JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 96 OF 2005

BEFORE: THE HON. MR. JUSTICE SMITH, J.A.
THE HON. MR. JUSTICE K. HARRISON, J.A.
THE HON. MR. JUSTICE MARSH, J.A. (Ag.)

BETWEEN	**HARTFORD MONTIQUE**	**APPELLANT**
A N D	**THE COMMISSIONER OF CORRECTIONS**	**1ST RESPONDENT**
A N D	**THE DIRECTOR OF PUBLIC PROSECUTIONS**	**2ND RESPONDENT**

Patrick Atkinson and Mrs. Carolyn Reid-Cameron for the appellant

Annaliesa Lindsay and **Kevin Powell** instructed by the **Director of State Proceedings** for the 1st Respondent
Donald A. Bryan, Deputy Director of Public Prosecutions for the 2nd Respondent

November 20, 21, 22, & 23, 2006 and March 8, 2007

SMITH J.A:

This is an appeal against an order of the Full Court of the Supreme Court (Reid, Harris and N. McIntosh JJ) dated 28th October 2005, dismissing the appellant's application for a Writ of Habeas Corpus.

The appellant, a Jamaican, is accused of extraditable offences in the United States of America (U.S.A). On 17th April 2004, a Grand Jury in the U.S.A. preferred an indictment against him and others containing 11 counts. Of these only 4 implicate the appellant. For the purposes of this appeal only two of the four (4) counts are relevant (two were not pursued at the Extradition hearing). The relevant two are counts 10 and 11.

Count 10 avers that Hartford Montique (the appellant) a/k/a "Brookie" and 5 others, on or about October 11, 2003 did knowingly and intentionally aid and abet the importation into the U.S.A. of 100 kilograms or more of substance containing marijuana.

Count 11 charges that the appellant and others on October 12, 2003 did knowingly and intentionally possess the said marijuana with intent to distribute same.

A Warrant of Arrest was issued on the same day the Indictment was preferred. Subsequently, a request was made by the U.S.A. of the Government of Jamaica for the extradition of the appellant. A Provisional Warrant of Arrest was issued under section 9 of the Extradition Act, 1991 (the Act) on June 21, 2004. On June 23, 2004 the Provisional Warrant was executed on the appellant.

On September 8, 2004 the Minister of Justice, by virtue of section 8 of the Act, issued his Authority to Proceed to the Resident Magistrate for the Corporate Area pursuant to the request for the appellant's extradition. Extradition proceedings in relation to counts 10 and 11 (supra) began before the Resident Magistrate, Mr. Martin Gayle, on September 22, 2004. On October 4, 2004 the Resident Magistrate issued his Warrant of Committal committing the appellant into the custody of the first respondent.

In the Supreme Court

The appellant, on October 19 2004, filed a Fixed Date Claim Form in the Supreme Court seeking the issuance of a Writ of Habeas Corpus. On December 8, 2004 an Amended Fixed Date Claim Form was filed. The grounds on which the Writ of Habeas Corpus was sought were:

(1) That the Learned Resident Magistrate in committing the claimant to be extradited relied on evidence contained in affidavit of Michael Layne dated the 22nd day of July, 2004 which said affidavit was not considered as evidence at the hearing before the Grand Jury.

(2) That the allegations related to counts 11 and 12 contained in the indictment relates to the offence of aiding and abetting and Jamaican law does not recognize the offence of aiding and abetting committed outside of the jurisdiction.

(3) That the learned Resident Magistrate erred in finding that on a prima facie case possession of ganja was made out against the claimant as there was no material before the court to establish at any of the material times, that the claimant was in the United States of America or that he had custody or control of the ganja the subject of the said counts on the indictment.

(4) That the learned Resident Magistrate erred in putting any weight at all on the affidavit of Michael Layne as:

(i) His affidavit is that of an uncorroborated accomplice

(ii) The requesting State failed to produce the Plea Bargain Agreement or co-operating Defendant's Agreement that it had with the said Michael Layne.

(iii) At the date of the said affidavit the said Michael Layne although charged with various criminal offences, had not yet been sentenced by the court.

At a Case Management Conference on the 9th December, 2004 the Judge ordered that the defendants (now the respondents) "use their best efforts to request through the proper channels, the transcripts from the Grand Jury Hearing" in respect of the appellant within 30 days from the date of the order. The Case Management Judge also granted the appellant leave to file additional grounds in support of his application for Writ of Habeas Corpus. Efforts by the respondents to have disclosure of the transcript of the Grand Jury Hearing were fruitless. A letter dated February 7, 2005 from Jerold McMillan, Assistant U.S. Attorney, advised that the U.S. law prohibits such disclosure with a view to maintaining the U.S. long standing legal tradition of grand jury secrecy.

On May 6, 2005, Notice of the following (amended) additional grounds was filed:

(5) The Learned Resident Magistrate, in deciding the Application for an Order for Extradition, erred in relying on sworn statements rather than on testimony as required by the Extradition Act and that

this amounts to a violation of the Claimant's constitutional rights as guaranteed by section 16 of the Constitution of Jamaica.

(6) That the Learned Resident Magistrate, in committing the Claimant erred in relying on the affidavit of Michael Layne, which is not sufficient evidence under the Extradition Act.

(7) That the Learned Resident Magistrate in deciding the application for an Order for Extradition against the Claimant failed to make any findings of fact as to whether the said Application fell within the Extradition Act and in the consequence, carried out a mere rubber stamping of the said Application.

(8) That the case against the Claimant before the Learned Resident Magistrate relied on the unproved allegations that the claimant was in Florida on or about the 29th of September, 2003 .

The 3rd and 8th grounds were not pursued in the Full Court. Harris J, who wrote the judgment of the Full Court, in rejecting the submissions of Mr. Atkinson held that:

(i) The word "testimony" as used in section 14(1) (a) of the Act embraces not only evidence given orally on oath but also statements under oath. An affidavit sets out testimony on oath and falls within the purview of section 14 (1)(a) of the Act.

(ii) The Learned Resident Magistrate did not err in holding that Layne's affidavit evidence was sufficient to warrant the committal of the appellant.

(iii) There was no duty on the Resident Magistrate to take into account the fact that Mr. Layne's affidavit was not before the Grand Jury.

(iv) The appellant's constitutional rights guaranteed by section 16 of the Constitution were not violated.

(v) The Jamaican law recognizes the offence of aiding and abetting committed outside the jurisdiction.

(vi) There is no duty on the Resident Magistrate, in proceedings for committal, to make findings of fact or to assess the evidence in order to determine the weight to be attached to it or to give reasons for the committal.

In the Court of Appeal

Section 21A(1) of the Judicature (Appellate Jurisdiction) Act gives the appellant the right of appeal from the decision of the Full Court in Habeas Corpus proceedings. The following grounds of appeal were argued:

(1) The Court failed to adequately address the violation of the Appellant's constitutional right guaranteed by Section 16 of the Constitution of Jamaica, when the Magistrate failed to follow

the requirements and terms of the Extradition Act in ordering the extradition of the Appellant.

(2) The Court erred in relying on the terms of the Extradition Treaty rather than the Extradition Act.

(3) The Court erred in failing to find that the Learned Resident Magistrate ordered that the Appellant be extradited without any prima facie evidence that the Appellant either possessed marijuana in the United States of America with intent to distribute it therein or that he imported the said drug into that country.

(4) The Court erred when it failed to correctly address the issue of the duty of the Magistrate to weigh up the evidence against the Appellant as follows:

(a) Whether there was any weight, at all, in the allegations of an unsentenced accomplice.

(b) Whether there was [any] weight, at all, in the allegations of a charged accomplice because the requesting state failed to say whether there was a plea bargain in existence and, if so, what its terms were.

(c) Whether there was any admissible evidence against the appellant according to the Laws of Jamaica.

(5) The Court erred in failing to address discrepancies between the request for extradition; the Grand Jury's Indictment; and the Magistrate's Warrant of Committal.

(6) The Court erred by misinterpreting the Extradition Act, which allows, in addition to the normal evidence allowed by Jamaican Laws, a document "duly authenticated" purporting to "set out Testimony given on oath in an approved state". In this regard, the Court erred in relying on a Dictionary to interpret the meaning of "Testimony", a legal term of art, instead of looking at the clear meaning of the statute itself.

(7) The Court erred in accepting, as testimony, the affidavit of Jerold McMillan, which contained hearsay allegations, opinions and conclusions apparently gleaned from a police investigation, as a document duly authenticated, which contained testimony given in an approved state.

The submissions in respect of these grounds involved three main issues:

(1) Whether or not the affidavits constitute "testimony given on oath" pursuant to section 14 (1) (a) of the Act.

(2) If they do, whether or not the affidavit evidence before the Magistrate was sufficient to warrant a committal of the appellant.

(3) The legal effect of the discrepancies between the relevant offences on the Grand Jury Indictment and the Warrant of Committal.

The Affidavit Issue

The submissions of Mr. Atkinson for the appellant may be summarized as follows:

(i) "Testimony on oath," as referred to in section 14(1)(a) of the Act, means evidence received in curial proceedings. This section provides for the reception in evidence of authenticated documents which purport to contain, not simply evidence, but a record or report of "testimony given on oath," that is to say, evidence given on oath before a judge.

(ii) Statements on oath or affidavits do not constitute "testimony given on oath" and are, accordingly, not admissible as evidence under section 14(1)(a) in extradition proceedings. The Court erred in relying on the provisions of the Extradition Treaty and a dictionary in defining "testimony".

(iii) The Full Court erred in holding that the affidavit of Jerold McMillan with exhibits attached "purported frontline testimony". The affidavit of Michael Layne, an alleged accomplice, was incorrectly admitted under section 14(1) (a).

In support of his contention, counsel referred to ***Dowse v Governor of Pentonville Prison*** [1983] 2 A.C. 464.

The submissions of counsel for the 1st and 2nd respondents in summary form are:

(i) The Full Court was correct in adopting the dictionary meaning of the word "testimony"- see ***Pinner v. Everett*** [1969]1 WLR 1266 at 1273; ***Camden (Marquis) v IRC*** [1914]1KB 641 at 647 & 648 and ***R v DPP ex.p Barnes*** 33JLR 66.

(ii) "Testimony" covers oral evidence given in Court under oath as well as statements on oath out of court. An affidavit sets out statements on oath out of court and falls within the purview of documents contemplated by section 14 (1) (a) once the affidavit is duly authenticated – See ***Prince Anthony Edwards v D.P.P. and Another*** [1994] 31 JLR 526.

To determine this issue it is necessary to set out section 14 of the Act.

> " (1) In any proceedings under this Act, including proceedings on an application for *habeas corpus* in respect of a person in custody under this Act—

(a) a document, duly authenticated, which purports to set out testimony given on oath in an approved State shall be admissible as evidence of the matters stated therein;

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

(c) a document, duly authenticated, which certifies that ---

(i) the person was convicted on the date specified in the document of an offence against the law of an approved State; or

(ii) that a warrant for his arrest was issued on the date specified in the document,

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

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

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

testimony or a true copy of that original document;

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

(c) in the case of a document, which certifies that a person was convicted or that a warrant for his arrest was issued as referred to in subsection (1) (c), if the document purports to be certified as aforesaid,

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

(3) In this section "oath" includes affirmation or declaration.

(4) Nothing in this section shall prevent the proof of any matter, or the admission in evidence of any document, in accordance with any other Law of Jamaica."

Counsel for the appellant is not challenging the authentication of the documents. The bone of his contention is that the affidavits do not "set out testimony given on oath" in court. It is not in dispute that an affidavit is a written statement signed voluntarily and sworn to or affirmed by the deponent. It is also not in dispute that the written statements, which bear the signatures of Michael Layne and Jerold McMillan, are in

fact their affidavits. Indeed, there is no challenge to the form of any of the affidavits which were received in evidence at the committal proceedings. The question is whether the affidavits are admissible in evidence in extradition proceedings. Is Mr. Atkinson's contention, that the phrase "testimony given on oath" suggests evidence given on oath in court proceedings and would thus exclude an affidavit, correct?.

The Full Court in deciding this question relied on the New Shorter Oxford English Dictionary for the definition of the word "testimony." This definition is:

> "Evidence, proof esp. (Law) evidence given in court, an oral or written statement under oath or affirmation."

It is instructive to note the following:

(1) Testimony is defined in the Osborn Concise Law Dictionary 5th Edition as:

> "The evidence of a witness given **viva voce** in court."

(2) The Concise Oxford Dictionary provides the following definition:

(i) a formal statement especially one given in a court of law

(ii) evidence of proof of something.

(3) "To give evidence in my opinion means to make statements on oath before a person duly authorized to administer an oath."-- ***Re Williams Brothers Ltd.*** [1928] 29 SRNSW 248 per Harvey, C.J.

(4) The Reader's Digest Encyclopedia Dictionary compiled by Oxford University Press defines testimony as:

> "Evidence, esp. (law) statement made under oath or affirmation."

I have referred to the above to indicate that support can be found for both contentions from authoritative works. In my view, the meaning of the phrase "testimony given on oath" must be considered in the context of the evolution of the law in respect of Extradition proceedings. In this regard a brief excursion into the history of section 14(1)(a) may be helpful.

The Extradition Act 1870 was the legal authority immediately before the enactment of the 1991 Act. Section 14 of the 1870 Act provided:

> "Depositions or statements on oath, taken in a foreign state, and copies of such original depositions or statements, and foreign certificates of or judicial documents stating the fact of conviction, may, if duly authenticated, be received in evidence in proceedings under this Act."

There was no doubt that an affidavit that is to say, a written statement on oath given extra judicially, was admissible by virtue of section 14 of the 1870 Act. However, it was the view then, that the above provisions did not seem to cover a transcript of oral evidence given on oath at a trial in a foreign state. Indeed the decision of the district judge which was on appeal in ***The Queen on the Application of Government of***

the U.S.A. v Bow Magistrates' Court **and** ***Lemieux v Governor of Belmarsh Prison*** [2002] EWHC 1144 (Admin) was to that effect. The district judge was of the view that the provisions envisage that the evidence in support of the application for extradition should fall within one or other of the following categories:

> "A deposition - that is a document containing the testimony of a witness given on oath or affirmation, in a court or before a notary, within the foreign state, and identifiable as such on the face of the document.
>
> A statement - that might be written anywhere within the foreign state but would need to be sworn or affirmed, otherwise as above, most typically an affidavit."[emphasis mine]

The learned district judge continued:

> "The natural reading... would not seem to cover oral evidence given on oath or affirmation at a trial in the foreign state, even when such evidence is later reduced into writing in the form of a transcript. A transcript is a record of the evidence given prepared from a contemporaneous shorthand note or audio recording. The typist who prepares the transcript is giving 'hearsay evidence.' It is not read back to the person who gave the evidence. That person is not asked to sign the written record of what he said. Contrast the position of the maker of a deposition or statement who is always expected to add his signature to the document thereby demonstrating an adoption of the document as his own."

Although the decision of the district judge was overruled by the Queen's Bench Division of the High Court, I have referred to it to make

the point that up to 2001 it seemed that the prevailing view was that section 14 of the 1870 Act did not cover transcript of oral evidence.

When the 1991 Act, which repealed the 1870 Act, was passed, Parliament no doubt had this in mind. In Section 14 (1)(a) of the 1991 Act the phrase "documents purporting to set out testimony on oath" was substituted for the words "depositions or statement on oath."

In view of the state of the law at the time, in my judgment, the intention of the legislature was to employ words whose scope was wide enough to cover depositions, statements on oath and transcripts of oral evidence. In this context the word "testimony" embraces both oral evidence received in court proceedings and written statements on oath given out of court. In this regard it is instructive to compare the wording of section 14(1)(a) with that of section 14(1)(b). The former speaks of "a document which purports to set out testimony given on oath"; the latter of "a document... which purports to have been received in evidence... in any proceedings." If it was the intention of the legislature that the testimony referred to in sub-section (1)(a) should have been received in evidence in court proceedings before it may be admitted in extradition proceedings, the legislature would have so stated.

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 document. The process intended by the Legislature is the creation of a document, whether in or out of court - see ***Dowse v Governor of Pentonville Prison*** [1983] A.C. 464. It has been said (in many cases) that the purpose of this section is to obviate the necessity of bringing witnesses from the requisitioning State. See for example, ***Nadeen Saif v the Governor of Brixton Prison and the Union of India*** [2000] EWHC QB 33.

In my view, the conclusion of the Full Court that affidavits duly attested are admissible under Section 14(1)(a) of the Act, is correct.

Sufficiency of Evidence

It is convenient to restate the charges for which the appellant was committed to answer. The particulars of count 10 are that he and others "on or about October 11, 2003, in Palm Beach County in the Southern District of Florida, the defendants... did knowingly and intentionally aid and abet the importation into the United States from a place outside thereof... of 100 kilograms or more of a mixture and substance containing a detectable amount of marijuana ..."

Count 11 charges that "On or about October 12, 2003, in a vehicle located in Miami-Dade County... the defendants... did knowingly and intentionally possess with intent to distribute" (the same substance referred to in count 10).

The respondents rely mainly on the affidavit evidence of one Michael Layne, an accomplice, and to a lesser extent on the affidavit evidence of Larry Brown, a constable of the Royal Bahamas Police Force and Mr. Jerold McMillan. This Court does not have the benefit of an examination or a weighing-up of the evidence by the court below with a view to determining if it was sufficient to raise a prima facie case. Although the affidavits are admissible under section 14(1)(a), any inadmissible hearsay or opinion evidence in them should have been excluded in the magistrate's weighing-up process. I agree with Mr. Atkinson that the Full Court erred in holding that the affidavit of Jerold P. McMillan with exhibits annexed thereto "purported to outline testimony". Section 14(1)(a) refers to direct evidence when it mentions "testimony given on oath." McMillan's affidavit does not contain any direct evidence of the appellant's involvement in any of the charges involved.

It contains for the most part a summary of and commentaries on information received by the deponent, an outline of the procedure in criminal prosecution in the U.S.A. the procedural history of the charges in the indictment and the relevant U.S.A. law in relation to these charges. In

my view the only aspects of this affidavit which were relevant to the committal proceedings are the statement in para. 36 that the "affidavits were sworn before a United States Magistrate Judge legally authorized to administer an oath" and the certified attachments, including of course, the important affidavit of Michael Layne.

I must now turn to the question as to whether the affidavit of Mr. Layne contains direct prima facie testimony of the appellant's participation in the alleged offences. In para. 1 the affiant states his age and that he is a resident of the U.S.A. In para. 2 he states in effect that he was an accomplice of the appellant and others. Para. 3 is relied on to a great extent by Mr. Bryan, the Deputy Director of Public Prosecutions. The affiant states that he knows the appellant, a Jamaican, for 12 years. He kept in touch with the appellant, whom he referred to as Montique a/k/a "Brookie," over the years. His statement that he knows the appellant to be a marijuana trafficker and that, in the past, he received marijuana in the U.S.A. from him, is not, in my view, direct evidence relevant to the charges in question. He states that on or about September 29, 2003, he met the appellant in Miami, Florida and the appellant told him of a man called "Magoo" also known as "Madu," a marijuana dealer. The appellant, he said, told him that "Magoo" would have something "come up" and asked him if he would be interested in helping out with it for "a piece of it."

Mr. Bryan for the 2nd Respondent, submitted that it was open to the magistrate to conclude that the "something" (to "come up") was marijuana and that the words "come up" indicated that "something" would be coming from outside of the U.S.A. The affiant stated that [he] understood this to mean that the appellant and Magoo were "coordinating a marijuana shipment to the area and that [he] could receive some of the marijuana if [he] helped them with the shipment."

Mr. Atkinson's contention, which seems to have some merit, is that, according to the affiant, what the appellant said is that "Magoo" would have something "come up" and not that the appellant himself would be involved. This he submitted, would probably suggest a conspiracy but not aiding and abetting or procuring the importation of that "something". Paras 4, 5 and 6 speak to conversations between the affiant and "Magoo" on October 3, 2003 and an unidentified Bahamian on October 1 and one "Charlie" on October 11 respectively. None of these paragraphs contains direct evidence implicating the appellant. In para. 7 the affiant states that on October 11 at about 12:00 noon he obtained a silver Nissan Quest mini-van from his employer and made it available to "Charlie" and an unidentified man. They left with the van and returned with it a short time later. The van was returned to him (the affiant) and he drove it back to Miami and parked it at his residence. He saw a large quantity of marijuana in the back of the van.

The clear inference here is that Charlie and the identified man placed the marijuana in the mini-van. The evidence in para. 8 is that about 7 hours after the marijuana was placed in the mini-van the appellant telephoned the affiant and enquired if he had received the "babies". He stated that he understood "babies" to mean marijuana. He confirmed that he had received the "babies". Thereafter the appellant told him that someone would contact him later that said night to pick up the mini-van containing the marijuana.

In paras. 9 and 10 he stated that on October 11 and 12, 2003 agents from the DEA visited his residence and observed the mini-van with marijuana. The affiant's residence was searched. The marijuana was seized on October 12.

The same day, between 12:00 noon and 1:00 p.m. the appellant telephoned and told the affiant that he had heard about the seizure of the marijuana. He further told the affiant that he was going to put "Magoo" on the phone. A person whom the affiant believed to be "Magoo" came on the phone and according to the affiant "cursed at [him] about the marijuana seizure". On October 21, 2003, the affiant telephoned the appellant in Jamaica at telephone number 876-376-7172. During the conversation the appellant told him that he (the appellant) had shown the "man" (referring to Magoo) the receipt of the marijuana seized and that the receipt was "no good". The appellant further told

him that he (the appellant) and Magoo were going to employ a lawyer in Miami to call the "guys' (the DEA agents) listed on the receipt. The appellant, he said also told him that he would have been paid "50" or "100" for taking receipt of the marijuana.

On October 22, 2003, the appellant telephoned the affiant and asked him why they (the DEA agents) came directly to the mini-van. The affiant told him he did not know. During the conversation "Magoo" was also on the telephone. They asked him if the DEA agents had stolen the marijuana and the appellant enquired if the affiant was willing to meet with someone face to face to discuss the seizure of the marijuana.

On July 21,2004 the affiant was shown by DEA agents an unmarked photograph which he identified as that of the appellant.

Mr. Atkinson contended that there was no evidence that the appellant imported or aided and abetted the importation of marijuana into the U.S.A. He argued that even if it could be said that the marijuana in the mini-van was imported into the U.S.A., there is no evidence linking the appellant with its importation. The prosecution, he submitted, had led evidence of some kind of conspiracy involving "Magoo," the appellant and others and that was all. Further, he submitted, the acts of the appellant relied on by the respondents took place after the "drugs" were already in the possession of Layne, the affiant.

Mr. Bryan, on the other hand, submitted that para. 3 of Layne's affidavit establishes that the appellant was involved in coordinating the importation of marijuana into the U.S.A. on or about October 11, 2003. Paras. 7 & 8, he argued, show that about 8 hours after the marijuana was placed in the mini-van of Mr. Layne, the appellant phoned him and asked him if he got the "babies". The appellant's statement to Mr. Layne that someone would contact him with a view to picking up the mini-van containing the marijuana is evidence that the appellant had constructive possession. Further evidence of the appellant's constructive possession, he contended, is the fact that within an hour of the seizure the appellant was informed and he telephoned the witness. He submitted that, although the appellant was not physically present in the U.S.A, he still retained possession. This could be inferred, he said, from the actions of the appellant as indicated in paras. 11, 12 & 13. These paragraphs also establish, he argued, that the appellant had proprietary interest in the marijuana and that he was the procurer of the offences. He relied on ***Hall v Cotton and Another*** [1987]1QB 504, ***R v Vincent*** [1991] 28 JLR 69 and section 6 of the Justices of the Peace (Jurisdiction) Act (The J.P. Act.)

I will first consider the charge of "Aiding and Abetting Importation of Controlled Substance." Having read the affidavit of Mr. Jerold McMillan, I think I can safely say that the law relating to aiding and

abetting an offence in the U.S.A. is the same as that which obtains in this jurisdiction. Thus McMillan's affidavit in this regard is helpful.

To establish the offence the Crown must show:

(1) that a person imported the controlled substance into the U.S.A;

(2) that the appellant aided and abetted the importation; and

(3) that the appellant knew all the facts which constituted the offence and intended to assist or encourage the principal.

The question for this Court is whether or not the evidence which was before the Magistrate establishes a prima facie case against the appellant.

The starting point is Layne's dialogue with the appellant on September 29, 2003. I think it would be reasonable to infer that the appellant knew that "Magoo" was planning to import controlled substance into the U.S.A. Although the content of "Magoo's" telephone conversation with Layne on October 8, 2003 is not evidence against the appellant, the fact of the telephone call is relevant bearing in mind the dialogue on September 29.

The telephone conversation between Layne and an unidentified Bahamian male on October 11 is, in our jurisdiction, not admissible against the appellant. In any event, it does not refer to any overt acts of the appellant. The same applies to the telephone conversation between

Layne and Charlie. Layne received the controlled substance which was placed in the back of his mini-van on October 11. Up to that stage, there is no evidence of the appellant acting together with anyone or actively encouraging the principal or directing anyone in a joint effort to import the substance. The evidence only shows, inferentially, that he knew of the plan to import the substance into the U.S.A. and that he enquired of Layne if he would assist. However, as it turned out, any assistance that Layne gave was after the substance was already in the U.S.A. Such an enquiry cannot, in my judgment, give rise to the presumption that he was aiding and abetting the ***importation*** of the substance. At the most it gives rise to suspicion. Accordingly, in my view there is not sufficient prima facie evidence to support this charge.

I turn next to the charge of possession of a controlled substance charge. Mr. Bryan relied heavily on ***Hall v Cotton and Treadwell*** (supra). In that case, Cotton, the owner of two shotguns took them to the house of Treadwell for safe keeping while both men and their families went on holiday together. Treadwell agreed to clean the shotguns before returning them. He did not hold a shotgun certificate. The guns remained at Treadwell's house beyond the duration of the holiday, until the intervention of the police. Cotton was charged with transferring the shotguns to Treadwell contrary to the relevant statute. Treadwell was charged with possession of a shotgun without a licence. The justices held

that, in merely leaving the shotguns at Treadwell's house for safety and for cleaning Cotton had not transferred them but retained possession of them, and, therefore, Treadwell could not have been in possession of the shotguns. On appeal it was held, inter alia, that a person could be in possession of a firearm at a time when he was not physically in control of it at the place where it was; and that on the facts, Cotton retained ***proprietary*** possession of the shotguns while they were at Treadwell's house. But that Treadwell had ***custodial*** possession of the shotguns. In coming to its decision, the Court followed the decision in the well known case of ***Sullivan v Earl of Caithness*** [1976]Q.B. 966. In the latter case, the ***Earl of Caithness*** who, at the material time, lived in Oxfordshire, and who was the owner of the certain guns, which he kept at his mother's apartment in Hampton Court Palace, was held to be in possession of the guns. The English Court of Appeal accepted the proposition that the word "possession" can, in law, embrace two separate legal concepts "proprietary possession" and "custodial possession". Applying this principle to the instant case, Mr. Bryan submitted that although Layne had "custodial possession," the appellant had "proprietary possession". As I have stated before, Mr. Bryan referred to the following conduct of the appellant in support of this submission:

(i) Shortly after Layne received the controlled substance the appellant telephoned him and enquired if he had received it.

(ii) The appellant's statements to Layne that someone would contact him and pick it up.

(iii) The appellant's statement that Layne would have been given "50" or "100" pounds of marijuana for taking receipt of the said marijuana and that he intended to hire an attorney in Miami regarding the seizure.

(iv) The appellant's questioning of Layne about the conduct of the DEA agents.

In the cases relied on by Mr. Bryan there was clear evidence as to who were the owners of the guns. In the instant case there is not a scintilla of evidence that the appellant had any proprietary interest in the controlled substance which was seized. As Mr. Atkinson submitted, his statements and conduct certainly provided reason to suspect that he was in some way involved in a conspiracy. But they do not establish that he gave any assistance or encouragement to the principal offender(s) in so far as the importation or possession of the drugs is concerned. Neither do the statements establish that he had proprietary possession of the substance.

Mr. Bryan also valiantly argued that Layne's affidavit shows that the appellant was "at the very least a procurer and by extension a facilitator of the marijuana the subject matter of this case, going into the U.S.A." He relied on the following statement of Lord Widgery, C.J., in ***Attorney General's Reference*** (No.1 of 1975) 1QB 773 at 779G:

> "To procure means to produce by endeavour. You procure a thing by setting out to see that it happens and taking the appropriate steps to produce that happening. We think that there are plenty of instances in which a person may be said to procure the commission of a crime by another even though there is no sort of conspiracy between the two, even though there is no attempt at agreement or discussion as to the form which the offence should take. In our judgment the offence described in this reference is such a case".

In that case a defendant, knowing that a motorist would shortly drive home, surreptitiously laced his drinks by adding spirits to them. Consequently, the motorist drove while the alcohol concentration in his blood was above the prescribed limit contrary to section 6(1) of the Road Traffic Act 1972 and was convicted of the offence. The defendant was charged with aiding, abetting, counseling or procuring the commission of the motorist's offence. He was acquitted on a ruling of no case to answer.

On the **Attorney General's Reference** it was held that "since the lacing of the motorist's drink was surreptitiously done so that he was unaware of what had happened and there was a causal link between

the defendant's act and the offence by the motorist who would not have committed it otherwise, the defendant had procured the commission of the motorist's offence; and that, therefore, there was a case to answer so that the defendant was not entitled to the ruling."

The definition of "procure" as stated by Widgery, C.J. was accepted and applied by this Court in ***R v Craigie, Hyman et al*** [1986] 23 JLR 172 at 196.

In the instant case there is no evidence of an endeavour by the appellant to carry out any plan designed by "Magoo" to import marijuana into the U.S.A. As Widgery C. J. said in the ***Attorney General's Reference*** (supra) at p. 780 B:

> "You cannot procure an offence unless there is a causal link between what you do and the commission of the offence..."

In his conversations with Layne the appellant did not admit doing anything which was a "causal link" with the offence of importing marijuana into the U.S.A. To make a person an accessory "there must be some sort of active proceeding on his part" - ***R v Taylor*** L.R. 2 CCR 147 at 149. In that case, A and B, having quarrelled, agreed to fight and deposited a sum of money with C as a stake. A was killed as a result of fight. It was held that C was not an accessory before the fact to the manslaughter of A merely because he held the stake, there being no

evidence that he "engaged the two men to fight or assisted (or procured) or counselled them to it".

In his statements to Layne the appellant did not admit engaging anyone to import the marijuana; he did not admit assisting, procuring or counselling anyone to commit any of the offences in question and he did not engage Layne to do anything in respect of the importation of the marijuana.

It is arguable that he procured Layne to be an accessory after the fact to the importation of the marijuana. But, of course, an accessory after the fact to a misdemeanour is no offence at all in this jurisdiction.

The Discrepancy Issue

In advancing his submissions on this issue Mr. Atkinson refers to the following facts:

(i) The Grand Jury Indictment – Count 10 charges aiding and abetting importation of marijuana. Count 11 charges possession of the said marijuana.

(ii) In his affidavit McMillan states that count 11 charges aiding and abetting possession.

(iii) The Provisional Warrant, the Authority to Proceed and the Warrant of Commitment refer to importation of marijuana (Count 10) and possession of marijuana (count 11).

The contention of Mr. Atkinson is that the Court below failed to address the discrepancies between the Request for Extradition, the Grand Jury's Indictment and the Magistrate's Warrant of Commitment. He complains that the appellant is left in the uncertain position that he will face trial on a Grand Jury Indictment which differs from the committal charge. The only discrepancies really are that, whereas in respect of count 10 of the indictment, reference is made to aiding and abetting, the documents at (iii) make no such reference and, whereas Mr. McMillan speaks of aiding and abetting in respect of count 11, none of the documents referred to at (i) and (iii) does.

I agree with Mr. Bryan and Miss Lindsay that such discrepancies are immaterial. In reliance on ***Charron v Government of U.S.A.*** (P.C.) [2000] 1WLR 1793, Mr. Bryan submitted that since, at the beginning of the hearing, the appellant and his legal advisers had been fully aware from the affidavits and exhibits served on them of the details of the offences in respect of which his extradition was being sought, no procedural unfairness or injustice had been caused to the appellant. Mr. Bryan also relied on section 7(3) of the Extradition Act which suggests that an extradited person may be tried for any lesser offence disclosed by the facts upon which the request was made.

I think Mr. Atkinson's submissions are untenable. In respect of misdemeanour the common-law does not make any distinction between

principals and others. The categorization of offenders into principals in the first degree and principals in the second degree is only applicable to felonies. In misdemeanour all the parties are called principals.

Section 41 of the Criminal Justice (Administration Act) which is a re-statement of the common law provides:

> "Whosoever shall aid, abet counsel or procure the commission of any misdemeanour whether the same be misdemeanour at common law or by virtue of any statute passed or to be passed shall be liable to be tried, indicted and punished as a principal offender."

A similar provision in respect of felonies appears in section 34 of the Criminal Justice (Administration Act). In the light of these provisions the addition or omission of the words "aid and abet" in any charge is of no moment. In this regard the Court is guided by considerations of substance rather than form. Accordingly, in my view, there is no merit in this complaint.

Mr. Atkinson also argued that the appellant's constitutional rights conferred by section 16 of the Constitution were being infringed. This complaint was based on his contention that the provisions of section 14 (1) (a) of the Extradition Act were not complied with in that the magistrate acted on affidavits. I have already concluded that there is no merit in the submissions on what I have called the affidavit issue. In any event, in ***Mitchell v United States Government*** [1990] 27 JLR 565 this Court held 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. The reason the Court gave was that the remedy provided under section 25 (2) of the Constitution is of a civil nature and no provision is made for the joinder with any other proceedings; further an application for habeas corpus is a criminal cause or matter notwithstanding that the proceedings are civil in form and it would be incongruous for such criminal proceedings to be joined with the civil proceedings under section 25(2) of the Constitution. Accordingly, there is plainly no merit in this complaint.

Conclusion

I am of the view that the evidence adduced before the Resident Magistrate is insufficient to found a **prima facie** case against the appellant for the offences of aiding and abetting, counselling or procuring the importation of marijuana into the U.S.A. and of possession of the marijuana seized in the mini-van on October 11, 2003.

I would therefore order the Writ of Habeas Corpus to issue to procure the discharge of the appellant.

K. HARRISON J.A.

The Background:

1. The Appellant, a Jamaican national, and others were said to be involved in the smuggling of marijuana and cocaine into the United States via the Bahamas. On October 11, 2003 a large quantity of marijuana was seized by Drug Enforcement Agents ("DEA") in the U.S.A. The Appellant was implicated in the importation of the drugs by Michael David Layne, a co-conspirator, and as a consequence, an indictment was preferred against the Appellant and others by the grand jury in the U.S.A. The case against the Appellant rests mainly on the evidence of Layne.

2. The Appellant was charged with four (4) of the eleven (11) counts in the indictment. They are:

> a) Count 1: Conspiracy to import into the United States controlled substances, namely cocaine and marijuana.
>
> b) Count 2: Conspiracy to possess with intent to distribute one or more controlled substances, namely cocaine and marijuana.
>
> c) Count 10: Aiding and abetting the importation into the United States a controlled substance, namely marijuana.
>
> d) Count 11: Possession with intent to distribute a controlled substance, namely marijuana.

3. A Request was made by the United States Government through diplomatic channels in accordance with Article VIII of an Extradition Treaty ("The Treaty")

between that country and Jamaica for the extradition of the Appellant to be dealt with on the drug charges.

4. The Authority to Proceed dated September 8, 2004 requested the Resident Magistrate to conduct extradition proceedings in relation to offences of (1) Importing a controlled substance that is one hundred (100) kilograms or more of a mixture and substance containing a detectable amount of marijuana (Count 10) and (2) Possession with intent to distribute a controlled substance that is one hundred (100) kilograms or more of a mixture and substance containing a detectable amount of marijuana (Count 11). Those extradition proceedings were concluded on October 4, 2004 and the Appellant was ordered to be extradited to the United States of America to answer the charges against him in respect of "importing a controlled substance ..." and "possession with intent to distribute a controlled substance ..." He has been in custody since the conclusion of the hearing before the learned Resident Magistrate.

5. By a Fixed Date Claim dated October 19, 2004 the Appellant applied for a Writ of Habeas Corpus to discharge him from the custody of the Commissioner of Corrections. This application was heard by the Full Court and was dismissed on October 28, 2005. The Appellant thereafter lodged an appeal in the Registry of the Court of Appeal against the decision of the Full Court.

The Grounds of Appeal:

6. The following are the original grounds of appeal that were argued before us:

> "a. The Court erred in law in finding that the word testimony under section 14 (1) of the Extradition Act includes statements given on oath in the form of Affidavit, which is taken outside curial proceedings.
>
> b. The documents submitted in support of the request for extradition did not disclose evidence sufficient to satisfy the requirements of the Extradition Act thereby enabling the learned Resident Magistrate to make an order for the Appellant/Claimant to be extradited to the United States."

7. The following supplemental grounds of appeal were argued:

> "1) The Court failed to adequately address the violation of the Appellant's constitutional right guaranteed by Section 16 of the Constitution of Jamaica, when the Magistrate failed to follow the requirements and terms of the Extradition Act in ordering the extradition of the Appellant.
>
> 2) The Court erred in relying on the terms of the Extradition Treaty rather than the Extradition Act.
>
> 3) The Court erred in failing to find that the Learned Resident Magistrate ordered that the Appellant be extradited without any prima facie evidence that the Appellant either possessed marijuana in the United States of America with intent to distribute it therein or that he imported the said drug into that country.
>
> 4) The Court erred when it failed to correctly address the issue of the duty of the Magistrate to weigh up the evidence against the Appellant as follows:
>
> a. Whether there was any weight, at all, in the allegations of an unsentenced accomplice.

b. Whether there was [any] weight, at all, in the allegations of a charged accomplice because the requesting state failed to say whether there was a plea bargain in existence and, if so, what its terms were.

c. Whether there was any admissible evidence against the Appellant according to the Laws of Jamaica.

5) The Court erred in failing to address discrepancies between the request for extradition; the Grand Jury's indictment; and the Magistrate's Warrant of Committal.

6) The Court erred by misinterpreting the Extradition Act, which allows, in addition to the normal evidence allowed by Jamaican Laws, a document "duly authenticated" purporting to "set out Testimony given on oath in an approved state". In this regard, the Court erred in relying on a dictionary to interpret the meaning of "testimony", a legal term of art instead of looking at the clear meaning of the statute itself.

7) The Court erred when in accepting, as testimony, the affidavit of Jerold McMillan, which contained hearsay allegations, opinions and conclusions apparently gleaned from a police investigation, as a document duly authenticated, which contained testimony given in an approved state."

The Issues:

(a) Whether the provisions of section 14(1)(a) of the Extradition Act have been satisfied.

8. Section 14 of the Extradition Act ("the Act") states as follows:

"14. (1) In any proceedings under this Act, including proceedings on an application for *habeas corpus* in respect of a person in custody under this Act -

(a) a document, duly authenticated, which purports to set out testimony given on oath in an approved State shall be admissible as evidence of the matters stated therein;

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

(c) a document, duly authenticated, which certifies that -

(i) the person was convicted on the date specified in the document of an offence against the law of an approved State; or

(ii) that a warrant for his arrest was issued on the date specified in the document,

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

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

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

(b) in the case of a document which purports to have been received in evidence as referred

> to in subsection (1) (b) or to be copy of a document so received, if the document purports to be certified as aforesaid to have been, or to be a true copy of, a document which has been so received; or
>
> (c) in the case of a document which certifies that a person was convicted or that a warrant for his arrest was issued as referred to in subsection (l) (c), if the document purports to be certified as aforesaid,
>
> and in any such case the document is authenticated either by the oath of a witness or by the official seal of a Minister of the approved State in question.
>
> (3) In this section "oath" includes affirmation or declaration.
>
> (4) Nothing in this section shall prevent the proof of any matter, or the admission in evidence of any document, in accordance with any other law of Jamaica."

9. The determination of this issue turns upon what amounts to admissible evidence in relation to the term "testimony given on oath" referred to in section 14(1)(a) (supra). Mr. Atkinson for the Appellant, submitted that although the documents in support of the extradition have been duly authenticated they have not satisfied the requirement of section 14(1)(a). He argued that there must be a judicial hearing for the consideration of lawful evidence and that evidence contained in "statements made under oath" (affidavits) do not fall within the ambit of section 14(1)(a). He submitted that the reason for this was to obviate the reception of hearsay evidence.

10. The Full Court as well as the Resident Magistrate had before them a number of affidavits including those of Michael Layne (an alleged accomplice) and Jerold McMillen, the Assistant United States Attorney for the Southern District of Florida. Let me say from the very outset that the affidavit of McMillen has not satisfied the provisions of section 14(1)(a). I do agree with Mr. Atkinson that what he has done is to advance an explanation of the charges and what he perceived to be the relevant law. He had also provided a summary of the case against the Appellant and others and made comments about the various affidavits. In my view, his affidavit evidence would certainly not constitute "testimony given on oath".

11. The phrase "testimony given on oath" has not been defined in the Act so one has to determine the meaning from some other source. Prior to the coming into operation of the Extradition Act 1991, the Extradition Act 1870 spoke of "affirmations", "depositions" and "statements on oath" being admissible in extradition proceedings. When the 1870 Act was repealed the above words were replaced with the words "testimony given on oath". By virtue of section 14(3) of the Act the word "oath" includes "declarations" and "affirmations".

12. Miss Lindsay, Counsel for the 1st Respondent, submitted that this court can rely on authoritative dictionaries in order to see what meaning is attributed to a word or phrase. See ***Camden (Marquis) v IRC*** [1914] 1KB 641 at 647 and 648 and ***R v DPP exparte Barnes*** (1996) 33 JLR 66. The Full Court had

referred to the New Shorter Oxford English Dictionary which defined the word "testimony" as "Evidence, proof, esp. (Law) evidence given in court, an oral or written statement under oath or affirmation". Miss Lindsay submitted that the word "testimony" was not limited to oral evidence given in curial proceedings but was also extended to statements on oath.

13. The Full Court had also relied on the treaty provisions between the U.S.A. and Jamaica in order to determine whether there was sufficient evidence before the learned Resident Magistrate to have the Appellant extradited. Mr. Atkinson submitted however, that Article VIII of the Treaty does make a distinction between "statements on oath" and the "evidence" to be submitted in seeking extradition". Miss Lindsay submitted that the Full Court's reference to paragraph 5 of Article VIII of the Extradition Treaty was no more than an outline of the method by which a request for extradition should take place between the United States of America and Jamaica. She submitted that the Full Court had concerned itself specifically with section 14 of the Act to see if the learned Resident Magistrate had acted in conformity in accepting the affidavits of McMillen and Layne as being admissible.

14. 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 form 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 irrelevant 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.

15. The affidavit of Michael Layne was in fact properly certified. Certification was in compliance with section 14(2)(a) of the Extradition Act. It formed part of the bundle referred to as certified and sealed by the Department of State of the United States of America and was properly authenticated. It was therefore admissible and was properly admitted by the Magistrate.

(b) Whether there was prima facie evidence in the case alleged against the Appellant connecting him with either possession of marijuana or the intent to import and distribute drugs in the U.S.A.

16. This next issue is concerned with the sufficiency of evidence connecting the Appellant with either possession of the marijuana or with the intent to import and distribute drugs in the U.S.A.

17. The affidavit of Layne was therefore crucial in the proceedings and must now be considered. He deposed as follows:

AFFIDAVIT OF MICHAEL LAYNE

"I, Michael David LAYNE, being duly sworn, depose and state as follows:

1. I am 46 years of age. I am a legal resident of the United States and I reside in Miami, Florida. I have been referred to as "MIKE," "MIKEY," and/or "JAMIKEY."

2. I am one of 2l defendants charged with drug related offenses in the Southern District of Florida in United States versus Melvin MAYCOCK, et al./04-20193CR-Altonaga. I am a cooperating defendant in this case, which is being investigated by the U.S. Drug Enforcement Administration (DEA).

3. Approximately twelve years ago I met a Jamaican male known to me as Howard MONTIGUE, a/k/a "BROOKIE" (later identified as Hartford MONTIGUE, hereafter referred to as "MONTIGUE"). I have kept in personal and professional contact with MONTIGUE since then. I know MONTIGUE to be a marijuana trafficker who resides and operates out of Montego Bay, Jamaica. In the past, I received a couple of pounds of marijuana in the U.S. from MONTIGUE and a man known best to me as "FATAH." (I believe his last name was Parkinson). On or about September 29, 2003, I met MONTIQUE in Miami, Florida, and MONTIQUE told me of an individual by the name of "MAGOO" (later identified as Dennis or Michael GAYLE, and also known by the alias name of"MADU") who is a major marijuana dealer from Montego Bay, Jamaica. MONTIGUE told me that "MAGOO" would have something "come up," and asked if I would be interested in helping out with it for a "piece of it." I understood this to mean that MONTIGUE and MAGOO were coordinating a marijuana shipment to the area and that I could receive some of the marijuana if I helped them with the shipment.

4. On or about October 8, 2003, I was telephonically contacted by a Jamaican male whom I later learned to be "MAGOO." During the conversation, MAGOO

told me that he (MAGOO) had heard from MONTIGUE that I was good, and that people would be calling me. I understood this to mean that they believed I was trustworthy enough to handle a drug related matter for them.

5. In the morning on October 11, 2003, I was telephonically contacted by an unidentified Bahamian male (hereafter referred to as UM #1) on my cellular telephone number (305) 798 - 6136. During the conversation, UM #1 asked if I was "MIKE," and I told him that I was "MIKE." UM #1 identified himself as "MADU boy." UM #1 informed me that his boy "CHARLIE" would call me shortly. I told UM #1 that I was working that day at Esserman Nissan and CHARLIE could call in order to meet. UM #1 told me they would call later. I understood from this conversation that UM #1 was following up on the drug transaction that MONTIGUE and MAGOO had talked to me about and that UM #1 was working for MAGOO I further understood that "CHARLIE" would call me later that day related to the same drug related matter and that I would pick up a quantity of drugs from him for UM #1, MONT1GUE, and MAGOO.

6. In the morning on October 11, 2003, I was telephonically contacted on my cellular TLEPHONE NUMBER (305) 798 – 6136 by an individual named "CHARLIE" who utilized (561) 541-6970. During the conversation, CHARLIE told me to get a van and meet him (CHARLIE) at the Burger King in West Palm Beach, located off Interstate 95 at the 45th Street Exit. I understood this conversation to mean that CHARLIE was the person from whom I would pick up a quantity of drugs for UM #1, MONTIGUE, and MAGOO.

7. On October 11, 2003, after 12:00 p.m., I met with CHARLIE and an unidentified black male (hereafter referred to as UM #2), at the Burger King in West Palm Beach, Florida. As requested, I provided them with a silver Nissan Quest mini-van that I had obtained from my employer, Esserman Nissan, and had driven in to West Palm Beach. CHARLIE and UM

#2 took the mini-van and departed the area. A short time later, CHARLIE and UM #2 returned to the area near the Burger King. After I received the mini-van, I telephonically contacted CHARLIE at (561) 541-6970 to verify the amount of drugs that had been placed into the van. During the conversation, CHARLIE related that the count was "1177." I understood this to mean that CHARLIE and UM #2 had just transferred 1177 pounds of marijuana in the van. I then drove back to Miami and parked the van at my residence. I also verified that there was indeed a large quantity of marijuana placed in the back of my van, consistent with what CHARLIE had told me.

8. On October 11, 2003, between 7:00 p.m. and 7:30 p.m., I was telephonically contacted by MONTIGUE. During the conversation, MONTIGUE asked if I had received the "babies," which I understood to mean bales of marijuana, and I confirmed that I had received them. MONTIGUE said that someone would contact me later that night to pick up the mini-van containing the marijuana.

9. On October 11, 2003, at approximately 11:55 p.m., agents from the DEA approached my residence located at 11930 S.W. 93 Terrace, Miami, Florida, and observed the same mini-van with marijuana parked in the driveway.

10. A short time later, in the early morning hours of October 12, 2003, I signed a DEA written consent to search form, for the search of my residence. During the search, DEA Agents seized one brown colored bale of marijuana which had been tied with orange rope from inside the house, one brown colored bale of marijuana which I had placed in front of the mini-van, as well as multiple brown colored bales tied with orange and green rope containing marijuana, partially covered by blankets, in the rear of the mini-van.

11. On October 12, 2003, between 12:00 p.m. and 1:00 p.m., I was telephonically contacted by MONTIGUE. MONTIGUE said that he had been informed about the marijuana seizure. MONTIGUE

then stated he was going to put MAGOO on the telephone to talk with me.

A Jamaican male, who, based on the context of the conversation, I believed to be MAGOO, took the telephone from MONTIGUE and cursed at me about the marijuana seizure. I further understood this to mean that MAGOO had an ownership interest in the marijuana and was therefore upset by the seizure.

12. On October 21, 2003, at approximately 9:30 p.m., I telephonically contacted MONTIGUE in Jamaica at telephone number (876) 376-7172. MONTIGUE stated that he had shown the "man" (referring to "MAGOO") the "paper" (referring to a receipt for the marijuana seized on 10/12/2003) and that "it" (referring to the receipt) was no good. MONTIGUE said that he and MAGOO were going to obtain a lawyer in Miami to call the "guys" (referring to the DEA Agents who were listed on the receipt for the marijuana seized on 10/12/2003). MONTIGUE stated that I would have been paid "50" or "100" (referring to 50 or 100 pounds of marijuana) for taking receipt of the marijuana. MONTIGUE again stated that they (MONTIGUE and MAGOO) wanted to hire an attorney in Miami, because there was nothing in the paper or on the news regarding the marijuana seizure.

13. On October 22, 2003, at approximately 7:50 p.m., I was telephonically contacted by MONTIGUE. MONTIGUE asked me why "they" (DEA Agents) came directly to the van (referring to the silver Nissan Quest). I told MONTIGUE that I did not know why the agents came directly to the van (MONTIGUE and MAGOO were both on the telephone during this conversation). MONTIGUE and MAGOO asked me if the DEA Agents had stolen "it" (referring to the marijuana). MONTIGUE asked if I was willing to meet with someone face to face to discuss the seizure of the marijuana and I agreed.

14. On July 21, 2004, Special Agents (S/As) Joseph McCaffrey and Manuel Recio showed me an unmarked/unlabeled photograph. I identified the

person in the photograph to S/As McCaffrey and Recio, as the individual I know as Howard MONTIGUE, a/k/a "BROOKIE."

15. Attached to this affidavit as exhibit number 1 is a photograph of defendant MONTIGUE, as identified by me.
FURTHER AFFIANT SAYETH NAUGHT

Sgd. Michael Layne
On this 22 day of July, 2004, Michael Layne personally appeared before me and after being sworn by me, signed this affidavit.

Sgd.
TED E. BANDSTRA
UNITED STATES MAGISTRATE JUDGE."

18. Mr. Atkinson submitted that the Full Court erred, when it agreed with the finding of the learned Resident Magistrate that sufficient evidence had been presented in the affidavit of Layne to establish a prima facie case for the extradition of the Appellant. He argued that a case had not been made out that the Appellant either possessed marijuana in the United States of America with intent to distribute it therein or that he imported the said drug into that country. He submitted that even if it could be said that the marijuana was brought into U.S.A. from outside, there was no evidence that the appellant was the person that was involved in aiding and abetting or procuring its importation. He said that the Prosecution had tried or attempted to create evidence of some kind of conspiracy involving the Appellant but the Warrant to Proceed did not include any count for conspiracy. He also submitted that a similar position applied to the

possession issue because a charge for possession of the marijuana could not be established under the Dangerous Drugs Law in Jamaica.

19. Mr. Atkinson submitted that Layne was the person who had physical custody of the marijuana in the U.S.A. The Appellant he said, was at no time in the U.S.A. and no evidence was presented which placed him in control of the drugs in the U.S.A. with knowledge and the requisite animus *possedendi*. He submitted that the Court below had erroneously applied the principles outlined in ***R v Vincent*** 28 J L R 69 and had failed to address those principles enunciated by the Privy Council in ***D.P.P. v Wishart Brooks*** 12 JLR 1374 to the instant case.

20. Mr. Bryan submitted that although the Appellant was not physically present in the U.S.A. when the drugs were seized, he was nevertheless in constructive possession. He submitted, that the Appellant would have had a proprietary interest in the drugs otherwise why would he tell Layne that Madu and himself would hire a lawyer to check on the whereabouts of the marijuana. He referred to and relied heavily upon the authority of ***Hall v Cotton and Another*** [1987] 1 QB 504.

21. What is the evidence which the Requesting State relied on? Layne had deposed in his affidavit that he knew the Appellant and that he had met him in Miami, Florida on or about September 29, 2003. He said the Appellant told him that an individual named "Madu" or "Magoo" said he had "something to come

up" and if he would be interested in helping out with it for a "piece of it". Layne deposed that he understood this to mean that the Appellant and "Madu" were coordinating a marijuana shipment to the area and that he would receive some of the marijuana if he helped him with the shipment. He further deposed that he was contacted by Madu on the telephone on or about October 8, 2003. On the morning of October 11, 2003 he said that an un-identified person contacted him by the telephone and told him that a man called "Charlie", would contact him. Charlie did contact him and he was told to get a van and meet him, Charlie, at the Burger King Restaurant in West Palm Beach. At about 12:00 noon on the 11th October, he met Charlie and another man at the agreed location. He handed over the van to them and they left. Shortly thereafter, the two men returned with the van which contained 1177 pounds of marijuana. Layne said he drove the van with the drugs to Miami and parked it at his residence. Between 7:00 and 7:30 that said day, he received a telephone call from the Appellant who asked him if he had received the "babies". He told him yes. He said he understood the term "babies" to mean "bales of marijuana". He was told by the Appellant that someone would come and pick up the van later. This did not materialize as the United States DEA came to his residence and seized the van containing the drugs.

22. Layne also deposed that the Appellant had telephoned him and enquired of him why the agents came directly to the van to which Layne said he did not know. He was also asked whether or not the DEA had stolen the drugs. The

Appellant he said, had asked him if he was willing to meet with someone "face to face" to discuss the seizure of the marijuana and he told him yes. He was further told by the Appellant that "Madu" and himself would obtain the services of a lawyer in Miami to make representations to the Drug Enforcement Agents about the seized drugs.

23. The headnote of ***Hall*** (supra) reads as follows:

> "The first defendant owned two shotguns and was the holder of a shotgun certificate. He took the shotguns to the house of the second defendant for safekeeping while both men and their families went on holiday together. The second defendant agreed to clean the shotguns before returning them. He did not hold a shotgun certificate. The guns remained at the second defendant's house beyond the duration of the holiday until the intervention of the police. The first defendant was charged with transferring shotguns, to which section 1 of the Firearms Act 1968 applied, to the second defendant, who was not a firearms dealer, did not produce a firearms certificate and was not entitled under the Act to acquire them without holding a certificate, contrary to section 3(2) of the Act. The second defendant was charged with having in his possession a shotgun to which section 2(1) of the Act applied, without holding a shotgun certificate, contrary to section 2(1). At the trial the justices held that in merely leaving the shotguns at the second defendant's house for safety and for cleaning the first defendant had not transferred them but retained possession of them, and, therefore, the second defendant could not have been in possession of the shotguns.
>
> On the prosecutor's appeal:
>
> Held, (1) that a person could be in possession of a firearm at a time when he was not physically in control of it at the place where it then was; and that

> on the facts the first defendant retained proprietary possession of the shotguns while they were at the second defendant's house (post, p. 510C-D).
>
> But (2) allowing the appeal, that on the true construction of section 57(4) of the Act of 1968 the phrase "lend and part with possession" was to be read disjunctively, and the definition of "transfer" was not exhaustive; that the second defendant had custodial possession of the shotguns which could only have arisen by a transfer from the first defendant which fell within the definition of "transfer" in section 57(4); and that, accordingly, the case would be remitted to the justices with a direction to convict."

24. Hall's case decided therefore, that the concept of possession embraced both proprietary and custodial possession, so on the particular facts of that case both the owner and the temporary recipient of the shot guns were held to be in possession for the purposes of the Act.

25. Harris J. (as she then was) in delivering the judgment of the Full Court stated at page 16:

> "The claimant may be deemed to be in possession of dangerous drugs notwithstanding his physical absence from the United States at the material time. A party may be vested with possession and control of dangerous drugs notwithstanding that he was not present at the material time. See Vincent v DPP (1991) 28 JLR 69"

26. Lord Diplock giving the opinion of the Board in ***D.P.P. v Wishart Brooks*** (supra) said at p. 1376:

> "In the ordinary use of the word 'possession' one has in one's possession whatever is to one's own knowledge physically in one's custody or under one's physical control."

and later at p. 1377:

> "The only *actus reus* required to constitute an offence under Section 7 (c) is that the dangerous drug should be physically in the custody or under the control of the accused."

27. In my judgment, the doctrine of constructive possession would be inapplicable in the instant case to make the Appellant a principal possessor. There is no evidence to establish that the marijuana which was found in Layne's van in the U.S.A. belonged to the Appellant or was in the possession of the Appellant. I would therefore disagree with the submissions of Mr. Bryan that the Appellant had retained proprietary possession of the marijuana. It is also my view, that the allegations in Layne's affidavit do not disclose any evidence of importation of marijuana or aiding and abetting in the importation of marijuana by the Appellant.

28. At the commencement of his submissions to this Court, Mr. Bryan submitted that there was ample evidence before the Resident Magistrate which clearly established that the Appellant was at the very least a procurer and by extension a facilitator of the marijuana entering the U.S.A. He argued that the provisions of Section 6 of the Justices of the Peace Jurisdiction Act would be relevant to the instant case. The section reads:

> "Every person who shall aid, abet, counsel or procure the commission of the offence which is or hereafter shall be punishable on summary conviction, shall be liable to be proceeded against and convicted for the same, either together with the principal offender or before or after his conviction, and shall be liable, on

> conviction, to the same forfeiture and punishment as such principal offender is or shall be by law liable and may be proceeded against and convicted either in the parish where such principal offender may be convicted or that in which such offence of aiding, abetting, counselling or procuring may have been committed."

29. Article 11 of the Extradition Treaty also provides the following:

> "1. An offence shall be an extraditable offence if it is punishable under the laws of both Contracting Parties by imprisonment or other form of detention for a period of more than one year or by any greater punishment.
>
> 2. The following offences shall be extraditable if they meet the requirements of paragraph (1) -
>
> > (a) conspiring in, attempting to commit, aiding or abetting, assisting, counseling or procuring the commission of, or being an accessory before or after the fact to, an offence described in that paragraph.
> >
> > (b) ...."

30. What is the evidence regarding the role played by the appellant with respect to the marijuana which was seized in the U.S.A? Layne has deposed that he met the appellant on or about September 29, 2003 in Miami, Florida. They had a discussion and the appellant told him about an arrangement for "something to come up". Layne said he understood the term "something to come up" meant that it was a shipment of marijuana. Layne also said that he was asked by the Appellant if he was interested in helping out for "a piece of it" which meant that he would receive some of the marijuana. After other arrangements were put in place Layne provided the van in which the marijuana

was placed and he drove it to his home. The appellant placed a telephone call to Layne to enquire if he had received the marijuana and he responded in the affirmative. The marijuana was eventually seized by the DEA whilst the vehicle was parked at Layne's home and there was some promise by the appellant and "Magoo" to retain the services of a lawyer. This is in summary the evidence placed before the learned Resident Magistrate at the hearing of the extradition proceedings.

31. Now, the word "procure" is defined by Lord Widgery C.J in ***Attorney General's Reference*** (No. 1 of 1975) [1975] 1 QB 773 as follows:

> "To procure means to produce by endeavour. You procure a thing by setting out to see that it happens and taking appropriate steps to procure that happening. We think that there are plenty of instances in which a person may be said to procure the commission of a crime by another even though there is no sort of conspiracy between the two, even though there is no attempt at agreement or discussion as to the form which the offence should take."

This definition strongly suggests that the procurer must be shown to have intended to bring about the commission of the principal offence. Mere awareness that it might result will not suffice. In ***Blakely, Sutton v. D.P.P.*** [1991] Crim.L.R. 763 it was stated inter alia at page 764:

> "It must, at least, be shown that the accused contemplated that his act would or might bring about or assist the commission of the principal offence: he must have been prepared nevertheless to do his own act, and he must have done that act intentionally. Those requirements matched those needed to convict

> principals in the second degree, and they fitted well with the liability of the parties to a joint enterprise. In relation to those accused only of procuring and perhaps also those accused only of counselling and commanding, it might be, as Lord Goddard's judgment in ***Ferguson v. Weaving*** would permit and as Lord Widgery's judgment in ***Att. - Gen.'s Reference*** (No. 1 of 1975) strongly suggested, that it was necessary to prove that the accused intended to bring about the principal offence..."
>
> (emphasis supplied)

At page 767 it is also stated:

> "When the prosecution charge the defendant solely with procuring, they undertake an additional burden of proof. They must prove that the defendant caused the act of the principal and, if Lord Widgery was right, that he intended to cause it. This is not necessary where aid, abet, or counsel - or assist or encourage - are alleged. Can the prosecution rely on one of these other forms in a case like the Attorney-General's Reference or the present? Probably not because these terms all seem to require that the principal has, or will have, some criminal result in view (which, of course, he usually does, but not in a case of strict liability where the principal does not have mens rea). Aiding or assisting a person to do something imply that he is trying to do that thing".

32. It is abundantly clear in the instant case that there is no evidence of an endeavour by the appellant to carry out any plan to import the marijuana into the U.S.A. What we have here is evidence of an initial conversation between the appellant and Layne about certain things "coming up" and what Layne understood the term "coming up" meant. There is also evidence of another conversation between the appellant and Layne after Layne received the

marijuana but in my judgment, this evidence is insufficient to support the offence of procuring the importation of the marijuana into the U.S.A. There must be evidence showing that the appellant contemplated some act that would or might bring about or assist the commission of the principal offence and that he intended to bring about that offence. There is certainly merit in the submissions of Mr. Atkinson on this issue.

(c) Weighing up of the evidence

33. It was contended on behalf of the Appellant that the Resident Magistrate had failed to correctly address the issue of deciding:

> (a) Whether there was any weight, at all, in the allegations of an unsentenced accomplice;
>
> (b) Whether there was any weight, at all, in the allegations of a charged accomplice because the requesting State failed to say whether there was a plea bargain in existence and, if so, what its terms were; and
>
> (c) Whether there was any admissible evidence against the Appellant according to the Laws of Jamaica.

34. The Act makes no provision for a Resident Magistrate to make finding of facts. Section 10 of the Act mandates the Magistrate however, to hear extradition cases as if he or she were sitting at a Preliminary Hearing and he or she had to be satisfied that the evidence was enough to warrant the trial just as if the acts had been committed in Jamaica. It would be the Magistrate's duty therefore, to consider the evidence as a whole, and to reject any evidence which he considers worthless. In that sense it is his duty to *weigh up* the evidence.

But it is 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 that the magistrate is not concerned with inconsistencies or contradictions, unless they were such as to justify rejecting or eliminating that evidence altogether. Nor, of course, was the Magistrate concerned with whether the evidence of an accomplice was corroborated and if there was a plea bargain in existence and if so what were its terms: See ***R v Governor of Pentonville Prison and Anor. ex parte Osman*** [1989] 3 All E.R 701.

(d) The discrepancies issue.

35. Mr. Atkinson submitted that the Full Court erred in failing to address discrepancies between the Request for Extradition, the Grand Jury's Indictment, and the Magistrate's Warrant of Committal. The documents in the case revealed the following:

> (a) The Grand Jury's Indictment in the United States of America had charged the Appellant in Count 10 that, on or about October 2003, he did aid and abet the importation of marijuana into the U.S.A. In Count 11 he was charged that on or about October 12, 2003 in a vehicle located in Miami- Dade County, he did knowingly and intentionally possess with intent to distribute marijuana.
>
> (b) Jerold P. McMillen stated however, in his Affidavit that the Appellant was charged inter alia, in Count 10 with, Aiding and Abetting the importation of a controlled substance and in Count 11 with Aiding and Abetting possession with intent to distribute.

> (c) The Provisional Warrant as well as the Committal Warrant did not allege aiding and abetting but, there were allegations of importation and possession of the drug.

36. Mr. Atkinson further submitted that there was no reconciliation of the discrepancy by either the Full Court or the Resident Magistrate, thus leaving the appellant in the uncertain position that he will face trial on a Grand Jury Indictment which differs from the Committal Charge.

37. Mr. Bryan submitted that while the indictment speaks to aiding and abetting, the Authority to Proceed and Warrant of Committal spoke of importation. He submitted that it is nothing more than a perceived discrepancy because even if the charges were not fully formulated in the Authority to Proceed it did not affect the validity of the document that is, the Authority to Proceed as well as the Warrant of Committal. What was of importance he said, is that at the commencement of the committal hearing the Appellant and his Counsel had been fully aware from the affidavits and exhibits and other documents, the details of the offences with regards to his extradition which was being sought. He argued that in the circumstances there was no procedural unfairness or injustice caused to the Appellant.

38. In ***Alain Charron v Govt. of the USA*** [2000] 1 WLR 1793 the headnote reads:

> "The applicant, a Canadian citizen resident in Canada, was indicted by a grand jury in the United States of America for drug offences and a warrant for his arrest

was issued there. The Government of the United States of America did not seek his extradition from Canada, where he was facing trial on unrelated criminal charges, but on learning that he was going on holiday to The Bahamas requested his extradition from The Bahamas in accordance with the Extradition Treaty between The Bahamas and the United States of America 1990 and the Extradition Act 1994.[1] Article 14(1) of the Treaty provided that a person extradited thereunder could only be detained, tried or punished in the requesting state for the offence for which extradition was granted, and section 7(3) of the Act contained a similar provision. The applicant was arrested on his arrival in The Bahamas. An authority to proceed was issued under section 8(3) of the Act of 1994 by the Acting Minister of Foreign Affairs, in which the offences were formulated in general Bahamian terms. The affidavits relied on in support of the application for committal, giving details of the offences, were served on the applicant and his legal advisers, and the grand jury indictment and American warrant for his arrest were exhibited to those affidavits. The applicant was brought before a magistrate pursuant to section 10(1) of the Act of 1994, which required the magistrate to hear the case in the same manner, as nearly as possible, as if he were conducting a preliminary inquiry under the Criminal Procedure Code,[2] and as if that person were brought before him charged with an indictable offence committed within his jurisdiction. Rule 3(4) of the Rules for Framing Charges and Informations in Schedule 2 to the Code provided that after the statement of the offence particulars of such offence should be set out in ordinary language. A list of charges of specific crimes formulated in accordance with the law of The Bahamas together with particulars was not furnished at the commencement of the committal hearing to the magistrate or to the applicant, but the affidavits and exhibits were adduced in evidence. At the conclusion of the hearing the magistrate committed the applicant under section 10(5) to await his extradition. He applied under section 11(1) to the Supreme Court of The Bahamas for a writ of habeas corpus ad subjiciendum. The

> judge dismissed the application holding, inter alia, that the applicant was not entitled to be discharged under section 11(3) on the ground that it would be unjust or oppressive to extradite him. The Court of Appeal dismissed the applicant's appeal."

39. On the applicant's appeal to the Judicial Committee of the Privy Council it was held inter alia, dismissing the appeal, (1) that, although it was good practice to furnish the magistrate at the commencement of committal proceedings with a list of charges based on the alleged conduct formulated according to Bahamian law and giving particulars of the offences charged, there was no such requirement in the Extradition Act 1994; and that, since at the beginning of the hearing the applicant and his legal advisers had been fully aware from the affidavits and exhibits served on them of the details of the offences in respect of which his extradition was being sought, no procedural unfairness or injustice had been caused to the applicant by the failure to supply him and the magistrate with a list of charges.

40. In ***re Naghdi*** [1990] 1 W.L.R. 317 a provisional warrant was issued and the applicant was arrested and thereafter the Secretary of State made orders to proceed. Both the provisional warrant and the orders to proceed indicated in general terms the type of offences to which they related but none of the documents set out the offences in detail. The applicant was given a detailed statement of the offences for the committal proceedings and, at the end of those proceedings, he was committed in custody to await extradition. On the applicant applying for a writ of habeas corpus it was held inter alia dismissing the

application, (1) that the order to proceed was addressed to the magistrate and in itself was not an appropriate document to set out in detail the case that would be brought against the applicant at the committal proceedings; that it complied with the procedure established under the Extradition Act 1870 albeit the practice under the Fugitive Offenders Act 1967 was to give full details of the offences with the order to proceed; that there was no statutory requirement that the offences had to be set out in detail in the order to proceed; and that, therefore, the applicant's argument that he had been deprived of the opportunity to meet the case against him failed and he had been properly committed after committal proceedings which had been conducted in accordance with procedural fairness and the ordinary requirements of natural justice.

41. I find no merit in Mr. Atkinson's submissions on this issue. The practice in extradition cases has been that the 'offences' are stated in the Authority to Proceed in very general terms. The magistrate is not, of course, concerned with whether the offence is made out in foreign law. He is concerned solely with whether the evidence would support committal for trial in Jamaica, if the conduct complained of had taken place in Jamaica: See ***Government of Denmark v Nielsen*** [1984] 2 All ER 81, [1984] AC 606.

Conclusion

42. There is insufficient evidence in the instant matter to found a prima facie case against the appellant for the offences of aiding and abetting, counseling or

procuring the importation of marijuana into the U.S.A. and of possession of marijuana. The Full Court was wrong in my view, in refusing the application for habeas corpus. I would order the Writ of Habeas Corpus to issue.

MARSH, J.A. (Ag.):

The background to this appeal has been adequately and accurately outlined by my brothers, I will not repeat it.

The Appellant, by Fixed Date Claim Form dated the 19th day of October, 2004, applied for a Writ of Habeas Corpus . This application was heard on August 8, 9 and 10 and October 28, 2005. It was dismissed by the Full Court (Reid, Harris, N. McIntosh, JJ). It is this order of the Full Court that has given rise to this appeal.

Before us the following original grounds were argued:

(a) The Court erred in law in finding that the word "testimony" under section 14(1) of the Extradition Act includes statements given on oath in the form of Affidavit which is taken outside of curial proceedings.

(b) That the documents in support of the request for extradition did not disclose evidence sufficient to satisfy the requirements of the Extradition Act thereby enabling the learned Resident

Magistrate to make an order for the Appellant/Claimant to be extradited to the United States.

The following supplemental Grounds of Appeal were also argued:

(1) The Court failed to adequately address the violation of the Appellant's constitutional right guaranteed by Section 16 of the Constitution of Jamaica, when the Magistrate failed to follow the requirements and terms of the Extradition Act in ordering the extradition of the Appellant.

(2) The Court erred in relying on the terms of the Extradition Treaty rather than the Extradition Act of 1991.

(3) The Court erred in failing to find that the Learned Resident Magistrate ordered that the Appellant be extradited without any prima facie evidence that the Appellant either possessed marijuana in the United States of America with intent to distribute it therein or that he imported the said drug into that country.

(4) The Court erred when it failed to correctly address the issue of the duty of the Magistrate to weigh up the evidence against the Appellant as follows:

(a) Whether there was any weight, at all, in the allegations of an un-sentenced accomplice.

(b) Whether there was any weight, at all, in the allegations of a charged accomplice/cooperating defendant, in that

the requested State failed to say whether there was a plea bargain in existence and, if so, what its terms were.

(c) Whether there was any admissible evidence against the Appellant according to the Laws of Jamaica.

(5) The Court erred in failing to address discrepancies between the Request for Extraditions; the Grand Jury's indictments; and the Magistrate's Warrant of Committal.

(6) The Court erred by misinterpreting the Extradition Act, which allows, in addition to the normal evidence allowed by Jamaican Laws, a document "duly authenticated" purporting to "set out Testimony given on oath in an approved state". In this regard, the Court erred in relying on a Dictionary to interpret the meaning of "Testimony", a legal term of art instead of looking at the clear meaning of the statute itself.

(7) The Court erred when in accepting, as testimony, the affidavit of Jerold McMillen, which contained hearsay allegations, opinions and conclusions apparently gleaned from a police investigation, as a document duly authenticated, which contained testimony given in an approved State."

Were the provisions of section 14(1) (a) of the Extradition Act satisfied?

Section 14 of the Extradition Act states as follows:

> "14.—(1) In any proceedings under this Act, including proceedings on an application for

habeas corpus in respect of a person in custody under this Act—

(a) a document, duly authenticated, which purports to set out testimony given on oath in an approved State shall be admissible as evidence of the matters stated therein;

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

(c) a document, duly authenticated, which certifies that ---

(iii) the person was convicted on the date specified in the document of an offence against the law of an approved State; or

(iv) that a warrant for his arrest was issued on the date specified in the document,

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

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

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

testimony or a true copy of that original document;

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

(c) in the case of a document, which certifies that a person was convicted or that a warrant for his arrest was issued as referred to in subsection (1) (c), if the document purports to be certified as aforesaid,

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

(3) In this section "oath" includes affirmation or declaration.

(4) Nothing in this section shall prevent the proof of any matter, or the admission in evidence of any document, in accordance with any other Law of Jamaica."

Mr. Atkinson for the Appellant submitted that the documents in support of the extradition, though duly authenticated, had failed to satisfy the requirements of Section 14(1)(a). He argued that there must be lawful evidence considered in a judicial hearing.

Evidence contained in "statement made under oath" such as affidavits did not comply with the requirement of Section 14(1)(a). By

misinterpreting what was set out in Section 14 of the Extradition Act, it cannot be said that there was prima facie evidence on which the Magistrate could properly have committed the Appellant to be extradited. The form of evidence before the Magistrate, the affidavit, is not what was prescribed in the Act. This may have been possible before the enactment of the Extradition Act, as the English Statute then being used, described documentary evidence as "deposition or statement on oath". He further argued that the Jamaican Act clearly substituted therefor a description of a document setting out "testimony given on oath".

The Magistrate and the Full Court had before them a number of affidavits. Among these affidavits were those of Michael Layne and Jerold McMillen. Michael Layne is an alleged accomplice and Jerold McMillen is an Assistant United States Attorney for the Southern District of Florida. McMillen's affidavit was essentially a collection of opinions, explanations and conclusions and clearly failed to conform with the requirements of section 14(1)(a) of the Act.

There is no definition in the Act as to the meaning of "testimony given on oath." The meaning of the term must therefore be determined by other means. Miss Lindsay, counsel for the 1st respondent, submitted that reliance can be placed by the Court, on authoritative dictionaries in order to determine the meaning given to a word or phrase. See ***Camden***

(Marquis) v IRC[1914]1KB 641 at 647-648 and ***R v DPP ex parte Barnes*** [1996] 33 JLR 66 . In ***Camden (Marquis) v IRC*** (supra) Cozens-Hardy M.R stated:

> "It is for the Court to interpret the statute as best they can. In so doing the Court may no doubt assist themselves in the discharge of their duty by any literary help which they can find, including of course the consultation of standard authors and reference to well-known and authoritative dictionaries..."

The Full Court had consulted the New Shorter English Dictionary which defined the word "testimony" as "Evidence, proof esp. (Law) evidence given in Court, an oral or written statement under oath or affirmation."

Miss Lindsay further submitted that "testimony" was not limited to oral evidence given in Court proceedings but also included statement on oath. In its effort to determine whether there was sufficient evidence before the Magistrate to have committed the Appellant to extradition, the Full Court had examined and relied on the provisions of the Treaty between the United States of America and Jamaica. However, Mr. Atkinson submitted that Article VIII of the Treaty makes distinction between "statements on oath" and the "evidence" to be submitted in requesting extradition. Miss Lindsay submitted that the Full Court had concerned itself specifically with Section 14 of the Act in deciding whether the learned Magistrate had acted properly when he accepted the affidavits of Michael Layne and Jerold McMillen.

I hold that an affidavit, duly attested, is a statement on oath, and although recorded, extra curia, is to be considered "testimony given on oath" for the purposes of Section 14(1)(a) of the Act. If the affidavit contains any material which offends the rule against hearsay or inadmissibility, this should be excluded to make sure that the remaining evidence contained therein, is relevant and admissible. The affidavit of Michael Layne satisfied all the requirements of Section 14 of the Act and is admissible. It was therefore properly, in my view, admitted by the Magistrate.

Was there sufficient evidence before the learned Magistrate for him to find that there was prima facie evidence for which the Appellant could be charged with any of the two offences?

(1) Importing a controlled substance that is one hundred (100) kilograms or more of a mixture and substance containing a detectable amount of marijuana.

(2) Possession with intent to distribute a controlled substance that is one hundred (100) kilograms or more of a mixture and substance containing a detectable amount of a marijuana.

Michael Layne's affidavit is crucial to this consideration.

"**AFFIDAVIT OF MICHAEL LAYNE**

I, Michael David LAYNE, being duly sworn, depose and state as follows:

1. I am 46 years of age. I am a legal resident of the United States and I reside in Miami, Florida. I

have been referred to as 'MIKE,' 'MIKEY,' and/or 'JAMIKEY.'

2. I am one of (2) defendants charged with drug related offenses in the Southern District of Florida in United States versus Melvin MAYCOCK, et al./04-20193CR--Altonaga. I am a cooperating defendant in this case, which is being investigated by the U.S. Drug Enforcement Administration (DEA).

3. Approximately twelve years ago I met a Jamaican male known to me as Howard MONTIGUE, a/k/a 'BROOKIE' (later identified as Hartford MONTIGUE, hereafter referred to as 'MONTIGUE'). I have kept in personal and professional contact with MONTIGUE since then. I know MONTIGUE to be a marijuana trafficker who resides and operates out of Montego Bay, Jamaica. In the past, I received a couple of pounds of marijuana in the U.S. from MONTIGUE and a man known best to me as 'FATAH.' (I believe his last name was Parkinson). On or about September 29, 2003, I met MONTIGUE in Miami, Florida, and MONTIGUE told me of an individual by the name of 'MAGOO' (later identified as Dennis or Michael GAYLE, and also known by the alias name of 'MADU') who is a major marijuana dealer from Montego Bay, Jamaica. MONTIGUE told me that "MAGOO" would have something 'come up,' and asked if I would be interested in helping out with it for a 'piece of it.' I understood this to mean that MONTIGUE and MAGOO were coordinating a marijuana shipment to the area and that I could receive some of the marijuana if I helped them with the shipment.

4. On or about October 8, 2003, I was telephonically contacted by a Jamaican male whom I later learned to be 'MAGOO.' During the conversation, MAGOO told me that he (MAGOO) had heard from MONTIGUE that I was good, and that people would be calling me. I understood this to mean that they believed I was

trustworthy enough to handle a drug related matter for them.

5. In the morning on October 11, 2003, I was telephonically contacted by an unidentified Bahamian male (hereafter referred to as UM #1) on my cellular telephone number *(305)* 798- 6136. During the conversation, UM#1 asked if I was 'MIKE,' and I told him that I was 'MIKE.' UM #1 identified himself as 'MADU boy.' UM #1 informed me that his boy 'CHARLIE' would call me shortly. I told UM#1 that I was working that day at Esserman Nissan and CHARLIE could call in order to meet. UM #1 told me they would call later. I understood from this conversation that UM#1 was following up on the drug transaction that MONTIGUE and MAGOO had talked to me about, and that UM #1 was working for MAGOO.

I further understood that 'CHARLIE' would call me later that day related to the same drug related matter and that I would pick up a quantity of drugs from him for UM#1, MONTIGUE, and MAGOO.

6. In the morning on October 11, 2003, I was telephonically contacted on my cellular telephone number (305)798-6136, by an individual named "CHARLIE," who utilized *(561)* 541-6970. During the conversation, CHARLIE told me to get a van and meet him (CHARLIE) at the Burger King in West Palm Beach, located off Interstate 95 at the 45th Street Exit. I understood this conversation to mean that CHARLIE was the person from whom I would pick up a quantity of drugs for UM #1, MONTIGUE, and MAGOO.

7. On October 11, 2003, after 12:00 p.m., I met with CHARLIE and an unidentified black male

(hereafter referred to as UM #2), at the Burger King in West Palm Beach, Florida. As requested, I provided them with a silver Nissan Quest mini-van that I had obtained from my employer, Esserman Nissan, and had driven in to West Palm Beach. CHARLIE and UM #2 took the mini-van and departed the area. A short time later, CHARLIE and UM #2 returned to the area near the Burger King. After I received the mini-van, I telephonically contacted CHARLIE at (561) *541-6970* to verify the amount of drugs that had been placed into the van. During the conversation, 'CHARLIE' related that the count was '1177.' I understood this to mean that 'CHARLIE' and UM #2 had just transferred 1177 pounds of marijuana in the van. I then drove back to Miami and parked the van at my residence. I also verified that there was indeed a large quantity of marijuana placed in the back of my van, consistent with what CHARLIE had told me.

8. On October 11, 2003, between 7:00 p.m. and 7:30 p.m., I was telephonically contacted by MONTIGUE. During the conversation, MONTIGUE asked if I had received the "babies,' which I understood to mean bales of marijuana, and I confirmed that I had received them. MONTIGUE said that someone would contact me later that night to pick up the mini-van containing the marijuana.

9. On October 11, 2003, at approximately 11:55 p.m., agents from the DEA approached my residence located at 11930 S.W. 93 Terrace, Miami, Florida, and observed the same mini-van with marijuana parked in the driveway.

10. A short time later, in the early morning hours of October 12, 2003, I signed a DEA written consent to search form, for the search of my residence. During the search, DEA Agents seized one brown colored bale of marijuana which had been tied with orange rope from inside the

house, one brown colored bale of marijuana which I had placed in front of the mini-van, as well as multiple brown colored bales tied with orange and green rope containing marijuana, partially covered by blankets, in the rear of the mini-van.

11. On October 12, 2003, between 12:00 p.m. and 1:00 p.m., I was telephonically contacted by MONTIGUE. MONTIGUE said that he had been informed about the marijuana seizure. MONTIGUE then stated he was going to put MAGOO on the telephone to talk with me. A Jamaican male, who, based on the context of the conversation, I believed to be MAGOO, took the telephone from MONTIGUE and cursed at me about the marijuana seizure. I further understood this to mean that MAGOO had an ownership interest in the marijuana and was therefore upset by the seizure.

12. On October 21, 2003, at approximately 9:30 p.m., I telephonically contacted MONTIGUE in Jamaica at telephone number (876) 376-7172. MONTIGUE stated that he had shown the "man" (referring to "MAGOO)" the "paper" (referring to a receipt for the marijuana seized on 10/12/2003) and that 'it' (referring to the receipt) was no good. MONTIGUE said that he and MAGOO were going to obtain a lawyer in Miami to call the "guys" (referring to the DEA Agents who were listed on the receipt for the marijuana seized on 10/12/2003). MONTIGUE stated that I would have been paid "50" or "100" (referring to 50 or 100 pounds of marijuana) for taking receipt of the marijuana. MONTIGUE again stated that they (MONTIGUE and MAGOO) wanted to hire an attorney in Miami, because there was nothing in the paper or on the news regarding the marijuana seizure.

13. On October 22, 2003, at approximately 7:50 p.m., I was telephonically contacted by MONTIGUE. MONTIGUE asked me why "they" (DEA Agents) came directly to the van (referring to the silver Nissan Quest). I told MONTIGUE that I did not know why the agents came directly to the van (MONTIGUE and MAGOO were both on the telephone during this conversation). MONTIGUE and MAGOO asked me if the DEA Agents had stolen 'it' (referring to the marijuana). MONTIGUE asked if I was willing to meet with someone face to face to discuss the seizure of the marijuana and I agreed.

14. On July 21, 2004, Special Agents (S/As) Joseph McCaffrey and Manuel Recio showed me an unmarked/unlabeled photograph. I identified the person in the photograph to S/As McCaffrey and Recio, as the individual I know as Howard MONTIGUE, a/k/a "BROOKIE."

15. Attached to this affidavit as exhibit number 1 is a photograph of defendant MONTIGUE, as identified by me.

FURTHER AFFIANT SAYETH NAUGHT

_____

Michael Layne

On this 22 day of July, 2004, personally appeared before me and after being sworn by me, signed this affidavit.

TED E. BANDSTRA

UNITED STATES MAGISTRATE JUDGE "

Mr. Atkinson submitted that the Full Court erred when it agreed with the learned Resident Magistrate's finding that there was, in Michael Layne's affidavit, sufficient evidence to establish a **prima facie** case for

the Appellant's committal for extradition to the United States. He argued that no case had been made out against the Appellant that he either possessed marijuana in the United States of America with intent to distribute it therein or that he imported it into the United States of America. The Appellant was not the person who was involved in aiding and abetting or procuring its importation.

The Prosecution had attempted, unsuccessfully to provide evidence indicating some conspiracy, in which the Appellant was involved. However, it was interesting to note that the Warrant to Proceed included no count alleging conspiracy. The evidence before the learned Resident Magistrate, he further submitted, would not be sufficient to establish a charge of possession of marijuana under the Dangerous Drug Act in Jamaica.

There was no evidence presented of the Appellant being in the United States, and none placing any physical custody of the marijuana in him with the required knowledge and animus possedendi. The principles outlined in ***R v Vincent*** 28 JLR 69 had been relied on in the Full Court. The principles outlined in the case of ***D.P.P v Wishart Brooks*** 12 JLR 1374 were not applied to this case.

In reply to Mr. Atkinson's submission, Mr. Bryan, for the 2nd Respondent, placed heavy reliance on the case of ***Hall v Cotton and***

Another [1987]1Q.B. 504. He submitted that although the Appellant was outside of the United States of America when the drugs were seized, the Appellant had a proprietary interest in the marijuana. Were this not so, the Appellant would not have told Michael Layne that he and "Madu' would have a lawyer to check the whereabouts of the marijuana seized by the Drug Enforcement Agents.

The evidence from Michael Layne's affidavit is that he had met the Appellant sometime before in Miami, Florida on or about the 29th September, 2003. Appellant had told him that someone named "Madu" or "Magoo" had something to come up and questioned whether he would be interested in helping out with it "for a piece of it". Layne deponed that his understanding of this was that the Appellant and "Madu" were sending a shipment of marijuana to the area and for his keep, he would receive some of the marijuana shipped. In pursuit of this, Layne was contacted by "Madu" on October 8, 2003 by telephone. On October 11, 2003, one morning, he was contacted by an unknown person and told that a man named "Charlie" would contact him. This contact did materialize, as he was asked by one Charlie to get a van and meet him at a Burger King Restaurant in West Palm Beach. This was done and he handed the van over as arranged. Later, the van was returned with 1177 pounds of marijuana. He drove the van to his residence in Miami and parked it there with the marijuana. The Appellant

called him that day enquiring if he had received the "babies" and he said yes. He understood "babies" to refer to "bales of marijuana". He was told that someone would pick-up the van later, but before this could happen, the van and its contents were seized from his residence by US Drug Enforcement Agents.

The Appellant had called subsequently making enquiries as to why the agents had come directly to the van, and whether the Agents had stolen the marijuana. He agreed to meet face to face with someone, when asked by the Appellant, to discuss the marijuana seizure. The Appellant also told him that he and "Madu" would employ a lawyer in Miami to make representation to the DEA. concerning the seized marijuana.

The case of ***Hall*** (supra) relied on by Mr. Bryan for 2nd Respondent, held, inter alia, that a person could be in possession of a firearm at a time when he was not physically in control of it at the place where it then was; and that on the facts, the first defendant retained proprietary possession of the shotguns while they were at the second defendant's house. This case was however, decided on its particular facts. In ***DPP v Wishart Brooks*** (supra) at 1376, Lord Diplock, giving the Board's opinion stated:

> "In the ordinary use of the word "possession" one has in one's possession whatever is, to one's

> own knowledge, physically in one's custody or under one's physical control."

At page 1377, he continued:

> "The only *actus reus* required to constitute an offence under s.7(c) is that the dangerous drug should be physically in the custody or under the control of the accused."

Harris J (as she then was) at page 16 of the judgment of the Full Court said:

> "The claimant may be deemed to be in possession of dangerous drugs notwithstanding his physical absence from the United States at the material time. A party may be vested with possession and control of dangerous drugs notwithstanding that he was not present at the material time. See ***Vincent v D.P.P.*** (sic) [1991]28 JLR 69."

There is no evidence presented which could establish that the marijuana confiscated by the Drug Enforcement Agents from the Miami home of Michael Layne belonged to or was in the possession of the Appellant. Layne's affidavit does not disclose evidence of the Appellant importing or aiding and abetting importation of marijuana into the United States.

The doctrine of constructive possession of the marijuana is not applicable in the instant case. Mr. Bryan for the 2nd Respondent further argued that it was clearly established by the allegations in Michael Layne's affidavit that the Appellant was at least a "procurer". That

being so, section 6 of the Justices of the Peace Jurisdiction Act is relevant to this case. This section reads as follows:

> "6. Every person who shall aid, abet, counsel or procure the commission of any offence which is or hereafter shall be punishable on summary conviction, shall be liable to be proceeded against and convicted for the same, either together with the principal offender, or before or after his conviction, and shall be liable, on conviction, to the same forfeiture and punishment as such principal offender is or shall be by law liable, and may be proceeded against and convicted either in the parish where such principal offender may be convicted, or in that in which such offence of aiding, abetting, counseling, or procuring may have been committed."

In ***Attorney General's Reference*** (No. 1 of 1975) [1975] 1QB 773, Lord Widgery CJ in defining the word "procure" stated thus:

> "To procure means to procure by endeavour. You procure a thing by setting out to see that it happens and taking appropriate steps to produce that happening. We think that there are plenty of instances in which a person may be said to procure the commission of a crime by another even though there is no sort of conspiracy between the two, even though there is no attempt at agreement or discussion as to the form which the offence should take. "

It is necessary to prove that the Accused intended to bring about the principal offence. Layne's affidavit refers to some conversations involving the Appellant and the affiant Layne. In my view the evidence

contained therein is insufficient to ground the offence of "procuring". I cannot therefore agree with Mr. Bryan's submission in this point.

Did The Learned Resident Magistrate weigh up the evidence before making the order to commit Appellant for extradition?

Mr. Atkinson had argued that the learned Resident Magistrate had not correctly addressed the following issues:

> "(a) whether there was any weight, at all, in the allegations of an un-sentenced accomplice.
>
> (b) Whether there was any weight, at all, in the allegations of a charged accomplice because the requesting State failed to say whether there was a plea bargain in existence, and if so, what its terms were; and
>
> (c) Whether there was any admissible evidence against the Appellant according to the Laws of Jamaica."

Section 10 of the Act dictates that the Magistrate must hear Extradition Cases as if he or she were presiding at a Preliminary Hearing and should be satisfied that there was sufficient evidence to warrant trial as if the acts complained of had been committed in Jamaica. The Magistrate would be obliged to consider all the evidence before him/her and consider the sufficiency of it. However, it is not his/her duty to weigh the evidence i.e. to decide the amount of weight to be given to any evidence or to decide which witness he/she believes. The Extradition proceedings are not trials. The Magistrate should not be concerned with

whether there is corroboration of the evidence of an accomplice or whether there was plea bargain and if so, what were the terms. See ***R v Governor of Pentonville Prison and Another ex parte Osman*** [1989] 3 All E.R. 701. Mr. Atkinson submitted that the Full Court had erred when it failed to address the discrepancies between:

(i) The Request for Extradition,

(ii) The Grand Jury's Indictment and;

(iii) The Magistrate's Warrant of Committal.

He further submitted that there was no reconciliation of those discrepancies before the Magistrate or the Full Court. This resulted in the Appellant being left in an uncertain position that he may face trial on a Grand Jury indictment which differs from the Committal Charge.

Mr. Bryan in response submitted that it is nothing more than a perceived discrepancy. If the charges were not formulated fully in the Authority to Proceed, the document's validity was not affected, nor was the Warrant of Committal affected. There was no procedural unfairness or injustice caused to the Appellant by this. See ***Alain Charron v Government of the United States of America and Another*** [2000]1 WLR 1793.

I find Mr. Atkinson's submissions on this issue to be without merit. The Magistrate is concerned solely with whether the evidence adduced

before him/her would support committal for trial, in a Jamaican Court, were the acts complained of committed within this jurisdiction.

The evidence placed before the learned Resident Magistrate in this matter is insufficient to ground a prima facie case against the Appellant for any of the offences for which the learned Magistrate has made his Committal Order. The Full Court erred in refusing the application for habeas corpus.

I would discharge the Appellant by ordering the issue of a Writ of Habeas Corpus.

ORDER:

SMITH, J.A.:

It is hereby ordered that a Writ of Habeas Corpus issue to procure the discharge of the Appellant.