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1/6/2007



CAUSE NO. 183 OF 2007

1 IN THE GRAND COURT OF THE CAYMAN ISLANDS  
2 HOLDEN AT GEORGE TOWN, GRAND CAYMAN

3 CAYMAN ISLANDS  
4 LEGAL DEPARTMENT  
5 LIBRARY

6  
7 BETWEEN: DANIEL PETER FRANK VANDERWERFF

8 PLAINTIFF

9  
10 AND: ROYAL CAYMAN ISLANDS POLICE

11 DEFENDANT

12  
13  
14 Appearances: Mr. James Stenning of Stenning & Associates for the Plaintiff  
15 Mr. George Keightley for the Defendant, the Crown

16  
17 Before: Hon. Justice Henderson

18  
19 Heard: May 10, 17 & 24, 2007



20  
21  
22 JUDGEMENT

23  
24 How long may a foreigner who wishes to leave the country be detained in the Cayman  
25 Islands because he is under police investigation? To what extent may the court inquire  
26 into the strength of the evidence against him on a *habeas corpus* application? These  
27 important questions have been raised for the first time on the present application.

28  
29 FACTS

30  
31 The Plaintiff, Daniel Peter Frank Vanderwerff, is a Canadian citizen who has lived for  
32 some time in the Cayman Islands with his family. Until recently, he was employed here  
33 by K Coast Construction Limited. On April 28, 2007 Mr. Vanderwerff was accused by  
34 his employer of misappropriating company funds in excess of US \$230,000.00. His

1 employment was terminated and the allegation was reported to the Financial Crime Unit  
2 of the Royal Cayman Islands Police Service (“RCIP”) for investigation.

3

4 Mr. Vanderwerff decided to return to Canada with his family. On April 30<sup>th</sup>, 2007 he  
5 was arrested at the Owen Roberts International Airport while attempting to leave the  
6 island. He was taken to the Financial Crime Unit and told by Detective Sergeant Betty  
7 Ebanks that he was under investigation for theft. Detective Sergeant Ebanks said that the  
8 investigation was in an early stage but was continuing, and that she was not in a position  
9 to interview Mr. Vanderwerff “formally” at that time. Her affidavit continues:

10                    “I informed him that to allow for further investigations to be  
11                    conducted I would grant him bail to return to the Financial  
12                    Crime Unit on Monday May 7<sup>th</sup> 2007. I also informed him  
13                    that as a condition of his bail he would be restricted from  
14                    travelling and requested that he surrendered his passport  
15                    to me. I believed these conditions were necessary to secure  
16                    that Mr. Vanderwerff surrender to custody at the  
17                    appointed time given the serious nature of the charges and  
18                    his attempt to leave the jurisdiction that morning.”  
19  
20

21 She says that she has reasonable grounds for believing that Mr. Vanderwerff has  
22 committed an arrestable offence (theft is such an offence). There is insufficient detail in  
23 her affidavit to permit a court to determine objectively whether that is so.

24

25 Mr. Vanderwerff says in his own evidence that “any allegation of theft is totally  
26 unwarranted.” His wife and daughter have now returned to Canada. He believes that he  
27 would be unable to find employment in the Cayman Islands in the present circumstances

1 and says that his “liquid assets are non-existent.” He continues to live here by relying on  
2 his credit cards, a situation which cannot last indefinitely.

3  
4 On May 2<sup>nd</sup>, 2007 Mr. Vanderwerff applied to me *ex parte* for a writ of *habeas corpus ad*  
5 *subjiciendum*. (Order 54 of the *Grand Court Rules* sets out the procedure on an  
6 application for a writ of *habeas corpus*.) I determined that he had satisfied the limited  
7 initial burden upon him to justify an inquiry into the legality of the restraint upon his  
8 liberty. The fact that Mr. Vanderwerff is not detained in the usual sense but is at large on  
9 bail is no bar to the court’s ability to consider a *habeas corpus* application: see *R. v.*  
10 *Secretary of State, ex parte Launder* [1998] QB 994, at 1000 - 1; [1998] 3 WLR 221,  
11 225, 235 – 6.

12  
13 The return to the writ was presented on May 11, 2007. The hearing was then adjourned  
14 to May 17, 2007 to provide counsel further time to review the authorities.

15  
16 WHAT IS THE SCOPE OF THE ENQUIRY?

17  
18 Mr. Vanderwerff was arrested under section 36 of the *Police Law (2006 Revision)*, which  
19 reads in part:

20 “Any officer may, without an order from a Justice of the Peace and without  
21 a warrant, arrest any person -

22  
23 (a) whom he suspects on reasonable grounds to have committed  
24 or to be about to commit an arrestable offence; ...”  
25

26 The procedure to be followed after such an arrest is described in section 37:

1 “37. (1) When any person has been taken into custody without a warrant for an  
2 offence, the officer in charge of the police station or other place for the  
3 reception of arrested persons to which such person is brought shall at  
4 once enquire into the case, and if, when the enquiry is completed, there  
5 is no sufficient reason to believe that the person has committed any  
6 offence such person shall be released forthwith.

7  
8 (2) If, upon such enquiry, there is reason to believe that the person  
9 arrested has committed an offence such officer being of the rank of  
10 sergeant or above may release the person on bail.

11  
12 (3) Where the constable arresting a person determines that he does not  
13 have sufficient evidence to charge but has reasonable grounds for  
14 believing that the detention of that person without being charged is  
15 necessary –

- 16  
17 (a) to secure or preserve evidence relating to an offence for which  
18 he is under arrest;  
19 (b) to obtain such evidence by questioning him; or  
20 (c) to complete the investigation,

21  
22 he may place that person in police detention for a period not  
23 exceeding seventy-two hours from the time of arrest.

24  
25 (4) Where a constable of the rank of Superintendent or above has  
26 reasonable grounds for believing that –

- 27  
28 (a) the detention of that person without charge is necessary to  
29 secure or preserve evidence relating to an offence for which he  
30 is under arrest or to obtain such evidence by questioning him;  
31 (b) an offence for which he is under arrest is a serious arrestable  
32 offence; and  
33 (c) the investigation is being conducted diligently and  
34 expeditiously,

35  
36 he may authorise the keeping of that person in police detention for a  
37 further period of seventy-two hours after the period referred to in  
38 subsection (3).

39  
40 (5) Where the commissioner of Police has reasonable grounds for  
41 believing what is set out in subsection (4), he may authorise the  
42 keeping of that person in police detention for a further period of  
43 seventy-two hours after the period referred to in that subsection.  
44

1 (6) No person may be kept in police detention after the period referred to  
2 in subsection (5) except upon the order of a summary court made on  
3 the application of a constable.  
4

5 (7) The application made under subsection (6) shall be heard in  
6 chambers, and the court shall consider whether there are reasonable  
7 grounds for believing the matters set out in subsection (4) and, if it  
8 is so satisfied, it may order further detention for a further period of  
9 seventy-two hours.  
10

11 (8) If, at the end of the period of seventy-two hours referred to in  
12 subsection (7), the person is not charged, he shall be released without  
13 further reference to the court, but may be re-arrested for the offence  
14 for which he was previously arrested if new information justifying a  
15 further arrest has come to light since his release.” ...  
16

17 Thus, in the Cayman Islands, a person suspected of having committed an arrestable  
18 offence may be detained in custody without charge for up to twelve days. The arresting  
19 officer must believe the suspect has committed an arrestable offence and that belief must  
20 be held “on reasonable grounds.” If the arresting officer also believes that there is  
21 insufficient evidence to justify a charge, he may (subject to the other preconditions in  
22 section 37 (3) being satisfied) detain the suspect for up to seventy-two hours. A further  
23 seventy-two hours of detention may be imposed if a police officer of the rank of  
24 Superintendent or above agrees that the offence is a “serious arrestable offence” (section  
25 37 (4)) and that the other preconditions are satisfied. A third period of seventy-two hours  
26 of detention can be justified if the Commissioner of Police decides that he has reasonable  
27 grounds. Finally, the fourth and final seventy-two hours of detention can be justified by  
28 order of a Summary Court.  
29

30 In contrast, where the suspect is released on bail, the only requirement is that the  
31 arresting officer believe, on reasonable grounds, that an arrestable offence has been

1 committed. A release on bail by the arresting officer is governed by the provisions of the  
2 *Bail Law (2006 Revision): Police Law*, section 37 (10). The *Bail Law* permits the  
3 arresting officer to impose conditions of bail which appear to be necessary to ensure that  
4 the suspect “surrenders to custody”: *Bail Law*, sections 6 and 7. Holding a suspect’s  
5 passport is a common device for ensuring that he does so.

6  
7 Mr. Vanderwerff now argues that the court should enquire into the nature and strength of  
8 the evidence gathered by the authorities for the purpose of determining, objectively,  
9 whether Detective Sergeant Ebanks did indeed have reasonable grounds to believe he has  
10 committed theft.

11  
12 Mr. Keightley, for the Defendant, argues that the only permissible enquiry is a much  
13 narrower one – an enquiry into whether Detective Sergeant Ebanks does and did believe,  
14 subjectively, that there are reasonable grounds for the arrest. If she has formed that  
15 opinion in good faith, that is the end of the enquiry.

16  
17 He rests that submission on the well known decisions of the House of Lords in *Liversidge*  
18 *v. Sir John Anderson and another* [1942] 1 AC 206 and *Greene v. Secretary of State*  
19 [1942] AC 284. *Greene* involved a challenge by way of *habeas corpus* to a decision  
20 made by the Secretary of State for Home Affairs under Regulation 18 (B) of the *Defence*  
21 *(General) Regulations* made under the *Emergency Powers (Defence) Act*, 1939. The  
22 material part of the Regulation stated that:

23 “If the Secretary of State has reasonable cause to believe any  
24 person to be of hostile origin or associations or to have been

1 recently concerned in acts prejudicial to the public safety or  
2 the defence of the realm or in the preparation or instigation of  
3 such acts and that by reason thereof it is necessary to exercise  
4 control over him, he may make an order against that person  
5 directing that he be detained.”  
6  
7

8 *Liversidge* was a similar case, but the action was for false imprisonment. Mssrs.

9 *Liversidge* and *Greene* having been detained under the regulation, they argued that the  
10 court should enquire into whether the evidence in possession of the Secretary of State  
11 was sufficient to justify the decision taken. In other words, they asked for objective  
12 assessment by the court of the sufficiency of the evidence supporting the Secretary of  
13 State’s subjectively held view.  
14

15 Their Lordships held that there was no need for an affidavit from the Secretary of State.

16 The return to the writ asserted that he held the requisite view, and his good faith was not  
17 impugned. Lord McMillan’s judgment in *Greene* is representative:

18 “The Secretary of State is not bound to disclose or to justify to any  
19 court the grounds on which he concedes himself to have reasonable  
20 cause to believe that the appellant was a person of hostile associations  
21 and that by reason thereof it was necessary to exercise control  
22 over him. The result, in my opinion, is that the production of the  
23 Secretary of States’ order, the authenticity and good faith of which  
24 is in no way impugned, constitutes a complete and pre-emptory  
25 answer to the Appellant’s application. It justifies in law his  
26 detention. In the absence of any relevant challenge of its validity,  
27 and there is no such challenge, it necessarily follows that the  
28 Secretary of State has no need to submit an affidavit” (at page 297).  
29  
30

1 These cases were decided in a time of war. There were compelling reasons why the  
2 Secretary of State could not and should not have been expected to explain the grounds of  
3 his belief. There are no analogous concerns in the present case.

4

5 An earlier decision of the Privy Council in 1931, *Eleko v. Officer Administering the*  
6 *Government of Nigeria* [1931] 662, is a decision which may, at first glance, appear  
7 inconsistent with *Liversidge and Greene*. The Deposed Chief's Removal Order in  
8 Nigeria permitted the Governor to exclude a deposed native chief from the area over  
9 which he had previously exercised jurisdiction or influence. Before exercising his power  
10 under the Ordinance, the Governor had to be satisfied that the subject of his order was a  
11 native chief, that he had been deposed, and that native law and custom required that he  
12 leave the area over which he had exercised jurisdiction or influence.

13

14 Eleko argued on a *habeas corpus* application that he was not a native chief, that he had  
15 never been deposed, and that there was no such native law or custom. The Governor said  
16 that the court had no power to enquire into those questions of fact; his order (which, of  
17 course, embodied his own opinion on those matters) must be taken as final and  
18 conclusive.

19

20 The judgment of Their Lordships was delivered by Lord Atkin, who said:

21

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25

26

“Their Lordships are satisfied that the opinion which has prevailed  
that the Courts cannot investigate the whole of the necessary  
conditions is erroneous. The Governor acting under the Ordinance  
acts solely under executive powers, and in no sense as a court. As  
the executive he can only act in pursuance of the powers given to  
him by law. In accordance with British jurisprudence no member of

1 the executive can interfere with the liberty or property of a British  
2 subject except on the condition that he can support the legality of  
3 his action before a court of justice. And it is the tradition of British  
4 justice that judges should not shrink from deciding such issues in the  
5 face of the executive. The analogy of the powers of the English Home  
6 Secretary to deport aliens was invoked in this case. The analogy  
7 seems very close. Their Lordships entertain no doubt that under the  
8 legislation in question, if the Home Secretary deported a British  
9 subject in the belief that he was an alien, the subject would have the  
10 right to question the validity of any detention under such order by  
11 proceedings in habeas corpus, and that it would be the duty of the  
12 Courts to investigate the issue of alien or not.”  
13  
14

15 The three questions of fact were described as conditions precedent to the exercise of the  
16 Governor’s jurisdiction under the Ordinance.  
17

18 In *Regina v. Governor of Brixton Prison, ex parte Ahsan and others* [1969] 2 WLR 618,  
19 the Court of Appeal rationalized these apparently conflicting decisions. It emphasized  
20 that *Greene*, unlike *Eleko*, was not concerned with a challenge concerning a condition  
21 precedent upon which jurisdiction depended (per Lord Parker C.J. at page 234). The  
22 position arrived at by the Court of Appeal is that an objective assessment of the  
23 sufficiency of the evidence is permissible on any question which is a condition precedent  
24 to the exercise of jurisdiction by the decision maker; in contrast, no such enquiry is  
25 permitted concerning the ultimate issue.  
26

27 The question which Mr. Vanderwerff says I should address is this: does the evidence in  
28 the possession of Detective Sergeant Ebanks amount, on an objective assessment, to  
29 reasonable grounds for believing he has committed theft?  
30

1 Into which category does such a question fall? The question is answered conclusively by  
2 the judgment of the House of Lords in *Holgate – Mohammed v. Duke* [1984] 1 All E.R.  
3 1054. This was an action for false imprisonment which turned on the wording of section  
4 two (4) of the *Criminal Law Act 1967*, which reads:

5 “Where a constable, with reasonable cause, suspects that an  
6 arrestable offence has been committed, he may arrest without  
7 warrant anyone whom he, with reasonable cause, suspects to  
8 be guilty of the offence.”  
9  
10

11 The House of Lords held (at page 1057) that the presence of reasonable cause is a  
12 condition precedent to a constable having the power to make a lawful arrest without  
13 warrant. The presence or absence of this condition precedent is a question of fact which  
14 a court may determine. If the constable in question did have reasonable cause, his  
15 decision to arrest without warrant amounted to an exercise of “executive discretion”  
16 which could not be questioned in a court of law except on *Wednesbury* principles.  
17

18 There is no reasonable basis for distinguishing the *Holgate-Mohammed* decision. It is  
19 noteworthy, also, that in *Ghani and others v. Jones* [1969] 3 All E.R. 1700, the Court of  
20 Appeal engaged in an objective assessment of whether certain police officers had  
21 reasonable grounds for believing that passports and letters seized from the plaintiffs were  
22 material evidence of a murder (at page 1705).  
23

24 I am satisfied that the enquiry I must make is not confined to the narrow question of  
25 whether Detective Sergeant Ebanks did have the requisite state of mind, but must extend

1 to the broader question of whether the evidence in her possession amounts to reasonable  
2 grounds for suspecting an arrestable offence had been committed by Mr. Vanderwerff.

3

4 The present affidavit from Detective Sergeant Ebanks is inadequate for such an enquiry.

5

6 Obviously, the Defendant does not have to show beyond a reasonable doubt, or even on  
7 the balance of probabilities, that Mr. Vanderwerff has committed an arrestable offence.

8 Reasonable suspicion is more than mere suspicion although it cannot be equated with

9 *prima facie* proof: *Young v. Gordon* 1994-95 CILR 445 (Grand Court). The Defendant's  
10 burden is to show that there existed at the time of the arrest, and there still exists now, a  
11 body of evidence which would justify an independent and rational observer in concluding  
12 that Mr. Vanderwerff may have committed theft. For this purpose, hearsay evidence may  
13 be relied upon.

14

15 I direct the Defendant to file a further return to the writ within ten days setting out in  
16 summary fashion the evidence relied upon. The Plaintiff is at liberty to re-list the hearing  
17 for a date after that deadline has past.

18

19 FOR HOW LONG MAY THE PLAINTIFF BE KEPT IN THE CAYMAN ISLANDS  
20 AGAINST HIS WILL?

21

22 I start with the proposition, too well known to require citation of authority, that a  
23 legislative provision which amounts to a restraint on liberty must be construed

1 restrictively. Ambiguities in it must be resolved in favour of the liberty of the subject.  
2 Moreover, *habeas corpus* “is an area where substance rather than form governs”:  
3 *Cartwright and Knowles v. Superintendent of Her Majesty’s Prison, Privy Council*  
4 Appeal no. 40 of 2003 (February 10, 2004) at paragraph 16. “Semantics must yield to  
5 common sense”: *ibid.*

6  
7 Neither the *Police Law* nor the *Bail Law* impose any limit on the period of time during  
8 which Mr. Vanderwerff may be held in the Cayman Islands against his will, on bail but  
9 not charged. At the outset, Mr. Keightley argued that there is no limit at all – as long as  
10 the police are continuing to investigate the allegations in good faith, the suspect could be  
11 held on police bail indefinitely. During argument, Mr. Keightley retreated to a more  
12 defensible position – that he can only be held on bail without charge for a reasonable  
13 time. That must be correct. In the absence of any time limit in the legislation, I attribute  
14 to the Legislative Assembly an intention that a suspect may be held in the Cayman  
15 Islands on police bail only for a reasonable time.

16  
17 What is reasonable will depend on all of the circumstances, including:

- 18 1) the nature and extent of the allegations;
- 19 2) the period of time which a diligent and competent police force  
20 acting in good faith might be expected to take to investigate the  
21 allegations;
- 22 3) the seriousness of the allegations;
- 23 4) the degree of difficulty posed by having to extradite the suspect  
24 from his home country if he is allowed to return there;
- 25 5) the nature and extent of the suspect’s ties to the Cayman Islands;
- 26  
27  
28

1  
2 6) the difficulty and expense suffered by the suspect in remaining in  
3 the Cayman Islands against his will.  
4

5 This is not meant to be an exhaustive list.  
6

7 Clearly, the time period will be longer than the maximum period of twelve days during  
8 which a suspect may be detained in custody without charge in the Cayman Islands. The  
9 period will not, however, necessarily be as long as the usual amount of time taken to  
10 investigate similar allegations against suspects who reside here permanently. It is not  
11 unreasonable to expect the authorities to expedite an investigation into allegations against  
12 someone who finds himself in the same circumstances as Mr. Vanderwerff. Investigative  
13 resources available to the police are a factor to be considered but are not determinative.

14 In assessing what is a reasonable time, the court is entitled to assume that adequate  
15 resources will be applied to the investigation.  
16

17 In *Nazary and others v. R.* 2001 CILR 371, the Grand Court (*en banc*) heard a *habeas*  
18 *corpus* application by three detainees who had entered the Cayman Islands illegally and  
19 applied for asylum. This court held that the executive was obliged to determine and  
20 resolve the immigration status of the detainees within a reasonable time. The court  
21 adopted a statement of principle contained in the head note of the report of the judgment  
22 in *Tan Te Lam v. Superintendent of Tai A Chau Detention Centre* [1996] 4 All E.R. 256-  
23 257:

24 “Where a statute conferred power to detain an individual pending  
25 his removal from the country, in the absence of contrary indications  
26 in the statute, it was to be implied that that power could only be  
27 exercised during the period necessary, in all the circumstances of

1 the particular case, to effect that removal, that the person seeking  
2 to exercise the power of detention had to take all reasonable steps  
3 within his power to ensure the removal within a reasonable time and  
4 that, if it became clear that removal was not going to be possible  
5 within a reasonable time, further detention was not authorised. The  
6 courts would construe strictly any statutory provision purporting to  
7 allow the deprivation of individual liberty by administrative  
8 detention and would be slow to hold that statutory provisions  
9 authorised administrative detention for unreasonable periods or  
10 in unreasonable circumstances...” (underlining added)

11  
12 The passage includes an acknowledgement that, if it proves to be impossible to resolve  
13 the issue giving rise to the detention within a reasonable time, then “further detention was  
14 not authorised.” In other words, there may be cases where it is simply impossible to  
15 accomplish within a reasonable time what the authorities may wish to achieve.

16  
17 Holding Mr. Vanderwerff’s passport as a condition of his police bail is a restraint on his  
18 liberty which the Legislative Assembly has authorised by legislation, but it is authorised  
19 only for a reasonable time. If, on the further return to the writ of *habeas corpus*, the court  
20 concludes that the period of time during which the suspect’s passport has been held is  
21 unreasonable, the bail order will be set aside and the passport returned to the Plaintiff.

22  
23 The Defendant is directed to file a further return within 10 days setting out its view of  
24 what would constitute a reasonable time for the present investigation and the reasons  
25 supporting that opinion. Mr. Vanderwerff is at liberty to file his own affidavit on the

1 subject. If, on the forthcoming continuation of this hearing, I conclude that the arrest was  
2 lawful, the reasonable time issue will be addressed.

3

4 Dated this 1<sup>st</sup> day of June, 2007

5

6

Henderson, J.

7

Henderson, J.

8

Judge of the Grand Court

