

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civ. App. No. 119 of 2004
H.C.A 1404 of 2004

Between

THE COMMISSIONER OF PRISONS

3. The respondent was to begin his sentence on the 31st January 1994 but failed to surre

76. Following his return to Trinidad and Tobago, the respondent was charged with several matters in respect of which he had been extradited. These charges remain pending before the Magistrates' Court.

77. The Requesting State ("the USA") became aware that the respondent was in the UK in 2002, however no steps were taken to extradite him.

78. In December 2003, the Federal Bureau of Investigation ("FBI") and Bruce Reinhart (who incidenta

before the High Court. He argued that in extradition cases, there must be strict adherence to the pertinent procedures, as the consequence of granting a request for extradition is that the right of an individual to due process and liberty are seriously abrogated in reliance solely on the record of the case. The cases of *R (Guisto) v Governor of Brixton Prison & another* [2003] 2WLR 108, HL and *In re Antonia Da Costa Farinha* [1992] Imm AR 174 were cited in support of this principle.

92. He further submitted that the principle of strict adherence applies with even greater vigour to the issue of certification for the reasons outlined by Slomberg-Stein J in *UK v Tarantino* BCSC No. 11415.

93. The respondent's Counsel also submitted that the enactment of section 19A(2) of the Extradition Act 1985 was brought about by Act 12 of 2004 so as to change the law of Trinidad and Tobago to provide that, in the record of the case "the ... most blatant and unconfirmed hearsay would have to be allowed in..." from the Requesting State. Additionally he submitted that this represents a fundamental invasion of the rights of a defendant to the substantial practical advantage of a Requesting State, which does not exist in many other jurisdictions, as such the corollary of that inroad is that the courts of Trinidad and Tobago require strict compliance with section 19A (5)(b) by the Requesting State as a prerequisite to reliance upon the record of the case. In fact, Parliament had so provided by virtue of section 19A (2)(a).

94. Mr. Fitzpatrick also contended that the reliance by Counsel for the appellant on the US Code was ill founded. Firstly, he submitted that without expert evidence as to its existence, the Court should not take notice of the Code's effect. If the Court did deem it

95. Counsel therefore contended that there was reasonable doubt or insufficient evidence as to the propriety of the certification and therefore the record of the case was inadmissible. He also submitted that the contents of the affidavits of Mr. Reinhart, the attached exhibits, the supplemental affidavits of Diane Patrick, Jeffrey Gilbert and Jeff Koch are similarly inadmissible.

96. It is necessary to set out the relevant sections of the statute, to fully grasp the submissions of both Counsel. **Section 9 (2)** of the Act prescribes that a record of the case shall be furnished with any request for extradition. It states:

37. In *In re Antonia Da Costa Farinha* [1992] Imm AR 174, the court overturned a committal, on the basis that there had been a contravention of section 7(5) of the Extradition Act (UK) 1989. Section 7(5) of the Extradition Act (UK) 1989 provided:

“ An authority to proceed shall specify the offence or offences under the law of the United Kingdom which it appears to the Secretary of State would be constituted by equivalent conduct in the United Kingdom”.

Mann L.J declined to imply the specification of that offence although he readily knew it.

40. Mr. Mendes attempted to persuade this Court that the duties of the prosecuting authority in this jurisdiction, the DPP, should not be used as a guide in determining whether a certifier who purports to act as such an authority is in fact same for the purposes of the Act. In the absence of expert evidence that Mr. Reinhart is a prosecuting authority in the USA, I am confident that the correct course would be to compare Mr. Reinhart's powers with those of the DPP. The DPP may, *inter alia*, initiate or discontinue proceedings; this is a fundamental power of any prosecuting authority in my estimation, however there is no evidence that Mr. Reinhart, as an Assistant US Attorney had such powers. I am satisfied that he was in fact a prosecutor; however there is a

43. Mr. Mendes S.C. submitted that the learned trial judge's interpretation of the term

Governor of Brixton Prison, ex parte Sadri [1962] 1 WLR 1304 and *R v Governor of Brixton Prison, ex parte Shuter* [1960] 2 QB 89.

45. Mr. Mendes submitted that there was sufficient evidence to establish that the

offence of being in breach of his pretrial conditions. Mr. Mendes submitted that there was clearly no doubt raised by the bench warrant as any person in any jurisdiction who does not turn up to serve sentence would be guilty of offences relating to escaping custody or breaching, as in the instant case, terms of pretrial release.

49. In the event that the Court was not satisfied that the appellant had established that the respondent was unlawfully at large, Counsel submitted that the Court should allow the evidence of Mr. Reinhart at paragraph 4 of his affidavit (which the trial judge deemed inadmissible) which seeks to explain foreign law on the issue. The cases of *R v Governor of Brixton Prison, ex parte Sadri* and *R v Governor of Brixton Prison, ex parte Shuter*

53. Counsel challenged the propriety of the arrest warrant of the 15

thereafter he applied for the arrest warrant of April 15th 2004. Mr. Fitzpatrick contended that it was clear at the date of the certification of the record, that is, April 22nd 2004, Mr. Reinhart must have applied for the arrest warrant, as it was issued at his request. Therefore, he must have known of the appropriate practice at the date of certification, therefore his explanation as to why he exhibited the arrest warrant simply did not stand up on his own evidence, even without cross-examination. Therefore, the standard of proof, that is, beyond reasonable doubt, has not been met in relation to the issue of proving that the respondent was unlawfully at large.

57. The term “ unlawfully at large” has been interpreted as meaning “ liable to immediate arrest and detention without further order or judicial process” in the case of *Ginova v Czech Republic* (2003) EWHC 2187.

58. Section 12(4) of the Act provides:

“ Where an authority to proceed has been issued in respect of the person arrested and the Magistrate is satisfied, after hearing any evidence tendered in support of the request for the return of that person or on behalf of that person, that the offence to which the authority to proceed relates is an extraditable offence and is further satisfied

(a)---

(b) where the person is alleged to be unlawfully at large after conviction of the offence, that—

(i) the conviction was in respect of conduct that corresponds to

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committal of that person is so prohibited, the Magistrate shall discharge him from custody.”

59. The trial judge noted that the concept of a suspended sentence of imprisonment to commence at a future date is foreign to our jurisdiction and as such there ought to have been a statement by an expert on US law to clarify it.

60. It is recognised that in the case of *Cartwright v Superintendent Prison* (2004) 1 WLR 902 at 910, the Privy Council accepted that extradition statutes ought to be “accorded a broad and generous construction so far as the texts permit it in

65. The facts in *Ginova* and *Urru* clearly raised doubt as to whether the person committed was ever unlawfully at large which is a precondition to a committal for extradition under section 5(b) of the Act.

66. In the instant case, the certified copy of the judgment stated that the respondent was to surrender for service of sentence at the institution designated by the Bureau of Prisons for imprisonment for a term of 17 months before 12: 00 noon January 31st 1994. The terms of the bench warrant were:

“TO: Any United States Marshal or any Special Agent of the Federal Bureau

71. An analysis of those cases shows that the lack of evidence before the Magistrate

it would, having regard to all the circumstances, be unjust or oppressive to return the person”.

78. The respondent lived openly in Trinidad between 1994 and 2002. He went to the UK under an assumed identity in 2002 and the Requesting State beca

“where it is made to appear that by reason of the trivial nature of the case, or by reason of the application for the return of a fugitive not being made in good faith in the interests of justice or otherwise, it would, having regard to all the circumstances of the case, be unjust or oppress fugor too severe a punishment to return the fugitive either at all or until the expiration of a certain period, such court may discharge the fugitive...”.

82. The case of *Re Naranjan Singh* [1961] 2 All ER 565 is instructive. The C -0.1in discuss ng section 10 of the F-0.0084 Offenders Act 1881 noted that the c -0.’s discretion to discharge a fugitive can be exercised1in any case where the return of the fugitive would be unjust etc. and is not confined to cases where the application appears not to be “made in good faith”.

83. I am of the view that section 13(3) (iii) of the Act, which is similar to section 10

was wrong. The trial judge incorrectly took into consideration the factors noted at paragraph 83.

86. Mr. Mendes S.C. claimed that the onus is on the respondent to establish that extradition would be unjust and oppressive, that is, that extradition would lead to some hardship or prejudice. Further, Counsel submitted that the Court was limited in the circumstances on which a finding of injustice or oppression could be found. In this regard, Counsel relied on the cases of *Union of India v Narang* [1977] 2 All ER 348 and *Re Naranjan Singh* [1961] 2 All ER 565. Counsel also submitted the cases of *Re Merico* (

90. The content of the fresh evidence consisted of a statement by Dianne Patrick, an Assistant US Attorney as contained in the transcript of sentencing, in response to

- ppp. It must be shown that the evidence could not have been obtained without reasonable diligence for use at the trial;
 - i. The further evidence is such that if given, it would probably have an important influence on the result of the case; and
 - ii. The evidence is such as is presumably to be believed.

94.

97. It is clear from an assessment of this appeal that:
- a. the trial judge correctly held that the certifier must specify that he is a prosecuting authority and had failed to meet this requirement ;
 - b. the standard of proof required in proving that the respondent was unlawfully at large was not satisfied;
 - c. the trial judge correctly held that section 13(3)(iii)

DISPOSITION