Resident Magistrate before a warrant is issued under section 9(1)(a), to determine whether that warrant can be properly issued at all. In order to do so *he* must determine whether, "in his opinion", the offences charged in the foreign indictment are translatable into "corresponding offences" under Jamaican law. The same procedure applies in respect of a provisional warrant under section 9(1)(b), as was issued in the present case.

In issuing the provisional warrant of arrest on August 23, 2003 therefore, the Resident Magistrate declared that:

> "...information has been presented to me which would, in my opinion, authorize the issue of a warrant for the arrest of a person accused of committing a corresponding offence within my jurisdiction..."

In his February 4, 2004 authority to proceed, addressed to the Resident Magistrate, the Minister charged the Magistrate as follows:

> "NOW I HEREBY, by this Order under my hand and seal, signify to you that such request has been made, and require you to proceed with the Provisional Warrant of Arrest of such fugitive, provided that the conditions of the Extradition Act, 1991 relating to the issue of such Warrant, are in your judgment complied with, AND THEREAFTER to proceed in accordance with the provisions."

It is therefore the Resident Magistrate's duty to verify the existence of corresponding offences under Jamaican law and he stated in the body of the provisional warrant issued under his hand on August 23, 2003, that he was so satisfied. In those circumstances the Minister's authority to proceed was perfectly valid. We therefore find that there was no merit in this ground.

In ground 5 the argument was that there was no proper identification or nexus between the appellant and the photograph exhibited in the affidavit. He appellant was taken into custody by Det. Cpl. Brown on 21st November 2003. In Det. Brown's affidavit dated the 21st of November 2003 he said that he had a photograph of the appellant; he also had a provisional warrant issued by the Resident Magistrate. The provisional warrant would have recited the United States charges. The photograph that Det. Brown had was that of the appellant. Det. Brown asked the appellant if that was his photograph and he said "yes". He then read the warrant to him and the appellant made the comment "well is your duty". In addition, we find that the affidavit of Ian Musgrove stated that he knew the appellant. He identified him by name and photograph. There was a

clear and proper nexus between the appellant and the photograph exhibited. In that respect we also find that there is no merit in the ground as argued.

Ground 6 complained that the Full Court misdirected itself on the law and the facts and drew conclusions not warranted by the evidence. The findings that aiding and abetting in counts 2 to 5 were offences extraditable to the United States were wrong. Because of the reasons we had given above we do not find any merit in that argument.

It was also complained that the Full Court by the use of the term "residing in the United States", referring to the appellant, came to a conclusion that was not supported by the evidence. However, as we said before during the arguments before us, that the term "residing in the United States" did not go to the root of the matter to be enquired into by the Resident Magistrate. In that regard it did no violence whatsoever to his order to extradite.

The final ground was ground 7, the constitutional point. Leave was sought to argue the point that the Extradition Act was unconstitutional. The Act was in contravention of section 16 of the Jamaica Constitution, in that the Act sought to amend section 16 which conferred a fundamental right which can only be altered by sections 49 and 50 of the said Constitution.

We did not agree. Section 16 expressly permitted the Jamaican Parliament to make an exception to the guaranteed freedom of movement, if he is lawfully detained (Section 16(2)), or a law provides for his removal from Jamaica ... "to be tried outside Jamaica for a criminal offence..." (Section 16(3)).

The Extradition Act is such a "law." We refused leave to allow any argument in respect of ground 7, for the above reason and also because of the prohibition contained in section 63(1) and (2) of the Criminal Justice (Administration) Act – See ***Vivian Blake v The D.P.P. et al*** SCCA 107/96 dated 27th July 1998. This point was also dealt with in ***Trevor Forbes v The D.P.P.*** SCMA 9/04 dated 3rd November 2005.

For the above reasons, we dismissed the appeal. The order of the Full Court was affirmed and the application for habeas corpus was accordingly refused.

SMITH, J.A.

I agree.

HARRIS, J.A.

I agree.

HARRISON, P.

ORDER

The appeal is dismissed. The order of the Full Court is affirmed and the application for habeas corpus refused.