JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEALS NOS: 62,63,64,65,66,67/2007

BEFORE: THE HON. MR. JUSTICE PANTON, P.
THE HON. MR. JUSTICE COOKE, J.A.
THE HON. MR. JUSTICE MORRISON, J.A.

BETWEEN	**HERBERT HENRY**	**1ST APPELLANT**
	ROBROY WILLIAMS	**2ND APPELLANT**
	GLENFORD WILLIAMS	**3RD APPELLANT**
	LUIS MIGUEL AVILA ARIAS	**4TH APPELLANT**
	NORRIS NEMBHARD	**5TH APPELLANT**
	VIVIAN DALLY	**6TH APPELLANT**
A N D	**THE COMMISSIONER OF CORRECTIONS**	**1ST RESPONDENT**
	THE DIRECTOR OF PUBLIC PROSECUTIONS	**2ND RESPONDENT**

Patrick Bailey and Valerie Neita-Robertson instructed by **Patrick Bailey & Co.** for Herbert Henry

K.D. Knight, Q.C., Norma Linton, Q.C., Akilah Anderson and Franklin Halliburton for Robroy Williams and Glenford Williams
Jacqueline Cummings instructed by **Archer Cummings & Co.** for Luis Miguel Avila Arias
F.M. G. Phipps, Q.C, Jacqueline Samuels Brown, Wentworth Charles and **Kathryn Phipps** for Norris Nembhard.
Patrick Atkinson and **Sharon Usim** instructed, **Usim Williams** & Co. for Vivian Dally
Mr. Curtis Cochrane and **Mrs. Amina Maknoon** instructed by Director of State Proceedings for the Commissioner of Corrections
Mr. Jeremy Taylor Assistant Director of Public Prosecutions (Ag) and **Ms. Anne-Marie Nembhard,** Assistant Director of Public Prosecutions (Ag) for the Director of Public Prosecutions.

5, 6, 7, 8 , 9 May and 4 July 2008

PANTON, P:

I have read the reasons for judgment that have been written by my learned brother Morrison, J.A. I agree with him in every respect and have nothing to add.

COOKE, J.A.:

I agree that this appeal should be determined in the manner stated by my learned brother, Morrison, J.A.

MORRISON, J.A.:

Introduction

1. This is a consolidated appeal from an order of the Full Court of the Supreme Court (Wolfe CJ, Marva McIntosh and Hibbert JJ) made on 15 June 2007, dismissing the applications of the appellants for orders for the issue of writs of habeas corpus to secure their discharge from custody, they having been previously committed to custody by His Honour Mr. Martin Gayle after an extradition hearing in the Corporate Area Resident Magistrate's Court.

2. The proceedings before the Resident Magistrate originated in requests to the Government of Jamaica from the Government of the United States of America dated 19 April 2004, for the provisional arrest of the appellants for the purpose of their extradition to the United States. These requests were made pursuant to Article X of the Extradition Treaty

between the United States and Jamaica signed on 14 June 1983 and which came into force on the 7 July 1991 ("The Treaty").

3. The requests recited that all six appellants (five of whom are Jamaican nationals and one a national of Colombia) were the subject of an indictment filed on 30 March 2004 in the United States District Court of the Middle District of Florida, Tampa Division, charging them as follows:

> **Count 1**
>
> Conspiracy to distribute five (5) kilograms or more of a mixture or substance containing a detectable amount of cocaine, and to distribute one thousand (1,000) kilograms or more of a mixture or substance containing a detectable amount of marijuana, knowing and intending that such substance would be unlawfully imported into the United States or into waters within a distance of twelve (12) miles of the Coast of the United States, in violation of Title 21, United States Code, Section 959, all in violation of title 21, United States Code, Sections 963 and 960 (a) (3) and 960 (b) (I) (G).

4. In addition, the indictment charged the 2nd and the 4th appellants with an additional count as follows:

> **Count 2**
>
> Conspiracy with other persons, who were aboard a vessel subject to the jurisdiction of the United States, to possess with the intent to distribute five (5) kilograms or more of a mixture or substance containing a detectable amount of cocaine, in violation of Title 46 Appendix, United States Code, Section 1903(j); all in violation of Title 46 Appendix, United States Code, Section 1903 (g); and title 21, United States Code, Section 960(b) (1) (ii).

5. Further to authority to proceed given by the Minister of Justice in respect of each of the appellants on 22 June 2004, pursuant to section 8(1) of the Extradition Act ("the Act"), extradition proceedings were in due course commenced before His Honour Mr. Gayle on 29 July 2004. The committal hearing continued for several days over the course of almost a year, culminating in the committal of the appellants for the purpose of extradition on 30 June 2005.

6. The appellants challenged their committal by way of applications for writs of habeas corpus and the Full Court by written judgments delivered on 15 June 2007 made the orders dismissing the applications which are the subject of this appeal.

The appeal - a preliminary matter

7. All of the appellants filed detailed grounds of appeal, which will in due course require a careful review of the evidence relied on against them in the extradition proceedings and the relevant provisions of the Treaty and the Act. The grounds of appeal are not all identical, although there is some degree of overlap. There is, however, a ground common to all the appellants, albeit variously expressed, having to do with what has been described shortly in the argument as "irregularities in the indictment." As the determination of the issues raised by this ground can

have an impact on the outcome of all the appeals, I propose to deal with it as a preliminary matter.

8. The ground in question, as I have indicated, was differently formulated by each of the appellants. However, the ground filed on behalf of the 2nd appellant (Mr. Robroy Williams) captures the essence of the complaint:

> "The Full Court erred in law in holding that the documents relied on by the requesting State satisfied the requirements of the Extradition Act and the Extradition Treaty between that State and Jamaica"

9. The matter arises in this way. The request for extradition, which was made by way of diplomatic note, was supported initially by an affidavit sworn to on 8 June 2004 by Ms. Pamela Cothran Marsh ("Ms. Marsh"), an Assistant United States Attorney with responsibility in that capacity for the prosecution of the suspected criminal activities of the appellants. According to Ms. Marsh, the request arose from "an investigation by the United States Bureau of Immigration and Customs Enforcement, the United States Federal Bureau of Investigation and the United States Drug Enforcement Administration that revealed that [the appellants] were participants in an organized criminal group that was importing cocaine, marijuana and hash oil from Colombia to Jamaica through islands in the Bahamas, and ultimately into the United States."

10. At paragraph 6 of that affidavit, Ms. Marsh describes the manner in which a criminal prosecution may be initiated in the United States in these circumstances:

> "Under the laws of the United States, a criminal prosecution may be commenced by a Grand Jury through its return and filing of an Indictment with the Clerk of the United States District Court. A Grand Jury is composed of not less than sixteen (16) people whom the United States District Court selects at random from among the residents of the Judicial District where the crime was committed, in this instance, the Middle District of Florida, Tampa Division. The Grand Jury is a part of the Judicial Branch of the Federal Government. The purpose of the Grand Jury is to review evidence of crimes as presented by United States law enforcement authorities. After independently reviewing this evidence, each member of the Grand Jury must determine and vote on whether there is probable cause to believe that a crime has been committed and whether the particular defendant committed the crime. If at least twelve (12) Grand Jurors affirmatively vote that there is probable cause to believe that the defendant committed the crime or crimes, an indictment for the crime or crimes is returned. An indictment is the formal written document that charges the defendant with the crime or crimes, describes the specific laws that the defendant is charged with violating, as well as a brief description of the acts of the defendant that are alleged to be violations of the law. After the Grand Jury returns the indictment, a warrant for the defendant's or defendants' arrest is issued by the United States District Court Clerk at the direction of the United States Magistrate Judge."

11. Ms. Marsh stated further that on 30 March 2004 a federal grand jury sitting in Tampa returned an indictment under seal formally charging the

appellants (and two other individuals who are not parties to these proceedings) with the offences set out at paragraphs 3 and 4 above. She then goes on (at paragraph 9) to state the following:

> "It is the practice of the United States District Court for the Middle District of Florida to retain the original indictment and file it with the records of the court. Therefore, I have obtained a certified, true and accurate certified copy of the indictment in this case from the Clerk of Courts and have attached it to this affidavit as Exhibit A."

12. It is common ground that the document attached to Ms. Marsh's affidavit as Exhibit A, setting out in detail the charges purportedly laid against the appellants by the Grand Jury, did not bear a signature in the space indicated on the last page for the signature of the foreperson of the Grand Jury. Save for that omission, which the appellants contend to be fatal, the document appears to be otherwise in order and is in fact countersigned on its face by Ms. Marsh (then Ms. Cothran) and Mr. Joseph K. Ruddy also an Assistant United States Attorney. The document also appears to have been certified by the Clerk of the Court "to be a true and correct copy of the original".

13. Ms. Marsh goes on to state that, "based on the Indictment returned by the grand jury", a warrant of arrest was duly executed in respect of each appellant charged on 31 March 2004.

14. The documentation produced by Ms. Marsh and exhibited to her affidavit sworn to on 8 June 2004 and a supplemental affidavit dated 14

July 2004 were tendered in evidence in the committal proceedings before the learned Resident Magistrate.

15. Exhibit A was in due course admitted in evidence (despite apparent objection on behalf of the appellants), along with the other documentation, through Mr. Herman Lamont, the Director in the Ministry of Foreign Affairs with responsibility for dealing with extradition requests, who gave evidence on behalf of the Government of the United States, on 28 July 2004, 19 October 2004 and 25 October 2004.

16. On 22 February 2005, Mr. Lamont was recalled to give further evidence. He testified that on 3 January 2005, he received an additional diplomatic note and other documents in the matter dated 29 December 2004. These documents were also tendered and admitted in evidence (as exhibits 10A-10F), over objection from counsel on behalf of the appellants. These documents consisted of a second supplemental affidavit sworn to by Ms. Marsh on 9 December 2004, with six exhibits.

17. Paragraphs 6-10 of this affidavit are set out in full below:

> "6. It has been brought to my attention that the certified copy of the indictment, which was included in our initial request for extradition as Exhibit A to my affidavit signed on June 8, 2004, was a copy of an Indictment that had not been signed by the foreperson of the Grand Jury that returned the Indictment on March 30, 2004. I have therefore attached to this affidavit a certified copy of the Indictment filed in this case at

the United States District Court, Middle District of Florida, Tampa Division, as Exhibit Supp 2-A, which shows that the Indictment was indeed signed by the Foreperson of the Grand Jury on March 30, 2004.

Immediately following the return of an indictment by a Grand Jury, the foreperson signs the original, which also bears the original signatures of the assigned prosecutor (who, in this case is myself) and of the assigned prosecutor's supervisor (who, in this case, is Joseph K. Ruddy). At the time of the return of the Indictment against the defendants named in this case, the office of the Clerk of the Court required that the U.S. Attorney's Office also submit numerous copies of the Indictment (which are copies of the Indictment signed only by the prosecutor and the prosecutor's supervisor). Specifically, at the time of this Indictment, the Clerk's office required that the U.S. Attorney's Office submit two (2) copies per defendant indicted. Thus, in this case, because eight (8) defendants were indicted by the Grand Jury, the Clerk's office required that the U.S. Attorney's Office submit sixteen (16) copies of the Indictment, which copies would have shown only copies of the signatures of the prosecutor and the prosecutor's supervisor. Therefore, following the return of the indictment in this case, in accordance with the Clerk's Office's policies, the "indictment package" submitted to the Clerk's Office contained one original indictment bearing the signatures of the Grand Jury Foreperson, the Prosecutor and the Prosecutor's Supervisor (which are all original signatures), and sixteen (16) copies of the Indictment bearing photocopies of the

signatures of the prosecutor and the prosecutor's supervisor, only.

8. In preparing the affidavit and the exhibits needed to request the extradition of the defendants charged in this Indictment, the US. Attorney's Office requested that the Clerk's Office provide certified copies of the Indictment filed in this case. Inadvertently, the Clerk's Office responded by certifying one of the copies submitted in the "indictment package", which copies bear the signatures of only the prosecutor and the prosecutor's supervisor. This inadvertent error by the Clerk's Office was unfortunately not discovered by anyone in the U.S. Attorney's Office prior to sending the materials to the Office of International Affairs in Washington, D.C.

9. Upon recently discovering that the certified copy submitted in support of our extradition request did not bear the signature of the Grand Jury Foreperson, I contacted the Clerk's Office, and requested a certified copy of the original Indictment filed in this case. I have attached to this Affidavit, as Exhibit Supp2-A, the certified copy of the Indictment that I received from the Clerk's Office in response to my recent request. You will see that this Indictment was stamped received by the Clerk's Office on March 30, 2004, and bears the signature of the Grand Jury Foreperson, the Prosecutor and the Prosecutor's Supervisor, proving that it was appropriately signed and returned by the Grand Jury.

> 10. I have also personally viewed a copy of the Indictment that is on file in this case, as it appears on the Court's restricted Web Site, and can attest that the electronic copy that I viewed via computer does bear the signature of the Grand Jury Foreperson."

18. Exhibit Supp2-A to this affidavit is in form and substance virtually identical to Exhibit A to Ms. Marsh's earlier affidavit, save that it bears on its face the signature of the foreperson, Carolyn D. Bennett, the certification by the Clerk of the Court appears to have been signed by a different person and a stamp on the first page indicated that it was filed at 5:20 p.m. (and not 5:21 pm as noted on exhibit A) on 30 March 2004.

19. Before leaving this account of the background to this ground of appeal, I should advert to some evidence given by Mr. Lamont under cross-examination after Ms. Marsh's second supplemental affidavit had been tendered and admitted in evidence through him:

> "The Ministry of Foreign Affairs is the Ministry through which diplomatic correspondences are sent through. It is also the Ministry through which requests are made by requesting note.
>
> I gave evidence at the commencement of the proceeding and tendered a number of documents.
>
> I was present when several objections were made to include the unsigned indictment.
>
> No request was made for additional evidence in December 2004 by myself or my Ministry.

> I received Exhibit 10A-10F on the 3rd January 2005. They were received from the requesting state.
>
> ...
>
> I don't know one Pamela Cottman [sic] Marsh. I have never communicated directly to any such one.
>
> I have not kept Pamela Marsh abreast with these proceedings and no one on my behalf did so.
>
> I have never communicated to Miss Marsh any deficiencies in the case and no one on my behalf.
>
> Miss Marsh sending a second supplemental affidavit has nothing to do with me.
>
> I have nothing to do with her second or first supplemental affidavit.
>
> The reason why I am at these proceedings these matters have been assigned to me.
>
> When requests are to be made to the U.S.A. it is made through the Ministry of Foreign Affairs and those requests are made through the U.S.A. Embassy in Kingston.
>
> It would be a breach of protocol if request was to by-pass the Ministry of Foreign Affairs.
>
> The Treaty states that request must go through diplomatic channels."

20. And finally, in re-examination, Mr. Lamont said the following:

> "I did not request any additional information but the additional documents I received came through the diplomatic channel.

> It is not the first time, I am receiving additional document without request coming from Jamaican Government."

21. Before the Full Court, it was submitted on behalf of the appellants that the fact that the indictment originally produced by Ms. Marsh was unsigned, rendered it no more than "a piece of paper without any legal significance and therefore there was no basis for the Authority to Proceed which was issued by the Minister." All of the members of the court dealt with this complaint fairly summarily. The learned Chief Justice pointed out that there is no requirement in either the Treaty or the Act "for the indictment to be produced along with the request" and concluded that "defects in the indictment, if defects there be, are of absolutely no consequence and do not affect the validity of the proceedings." Marva McIntosh J and Hibbert J agreed, the former also observing that there is no requirement in extradition proceedings "that there be a signed indictment – it is not a required document which the Receiving State has to provide."

22. Before coming to the submissions made in this court on behalf of the appellants, I should also note that expert evidence was given at the committal hearing on this point by Mr. David Rowe, an attorney-at-law admitted to practice in Jamaica, as well as in several states in the United States, and an adjunct Professor of Law at the University of Miami Law School. Mr. Rowe expressed the opinion that "A document purporting to

be an indictment that is not signed by the Foreperson is not an indictment." The foreperson's signature he considered to be the "most important" of the formalities required for a grand jury indictment to be valid, without which, the unsigned document was no more than a "meaningless draft."

23. The submissions in this court were to similar effect as those which had been made to the court below. The unsigned indictment, it was submitted, was "defective and of no effect", with the result that the warrant and the Minister's authority to proceed, issued on the basis thereof, were themselves lacking in any validity. To the extent that the warrant of arrest is based on and is issued after the grand jury returns the indictment, it followed that if the indictment was irregularly issued, so too must the warrant itself have been irregular.

24. A subsidiary limb of the submissions on behalf of the appellants on this point (not all of the appellants actually made this a ground of appeal, but its success would obviously inure to the benefit of all) was that information was provided to the learned Resident Magistrate after the date of the issue of the Minister's authority to proceed and otherwise than through the diplomatic channel. This, it was submitted, was in breach of Article VIII (5) of the Treaty, which provides that "statements, depositions and other documents transmitted in support of the request for extradition

shall be transmitted through the diplomatic channel." In the light of Mr. Lamont's evidence at the committal hearing (see paragraphs 19 and 20 above) that no request had been made by or on behalf of the Minister for additional information in December 2004, so the submission went, the signed indictment produced by Ms. Marsh in her second supplemental affidavit must have come to the court otherwise than through the diplomatic channel and therefore in breach of the Treaty.

25. Counsel for the respondents submitted that the decision of the Full Court was correct and that neither section 8(2) of the Act nor Article VIII (3) of the Treaty requires that an indictment should be one of the documents submitted in support of the extradition request by the Requesting State. It was submitted that the defects alleged in the indictment did not affect the validity of the proceedings and that in any event any omission or want of regularity that there had been, was cured by Ms. Marsh's further supplemental affidavit.

26. With regard to the further complaint that the supplemental material had not been provided through the diplomatic channel, counsel for the respondents drew our attention to Article 1X(3) of the Treaty to provide the basis for the receipt by the learned Resident Magistrate of this material.

27. Article VIII of the Treaty provides as follows:

> "1. The request for extradition shall be made through the diplomatic channel.
>
> 2. The request for extradition shall be supported by:
>
> (a) documents, statements, or other evidence which describe the identity and probable location of the person sought.
>
> (b) a statement of the facts of the case, including, if possible, the time and location of the offence.
>
> (c) a statement of the provisions of the law describing the essential elements and the designation of the offence for which extradition is requested:
>
> (d) a statement of the provisions of the law prescribing the punishment for the offences; and
>
> (e) a statement of the provisions of the law prescribing any time limit on the prosecution or the execution of punishment for the offence.
>
> 3. A request for extradition relating to a person who is sought for prosecution shall also be supported by:
>
> (a) a copy of the warrant of arrest issued by a judge or other judicial authority in the Requesting State; and
>
> (b) such evidence as would justify the committal for trial of that person if the

offence had been committed in the Requested State.

4. When the request for extradition relates to a convicted person, in addition to those items required by paragraph (2), it shall be supported by a certificate of conviction, or copy of the judgment of conviction rendered by a court in the Requesting State. If the person has been convicted and sentenced, the request for extradition shall also be supported by a statement showing to what extent the sentence has been carried out. If the person has been convicted but not sentenced, the request for extradition shall also be supported by a statement to that effect.

5. Statements, depositions and other documents transmitted in support of the request for extradition shall be transmitted through the diplomatic channel and shall be admissible if certified or authenticated in such a manner as may be required by the law of the Requested State."

28. Section 8 of the Act provides as follows:

> "**8.** (1) Subject to the provisions of this Act relating to provisional warrants, a person shall not be dealt with under this Act except in pursuance of an order of the Minister (in this Act referred to as "authority to proceed") issued in pursuance of a request made to the Minister by or on behalf of an approved State in which the person to be extradited is accused or was convicted.
>
> (2) 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 the 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.
>
> (3) On 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."

29. The objective of the provisions of Article VIII and Section 8 is clear. It is to enable the competent authority in the requested state (the Minister) to determine whether the offence or offences in respect of which extradition is being sought by the requesting state fall within the category of extradition offences agreed to be such by the parties to the Treaty, as well as whether the circumstances described by the request are such that an order for extradition could lawfully be made. As was observed by Lord Bridge of Harwich in ***R v Governor of Ashford Ex p Postlethwaite*** [1988] A.C. 924, 946 (and cited with approval by Rattray P in ***Walter Byles v Director of Public Prosecutions and Another*** (1997) 34 JLR 471, 474), "an extradition treaty is a contract between two sovereign states," with the

effect that an extradition request falls primarily to be considered within the context of the terms of the Treaty and the enabling legislation themselves.

30. It is therefore, in my view, a sufficient answer to this complaint to state, as Wolfe, CJ did in the court below, that "there is no requirement in the Extradition Treaty or the Act for the indictment to be produced along with the request". Neither is there any requirement in my view, to go behind the warrant for arrest issued by the requesting state (which is required to be furnished with the request by section 8(2)(c)) to determine whether conditions precedent to its issue in that state have been met.

31. But I think further that, at the end of the day, in the light of Ms. Marsh's clear and unchallenged account of the circumstances in which the "unsigned" indictment came to be produced in the first place, it could not seriously be maintained that the Grand Jury did not in fact return a verdict to charge the appellants with the offences set out in the document. In her original affidavit sworn to on 8 June 2004, Ms. Marsh swore that this was in fact the case (see paragraph 11 above) and in her second supplemental affidavit sworn to on 9 December 2004, she gave a detailed explanation of how it was that a copy of an unsigned indictment had come to be exhibited to the earlier affidavit and supplied the deficiency by producing a copy of the duly signed indictment. So that in the face of this evidence, it appears to me, the complaint that the

indictment was an "incomplete and inchoate document," and a "meaningless draft", falls away completely.

32. The only remaining question on this aspect of the matter would therefore be whether it was proper for the learned Resident Magistrate to have received Ms. Marsh's second supplemental affidavit otherwise than in response to a request made through the diplomatic channel, as the appellants contend on the basis of Mr. Lamont's evidence that it ought to have been.

33. Consonant with the status of the Treaty as "a contract between two sovereign states", it is not surprising that Article VIII (1) should require that a request for extradition "shall be made through the diplomatic channel", or that Article VIII(5) should provide that documents provided by the requesting state are to be supplied through that channel as well.

34. However, given that the process also requires that once the person whose extradition is sought has been arrested in pursuance of a warrant issued under section 8 of the Act (and as a consequence of the Minister's authority to proceed), he is to be brought before a magistrate for the purposes of a committal hearing, it is also hardly surprising that provision should be made in the Treaty for additional information to be requested from and supplied by the requesting state before the request is actually submitted to the court (as a result, for instance, of advice received by the

requested state from its legal advisors). Hence Article IX, which provides as follows:

> "1. If the executive authority of the Requested State considers that the information furnished in support of the request for extradition is not sufficient to fulfill the requirements of the Treaty, it shall notify the Requesting State in order to enable that State to furnish additional information before the request is submitted to a court of the Requested State.
>
> 2. The executive authority may fix a time limit for such information to be furnished.
>
> 3. Nothing in paragraph (1) or (2) shall prevent the executive authority of the Requested State from presenting to a court of that State information sought or obtained after submission of the request to the Court or after expiration of the time stipulated pursuant to paragraph (2)".

35. It is not, in my view, entirely clear whether the request for additional information pursuant to Article IX (1) must also be made through the diplomatic channel. In fact, it may well be arguable that it need not be, in the light of the actual language used in the article, which is that the executive authority "shall notify the Requesting State in order to enable that State to furnish additional information". However, I do not find it necessary to express a concluded view on this aspect of the matter because of the clear provision in Article IX (3) that preserves the right of the executive authority of the requested state, notwithstanding the provisions of Article IX (1), to present to the court "information sought or

obtained after submission of the request to the Court" (emphasis supplied).

36. In my view, Article IX (3) is an explicit reservation of a right to the executive authority of the requested state to present additional information to the court during the course of the committal hearing itself, irrespective of whether that information was sought or was obtained by it after the submission of the request to the court. In this regard, I am therefore in agreement with the submission of counsel for the respondents that Ms. Marsh's second supplemental affidavit was properly received in the committal proceedings by virtue of the provisions of Article IX (3) of the Treaty.

37. I would therefore conclude that the complaints that I have dealt with above as a preliminary matter cannot succeed and I accordingly now turn to a consideration of the other grounds argued on behalf of each appellant individually.

The 1st appellant (Herbert Henry)

This appellant filed in all eight (8) grounds of appeal as follows:

> "(i) That the indictment issued, which was the basis of the Appellant's arrest, ought to have been signed, and the Order of Extradition on the unsigned Indictment was a fundamental breach of the said Appellant's Constitutional right to a fair hearing.

(ii) That the majority decision of the Full Court to refuse the Writ of Habeas Corpus ad Subjiciendum was unsafe in that there was no evidence that the Appellant was a party to the conspiracy alleged in Count 1 of the Indictment, and the minority decision of the Honourable Mr. Justice Hibbert should be affirmed and the said Writ of Habeas Corpus issued.

(iii) That the decision to extradite the Appellant is unsound and wrong in law as the conspiracy alleged in relation to Count 1 of the Indictment and the Commitment Warrant, which formed the substratum of the case for the requesting state against the Appellant, has not been established in relation to him and that the Learned Resident Magistrate who was clearly troubled on this point, should have resolved the matter in favour of the Appellant.

(vi) That the Honourable Chief Justice and Mrs. Justice Marva McIntosh failed to exercise their discretion in deciding whether the evidence before the court was sufficient to provide a prima facie case against the Appellant on Count 1 of the indictment.

(v) That the Supplemental Affidavit of Alexander Young Duffis and Paul Newton Christopher Dixon respectively represented an afterthought, and had a major contradiction as against the specific jurisdiction 'U.S.A',, and the general and worldwide location 'overseas', as it was alleged by Alexander Young Duffis, for the first time, after the grand jury hearing and, importantly, after the extradition proceedings had started in Jamaica, that Henry stated that he was planning to ship the cocaine to the United States. However, speaking about the same conversation, Mr. Paul Dixon used the word 'overseas' and made no mention of the United States.

> (vi) Furthermore, that there was no evidence that the aforesaid additional information provided by the Supplemental Affidavits, was requested by the Executive Authority, as required by Article IX paragraph 1 of the Extradition Treaty between the Government of Jamaica and the Government of the United States of America.
>
> (vii) That the aforesaid Supplemental Affidavits issued against the Appellant was [sic] clearly tailored to meet the decision in ***Berkley Hepburn v Director of Correctional Services and the Director of Public Prosecutions*** (Unreported) Supreme Court May 28, 2004, and the decision of the majority of the Full Court failed to warn itself of acting on the afterthought which was contained in the said Supplemental Affidavits.
>
> (viii) That the Affidavit evidence of alleged co-conspirators and accomplices was unreliable being uncorroborated, and there was no evidence that the majority of the Full Court applied the requisite warning of danger."

39. Grounds (i) (the unsigned indictment) and (vi) (the additional information) are covered by the discussion in the preceding paragraphs, as a result of which they cannot in my view succeed. Mr. Patrick Bailey's submissions in support of the remaining grounds were very helpfully consolidated by him into a single submission that there was no evidence sufficient to make out a prima facie case that this appellant was a party to the conspiracy alleged in count 1 of the indictment (count 2 does not relate to this appellant).

40. In the Full Court, Hibbert J, dissenting on this point, had found for the appellant on what was basically the identical ground, concluding after a review of the evidence against this appellant that "the evidence does not show him to be a participant in the conspiracy engaged in by the other claimants as charged in Count 1 of the indictment." Mr. Bailey urged this court to say that Hibbert J was correct and that Wolfe CJ and Marva McIntosh J, who came to the opposite conclusion, fell into error.

41. The evidence against this appellant is to be found in the following affidavits:

(i) The first and supplemental affidavits of Alexander Young Duffis, sworn to on 17 May 2004 ("the first Young Duffis affidavit"), and 13 July 2004 ("the second Young Duffis affidavit") respectively; and

(ii) the first and supplemental affidavits of Paul Newton Christopher Dixon, sworn to on 2 June 2004 ("the first Dixon affidavit") and 12 July 2004 ("the second Dixon affidavit") respectively.

42. In the first Young Duffis affidavit (in which the affiant was incorrectly described as "Alexander Duffis Young"), Mr. Young Duffis spoke to having had dealings with several of the appellants over a number of years, he

having lived in Jamaica from 1998 to 2004. He gave a detailed account of various transactions involving the importation of cocaine into Jamaica from Colombia, the sale of cocaine in Jamaica and its onward transshipment to the United States. As the details of this affidavit are also relevant to the appeals of some of the other appellants, I cannot avoid reproducing it virtually in full below:

> "1. I ALEXANDER Duffis Young also known as 'Cabezon' or 'Alex' being duly sworn hereby depose and state the following information is true and accurate and concerns individuals I know as Robroy Williams, or also known to me as 'Spy' Norris Nembhard, or also known to me as 'Dido'. Herbert Henry, also known to me as 'Scary' Glenford Williams, also known to me as 'Toe' Presley Gingham, also called 'Presser' and Vivian Dalley, also known to me as 'Jungo'.
>
> 2. I am thirty-three years of age. I am a legal resident of Colombia and I resided in Jamaica from January of 1998 to August of 2004. I have known Robroy Williams (hereinafter referred to as Williams) and Vivian Dalley since early 1998. I met Norris Nembhard in late November or early December, 1999.
>
> 3. In May, 2002, Paul Dixon, a Jamaica Constabulary Force Police Officer, and I picked up approximately $600,000 USD from Constable Herbert Henry, another Jamaica Constabulary Force Police Officer. This money was a payment to Williams from Constable Henry for the purchase of approximately one hundred (100) kilograms of cocaine. Dixon and I then delivered this money to Williams at his office in Coral Gardens, Jamaica. After we delivered the money to Williams, Dixon and I went to Winston garage in Latium Jamaica to pick up the cocaine. Upon our arrival, Winston removed the cocaine from

an old car and gave it to Dixon. I then accompanied Dixon to deliver to Constable Henry."

4. In January 2002, William, Glenford Williams (Williams' brother) another individual and I were present when Dixon delivered one hundred and fifty (150) kilograms of cocaine to Williams, at Williams' farm in Latium District, Jamaica. The one hundred and fifty (150) kilograms of cocaine were part of a load sent to Williams from Colombian individual. When Dixon delivered the one hundred and fifty (150) kilograms of cocaine, Williams immediately opened one individually wrapped kilogram of cocaine to determine the quality.

5. Also in May, 2002, I mediated for Williams to receive approximately eight hundred (800) kilograms of cocaine in Jamaica from Colombian individual. I often translated between Williams and the Colombian when they negotiated cocaine transactions. The Colombian allowed Williams to keep four hundred (400) kilograms of the cocaine and the other four hundred (400) kilograms were delivered to a second person. Winston stored the four hundred (400) kilograms of cocaine for Williams.

6. Approximately one month later, Williams received another shipment of approximately eight hundred (800) kilograms of cocaine in Jamaica from Colombia. This cocaine shipment was of very low purity. Therefore, Williams stored the cocaine shipment in a cave located on his farm in the rural part of Latium, St. James, Jamaica, with plans to reprocess the cocaine into better quality. Prior to reprocessing the cocaine, Williams sold 200 kilograms to individuals (in Jamaica) to include two individuals from Holland.

7. A Colombian came up with the idea to reprocess the bad quality cocaine and supplied a chemist to help with the project. This Colombian took photographs of the stored cocaine in the cave and had these pictures saved on his computer, which he showed to me. WILLIAMS reprocessed the

remaining six hundred (600) kilograms by turning it to cocaine base, then back to cocaine hydrochloride. This process was conducted in the cave, which resulted in three hundred (300) kilograms of high quality cocaine. Both Williams and the Colombian discussed this project on several occasions with me.

8. In May 2002, Norris Nembhard, aka "DIDO", received approximately one thousand three hundred (1,300) kilograms of cocaine from a Colombian male. Nembhard attempted to transport four (400) kilograms of this cocaine shipment to the United States. However, law enforcement authorities seized the shipment. Subsequently, the Colombian supplier ordered Nembhard to release seven hundred and fifty (750) kilograms of cocaine to Williams. Williams was responsible for the transshipment of the seven hundred and fifty (750) kilograms of cocaine to the United States. When Williams received the seven hundred and fifty (750) kilograms of cocaine from Nembhard, Williams successfully transported two hundred (200) kilograms of cocaine to Miami, Florida. The Colombian suppliers then authorized WILLIAMS to transport the remaining five hundred (500) kilograms of cocaine to Miami, Florida.

9. Williams was responsible for coordinating the transportation of the above mentioned five hundred (500) kilogram of cocaine shipment from Jamaica to Miami, Florida. Williams utilized a Jamaican National to coordinate the transportation of the five hundred (500) kilograms of cocaine to the United States. The Jamaican National reported to Williams that the watchers of the cocaine stole two hundred (200) kilograms when the load arrived in Miami, Florida. Williams reported to the Colombian that the entire cocaine load was lost so that Williams did not have to pay the Colombian for the load.

10. In April 2002, Williams asked me to assist him in transporting U.S. Currency from Jamaica to Panama, utilizing commercial airlines departing from the Norman Manley International Airport in Kingston, Jamaica. This money, $1,000,000.00 USD, was proceeds from successful drug sales in the United States and was being sent to Panama as a payment to a Colombian cocaine supplier from Williams. Williams sent the one million dollars ($1,000,000.00 USD) to me via Williams son, Keniel Williams, and Junior Minto the night prior to transporting the money from Jamaica to Panama. Paul Dixon picked up the money from Keniel Williams and Minto and delivered it to me for storage and safekeeping. The following day, Dixon and I met with Vivian Dally. aka "Jungo", Dalley's brother Alwayn Dalley. Conroy Markland, aka "Mark', Junior Minto, and Keniel Williams outside the Norman Manley International Airport in Kingston, Jamaica. I distributed the one million dollars ($1,000,000.00 USD) among the five men. I gave 3 men approximately two hundred thousand dollars ($200,000.00 USD), I gave one man approximately two hundred and fifty thousand ($250,000.00 USD) and I gave another man approximately one hundred and fifty thousand ($150,000.00 USD) to carry. I recall one of the uniformed Police Officers was Dixon's friend and was paid 1% of the one million dollars ($1,000,000.00 U.S.D.) to assist us with moving the money through the airport. Subsequently, Keniel Williams, Minto, Alwayn Dalley and Markland were caught and arrested at Norman Manley International Airport. Vivian Dalley was able to evade detection and returned to where Dixon and I were waiting inside of a vehicle outside the airport. As soon as this incident happened, a Police Officer came outside of the airport and returned forty thousand ($40,000.00 USD) to Dixon and me. Keniel Williams. Minto, Alwayn Dalley and Markland.

I told the Jamaican Authorities that the money belonged to a road construction company and that the money was going to be utilized to purchase equipment for the company in Panama City. Panama. Vivian DALLEY returned two hundred ninety thousand dollars ($290,000.00) to Williams and Williams told the Colombian supplier that all the money was seized at the airport.

11. The narcotics and weapons found during the search Rasta Teddy's place in Lilliput, Jamaica in April of 2003, belonged to Williams and Presley Bingham, also known as 'Presser. Vivian Dalley told me that shortly after the searches were conducted at Williams' farms, Williams ordered Dalley to "get rid of everything". I understood this to mean records and documents that could be used as evidence of Williams' involvement in drug trafficking.

12. Sometime in 1999, I was in need of cocaine to sell to a Colombian. I purchased the cocaine from Norris Nembhard and second Colombian. I met with the Colombian and Nembhard at a villa in St. Ann's Bay, where the Colombian told Nembhard to give me sixty four (64) kilograms of cocaine. I paid the Colombian forty eight hundred dollars ($4,800.00 USD) per kilogram. A Jamaican national and Nembhard coordinated the delivery for me, and I subsequently sold the sixty four (64) kilograms to a Colombian for fifty three hundred dollars ($5,300 USD) per kilogram.

13. Williams and Norris Nembhard sometimes assisted one another in the drug business. The cocaine seized in April 2003 at Williams' farm in Latium actually belonged to Norris Nembhard. However, Williams was going to sell it for Nembhard. I recalled on one occasion in early 2001 in which a Jamaican National received a shipment of approximately (800) kilograms of cocaine sent from Colombia to Jamaica. From this eight hundred (800) kilogram shipment of cocaine, fifty (50) kilograms belonged to Nembhard and a Colombian in Jamaica. Paul Dixon provided security while the

> Colombian and Nembhard picked up the fifty (50) kilograms from Williams' farm in Latium, Jamaica. Presley Bingham and Williams were present at the farm on this occasion."

43. In the first Dixon affidavit, the affiant, a former member of the Jamaica Constabulary Force (he was arrested for possession of cocaine and US currency in 2002), provided information about his dealings with this appellant, as well as the appellant Mr. Robroy Williams, in 2001. In that year, he met Mr. Williams, who was otherwise called "Spy", and he described his encounters with this appellant as follows:

> "1...
> 2...
> 3. I knew Herbert Henry, who is also called 'Scary', who I knew to be a Police Officer. 'Scary' introduced me to a Colombian in 2001. After being introduced to 'Spy' and the Colombian, I realized that they were dealing in drugs.' Scary' told me that we were suffering too long and it is about time that we make some money. Scary suggested to me that we should provide security and transport for the drug traffickers in order to and make some additional money.
>
> 4. About three (3) months after I met Spy and the Colombian, the Colombian telephoned me and told me that I should go and check with SPY, which I did. That same day when the Colombian told me to check with Spy, I immediately went to Coral Gardens, where I saw Spy. He was at the apartment in Coral Gardens, which he used as an office. After speaking to him, we left in separate vehicles and drove for about forty-five (45) minutes with Spy leading the way. We went to a farm in St. James and we were there for couple minutes, when I saw Spy call over a young man and speak to him. The young man

> went into a nearby board house on the same premises. He returned with forty packages of rectangular shape. I was at that time driving a grey Toyota motor car.
>
> 5. When the young man returned with the packages, "Spy" said to me Dicko a di stuff dis". I then understood the meaning of the 'stuff' to be cocaine. I am affectionately called "Dicko' which is an abbreviation of my surname Dixon. The packages that the young man brought from the board house were all marked 'Taxi' and they were in colored yellow and black plastic material. I opened my car trunk, and the young man placed all forty (40) packages inside.
>
> 6. 'Spy' told me to take the packages to 'Scary' at St. Catherine Hall Housing Scheme, which I did, and after delivering the packages 'Scary gave me thirty thousand Jamaican dollars (J530,000.00) as payment for the transportation of the drugs."

44. In the second Dixon affidavit, Mr. Dixon referred to his 2001 involvement with this appellant described in the previous paragraph and stated further that after he had delivered the packages with cocaine to him "he told me that he had plans to ship the cocaine overseas immediately and that the cocaine was not enough". According to Mr. Dixon, this appellant added "that he needed to ship more cocaine overseas." Later that same day, this appellant gave about J$40,000.00 to Mr. Young Duffis, who complained that he "taking him for a fool" and that the money was "not enough". Mr. Dixon stated that this money was payment for the delivery of the cocaine that he had given to this

appellant and that Mr. Young Duffis took the money and gave him J$20,000.00. The second Dixon affidavit concluded as follows:

> "In August, 2001, I saw Henry with a draw string bag filled with United States currency, I could not say how much money it was, however, I saw it and knew that it was a large amount. The money was in packages and I felt the bag and it was heavy. Henry told me that this money came from 'up so' which I understood to mean overseas.
>
> Sometimes after August 2001, I remembered having a conversation with Henry where he was boasting that he had someone who works with American Airlines who 'move things twice a week for him'. I interpret the things he was referring to be cocaine and the word 'move' to ship the cocaine overseas."

45. And finally, in the second Young Duffis affidavit, the affiant confirmed that he had known Mr. Henry since 1998 and stated the following:

> "1...
> 2...
> 3...
> 4...
> 5. In May 2002 Paul Dixon a Jamaica Constabulary Force Police Officer, and I picked up approximately one hundred (100) kilograms of cocaine at Winston's garage in Latium, Jamaica, on behalf of Williams. Dixon was hired to pick up the cocaine from Winston's garage and deliver it to Constable Herbert HENRY, also a Jamaica Constabulary Force Police Officer. Dixon and I went to Winston's garage to perform the cocaine transaction for Williams and a second individual. When the cocaine was delivered to Constable Henry, Henry told me that the cocaine would be shipped to the United States. Henry

> stated that an associate of his would place the cocaine on board an aircraft destined for the United States. Henry told Dixon that he would pay Dixon for his assistance once the cocaine was sold in the United States. Henry then gave Dixon a small sum of Jamaica currency in good faith. Dixon later told me, that Henry did not like to pay his debts and he did not think Henry would pay him any additional money."

46. Mr. Bailey submitted that this evidence was insufficient to link this appellant to the conspiracy alleged in count 1 of the indictment. Paragraphs 3 and 6 of the first Young Duffis affidavit plainly made reference to dealings, albeit illegal, involving cocaine in Jamaica only and the attempts in the second Young Duffis and Dixon affidavits to connect the appellant with the selling of cocaine in the United States were also insufficient. Mr. Bailey also commented on the words "overseas" and "up so" attributed to the appellant and submitted that these words were valueless in the context of count 1.

47. Mr. Bailey finally drew attention to the fact that the supplemental affidavits had come after the decision of the Full Court in ***Berkley Hepburn v Director of Correctional Services and Director of Public Prosecutions*** (Claim No. 2003 HCV 2138, judgment delivered on 28 May 2004), in which it was held (following the decision of this court in ***Delroy Boyd v Commissioner of Correctional Services and the Director of Public Prosecutions,*** SCCA No. 47/2004, judgment delivered 1 February 2004) "that in order to establish a prima facie case the claimant's evidence

must show that the applicant had knowledge that the drugs were intended for importation into the United States." (per McCalla J, as she then was, at page 8). Thus on the face of it, Mr. Bailey submitted, the supplemental affidavits were plainly intended to blunt the force of that decision, given the deficiency in this regard in the first Young Duffis and Dixon affidavits. They had both in any event failed to do so.

48. The majority in the Full Court in the instant case disagreed with Mr. Bailey's submissions on behalf of this appellant, and so do I. Marva McIntosh J, after going through the affidavit evidence referred to above, concluded that "[the appellant] was not an innocent party to the activities, he was perfectly aware of the drug smuggling operation and participated in it and there was sufficient evidence on which the Learned Resident Magistrate could find that a prima facie case had been made out against Henry" (page 35). This was in fact all that the Resident Magistrate was required to do, given, as Wolfe CJ observed (at page 13), that his duty at the committal hearing stage is to hear the case "in the same manner, as nearly as may be, 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" (see section 10 of the Act).

49. On this basis, I am of the view that, taken together, the evidence contained in the first and second affidavits of both witnesses who speak

to this appellant's involvement in the conspiracy that is the subject of count 1 was sufficient to ground the order of the learned Resident Magistrate. While it may well be the case, as Mr. Bailey contends, that the supplemental affidavits were produced in order to close a perceived gap in the evidence, the fact is that that evidence was properly before the learned Resident Magistrate and did, in my view, suffice to close such gap as there might have been. Taken in the context of the conspiracy alleged as a whole, I am of the view that the various references attributed to this appellant to shipping cocaine "overseas," to money coming from "up so" and to his contact at American Airlines who "move things twice a week for him", recounted by Mr. Dixon and set out at paragraph 44 above, all justify the finding of a prima facie case against this appellant.

The 2nd and 3rd appellants (Robroy and Glenford Williams)

50. The following are the grounds of appeal filed on behalf of these appellants, who were jointly represented by Mr. K. D. Knight QC and Ms. Norma Linton QC :

(a) **Robroy Williams**

> "1. The Full Court erred in law in holding that the documents relied on by the requesting state satisfied the requirements of the Extradition Act and the Extradition Treaty between that State and Jamaica.

2. (i) The Full Court erred in law in holding that the Jamaican courts have jurisdiction over offences committed on the high seas on a vessel without nationality.

(ii) The Full Court erred in law in failing to properly interpret and apply Article 1 (2) of the Treaty.

3. The Full Court erred in law in holding the Indictment is not an integral part of the documents to be produced in that it is the foundation of the warrant of arrest which is valid only if it is based on the indictment returned by the Grand Jury."

(b) **Glenford Williams**

"1. The Full Court erred in law in holding that Glenford Williams was not convicted and/or acquitted in a competent Jamaican court on charges which are substantially the same on which he is to be tried in the requesting state.

2. The Full Court erred in law in holding that the warrant of arrest to ground the request for extradition by the requested state was regularly issued and based on existing and/or admissible evidence.

3. The Full Court erred in law in holding the Indictment is not an integral part of the documents to be produced in that it is the foundation of the warrant of arrest which is valid only if it is based on the indictment returned by the Grand Jury."

51. The identical ground 3 filed on behalf of both these appellants cannot in my view succeed for the reasons already given (see paragraphs 7 to 37 above).

52. Mr. Knight QC made submissions on grounds 1 and 2 filed on behalf of Robroy and Glenford Williams respectively. His basic contention was as set out in the skeleton argument filed on behalf of Mr. Robroy Williams:

> "The indictment was irregularly obtained in that the grand jury had no evidence before it to properly determine whether an offence had been committed and if so whether the appellant committed it. The bundle presented reveals that all the evidence on which the request is based came into being by way of sworn affidavits subsequent to the purported return of the indictment by the grand jury on March 30, 2004.
>
> The effect is that the appellant has been denied due process in that the preliminary hearing required by the laws of the Requesting State was significantly flawed."

53. In support of this contention, Mr. Knight advanced an elaborate and interesting argument which I hope I do no injustice by summarizing as follows:

(i) The basic question for a country before entering into an extradition treaty with another country must be whether the jurisprudence of that country is generally acceptable to it, that is, is this system one which is acceptable to us in Jamaica, which we can respect and under whose jurisprudence we can therefore trust to have our citizens tried.

(ii) In entering into an extradition treaty with the United States, the Jamaican legislature and executive would have been made aware of the relevant principles relating to the grand jury process in the United States as part of the process of determining whether that system was acceptable to us as a pre-condition to proceeding with the treaty arrangements.

(iii) Section 8(2) of the Act requires that the evidence furnished to support the extradition request must be that which was considered by the grand jury or a duly authenticated report showing that the required procedure under United States law had been complied with.

(iv) In the instant case, what was before the magistrate were numerous affidavits which all post-dated the grand jury hearing, with the result that either there was no evidence before the grand jury in this case or, alternatively, there is no proof as required by sections 8(2) and 14 of the Act of what that evidence was.

(v) In these circumstances a defendant in the United States would not be convicted "on the basis of facts not found by, or perhaps not even presented to" the grand jury (***United States v Keith*** 605 F2d 462 (1979)), or would be entitled to have an indictment dismissed where the grand jury proceeding is shown to

have been defective (***People v Huston*** 668 N.E. 2nd 1362 60 N.Y. (1996)).

(vi) It is an implied term of a bilateral extradition treaty that a state will not discriminate against a national of the other in its criminal procedure which accords fundamental rights to its citizens , and that the same due process available to its nationals will be made available to the foreign national.

(vii) Where discrimination or a breach of due process is demonstrated in extradition proceedings, "this amounts to a breach of the bilateral treaty and obviates the surrender of the fugitive."

54. Mr. Knight did not flinch from the fact that key elements of his submissions ran contrary to at least two previous decisions of this court, submitting that ***Byles v Director of Public Prosecutions and Another*** (1997) 34 J.L.R. 471 was either distinguishable or wrongly decided and that ***Montique v Commissioner of Corrections and Another*** (SCCA 96/05, judgment delivered 8 March 2007) had been decided per incuriam. Counsel for the respondents, on the other hand, submitted on the authority of ***Byles***, that an affidavit which post dates an indictment does not in any way invalidate the testimony in the affidavit and that there was no requirement that the Resident Magistrate should take into account the evidence that was actually before the grand jury. Reliance was also

placed on ***Montique*** as to the correct interpretation of the phrase "testimony given on oath" as used in section 14(1) (a) of the Act.

55. In ***Byles*** it was contended that the affidavits forwarded in support of an extradition request were invalid insofar as they related to incidents which pre-dated the indictment. In a judgment with which the other members of this court (Gordon and Bingham JJA) agreed, Rattray P stated that the fact that "[the affidavits'] post dated 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 [the] accusations".

56. Although it is a fact, as Mr. Knight pointed out, that this comment was strictly speaking obiter (the appeal having been allowed on another ground), Rattray P's dictum on this point has been treated subsequently and accepted as authoritative by this court (see for example ***Shervin Emmanuel v Commissioner of Correctional Services and Director of Public Prosecutions*** SCCA 100/04, judgment delivered 8 March 2007, per Harrison P at pages 10-11).

57. Neither can I, in the circumstances of this case, see a basis for distinguishing ***Byles*** on the ground suggested by Mr. Knight, which is that his complaint in the instant case is not so much as to the fact that the affidavits post dated the grand jury hearing, but rather that that evidence was not before the grand jury. There is, in my view, no requirement in the

Act or the Treaty that the evidence which was before the grand jury should be made available as part of the committal proceedings.

58. In ***Montique,*** it was submitted to this court that the phrase "testimony given in oath" which appears in Section 14(1)(a) of the Act was referable to oral evidence given on oath in court proceedings and therefore excluded evidence given by sworn affidavit.

59. After canvassing various dictionary meanings (which taken together were not conclusive one way or the other) and tracing the legislative history of section 14(1)(a), Smith JA concluded that the word 'testimony' in the section "embraces both oral evidence received in court proceedings and written statements on oath given out of court." The learned judge further observed as follows:

> "Section 14 is concerned with the mode of presenting evidence. Subsection (1) enables the magistrate to receive in evidence a document duly authenticated which purports to set out testimony on oath. An affidavit is a form of testimony on oath. The precise form in which the testimony of a witness is given on oath will vary according to the procedures of the jurisdiction. But in order for the authenticated document to be admissible it must purport to set out testimony on oath. The section does not affect the contents of the documents" (pages 16-17).

60. Both Harrison JA and Marsh JA (Ag) agreed and the following comment by Harrison JA (at pages 41-42) is particularly worthy of note:

> "In my view, depositions, affirmations and declarations are records of testimony and while statements on oath (affidavits) are extra curial

> records they are nevertheless in solemn form. They are parts of a continuum of forms of testimony and as such an affidavit would fall within the category of "testimony given on oath" as contemplated by section 14(1)(a) of the Act. In these proceedings, the liberty of the individual cannot be overlooked so a Court in seeking to have an affidavit admitted in evidence must ensure that all relevant allegations and matters infringing the rule against hearsay are excluded. Once the affiant gives direct evidence under oath as to what he or she has testified that evidence would be properly admissible."

61. Mr. Knight invited the court to hold that ***Montique*** was decided per incuriam, revisiting submissions based on dictionary means of "testimony" which had in fact been canvassed before the court in that case. Despite his efforts, however, I have come to the view that the decision of this court in ***Montique*** was correct for all the reasons stated by Smith and Harrison JJA and that no basis has been demonstrated for departing from it.

62. In my judgment, therefore, Mr. Knight's submissions on these grounds cannot succeed in the light of the decisions of this court in ***Byles*** and ***Montique***. Once it is accepted that the affidavits filed in extradition proceedings are valid, notwithstanding that they have come into existence after the grand jury proceedings, the contention that the magistrate at the committal proceedings must have before him the actual evidence presented to the grand jury cannot be sustained. And similarly, once it is also accepted that properly sworn and authenticated affidavits are sufficient "testimony" for the purposes of Section 14(1)(a),

neither can Mr. Knight's submission that the intention of the legislature was "to ensure that all statements of fact upon which reliance is placed would have had judicial oversight, or be subject to some preliminary process involving adjudication by the court". It should be noted finally on this point that in this appeal there is not now any challenge to the form, attestation or manner of authentication of the affidavits relied on in the extradition proceedings.

63. Mr. Knight also argued briefly ground 1 filed on behalf of the appellant Glenford Williams (which is set out at paragraph 50 above). That ground, it will be recalled, raises a question of autrefois acquit/convict, and is based on the assertion that this appellant was previously tried in Jamaica on charges arising out of the same set of facts relied upon by the requesting state in the extradition proceedings. It appears that he was charged and tried in the Resident Magistrate's Court for the parish of Saint James on six informations, was acquitted of two and convicted upon four of the charges. The ground therefore potentially called into play section 7(2) of the Act (that in effect preserves a plea of autrefois as an objection to extradition.)

64. However, despite the fact that a skeleton argument was filed on this ground, Mr. Knight on his feet told the court that he did not feel able to pursue his complaint on the basis of autrefois. The substantial complaint on behalf of this appellant, he now contended, was

made on the ground of oppression and he submitted that this court has an inherent jurisdiction to ensure that the making of an extradition order does not result in/involve any element of oppression.

65. Section 11(3) of the Act gives to the court on an application for habeas corpus the power to order the discharge of the person in custody where, by reason of (a) the nature of the offence, (b) the passage of time since the commission of the alleged offence or that he has been at large or (c) a lack of good faith in the making of the accusation against him, "it would, having regard to all the circumstances, be unjust or oppressive to extradite him." In my view, it is clear that the section has no application unless at least one of the three pre-conditions (a), (b), or (c) is first satisfied (as in fact was the case in ***Byles,*** where the passage of time since the commission of the alleged offence was the premise upon which the oppression argument was based and in fact succeeded.)

66. In the instant case, therefore, in the absence of any evidence or argument in support of any of the pre-conditions, the question of oppression cannot therefore arise. While it is true that Mr. Knight did not base his argument on this ground on the provisions of the statute, but appealed rather to the inherent jurisdiction of the court, no other authoritative source was shown as a basis for this jurisdiction in extradition proceedings.

67. In my view, therefore, none of the grounds of appeal argued by Mr. Knight on behalf of these appellants has been made good. I have not dealt specifically with his thoughtful submission based on the need in extradition matters to strike a balance between the principles of comity and reciprocity, which are the foundation of the modern arrangements, on the one hand, and ensuring that the jurisprudence of our bilateral treaty partner conforms with our norms of criminal justice, on the other hand. It is not that I do not regard it as a point of cardinal general importance, but it is rather that, in my view, that is a balance to be struck at the outset by the executive in negotiating and concluding the Treaty and by the legislature in prescribing in the Act the necessary safeguards and the limits within which the courts are to operate in extradition matters. Once these safeguards and limits are adhered to, the cautionary words of La Forest J in ***Republic of Argentina v Mellino*** (1987) 40 D.L.R (4th) 74, 93 remain apposite:

> "Our Courts must assume that [the defendant] will be given a fair trial in the foreign country. Matters of due process generally are to be left for the courts to determine at the trial there as they would be if he were to be tried here. Attempts to pre-empt, decisions on such matters, whether arising through delay or otherwise, would directly conflict with the principles of comity on which extradition is based". (Also cited with approval , though erroneously attributed to Lamer J, by the Judicial Committee in ***Heath & Another v Government of the United States of America*** (No. 2 (2005) 67 WIR 73, 81-82).

68. The remaining ground 2 filed on behalf of the appellant Robroy Williams set out at paragraph 50 above was argued by Ms. Linton QC. Ms. Linton's submission was that Article 1(2) of the Treaty was not satisfied in this case in that Jamaican courts have no jurisdiction under Jamaican law with respect to the apprehension of an unregistered vessel on the high seas. Accordingly, Ms. Linton submitted, the test of jurisdiction set out in Article 1(2) of the Treaty in respect of offences committed outside of the territory of the requesting state, that is, whether there is jurisdiction under the laws of both states for the punishment of such an offence "in corresponding circumstances," had not been satisfied.

69. A brief account of the factual background to this ground may be of some assistance. The affidavit evidence disclosed that on 25 May 2004 an unmarked vessel bound for Jamaica from Colombia with a cargo of cocaine on board was intercepted by the U.S. coastguard in international waters. The vessel was stopped in accordance with the provisions of the U.S. Maritime Drug Law Enforcement Act, (the MDLEA). According to witnesses aboard the vessel, the cocaine seized during that interdiction was supplied by the appellant Luis Miguel Avila Arias and was intended for delivery to the appellant Robroy Williams. As a result both men were charged in Count 2 of the indictment (see paragraph 4 above) with participating in a conspiracy in breach of the MDLEA.

70. The United States Government asserted jurisdiction over the vessel on the basis of evidence that no member of the crew identified himself as the master, captain or person in charge thereof or responded when asked by a federal law enforcement officer to identify the nationality of the vessel. The vessel was as a result deemed a "vessel without nationality", and therefore within the reach of the MDLEA, which extends to persons who conspire with those found on board a vessel without nationality and who are thus subject to the jurisdiction of the United States.

71. The account in the two preceding paragraphs is taken from Ms. Marsh's supplemental affidavit sworn to on 14 July 2004 and is not in issue for the purposes of the appeal. Indeed, it is this appellant's submission that although the laws of the requesting state "confer specific authority on their law enforcement officials in relation to vessels on the high seas... There is no corresponding statute under the laws of Jamaica nor are there laws of any other origin that confer that right". The respondents on the other hand submit (and the Full Court so found), that the provisions of Article 1 (2) of the Treaty and Section 22(1) (b) of the Dangerous Drugs Act confer jurisdiction on the Jamaican courts in the circumstances of this case.

72. Article 1(2) of the Treaty provides as follows:

> "With respect to an offence committed outside the territory of the Requesting State, the

> Requested State shall grant extradition, subject to the provisions of this Treaty, if there is jurisdiction under the laws of both States for the punishment of such an offence in corresponding circumstances."

73. Section 22 of the Dangerous Drugs Act provides as follows:

> " **22.-** (1) Every person who—
>
> (a)...
> (b) in the Island aids, abets, counsels , or procures the commission in any place outside the Island of any offence punishable under the provisions of any corresponding law in force in that place, or does any act preparatory to, or in furtherance of, any act which if committed in the Island would constitute an offence against this Act...
> shall be guilty of an offence against this Act."

74. As Marva McIntosh J observed in the court below, section 22(1)(b) "contemplates that acts done in furtherance of a conspiracy may cross territorial boundaries and is mindful of the fact that crimes, especially of conspiracies, span multiple jurisdictions and are committed on an international scale." In the instant case, the case against this appellant on count 2 is that he, based in Jamaica, conspired with others to commit an offence against the laws of the United States. That allegation, if proved, plainly in my view amounts to an allegation of an offence contrary to section 22(1)(b) of the Dangerous Drugs Act and therefore satisfies on the basis of the corresponding jurisdiction claimed by the United States and not challenged at this stage of the proceedings, the provisions of Article

1(2) of the Treaty (the "double criminality rule", which, to quote Lord Millett in ***R (Al-Fawwaz) v Governor of Brixton Prison*** [2002] 2 WLR 101, 130, "lies at the heart of our law of extradition").

75. This ground of appeal must accordingly fail as well.

The 4th appellant (Luis Miguel Avila Arias)

76. Ms. Jacqueline Cummings filed on behalf of this appellant some thirteen grounds of appeal, but at the actual hearing was content to confine her oral argument to the grounds relating to identification, sufficiency of evidence, jurisdiction and the form of the indictment. In so far as the last named issue is concerned, that is, the form of the indictment, I have already dealt with this ground at paragraphs 7 to 37 above and I accordingly set out below only those grounds that are relevant to the remaining issues in respect of this appellant:

> "4. The Full Court erred when it held that the statement of James Fortier provides evidence which justified treating the boat as stateless and therefore legitimized the boarding of the boat by the United States Coast Guard.
>
> 5. The Full Court erred when it held that the identification evidence before the Learned Resident Magistrate required him to leave same for consideration of the Trial Court.
>
> ...
>
> 8. The Full Court erred when it held that the Affidavit of Delroy Anthony Williams revealed that there was a conspiracy to distribute cocaine within the United States of America.
> ...

> 10. The Full Court erred when it held that the evidence before the Learned Resident Magistrate was sufficient for him to find that a prima facie case had been made out against the Appellant.
> ...
>
> 13. The Full Court erred when it held that identification would not have been an issue before the Magistrate as there was sufficient evidence on which he could find that this was the correct person before him."

77. On the issue of identification (grounds 4 and 13), Ms. Cummings pointed out that the only affiant to have mentioned this appellant was Delroy Williams and submitted that the photograph of the appellant produced in evidence did not provide a sufficient basis upon which Mr. Williams could have identified him after only two previous encounters. For the respondents, it was submitted by Mr. Cochrane and Mr. Taylor that there was sufficient prima facie evidence before the court on which the learned Resident Magistrate could conclude that this appellant had been properly identified.

78. It is common ground that the only evidence presented against this appellant in the committal proceedings was that contained in the affidavit of Delroy Anthony Williams sworn to on 17 May 2004. In that affidavit, Mr. Williams stated that in early 2002, he participated in four or five cocaine smuggling trips from Colombia to Jamaica at the behest of

the 2nd appellant Robroy Williams. His evidence of this appellant's involvement was as follows:

> "In early May of 2002, my uncle, SPY, hired me to participate in another cocaine smuggling venture for him. SPY provided me with $1,200.00 USD and told me to buy a plane ticket to Colombia. I bought a ticket for approximately $850.00 USD. SPY then gave me $1,000.00- $1500. in travel money and I left the next day for Colombia. An individual who I then knew as Miguel and who I now know too to be LUIS MIGUEL AVILA-ARIAS, and two other individuals picked me up from the airport in Cartagena. For approximately two weeks, I stayed at Miguel's girlfriend's house in Cartagena. During this time, I met one of the other crew members who was also slated to go on this same venture. I knew this individual as Boxton and later, learned his true name to be Dien Boxton- Moises. Approximately two weeks after arriving in Cartagena, myself and another individual traveled to Santa Marta, Colombia via bus. I was eventually picked up and taken to the launch site — a beach/farm where the four other crewmembers (to include Boxton) and MIGUEL arrived shortly after me. I remember that MIGUEL and BOXTON were studying nautical charts/maps and that MIGUEL provided BOXTON with a GPS unit prior to the launch, MIGUEL also provided us with a satellite phone, a nautical chart, a radio, rain gear and life jackets. I also know that MIGUEL was the individual who supplied the cocaine for this venture. The five of us departed Colombia aboard a go-fast vessel on Friday night May 24, 2002 with a load of 1,050 kgs. of cocaine. Ultimately this venture was not successful as we were stopped by law enforcement authorities on Saturday, May 25, 2002.

> While I was in Colombia waiting to go on this venture, I met another Jamaican individual who was also in Colombia waiting to participate in a cocaine smuggling venture for Spy. This Jamaican individual, along with the person who accompanied me to Santa Marta via bus, were both supposed to be crewmembers on this second smuggling venture for Spy. This second vessel was supposed to launch after our vessel reached Jamaica and successfully offloaded the cocaine. Once we had successfully offloaded the cocaine to Spy's organization, MIGUEL would be notified and he would then dispatch the second go-fast vessel. This second cocaine load was also going to my uncle, Spy.. I was not aware of the amount of cocaine to be transported on this second venture.
>
> I initially met Miguel in October/November of 2001 at Spy's office in Coral Gardens, Jamaica. Miguel was in Jamaica to organize a cocaine smuggling venture from Colombia to Jamaica with Spy. At this time, I knew Miguel to be one of Spy's main cocaine suppliers in Colombia. Spy and Miguel organized a go-fast load that consisted of 1,800 kgs. of cocaine. The load departed Colombia and arrived off the coast of Negril, Jamaica. There, one of Spy's vessels met the Colombian go-fast to receive the load of cocaine and transport it back to Montego Bay. Once the cocaine was offloaded in Montego Bay, the entire load was convoyed to Rasta Teddy's stash house."

79. Mr. Williams positively identified a photograph of this appellant ("Miguel") from a "photo line up" as the person now known to him as Luis Miguel Avila Arias.

80. In the light of this evidence, I find myself in complete agreement with the Full Court that there was sufficient evidence on a prima facie basis to require the Resident Magistrate to make the order for committal and thus leave the issue of the ultimate adequacy of the identification evidence to the trial court. Mr. Williams' evidence was that he had first met this appellant in Jamaica in 2001, that in May 2002, he had been a guest in the appellant's girlfriend's home in Cartagena and that on the night of the aborted smuggling trip from Colombia to Jamaica on 24 May 2002, both he and the appellant had been together at the launch site " poring over maps," as Mr. Cochrane put it, (although my reading of Mr. Williams's affidavit does not suggest that this appellant was himself actually on the vessel at the time of its interdiction by the United States Coastguard, as the Chief Justice seems to have concluded. - see page 20 of his judgment).

81. With regard to the issue of jurisdiction, it will be recalled that this appellant was charged with all the other appellants on count 1 of the indictment and with the 2nd appellant Robroy Williams on Count 2. Ms. Cummings submitted that on the basis of Article 1(2) of the Treaty, the learned Resident Magistrate had no jurisdiction over this appellant, given that section 22(1)(b) of the Dangerous Drugs Act speaks specifically to a person who aids and abets "in the Island" the commission of an offence outside of Jamaica. Given that the evidence against this appellant

relates to alleged activities outside of Jamaica, Ms. Cummings therefore submitted, section 22(1)(b) could not provide the link of criminality in corresponding circumstances required by Article 1(2).

82. Counsel for the respondents on the other hand submitted that even if section 22 (1) (b) did not apply, the matter was nevertheless covered by the common law rule confirmed in ***Liangsiriprasert v United States Government and Another*** [1990] 2 All ER 866, with the result that a conspiracy entered into abroad to commit a crime in Jamaica is triable in Jamaica in the absence of any overt act taking place in Jamaica in pursuance of the conspiracy.

83. As this ground does not appear to have been argued in these terms in the court below, we do not have the benefit of the views of the Full Court on it. However, while it appears to me that there may be some force in Ms. Cummings' submission as it relates to section 22(1)(b) of the Dangerous Drugs Act (in that the acts alleged against this appellant were plainly not done "in the Island"), I consider the submission for the respondents based on the common law to be unanswerable, as Ms. Cummings herself appeared to think, though not concede, that it might be. To the extent that the evidence against this appellant suggests that he was at the very least part of a conspiracy to import cocaine into Jamaica in the first place, that would itself be evidence of an inchoate

crime committed abroad which was intended to result in the commission of a criminal offence or offences in Jamaica (see for example section 8 of the Dangerous Drugs Act). As Harrison P observed in ***Shervin Emmanuel*** (supra, at pages 26-27), while "the classic example of aiding and abetting presupposes presence as a component element in establishing a charge of aiding and abetting [applying ***Liangsiriprasert*** and ***Al-Fawwaz***] ... the perimeters of aiding and abetting are rightly extended in the context of extradition cases". (See also ***Ramcharan & Williams v Commissioner of Correctional Services & Director of Public Prosecutions,*** SCCA nos. 106& 107/2005, judgment delivered 16 March 2007). In my view this ground of appeal must therefore also fail.

84. Finally, on the question of sufficiency of evidence, Ms. Cummings submitted that there was no evidence that this appellant had any knowledge that the cocaine was to be shipped beyond Jamaica and on to the United States. In order to establish a prima facie case, her skeleton argument runs, "the evidence must show that the appellant had knowledge that the drugs were intended for importation and distribution into the United States." The only evidence against this appellant is that of Delroy Williams (see paragraph 78 above) and that evidence does not provide a basis for any reasonable inference that this appellant was a party to a conspiracy to smuggle drugs into that country.

85. Ms. Cummings based her submissions squarely on the decisions of this court in ***Delroy Boyd*** and of the Full Court in ***Berkley Hepburn*** to which I have already made reference (at paragraph 47 above). In addition to the extract from the judgment of McCalla J (as she then was) in ***Berkley Hepburn*** previously referred to, Ms. Cummings relied in particular on the following passage from the judgment of Cooke JA (Ag) (as he then was) at pages 9-10 of his judgment in ***Delroy Boyd***:

> "There is undoubtedly, evidence that the appellant was involved in a conspiracy to import marijuana and cocaine into the Bahamas from Jamaica. But was he a party to a conspiracy to the importation of those same drugs into the United States? This is the critical question. In the affidavits of Newton and Cambridge there is only one sentence that mentions the Untied States. This is to be found in paragraph 2 of the Cambridge affidavit. It reads:
>
> > 'The cocaine and marijuana would then be transported into the Untied States.'
>
> The Full Court appears to have placed telling significance on that sentence. Here is how it dealt with this aspect:
>
> > 'From the affidavits of Newton and Cambridge it seems quite clear that they were involved in international narcotics trafficking as integral parts of a criminal organization. From their affidavits there is ample evidence to show that the applicant subsequently joined this organization. Bearing in mind the duration and nature of Cambridge's involvement it might well be expected that he would have actual knowledge of the scope of the drug operations. Consequently, his

> assertion that the drugs supplied by the applicant would be shipped to the Bahamas and then transported to the United States of America cannot be, without more, written off as mere speculation, his words when taken at face value represent an assertion of facts and as such are capable of being accepted by a tribunal of fact.
>
> If Cambridge had actual knowledge of the scope of the drug operation, it does not follow that the appellant was privy to that scope. What the evidence in the affidavits reveals is that the appellant was a supplier of illicit drugs which were destined for the Bahamas. Interestingly, nowhere in the judgment of the Full Court was it sought to impute to the appellant knowledge of the scope of the drug operations. The Full Court seemed to have concluded that since the appellant was a party to 'international narcotics trafficking' he must necessarily be aware of the ultimate destination of the drugs. This is an unwarranted leap. There is no evidential basis upon which such an inference can be drawn."

86. Counsel for both respondents urged this court to say that the Full Court was correct to hold that there was ample evidence connecting this appellant with the overall conspiracy. Mr. Taylor in particular submitted that Mr. Williams' affidavit should be taken as a whole and the words "another cocaine smuggling venture" in the second line of the extract quoted at paragraph 78 above were sufficient to provide a link between what is thereafter attributed by the witness to this appellant and the wider dimensions of the conspiracy, with the United States as the ultimate

destination, to which reference had previously been made in the affidavit evidence.

87. In the Full Court, this question was dealt with in very general terms. Hibbert J, for example, concluded that the evidence "clearly reveals an elaborate scheme whereby cocaine was imported into Jamaica and most of it transshipped to the United States, sometime through the Bahamas...looked at as a whole, it is in my opinion that the evidence identifies Robroy Williams, Norris Nembhard, Louis [sic], Miguel Avila Arias, Vivian Dally and Glenford Willams as co-conspirators in this scheme as charged in Count 1 of the indictment" (pages 58-59). Marva McIntosh J's comment with regard to this appellant was that "different conspirators may enter the venture at different stages and this fact does not place those who came in at a later stage in any different position from the initiators of the conspiracy" (page 37).

88. That this appellant was integrally involved in a conspiracy to import cocaine into Jamaica from Colombia appears clearly from Mr. Williams' affidavit, both in respect of the May 2002 venture, when Mr. Williams met this appellant in Colombia, and the earlier 2001 venture, at the time when Mr. Williams first met him in Coral Gardens, Jamaica. But the "critical question" as Cooke JA described it in ***Delroy Boyd***, is "was he a party to a conspiracy to the importation of these same drugs into the United States?" While it is a fact that each conspirator may undoubtedly have a

different role to play at different stages of the venture, the evidence must connect each conspirator with the ultimate objective of the conspiracy alleged, that is, the smuggling of illicit drugs into the United States, in some way. In other words, it is not enough for it to be shown that a person in the position of this appellant was part of an elaborate alleged scheme of international narcotic trafficking without demonstrating by the evidence that he was aware of the ultimate destination of the drugs. Or, again to quote Cooke JA in ***Delroy Boyd***, "It has to be shown that the appellant was involved in a conspiracy, the object of which was the importation of drugs into the United States" (page 4).

89. It follows from this that in my view this appellant is entitled to succeed on the ground that there was no evidence adduced before the learned Resident Magistrate that he had any knowledge that the cocaine was to be shipped beyond Jamaica and on to the United States. There is in my view, no evidential basis from which any such inference can reasonably be drawn. I would therefore allow this appellant's appeal and order that habeas corpus should go in respect of him.

The 5th appellant (Norris Nembhard)

90. This appellant filed four grounds of appeal originally as follows:

> "(a) That the Full Court erred in concluding that irregularities in the indictment and on the warrant were of no consequence and did not affect the validity of the extradition proceedings

(b) That the Full Court was in error when it rejected the appellant's claim that there was insufficient evidence to commit the Appellant to be extradited.

(c) That the Full Court erred when it failed to find that the Magistrate did not weigh up the affidavits presented to him and did not seek to distinguish direct evidence from hearsay and other forms of inadmissible evidence contained in the affidavits.

(d) The Full Court failed to consider any likely violations of the Appellant's constitutional rights when the Appellant was designated as "Drug Kingpin" by the requesting state, or by the reliance of the Magistrate on the documents that were presented by him."

91. In addition to these four grounds, this appellant also sought leave to argue two supplemental grounds of appeal which were as follows:

"(1) The Appellant's extradition will be in breach of Section 11 of the Extradition Act and Section 20(1) of the Constitution by virtue of, inter alia, the delays which have occurred since his arrest and accordingly the Learned Court erred in confirming the order for his extradition.

(2) the appellant did not as a matter of procedural law receive a fair hearing at the Supreme Court and/or the Court as constituted had no jurisdiction to hear the Appellant's applications as one of

the Judges who presided had a connection or apparent connection to the Requesting State."

92. The 2nd respondent took a preliminary objection to the grant of leave to this appellant to argue the supplemental grounds, on the basis of section 63 of the Criminal Justice (Administration) Act, which provides that an application for a writ of habeas corpus shall state all the grounds upon which it is based (section 63(1)) and that, once made, no further application may be made "to the same court or to any other court" in the absence of fresh evidence (section 63)(2)).

93. The court, having considered this objection and the authorities relied on by Mr. Taylor in support of it, granted leave to Mr. Phipps QC, who appeared for this appellant, to argue supplemental ground 2, but not ground 1. Mr. Taylor's objection in relation to supplemental ground 1 was, in my view, clearly well taken in the light of several previous decisions of this court, most recently in ***Ramcharan & Williams*** (supra, per Harrison P at pages 47-48, per Cooke JA at pages 70-71 and per Harris JA at pages 84-85).

94. Supplemental ground 2 and the original grounds (b) and (c) were argued by Mr. Phipps (in that order) and ground (a), was argued by Mrs. Samuels-Brown. I have already considered fully the arguments put forward by Mrs. Samuels-Brown and other counsel on ground (a) at paragraphs 7 to 30 above and, for the reasons already given, I do not

think that this ground can succeed. I turn therefore to the grounds argued by Mr. Phipps under the headings "Bias" and "Sufficiency of Evidence".

Bias

95. The appellant's complaint is that the participation of Hibbert J as a member of the Full Court at the hearing of the application for habeas corpus was apt to give rise to an appearance of bias or partiality as a result of what was described by Mr. Phipps in his written submission as "his long and close past relationship with the Requesting State in these proceedings." The basis of the complaint is that the learned judge had been a senior member of the office of the Director of Public Prosecutions for several years prior to his appointment as a judge of the Supreme Court and that in that capacity he had acted as counsel for, as well as provided advice to, the United States Government in connection with extradition requests from time to time. However, there was no evidence that in that capacity Hibbert J had ever had anything to do with any matter related to this appellant and Mr. Phipps QC was careful to emphasize that no allegation of actual bias was being made against the learned judge.

96. We were told by Mr. Phipps that at the commencement of the hearing in the Full Court this appellant's counsel had "indicated a challenge to the composition of the court." As a result of this intimation,

the court adjourned to chambers, where this and other matters were discussed "with [Hibbert J] taking part in the discussions." We were also told that the appellant's complaint was determined against him then and there in chambers and that nothing further was said of the matter when the hearing resumed in open court. There is certainly no mention of any of this in the judgments of the court.

97. Mr. Phipps submitted that by virtue of Hibbert J's previous close relationship with the United States as the requesting state in extradition proceedings while he was at the bar, the appellant was denied a fair hearing by an independent and impartial tribunal as guaranteed to all citizens by section 20(1) of the Constitution of Jamaica.

98. Mr. Phipps further submitted that the Full Court was in error in dismissing this appellant's application for habeas corpus without first giving "full, careful and thorough consideration" to the complaint of bias in open court, where the complaint was first made. Counsel complained in particular that the matter was dealt with in chambers "without hearing evidence and with Hibbert J taking part in the discussions." Finally, in his reply to the submissions made on behalf of the respondents, Mr. Phipps commented that although this court might find, on the basis of information supplied by the Crown that the learned judge had not been involved as counsel in any matter relating to this appellant, that Hibbert J

was not biased, the court was nevertheless being asked "to pronounce on whether the Full Court gave this complaint a fair hearing."

99. Both Mr. Cochrane and Mr. Taylor for the 1st and 2nd respondents respectively submitted that there was no apparent bias in this case within the meaning of the authorities, to a number of which we were referred in this regard. It was also pointed out that Hibbert J had in fact severed his connection with the office of the Director of the Public Prosecutions some years before the Full Court hearing in this matter.

100. I have already pointed out this appellant expressly eschews any suggestion that Hibbert J was actually biased. Nor is it contended that the judge was either a party to these proceedings or had a "relevant interest" in the subject matter, either of which would result in his automatic disqualification from sitting in the case "without any investigation into whether there was a likelihood or suspicion of bias" (per Lord Browne-Wilkinson ***in R v Bow Street Metropolitan Stipendiary Magistrate Ex parte Pinochet Ugarte*** (No.2) [1999] 1 All ER 577, 586).

101. It follows from this that the matter must therefore fall to be dealt with on the footing of apparent bias only, in respect of which the test is the objective one formulated in ***Porter v Magill*** [2002] 2 A.C. 357; that is, whether the fair-minded and informed observer, having considered the facts, would consider that there was a real possibility that the tribunal was biased. This is ground now much traversed in the authorities, from

decisions of the House of Lords in ***R v Gough*** [1993] A.C. 646 (the "real danger" of bias test), through ***Porter v Magill*** (the source of the "real possibility" of bias emendation), including decisions of this court in ***Perkins v Irving*** (SCCA No. 80/95 judgment delivered 31 July, 1997) and ***R v Andem*** (SCCA No. 159/05 judgment delivered 22 June 2007) and, hardly least, decisions of the Privy Council in ***Berry v Director of Public Prosecutions and the Attorney General*** (1996) 33 JLR 308, ***Panton and another v the Minister of Finance and another*** (2001) 59 WIR 418 and ***Meerabux v Attorney General*** (2005) 66 WIR 113.

102. Most recently, in the Trinidad and Tobago case of ***Basdeo Panday v Wellington Virgil*** (App. No. 75 of 2006, judgment delivered 4 April 2007), Archie JA, as he then was, put the matter in this way:

> "If the integrity of the judicial system and public confidence in the administration of justice is to be maintained, then fairness and impartiality must both be subjectively present and objectively demonstrated to the informed and reasonable observer. The duty of the court when investigating an allegation of apparent bias is to place itself in the shoes of a hypothetical observer who is both 'fair minded' and 'informed'. If such an observer would conclude that there is a real possibility that the tribunal was biased, the system has failed and the proceedings are vitiated."

103. Applying this test to the instant case, the question may therefore be put as follows: would a fair-minded observer armed with the knowledge that Hibbert J, who had in 2007 been a judge of the Supreme Court for a

number of years, had before his appointment as a judge worked as a prosecutor in the Government service and had particular responsibility for advising and marshalling the evidence in extradition matters on behalf of the United States Government, but had no connection with any matter involving this appellant, conclude that there was a real possibility that he would be biased against this appellant in these proceedings?

104. In my view, the answer to this question on the facts of the instant case must be in the negative. For the fair minded and informed observer would appreciate, I think, that although each judge comes to the role against a backdrop of diverse professional interests, experience and pre-occupations, it does not follow without more that a real possibility of bias can be assumed, on the basis only of the particular judge having had a role as a professional advisor in matters of the type currently under investigation. In answer to a question from the court, Mr. Phipps maintained, as I think the logic of his primary submission constrained him to do, that Hibbert J's professional background disqualified him from sitting in <u>any</u> extradition matter involving the United States Government. I do not myself think that a fair minded and informed observer would be prepared to go so far, otherwise persons in the position of Hibbert J might be disqualified altogether from presiding over any criminal trial and so too, presumably, would a judge whose professional background was in private defence work.

105. In any event, it appears to me that at the end of the day Mr. Phipps had considerably narrowed his complaint on this ground to the issue of whether the Full Court ought to have dealt with the objection to Hibbert J's participation in the case in open court. While I fully understand the considerations that might have led to the matter being ventilated initially in chambers rather than in open court, I nevertheless think that it would have been best to place the discussion and its outcome on record at some point after, preferably immediately after, the resumption of the matter in open court. But this appellant has not demonstrated how the failure to do this (particularly where no request appears to have been made on his behalf to the court below for this to be done) can be said to have infringed his right to a fair hearing as a separate issue from the wider question, which is whether Hibbert J, ought to have disqualified himself in the circumstances. Nor does anything turn, in my view, on the fact that Hibbert J was himself a party to the discussions in chambers, as even if he had been a judge sitting alone, an application for him to recuse himself for any reason would have had to be directed to him for his consideration in the first place.

106. For all the above reasons, therefore, I am of the view that the supplemental ground of appeal filed on behalf of this appellant cannot succeed.

Sufficiency of Evidence

107. In support of grounds (b) and (c) Mr. Phipps submitted that the judges in the Full Court misdirected themselves as to what was alleged against this appellant in the indictment and other documents, as a consequence of which they "failed to give adequate consideration to the sufficiency of the evidence to prove the offence charged against [this appellant] especially where there was a complaint at ground 3... that the offence charged did not amount to an offence in Jamaican law." Mr. Phipps pointed out while the members of the court used language describing the charge as one of a "conspiracy to distribute cocaine and marijuana in the United States" (per Wolfe CJ at page 6), the language of count 1 in effect amounted to an allegation of a conspiracy to distribute drugs in Jamaica. This called for, Mr. Phipps submitted, a weighing-up of the evidence with close and careful consideration to determine the sufficiency of the evidence to establish a prima facie case of what is alleged against this appellant, "not what was mistakenly accepted by the judges as the charge".

108. Finally, Mr. Phipps submitted that count 1 as worded "does not make an allegation of particulars which, if committed in Jamaica, would be an offence in Jamaica, in that conspiracy to distribute knowing that [the drugs] would be exported to the United States is not an offence known to Jamaican Law"

109. It was submitted by counsel for the respondents that there was sufficient prima facie evidence to justify this appellant's committal. Mr. Cochrane for the 1st respondent submitted further that the nature of extradition proceedings is such that the description of corresponding offences in the requesting and the requested state may not be the same, citing in support ***In re Bellencontre*** [1891] 2 Q.B. 123.

110. The evidence against this appellant is to be formed primarily in the first and second Young Duffis affidavits, the affidavits of John Pablo Garcia- Washington sworn to on 21 May 2004 and the affidavit of Delroy Williams, sworn to on the 17 May 2004.

111. At paragraph 8 of the first Young Duffis' affidavit, the affiant described a failed attempt by this appellant in May 2002 to transport some 400 kilograms of cocaine to the United States and the subsequent successful transportation of a further 200 kilograms of cocaine supplied by this appellant out of cocaine obtained from a Colombian supplier to the Untied States. Mr. Young Duffis also stated that he had sometime in 1999 purchased cocaine for resale from this appellant and a Colombian person, both of whom he had met while in St. Ann's Bay. During the course of this meeting, this appellant told him "that he had a good connection to get cocaine to the United States and that if I ever needed to get a shipment to the United States he could make it happen." According to Mr. Young Duffis, this appellant and the appellant Robroy

Williams "sometimes assisted one another in the drug business" and a seizure of cocaine which he had described as having taken place at Mr. Williams' farm in Latium in 2004 actually related to cocaine which belonged to this appellant, for whom Mr. Williams "was going to sell it".

112. Mr. Garcia-Washington stated that he personally participated in two smuggling ventures from Colombia to Jamaica "in which the loads were to be delivered to [this appellant]" the first of these being between March and June 2000 and the second in June 2000.

113. Mr. Delroy Williams for his part stated that he had seen this appellant at the office of the 2nd appellant Robroy Williams on several occasions, when this appellant "typically arranged to purchase 10-15 kilograms of cocaine from [the appellant Williams] at a time." On two occasions he saw this appellant pay US$50,-70,000 to the appellant Williams and on another occasion he saw this appellant at the appellant Williams' farm in Latium.

114. Mr. Cochrane submitted that there was sufficient evidence within these affidavits to make a prima facie case against this appellant on count 1, and I entirely agree. Indeed, as Marva McIntosh J observed, this evidence clearly suggested that this appellant was "deeply involved" in the conspiracy alleged and plainly suffices, in my view, to establish a prima facie against him.

115. As to Mr. Phipps' complaint based on the nature of the allegation in count 1, I am unable to agree with his submission that count 1 relates solely to distribution of drugs in Jamaica. The evidence summarized above also opens up the additional dimension of unlawful importation into the United States and, once a prima facie case is made out that the appellant is guilty of a crime under United States law that is also a crime under Jamaican law, there is no additional requirement that there should be "an exact correspondence" in the definition or description of the crime in the laws of both countries (see ***In re Bellencontre,*** supra, per Wills J, at pages 140-141, and see also ***Ramcharan & Williams***, supra, per Harrison P at page 49.)

116. I am therefore of the view that the grounds argued on behalf of this appellant must also fail.

The 6th appellant (Vivian Dally)

117. This appellant, who was represented by Mr. Patrick Atkinson, filed five grounds of appeal as follows:

(a) That the Court failed to consider the violation of the Appellant's Constitutional rights by the manner in which the request for extradition was presented against the Appellant.

b) That the Court failed in finding that the Affidavits were properly authenticated.

c) The Court failed to weigh up the Affidavit evidence presented against the Appellant to determine if there was any sufficient direct evidence to establish a prima facie case against the Appellant with the charge on which extradition has been ordered.

d) That the Court failed to consider whether there was sufficient evidence against the Appellant amounting to a conspiracy to distribute drugs in the United States of America.

e) The Court erred in finding that supplemental or additional Affidavits not considered in the granting of the authority to proceed were admissible by the Magistrate in deciding whether or not there was a prima facie case made.

118. Like Mr. Knight who had gone before him, Mr. Atkinson was not inhibited by the fact that the decision of this court in ***Montique*** provided direct authority against his grounds (a) and (b). Indeed, he adopted Mr. Knight's submissions and submitted further that having regard to the fact that no indictment under United States law "can be based on other than viva voce evidence before a curial body", principles of comity would generate an expectation that a properly authenticated record of that viva voce evidence would be presented at the committal hearing in proceedings under the Act.

119. Mr. Atkinson submitted further that this appellant's constitutional rights had been violated, since the evidence on which the warrant of commitment against him was based was in the form of affidavits and not testimony, as required by the Act, as a result of which the removal of the appellant from Jamaica pursuant to the warrant is "outside of the provisions of the law and is therefore unconstitutional."

120. Mr. Atkinson invited the court to disregard and overrule ***Montique*** on the basis that:

(I) in that case the reference by Smith JA in his judgment to the case of ***Bow Street Magistrates' Court and Lemieux v Governor of Belmarsh Prison***[2002] EWHC 1144 (Admin) for the purposes of elucidating the meaning of section 14 of the Extradition Act 1870, did not take into consideration the fact that that was a U.K. statute ;

(ii) that the application in that case of the principle "that an applicant may not have recourse to a so-called constitutional motion seeking a writ of habeas corpus when he is simultaneously seeking a similar remedy under the provisions of the Extradition Act" (see per Smith JA at pages 32-33, applying ***Mitchell v United States Government*** (1990) 27JLR 175) was "flawed", because what the appellant was seeking to do was to raise a constitutional question rather than to move a constitutional motion; and

(iii) since in the law of the requesting state an indictment could only be founded on testimony to a preliminary hearing before a court or a grand jury enquiry, comity required that a copy of that testimony be supplied to the learned Resident Magistrate.

121. Counsel for the respondents, hardly surprisingly, were content to rely on the previous decisions of this court in ***Byles*** and ***Montique.***

122. Despite Mr. Atkinson's spirited efforts, I have not been persuaded that there is anything in any of the reasons he has suggested for treating ***Montique*** as not having been correctly decided. In the first place, the complaint that the Extradition Act 1870 was a United Kingdom statute, though accurate taken by itself, entirely ignores the further and more important point that that Act was in fact an imperial statute which by its terms applied to all the then colonies of Great Britain, which at the time included Jamaica. This is lucidly explained by Carey J (as he then was) in ***R v Commissioner of Correctional Services, ex parte Fitz Henri*** (1976) 24 WIR 471, 478, where he points out that, prior to independence, "the Acts which governed extradition in this country, were the Extradition Acts 1870 – 1932, Acts of the imperial Parliament, legislating in virtue of its sovereignty over this country". Mr. Atkinson's second and third points, one described by him as a constitutional point, the other said to be based on comity, are really no more than restatements of his primary submission in ***Montique,*** and again in this appeal, that section 14 does not permit the

magistrate to act on affidavits. The submission has not gained any added value, in my view, by its repetition, albeit in perhaps more evocative language, in constitutional guise.

123. For these reasons, and for these already given at paragraphs 58 to 61 above, I consider that ***Montique*** was correctly decided and that this appellant's grounds (a) and (b) cannot therefore succeed.

124. Grounds (c), (d) and (e) were argued together by Mr. Atkinson, who submitted firstly that the learned Resident Magistrate had erred in taking into account evidence that did not come through the diplomatic channel. The supplemental affidavits, Mr. Atkinson complained, were not "truly supplemental" and amounted to no more than "a failed attempt to escape the decision in ***Boyd***". These are points that have already been dealt with at paragraphs 32 to 36 above, and I would only add that in my view, once the evidence is properly received by virtue of Article IX (3) and section 14(1)(a), I cannot see in principle why its description as "supplemental" should be regarded as limiting or confining the information that it is capable of providing.

125. Finally, on the question of the sufficiency of the evidence against this appellant, Mr. Atkinson submitted (relying now on ***Montique***) that, even if affidavits are admissible at the committal hearing, "not everything put in an affidavit is acceptable", (see for example page 18 of **Montique**, where Smith JA observed that even where affidavits were admissible

pursuant , to section 14(1)(a), "inadmissible or hearsay evidence in them fall to be excluded in the weighing-up process." A proper weighing-up of the evidence, Mr. Atkinson submitted, would have made it clear that much of it was "pure hearsay" and that the witnesses who gave evidence against this appellant were persons with an interest to serve. When these facts are taken into account there was accordingly no prima facie case against him.

126. Mr. Cochrane for the 1st respondent submitted that while the magistrate in committal proceedings is required to give consideration to all the evidence before him and to reject that which he deems irrelevant, he is required only to determine whether it describes a prima facie case. The evidence against this appellant amply justified the learned Resident Magistrate's conclusion that the evidence against him was sufficient for this purpose.

127. Mr. Delroy Williams identified this appellant (known as "Jungo") as the appellant Robroy Williams' "trustee" and attributed to him the critical role in Mr. Williams' organization of custodian of the funds.

> "I know that in Spy's organization, Jungo (who I now know to be Vivian Dalley) served as a 'trustee' who carried and wired money. I know this because Jungo was the person who wired me $500 U.S. currency at Spy's direction on two separate occasions in April/May 2002 while I was in Colombia waiting to transport cocaine to Jamaica for Spy. This load of cocaine was the load on which I was ultimately arrested.

> I also know that Jungo has carried large sums of money (to include currency) generated from drug sales in the U.S. from Jamaica to Panama for Spy's on at least two occasions."

128. The first Young Duffis affidavit (see paragraph 43 above) attributes a similar role to this appellant as a participant in an aborted mission from the Norman Manley International Airport to Panama, for the purpose of transporting US$1 Million, "proceeds from successful drug sales in the United States...being sent to Panama as a payment to a Colombian supplier from [the appellant] Williams". In the second Young Duffis affidavit, this appellant is described as himself being, at the appellant Robroy Williams' suggestion, the owner of "approximately two (2) of the one thousand three hundred (1,300) kilograms [of cocaine] shipped to the United States" and in 2002 as having travelled to the United States, again at the appellant Robroy Williams' request, "to pick up two hundred thousand dollars ($200,000.00US) currency."

129. In my view, this evidence was clearly sufficient to satisfy the prima facie threshold in relation to this appellant, as the Full Court found, the learned Chief Justice referring with approval to the following statement on the role of the magistrate in committal proceedings from the judgment of the court delivered by Lloyd LJ in ***R v Governor of Pentonville Prison and another Ex parte Osman*** [1989] 3 All ER 701, 721:

> "In our judgment, it was the magistrate's duty to consider the evidence as a whole, and to reject any evidence which he considered worthless. In that sense it was his duty to *weigh up* the evidence. But it was not his duty to *weigh* the evidence. He was neither entitled nor obliged to determine the amount of weight to be attached to any evidence or to compare one witness with another. That would be for the jury at the trial. It follows therefore that the magistrate was not concerned with any inconsistencies or contradictions in [a witness'] evidence, unless they were such as to justify rejecting or eliminating his evidence altogether. Nor, of course, was he concerned with whether [the witness'] evidence is corroborated."

Conclusion

130. It is for all these reasons, that I have, therefore, come to the conclusion that:

(i) the appeals of the appellants Herbert Henry, Robroy Williams, Glenford Williams, Norris Nembhard and Vivian Dally should be dismissed and the order of the Full Court refusing their applications for habeas corpus affirmed; and

(ii) the appeal of the appellant, Luis Miguel Avila Arias, should be allowed, the order of the Full Court set

aside and an order made for the issue of a writ of habeas corpus in respect of this appellant.

PANTON, P:

ORDER:

(i) The appeals of the appellants Herbert Henry, Robroy Williams, Glenford Williams, Norris Nembhard and Vivian Dally are dismissed and the order of the Full Court refusing their applications for habeas corpus affirmed; and

(ii) The appeal of the appellant, Luis Miguel Avila Arias is allowed; the order of the Full Court is set aside and order made for the issue of a writ of habeas corpus in respect of this appellant.