JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 116/2006

BEFORE:	**THE HON. MR. JUSTICE COOKE, J.A.** **THE HON. MR. JUSTICE HARRISON, J.A.** **THE HON. MRS. JUSTICE HARRIS, J.A.**

BETWEEN	**LOUIS WASHINGTON TIMOLL**	**APPELLANT**
AND	**THE COMMISSIONER OF CORRECTIONAL SERVICES**	**1ST RESPONDENT**
AND	**THE DIRECTOR OF PUBLIC PROSECUTIONS**	**2ND RESPONDENT**

Mr. Earl Witter, Q.C. and Barrington Frankson instructed by Gaynair and Fraser for the Appellant.

Patrick Foster, Q.C., Deputy Solicitor General and Kevin Powell instructed by Director of State Proceedings for 1st Respondent

Mr. Donald Bryan, Deputy Director of Public Prosecutions for 2nd Respondent

July 23, 24, 25 and September 28, 2007

COOKE, J.A.

1. On the 17th June, 2004 the Resident Magistrate for the Corporate Area committed the appellant to custody to await his extradition to the United States of America (the requesting state). On the 1st July, 2004, the appellant filed in the Supreme Court an application seeking a 'Writ of Habeas Corpus' for his

discharge from custody. The grounds upon which that application was brought were:

> "That (i) by reason of the passage of time since the Applicant is alleged to have committed the offence to which he pleaded guilty and/or alleged to have committed the offences with which he was charged and/or since he is alleged to have become unlawfully at large, as the case may be, and
>
> (ii) because the Requisition herein is not made in good faith in the interest of justice"

In his affidavit supporting the application at para. 10 the appellant stated as follows:

> "That I say humbly and respectfully that having regard to all the relevant circumstances, in particular the unexplained and indeed inexplicable delay on the part of the requisitioning State in seeking my extradition, as well as my own changed circumstances (domestic and medical) as testified to by me, or, on my behalf, it would be oppressive and/or unjust to extradite me as requested or at all."

The appellant sought to invoke Section 11 (3) (b) and (c) of the Extradition Act (the Act) which provides that:

> "On any such application the Supreme Court may, without prejudice to any other power of the Court, order the person committed to be discharged from custody if it appears to the Court that —
>
> (a) ...
>
> (b) by reason of the passage of time since he is alleged to have committed the offence or to

have become unlawfully at large, as the case may be; or

(c) because the accusation against him is not made in good faith in the interest of justice, it would, having regard to all the circumstances, be unjust or oppressive to extradite him."

The appellant's application was refused by the Full Court on the 15th December, 2006. That Court, unhappily and with much regret did not provide either a written or oral judgment. This failure has put this Court at some disadvantage since it is denied the benefit of the thought process of that court. It is from the refusal of the appellant's application by the Full Court that this appeal now lies.

2. At the outset of this judgment let me say that I accept that the proper approach to the resolution of this appeal is that whether or not it would be unjust or oppressive to return a fugitive does not involve the exercise of a discretionary jurisdiction but is a decision of fact of what is the proper inference to be drawn from the primary facts established by the court. See **Union of India v. Manorhar Lal Narang and another**, a decision of the House of Lords [1977] 2 All E.R. 348.

3. The bald incontrovertible primary facts were:

(a) On the 22nd April, 1986 the appellant pleaded guilty to count one of a three count indictment in the United States District Court Eastern District of New York. Apparently this plea was a part of a plea bargaining exercise. He pleaded guilty for conspiracy to import

substantial quantities of marijuana into the United States.

(b) He was scheduled for sentencing on or about the 6th June, 1986, but he did not appear. He willfully refused to honour a condition of his being on bail.

(c) He returned to Jamaica at some undisclosed time in 1986.

(d) The first documented effort by the requesting state to have the appellant extradited is evidenced by a Diplomatic Note dated the 25th March, 2003. This was followed by another Diplomatic Note 292 with supporting documents. This was dated 26th September, 2003.

(e) The authority to proceed was issued on the 13th November, 2000, and the warrant of arrest on the 18th November, 2003. The latter was executed on the 22nd November, 2003.

(f) From the time the appellant absconded bail until the hearing in the Supreme Court, more than 20 years had elapsed.

4. In this Court attention was focused entirely on 11 (3) (b) of the Act. It is well to appreciate at once that the appellant fugitive is not in the category of those persons concerning whom there are allegations. He is unlawfully at large in circumstances where he had pleaded guilty to a serious offence and absconded bail prior to his sentencing. The seriousness of the offence to which he pleaded guilty is demonstrated by the fact that the maximum period for imprisonment is 15 years. The stark question is whether or not by reason of the

passage of time, having regard to all the circumstances it would be unjust or oppressive that having pleaded guilty and fled, for him to be extradited to be sentenced.

5. Before I turn my attention to the contending positions as to the effect of the passage of time I will advert to two authorities. I begin with a passage from the speech of Lord Morris of Borth-Y-Gest in **Narang** (supra) at p 368 c – d.

> "It seems to me that the court is enjoined to have 'regard' to all the circumstances which reasonably can have bearing on the question whether 'by reason of the passage of time' an order to return would be unjust. The circumstances must all relate to the passage of time and relate to the question whether there would be injustice because of the passage of time if an order to return was made. The circumstances will naturally have arisen during the period of the passage of time but not all such circumstances will be relevant. *Those in contemplation are primarily the circumstances which have relation to the trial which, after a return, is to take place and to the defence to charges to be made and to the question whether 'by reason of the passage of time' it would be unjust to a person to return him to take his trial.*" (emphasis mine)

I consider that "trial" includes sentencing. Accordingly, much significance should be placed on the effect of the passage of time as regards how any consequences occasioned thereby, may reasonably be said to be a source of prejudice to him, at a future sentencing hearing.

6. In **Kakis v. Government of the Republic of Cyprus** a decision of the House of Lords [1978] 1 W.L.R. 779 Lord Diplock in his speech at p. 782 H — 783 A — B said:

> " 'Unjust' I regard as directed primarily to the risk of prejudice to the accused in the conduct of the trial itself, 'oppressive' as directed to hardship to the accused resulting from changes in his circumstances that have occurred during the period to be taken into consideration; but there is room for overlapping, and between them they would cover all cases where to return him would not be fair. Delay in the commencement or conduct of extradition proceedings which is brought about by the accused himself by fleeing the country, concealing his whereabouts or evading arrest cannot, in my view, be relied upon as a ground for holding it to be either unjust or oppressive to return him. Any difficulties that he may encounter in the conduct of his defence in consequence of the delay due to such causes are of his own choice and making. Save in the most exceptional circumstances it would be neither unjust nor oppressive that he should be required to accept them."

Here again as in the passage excerpted from the speech of Lord Morris, the emphasis is on the prejudice which delay may occasion when a fugitive is brought to justice. In this case would it be prejudicial to the appellant if he should be subject to the sentencing procedure?

7. In **Kakis** (supra) Lord Edmud-Davies in his short speech had this to say at p. 785 A — E.

> "My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Diplock, and I am in general agreement with the

> reasons he gives for holding that this appeal should be allowed.
>
> I have, however, one qualification to make. I am unable to concur in the following passage in the speech of my Lord:
>
> 'As respects delay which is not brought about by the acts of the accused himself, ... the question of where responsibility lies for the delay is not generally relevant. What matters is not so much the cause of such delay as its effect; or, rather, the effects of those events which would not have happened before the trial of the accused if it had taken place with ordinary promptitude.'
>
> In my respectful judgment, on the contrary, the answer to the question of where responsibility lies for the delay may well have a direct bearing on the issues of injustice and oppression. Thus, the fact that the requesting government is shown to have been inexcusably dilatory in taking steps to bring the fugitive to justice may serve to establish both the injustice and the oppressiveness of making an order for his return, whereas the issue might be left in some doubt if the only known fact related to the extent of the passage of time, and it has been customary in practice to advert to that factor: see, for example, **Reg. v. Governor of Pentonville Prison, Ex parte Teja** [1971] 2 Q.B. 274, 290 per Lord Parker C.J. and the speeches in this House in **Reg. v. Governor of Pentonville Prison, Ex parte Narang** [1978] A.C. 247."

This passage suggests to me that delay by itself is not necessarily a telling factor unless the requesting state is shown to be inexcusably dilatory in taking steps to bring the fugitive to justice.

8. In **Narang** (supra) Lord Fraser of Tulleybelton in his speech at p. 376 a — b said:

> "I have no intention of making an exhaustive list of such circumstances but I think that they would include the reasons for the passage of time since the offence: if the reason was that the requesting government had been dilatory, then the passage of time would tell in favour of the fugitive, as in **Re Naranjan Singh** *([1961] 2 All ER 565 or [1962] 1QB 211)*, but if the passage of time was inevitable, as in **Re Henderson, Henderson v. Secretary of State for Home Affairs** *([1950] 1 All ER 283)*, it would not. Other relevant circumstances might be the age of the appellant, and whether he has settled in the United Kingdom: see **Re Naranjan Singh** *(supra)*." [Emphasis mine].

Here considerations mentioned are the age of the fugitive and "whether he has settled on in the United Kingdom".

9. Lord Keith of Kinkel in **Narang** said at p. 379 i — 380 a:

> "I do not think it possible to describe exhaustively the type of circumstances which might properly influence the court. So far as the passage of time is concerned, that being the only ground in issue in this case, I think it would always be material to take into account the reasons why the passage of time had come about, for example, that it was due to concealment on the part of the applicant or to dilatoriness on the part of the authority seeking his return. I would also think it proper to be influenced, in an appropriate case, by the personal circumstances of the applicant, for example, that he had long been settled in this country with his family and had led there a respectable life in a responsible ..."

Here there is the consideration of the fact that "he had long been settled in this country with his family and had then led a responsible life in a responsible position".

10. The factors contemplated in the excerpts I have reproduced pertain to persons who have yet to face a trial. Since sentencing is part of the trial process, as already mentioned, these factors are not to be ignored. However, there has been no submission to the effect that the appellant fugitive would by reason of the passage of time been prejudiced at the sentencing hearing. The submissions on behalf of the appellant were founded on "oppression" as a result of:

(a) The delay in requesting extradition is "egregious or evidences indolence which is inexcusable and indeed unexpected"

(b) The settled and respectable life of the appellant since his return to Jamaica in 1986.

(c) Age

(d) Medical condition.

11. As to: (a) the position of the appellant is that:

(i) Since his return to Jamaica he has made no attempt to conceal the fact that he was living at 81 East St, Old Harbour in St. Catherine. This was the family residence – in fact where he was born.

(ii) He lived an open life and was well known in the community of Old Harbour as a resident and as a person in the fishing business.

(iii) He was well known to the constables (police) of Old Harbour and St. Catherine.

As to: (b) The stance of the appellant:

(i) Since his return to Jamaica in 1981 he started a fishing business with "few dollars" which turned out to be J$100,000.00.

(ii) Since 1991 he has been in a permanent relationship with one Ana-Marie Crooks. They live together. There are two children in that household. One, a girl who was aged 16 at the time of the committal hearing and a boy who was 10 years old. It is not clear if he is the biological father of that boy.

(iii) He is the co-founder of the Old Harbour Fish and Bammy Festival which is an annual event. There was publicity of his efforts in that regard in a national newspaper "The Sunday Gleaner" on 22nd October, 2000 in which his photograph appeared among those who were described as the chief organizers of the event. There was a follow-up story in the Daily Gleaner, in which the appellant's name is mentioned on the 24th October, 2000.

In respect of (c) he was born in 1947 and as regards (d) Dr. Errol O'Connor at the committal hearing said that the appellant "was suffering from diabetes, mellitus, [sic] peptic ulcer and obesity significantly". Further he had also

developed "muscular skeletal problems, backaches and also disturbance of his balancing mechanism due to mineris [sic] disease." Dr. O'Connor told the court that "Mr. Timoll he have [sic] a family history of these illnesses I described." It was his view that "a man in the condition of Mr. Timoll is best treated outside of incarceration."

12. In her affidavit Samantha Schrieber an Assistant United States Attorney, at para. 47 speaks to the action of the requesting state in initiating extradition proceedings. She said:

> "In or about February 2001, Jamaican authorities advised United States law enforcement officials that they had possibly located LOUIS WASHINGTON TIMOLL in Jamaica. In or about March 2001, the Jamaica Constabulary Force, Fugitive Apprehension Team ("J–FAT") confirmed to United States law enforcement officials that they had positively identified and located LOUIS WASHINGTON TIMOLL at 81 East Street in the Old Harbour area of St. Catherine, Jamaica, and urged the United States to expedite his extradition."

13. I will now address the issue of whether or not the requesting state has been rightly criticized for "irresponsible delay" which was "egregious" and "inexcusable". Mr. Witter, for the appellant never lost an opportunity to trumpet the fact that more than twenty years had passed between the absconding of bail and the hearing in the Supreme Court. He would seek to ascribe blame for the want of extradition proceedings to the requesting state. It is my view that he uses too broad a brush to paint his picture. It must be recognized that the

requesting state could not begin extradition proceedings unless and until there was some assurance that the fugitive had been located. The task of discovering the location of the fugitive rested entirely with the Jamaican authorities. This is a job of some sensitivity, hence, the creation of the Fugitive Apprehension Team within the Jamaica Constabulary Force. Samantha Schrieber stated that it was on or about March 2001 that the requesting state became aware, that the appellant had been positively identified and located. In respect of delay on the part of the requesting state, time should begin to run as of March 2001. Perhaps, I should state that there is no reason for me to doubt the veracity of Schrieber. It will be recalled that the first Diplomatic Note (074) of relevance is dated the 25th March 2003. Accordingly the relevant period for consideration is that of approximately two (2) years. So, therefore the question arises as to whether declining to act for two (2) years should be regarded as "inexcusably dilatory". Apparently Schrieber did not in her affidavit find it necessary to say why it took the requesting state two years to act.

14. This Court does not have the benefit of having evidence pertaining to the mechanics of instituting extradition proceedings – legal, administrative and executive. The Act does not mention time frame – nor does the Treaty. In passing, it is to be observed in respect of persons to be extradited from Jamaica, there is a time frame – see section 11 (2) (a) & (b) and 13 of the Act. In the absence of evidence pertaining to what I have described as the mechanics of

instituting extradition proceedings, I nonetheless have to make a determination. On the face of it, I would not regard the passage of two years as obviously indicating that the requesting state has been "inexcusably dilatory". In coming to this conclusion I have not been uninfluenced by the fact that the appellant fugitive has pleaded guilty to a serious criminal offence. I have also had regard to the comity between requesting and requested states as is envisioned by the Treaty.

15. Before I proceed to examine the other factors which the appellant has prayed in aid, let me say that I start from the position that the main criterion is whether or not by reason of the passage of time the fugitive will be handicapped when he is brought to the seat of justice. In this case, having pleaded guilty, the passage of time is quite irrelevant as to any prejudice which the appellant could possibly encounter at the continuation of his trial. I reiterate that this is not an accusation case. It is a conviction case. Consequently, less weight must be accorded to the other factors which do not concern his prospect of having a fair sentencing hearing.

16. I do not consider that the age of the appellant merits serious consideration so I will move on to the issue of his medical condition. This can be shortly disposed of. Firstly, whatever medical condition he now endures cannot be attributed to "by reason of the passage of time". It is not the passage of

time which has occasioned his disabilities. It would appear, taking into account his family history that in due course he would suffer from the diagnosed ailments. Secondly, I would have expected a more recent medical opinion as to his condition. He has been incarcerated since the 22nd November, 2003. Although, strictly speaking his medical condition does not fall within the ambit of changes in his personal circumstances brought about by reason of the passage of time, I would be prepared to view favourably the position of a fugitive where medical opinion established a terminal illness.

17. The appellant has submitted that since the time of his return to Jamaica he has led a respectable life, has a stable family unit, and was a leader in the affairs of his community in Old Harbour. Further, he has lived an open life and in his evidence at the committal hearing said "fifteen years I was not hiding so I thought that (criminal proceedings in the requesting state) was behind me". In the normal course of things, convicted persons must be subject to the sanctions of the law. The circumstances would be most unusual, indeed very exceptional wherein the law should not take its course. The changed circumstances which the appellant has relied on are, as such, neither unusual nor exceptional. In this case the appellant fled to escape the imposition of sanctions for a serious crime to which he has confessed by pleading guilty. To my mind the factors set out at the beginning of this paragraph are really more pertinent to what I have termed an accusation case. In any event the fugitive had not "settled" in a

foreign country. The requesting state did nothing to lead the appellant to harbour any genuine belief that his crime "was behind me". In a sense it is the appellant's behaviour which is the foundation of his present predicament. Up to now he has benefited from absconding trial. I am afraid that the proverbial long arm of the law now has him in its clutch. The factors brought to our attention are better suited, in the circumstances of this case, as substance for a plea in mitigation at the appropriate time.

18. It is only left for me to say that I would dismiss this appeal. I would affirm the order made in the Supreme Court and award costs to the respondents to be agreed or taxed.

HARRISON, J.A:

1. This is an appeal from an Order made by the Full Court (D. McIntosh, Smith, Hibbert, JJ) on December 15, 2006 for extradition of the appellant Louis Washington Timoll to the United States of America. Regrettably, there is no written judgment from the Full Court.

2. On April 22 1986, the appellant had appeared before the United States District Court for the Eastern District of New York, and pleaded guilty to Count 1 of the indictment which charged him with the offence of conspiracy to import substantial quantities of marijuana into the United States and to posses with intent to distribute. He was released on bail to appear for sentence on the 9th June 1986, but he failed to do so due to the fact that he had returned to Jamaica. As a consequence, a warrant was issued for his arrest.

3. The basic legal issue which is raised by the appellant in this appeal is whether it would be unjust and oppressive pursuant to the provisions of section 11(3)(b) of the Extradition Act for him to be extradited in all the circumstances of the case.

4. The onus is therefore on the appellant to establish the facts and circumstances which would make his extradition to the United States of America unjust or oppressive within the meaning of section 11(3)(b) of the Act.

5. The appellant contends firstly:

> "(a) That (i) by reason of the passage of time since the Applicant is alleged to have committed the offence to which he pleaded guilty and/or is alleged to have committed the offences with which he was charged and/or since he is alleged to have become unlawfully at large, as the case may be, and
>
> (ii) because the Requisition herein is not made in good faith in the interest of justice it would, having regard to all the circumstances, be unjust and/or oppressive to extradite him."

Statutory Provisions

6. Section 11(3)(b) of the Extradition Act ("the Act") states as follows:

> "11(3) On any such application the Supreme Court may, without prejudice to any other power of the Court, order the person committed to be discharged from custody if it appears to the Court that -
>
> (a) ...
>
> (b) by reason of the passage of time since he is alleged to have committed the offence or to have become unlawfully at large, as the case may be; or
>
> (c) because the accusation against him is not made in good faith in the interest of justice it would, having regard to all the circumstances, be unjust or oppressive to extradite him."

7. Section 3 of the Act also provides that the Court of Appeal shall have all the powers of the Supreme Court on any matter coming before it on appeal from the latter Court. If it appears to the Court of Appeal that for the reasons stated in Section 11(3) of the Act that "it would, having regard to all the circumstances,

be unjust or oppressive to extradite the appellant", it will exercise its own jurisdiction based upon its own view of the circumstances.

The general principles

8. There is no dispute about the general principles to be extracted from the authorities with regard to the application of section 11(3) (see in particular ***R v Governor of Pentonville Prison ex parte Narang*** [1978] AC 247 and ***Kakis v the Government of the Republic of Cyprus*** [1978] 2 All ER 634). Those principles may be summarized as follows:

(a) The passage of time is to be measured from the date of the alleged commission of the offence until the hearing of the application for habeas corpus.

(b) If, for any of the reasons specified in section 11(3) it appears that the return will be unjust or oppressive there is no room for any residual exercise of discretion by the court.

(c) Where the passage of time is due to dilatory conduct on behalf of the requesting Government it tells in favour of the fugitive; whereas if the passage of time was inevitable, it does not.

(d) No account is to be taken of delays caused by the actions of fugitive himself.

8. In **Kakis v Government of the Republic of Cyprus** [1978] 2 All ER 634 at 638 - 639, Lord Diplock considered the words 'unjust and oppressive' in the corresponding section, s 8(3) of the English 1967 Act:

> " 'Unjust' I regard as directed primarily to the risk of prejudice to the accused in the conduct of the trial itself, "oppressive" as directed to hardship to the accused resulting from changes in his circumstances that have occurred during the period to be taken into consideration; but there is room for overlapping, and between them they would cover all cases where to return him would not be fair. Delay in the commencement or conduct of extradition proceedings which is brought about by the accused himself by fleeing the country, concealing his whereabouts or evading arrest cannot, in my view, be relied on as a ground for holding it to be either unjust or oppressive to return him. Any difficulties that he may encounter in the conduct of his defence in consequence of delay due to such causes are of his own choice and making. Save in most exceptional circumstances it would be neither unjust nor oppressive that he should be required to accept them.
>
> As respects delay which is not brought about by the acts of the accused himself, however, the question of where responsibility lies for the delay is not generally relevant. What matters is not so much the cause of such delay as its effect; or, rather, the effects of those events which would not have happened before the trial of the accused if it had taken place with ordinary promptitude. So where the application for discharge under s 8(3) is based on the "passage of time" under para (b) and not on absence of good faith under para (c), the court is not normally concerned with what could be an invidious task of considering whether mere inaction of the requisitioning government or its prosecuting authorities which resulted in delay was blameworthy or otherwise. Your Lordships have no occasion to do so in the instant case."

Lord Scarman at page 644 stated:

> "The oppressiveness in returning him for trial would arise because during the years that have elapsed since the end of July 1974 events have conspired to induce in the appellant a sense of security from prosecution. Yet during these years he has not led the life of a fugitive from justice. On the contrary, he has settled in this country openly and, as it must have appeared to him, with the assent of, or at the very least without objection by, the authorities in Cyprus."

9. As to the words 'having regard to all the circumstances', Viscount Dilhorne said in ***Union of India v Narang*** [1977] 2 All ER 348 at 362, in which a corresponding section to 11(3) (supra) was being considered:

> "In my opinion this can only mean circumstances relevant to the particular ground or grounds on which the application for release is based ... Where the application is ... on the ground that it was unjust or oppressive to return him by reason of the passage of time ... the circumstances to which regard may be had must be relevant to the question whether or not it would be unjust or oppressive to return a person because of the passage of time."

<u>The submissions</u>

10. It is Mr. Witter's submission before us that it would be both unjust and oppressive to return the appellant to the United States of America now, after the passage of so many years. He submitted, that it could not reasonably be argued, that no matter how long "the passage of time" delay in requisitioning attributable entirely to the requesting State could not render a return oppressive. The question he asked is: "how long is too long"? He submitted that a delay of twenty and one-half years, in circumstances where the fugitive, so far from

hiding, was living openly (which was not attempted to be contradicted in cross-examination or otherwise at the committal proceedings) is too long. He further submitted that a proper construction of section 11(3)(b) based on a fair reading thereof, leads to the conclusion that the legislature must have intended that "passage of time" in the case of a convict "unlawfully at large" could, as in the case of a fugitive accused yet to be tried, make it oppressive to order his return.

11. He submitted that no case of dilatoriness exceeding ten years can be found in the law books. Furthermore, he said that there was not a scintilla of evidence suggesting any effort on the part of the requisitioning State to trace or seek the appellant's extradition before 2001.

12. Mr. Witter finally submitted that the appellant's case was "most exceptional" and that habeas corpus should go. He argued that the Court should be "as keen not to set a bad precedent as it is to avoid encouraging, endorsing or approving inertia, indolence, inexcusable, unexplained or inexplicable delay in seeking extradition of a fugitive accused or a convict unlawfully at large."

13. Mr. Frankson argued grounds (b)(c) and (d) (i)(ii)(iii) on behalf of the appellant. He submitted both in his written skeleton arguments and oral submissions that:

> "(i) ... the Affidavit evidence in support of the Requisitioning State to extradite the Appellant failed to disclose a prima facie case against the Appellant. It cannot be said that there was sufficiency of evidence

from which a conspiracy could be inferred and for which it could be found that he was identified and involved;

(ii) The evidence does not show that the Appellant was a part of a scheme in which he agreed to distribute the prohibitive substance, marijuana. It has not been established that there is sufficient evidence upon which the Appellant ought to be extradited, notwithstanding, that, the Appellant entered a guilty plea for the offence of conspiracy;

(iii) The only evidence adduced in the case against Mr. Timoll was that he was a passenger in the motor car at the time when it was intercepted by the DEA agents;

(iv) The allegation by his co-defendants Robson and March is not evidence against Timoll and so, in the circumstances, the offence of conspiracy was not established and in those circumstances, his plea of guilty ought to have been accepted by the court and he was not guilty of any offence, as a matter of law;

(v) Having regard to the manner in which he was assisted by his attorney-at-law, it cannot be said that his plea of guilty gave rise to a fair hearing;

(vi) The plea was contrary to the circumstances explained by the Requisitioning State as well as those explained by the Appellant as to how he came to be charged with the offence;

(vii) No evidence adduced before the court as to the fate of other co-conspirators;

(viii) The Appellant will rely upon the provisions of Section 9 of the Extradition Act.

(ix) Upon an examination of all the circumstances, it is respectfully submitted that it would be unfair, unjust and/or oppressive for the Appellant to be extradited to the United States of America."

14. Mr. Frankson submitted that ***R v Lloydell Richards*** [1987] 24 JLR 142 supports the proposition that a guilty plea, not followed by a sentence, does not constitute a conviction and was no more than a solemn confession of the ingredients of the crime alleged and that it may with the Court's permission, for good cause be altered. Good cause, in the instant case he said, would be that there were no facts presented to support the plea and in addition thereto the circumstances giving rise to the plea. He submitted that the appellant would in these circumstances have the right at any time to change his plea.

15. He further submitted that it was not surprising that the Warrant of Arrest and the Warrant of Committal referred to the appellant as being "Accused."

16. Mr. Foster for the 1st respondent submitted inter alia that where the prisoner is the author of the delay which he seeks to rely on it will not be unjust or oppressive to extradite him: ***Kevin Joseph Deschenes v The Commissioner of Corrections and the Director of Public Prosecutions*** SCCA Suit No. M-119/1999 delivered December 16, 1999. He submitted that if after hearing the evidence in support of the request for extradition the Resident Magistrate is satisfied that the offence is an extradition offence and the evidence is sufficient to warrant the trial of the person arrested, if that offence had been committed in Jamaica, the Resident Magistrate may order that person's committal. He argued that amongst the evidence before the Resident Magistrate was the appellant's guilty plea. The Resident Magistrate he submitted, had no

reason to look behind this plea and accordingly was correct, as was the Full Court, in granting the request for the Appellant's extradition.

17. Mr. Bryan for the 2nd respondent submitted that it would be an affront to the system of justice for a fugitive who has avoided recapture to pray in aid the passage of time especially after he had pleaded guilty and absconded bail. The Court he said, must take into account the appellant's contribution to the passage of time. He also submitted that the requesting state in the authenticated affidavit of Special Agent Keith Hall paragraph 11, indicated that the appellant's whereabouts were unknown until 2001. He submitted that the passage of time without more is not a basis for granting an application for a writ of *Habeas Corpus.* Furthermore there were no circumstances to indicate that the trial would be unfair due to the passage of time or to suggest oppression if he was returned.

Analysis of the submissions and application of the principles of law

18. In my view, there are a number of difficulties in accepting Mr. Witter's submissions. Generally speaking, there is always likely to be some prejudice to an accused when a prosecution is brought long after the event. But ordinarily, passage of time alone will not be sufficient to found a successful application to have a prosecution stopped. However, an important aspect of this appeal is the fact that the appellant stands already convicted of the offence in respect of which his extradition is sought.

19. The appellant's circumstances are therefore different from a case where extradition is sought for the purpose of putting on trial a person for a criminal offence since that person enjoys the presumption of innocence and is not a convicted criminal who has fled from an Order of a Court after conviction. Where a convict remains at large for a considerable period of time this does not diminish the criminal nature of the act alleged against him though there may be factors that could be taken into account in sentencing the individual. ***Kakis'*** case (supra) is distinguishable from the instant case. The former was a case where the applicant was one who was alleged to have committed (an) offence not one who had become unlawfully at large as in the instant case.

20. It is also relevant to note that the appellant does not rely on any extraneous matter which could render his return as unjust, oppressive such as the risk of ill-treatment, denial of a fair hearing or other denial of rights if returned to the American court for sentencing. There are just two aspects of the case made on his behalf as regards his claim that his return would be unjust and oppressive. Essentially, his case as I have said is based on the passage of time.

21. Mr. Witter had also submitted that he could find "no case of dilatoriness" exceeding ten years in the law books. However, there is dicta from ***Woodcock v Government of New Zealand*** [2003] EWHC 2668 (Admin) (un-reported) delivered November 14, 2003 in which Lord Justice Simon Brown said:

> "My researches following the hearing led me to an unreported decision of this court in ***Sagman v***

> ***Government of Turkey*** [2001] EWHC (Admin) 474, referred to in the footnotes to paragraph 8.26 of Nicholls, Montgomery & Knowles on The Law of Extradition and Mutual Assistance. The facts of the case are strikingly different from those of the present case and ultimately I found it of no assistance. But I could not help noting Rose LJ's observation at paragraph 19 of his judgment that "no case is known to counsel, or to the court, where an extradition has been ordered after a lapse of so long a period as 15 years". There may or may not previously have been such a case. In my judgment, however, there can be no cut-off point beyond which extradition must inevitably be regarded as unjust or oppressive. It hardly needs me to point out that trial after 20 years or more is far from ideal. Sometimes, however, it may nevertheless be appropriate to extradite an accused for that purpose. This, in my judgment, is such a case. I would dismiss this application."

22. I now turn to the submissions made by Mr. Frankson. I find no merit in these submissions for the following reasons:

(a) The appellant had admitted his involvement with the shipment of marijuana to the United States of America to Special Agent Raymond D'Alessio;

(b) The appellant had signed a plea bargain agreement with the authorities which is exhibited in the authenticated affidavit of former United States Attorney, Larry Kranz;

(c) The appellant had pleaded guilty to the charge in the indictment and that information is set out in the authenticated affidavit of former United States Attorney, Larry Kranz.

(d) There is no merit in the submission that a guilty plea which is not followed by a sentence does not constitute a conviction. ***R v Lloydell Richards*** [1987] 24 JLR 142 was relied on by Counsel but in ***Junious Morgan v Attorney-General*** (1990) 38 WIR 232, a Jamaican case decided by the Privy Council in June 1990, it was decided that for the purposes of sections 10 and 26 of the Extradition Act 1870, a 'convicted person' is a person who has been found guilty of a criminal offence (even if not sentenced).

Lord Templeman delivering the judgment in ***Morgan*** (supra) said at page 233:

> "...In some contexts a conviction is not completed until sentence has been passed: see ***R v Cole*** [1965] 2 Q B 388. But in the context of the Act of 1870 a 'convicted person' is a person who has been found guilty. The object of extradition is to enable a country where a criminal offence has been committed to try the accused and punish the guilty. The appellant has been tried and found guilty and must be extradited in order to be punished. Notwithstanding a valiant attempt by Mr. Serota on behalf of the appellant the point taken by the appellant is unarguable. In these circumstances no constitutional question need be considered."

(e) Both the Authority to Proceed and the Warrant of Committal speak of the "surrender of fugitive Loius Washington Timoll who is accused of the offence of....and to which count the fugitive pleaded guilty ..." There is a difference between those words and

what Mr. Frankson submits that the appellant was described as, an "accused" person.

Conclusion

Given all the circumstances in this case, I conclude that it would not be unjust and or oppressive to return the appellant to face sentencing in the United States of America since he had pleaded guilty to breaching the criminal law, of that country, and had evaded justice. It is therefore my view, that the appeal ought to be dismissed.

HARRIS, J.A:

I have read in draft the judgments of Cooke and Harrison, J.J.A. I am in agreement with their reasoning and conclusions and have nothing further to add.

COOKE, J.A.

ORDER:

The appeal is dismissed. The order made in the court below is affirmed. Costs are awarded to the respondents to be agreed or taxed.