JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL 48/2001

BEFORE : **THE HON. MR. JUSTICE FORTE, P.**
THE HON. MR. JUSTICE PANTON, J.A.
THE HON. MR. JUSTICE SMITH, J.A.

BETWEEN:	**DAVE ANTONIO GRANT**	**APPELLANT**
AND	**THE DIRECTOR OF CORRECTIONAL SERVICES**	
AND	**THE DIRECTOR OF PUBLIC PROSECUTIONS**	**RESPONDENTS**

Mrs. Jacqueline Samuels-Brown and Ms. Thalia Maragh for the appellant

Ms. Katherine Francis instructed by the Director of State Proceedings, for the Director of Correctional Services

Mrs. Georgianna Fraser for the Director of Public Prosecutions

May 6, 7, 8; July 22, 31, and November 7, 2002

PANTON, J.A.

1. The appellant, a Jamaican, is a self-confessed fugitive from American justice. In 1985, or thereabouts, he went to Canada to work and study. According to him, he had a difficult time in achieving his goal so he went to the United States of America. He fared no better, it seems, so far as achieving his stated goals was concerned because, for reasons which have not been expressed in these proceedings, he became involved in illegal drug-related activities and

was apprehended on January 11, 1998, by officers of the Houston Police Department and the Drug Enforcement Administration in Houston, Texas. On February 9, 1998, a federal grand jury sitting in the Southern District of Texas returned and filed an indictment against him charging him with possession with intent to distribute a controlled substance (marijuana) in violation of Title 21 of the United States Code. On April 14, 1998, he pleaded guilty as charged before a United States District Judge. Sentencing was postponed until July 10, 1998. The appellant failed to appear for sentencing. Instead, he fled to his homeland. According to him, he returned home as he "did not trust the justice of the United States system".

2. On August 18, 2000, the appellant received a visit from the Jamaican police. He was at his gate when he was arrested and taken to the Central Police Station. Subsequently, His Honour Mr. Ralston Williams, Resident Magistrate for the Corporate Area presided over proceedings which sought the extradition of the appellant to the United States for the purpose of the completion of the case in which he had entered the plea of guilty. On November 9, 2000, the Resident Magistrate committed him to custody to await extradition to the United States of America.

3. On November 23, 2000, the appellant filed a notice of motion in which he sought an order for the issue of a writ of habeas corpus in order to secure his release from custody. The Full Court heard the motion and dismissed it.

4. Before us, the appellant now seeks a reversal of the judgment of the Full Court (Wolfe, C.J., Granville James and Karl Harrison, JJ). There are four grounds of appeal. They complain that the Full Court erred in holding as follows:

Firstly, that the appellant was an accused person for the purposes of the request for extradition.

Secondly, that the warrant for the arrest of the appellant was in proper form and was for his arrest for the offence in relation to which his extradition was requested.

Thirdly, that the offence for which the appellant's extradition was requested was an offence under Jamaican law and that the substance in relation to which his extradition is sought is prohibited by the laws of Jamaica.

Fourthly, that the committal warrant is lawful and procedurally correct.

Is the appellant an accused person?

5. Mrs. Samuels-Brown submitted that the requesting State has not strictly complied with the requirements of the Extradition Act in that it has not been stated whether the appellant's extradition is sought on the basis that he is an accused or convicted person. In her view, that failure is fatal to the request.

In her skeleton arguments, she referred to four cases in which she said that extradition requests had been refused due to the failure of the requesting State to strictly comply with the requirements of the law even where it was plain that some crime had been committed. The cases are **R. v. Governor of Brixton Prison ex parte Lennon** [1963] Crim.L.R. 41 (no prima facie evidence to

support the alledged extradition offence); **R. v. Governor of Brixton Prison ex parte Otchere** [1963] Crim.L.R. 43 (difference between the date of offence stated in the request and that disclosed in the evidence); **Byles v. DPP and Director of Correctional Services** (unreported Supreme Court Civil Appeal No.44/96) delivered October 13, 1997) (indictment number in affidavit different from that on the indictment received); **R. v. Director of Prisons et al. ex parte Morally** [1975] 14 J.L.R.1 (insufficiency of facts submitted by the requesting State).

6. These cases clearly show that the requesting state had failed in each case to present evidence which met the required standard of proof. That scenario is markedly different from that which obtains in the instant case. Section 8 (2) of the Extradition Act states:

> "There shall be furnished with any request made for the purposes of this section by or on behalf of any approved State-
>
> (a) in the case of a person accused of an offence, a warrant for his arrest issued in that State; or
>
> (b) in the case of a person unlawfully at large after conviction of an offence, a certificate of the conviction and sentence in that State and a statement of the part, if any, of that sentence which has been served,
>
> together with, in each case, the particulars of the person whose extradition is requested, and of the facts upon which and the law under which he is accused or was convicted, and evidence sufficient to justify the issue of a warrant for his arrest under section 9".

The learned Chief Justice in his judgment said:

> "A man who pleads guilty to an offence and is admitted to bail and absconds prior to being sentenced remains an accused person until he is sentenced".

It is not possible, it seems, to detect any flaw in that statement. There are only two categories of persons recognized by the Act- those accused and those convicted. The appellant does not fall in the latter category as he had not been sentenced prior to his flight from American justice. He clearly remains in the first category until sentenced. The Extradition Act is the only authority that is needed for the articulation of that legal position. It is somewhat surprising that an argument could have been mounted to the contrary.

The warrant

7. When the appellant failed to appear on July 10, 1998, District Judge Nancy Atlas signed an order for his arrest for "violating a condition of his release", he having been on a bond pending sentence. On July 14, 1998, in keeping with the order, the Clerk of the District Court issued a warrant to the United States Marshal and any Authorized United States Officer for the arrest of the appellant with the command that he was to be taken on arrest forthwith to the nearest magistrate to answer the charge of violating the condition of his release. There was to be no bail. It may be apt to note that the United States District Court proceeded in the same manner that any criminal court in Jamaica would have proceeded in similar circumstances. Certified copies of the District Judge's order, the warrant for arrest and the indictment filed by the Grand Jury

were duly furnished by the requesting State to the relevant authority in this country.

8. Mrs. Samuels-Brown submitted that the requesting State has not furnished the warrant of arrest for the offence with which the appellant is charged. That being the case, she said, there is a deficiency which ought to result in the release of the appellant.

In assessing the merits of this submission, it should be recalled that the appellant was caught red-handed, according to the allegations, and that thereafter the matter was inquired into by the Grand Jury which filed an indictment against him. The indictment has been furnished. There is in respect of the appellant no warrant other than that for the violation of the terms of his bond while on bail.

9. The Extradition Act, section 8 (2), as quoted above, requires the furnishing of the following: "a warrant for his arrest issued in that State" (the requesting State), "the particulars of the person whose extradition is requested, and of the facts upon which and the law under which he is accused", and "evidence to justify the issue of a warrant for his arrest under section 9". These requirements having been fully met by the requesting State, it cannot be said that there is any merit whatsoever in this ground of appeal.

10. **Is the offence for which the appellant's extradition is sought an offence under Jamaican law?**

Section 5(1)(b) of the Extradition Act provides that, in circumstances such as in the instant case, an offence is an extradition offence if it is an offence

which is provided for by the extradition treaty (with the United States of America), and the act constituting the offence or the equivalent act would constitute an offence against the law of Jamaica if it took place within Jamaica.

11. Mrs. Samuels-Brown submitted that in the instant case the offence charged is possession with intent to distribute "marijuana". However, in the United States of America, the definition of marijuana is more inclusive than the definition of "ganja" under the Jamaican law. Marijuana in the United States of America includes the plant from which the resin has been extracted, whereas possession of the same in Jamaica would not be an offence. No evidence has been led, she said, to suggest that the drug is ganja as defined in Jamaican law.

Mrs. Fraser, on the other hand, submitted that ganja is the same as marijuana, and that the vegetable matter had been the subject of chemical analysis which confirmed that it was marijuana. She placed reliance on the case **Byles v. DPP and the Director of Correctional Services** (SCCA No. 44/96- judgment delivered on October 13, 1997).

12. In the **Byles** case (supra), Rattray, P., in delivering the judgment of the Court, in a similar extradition matter, posed the question: "Was there evidence upon which the committing magistrate could find, contrary to Mr. Ramsay's further submission, that the substance alleged to be marijuana was the same as ganja under the Jamaican Criminal law?" He then proceeded to quote the definitions of ganja and marijuana in the Jamaican and American laws respectively. The definitions are as follows:

> " 'Ganja' includes all parts of the plant known as cannabis sativa from which the resin has not been extracted and includes any resin obtained from that plant, but does not include medicinal preparations made from that plant;.."
>
> "Marijuana means all parts of the plant cannabis sativa, whether growing or not; the seeds, thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture or preparation of such plant, its seed or resin..."

Rattray, P. continued:

> "The definition in the Jamaican statute - "ganja" is not exhaustive of what ganja "is" or "means".

He expressed the view that the definitions were of assistance in determining the nature of marijuana as being ganja.

> "Particularly is this so ", he said, "when the definition of ganja is one which "includes" and is therefore in my view not exhaustive".

In that case, the conclusion was that the ground of appeal was without merit.

13. It should be pointed out however that in **Byles'** case there was not only the green plant material but also marijuana oil as well as a greenish brown solid substance which the chemist found to be cannabis resin.

14. In the instant case, we observed that the chemist had identified the plant as cannabis sativa but had not stated whether the resin had been extracted or not. We thought that the interests of justice would best be served by having a clarification from the chemist as to whether the resin had been extracted or not from the plant that he had identified. This clarification did not require any further

examination from the chemist so it was not a situation in which we were allowing the requesting State to do over the examination and to produce fresh evidence as a result of that new examination.

15. As stated earlier, in this country, "ganja" includes all parts of the plant cannabis sativa from which the resin has not been extracted whereas "marijuana" in the United States of America means all parts of the plant cannabis sativa, whether the resin has been extracted or not. The analyst's certificate in the instant case was quite clear in its identification of the plant which the appellant has admitted that he was in possession of. In our view, the interests of justice cried out for us to seek clarification from the analyst, through the requesting State, as to whether the resin had been extracted or not from the cannabis sativa.

16. Mrs. Samuels-Brown submitted that any such clarification would be fresh evidence, and so she raised an objection which we rejected. As it has turned out, the analyst has stated that at the time he examined the plant it contained resin: some or all of the resin had not been extracted. There is no doubt that this clarification has resulted in the filling of a lacuna in the case presented by the requesting State. The failure to deal with this lacuna would have, on the face of it, entitled the appellant to the writ that he seeks. However, that would have subjected him to re-arrest and a repetition of the extradiction and habeas corpus proceedings. Judicial time should not be wasted in such a manner.

17. The question of the filling of a gap in habeas corpus proceedings is not something that is forbidden. It is not something that has not exercised judicial minds. Indeed, in the case **Schtraks v. Government of Israel** (1962) 3 All ER 529 at 550 F-G, Lord Hodson said:

> "The appellant also relies on certain cases wherein the Crown has been allowed to cure a technicality or fill a lacuna which, while it remained uncorrected or unfilled, would prima facie give the prisoner a right to the writ although it would avail him little since he could be re-arrested and the technicality corrected or the gap in the prosecution's case filled without difficulty. Examples of such cases are **R. v. Governor of Brixton Prison, Ex p. Percival** [1907]1 K.B. 696, **R. v. Governor of Brixton Prison, Ex. p. Servini** [1914] 1 K.B. 77. and **Re Shuter** [1959] 2 All E.R. 782. These decisions are, I think, justified on the basis that habeas corpus is not granted on a mere technicality."

In the circumstances of this case, we see no injustice or undue prejudice being caused to the appellant in a situation in which the plant has already been identified by the analyst as cannabis sativa.

18. The appellant having failed on all the grounds of appeal filed, the appeal was dismissed on the 31st. July at which time we had promised to put our reasons in writing.

FORTE, P:

I agree.

SMITH, J.A.

I agree.