19.1.89 2

Extradition

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

CAUSE NO. 344/88

IN THE MATTER OF AN APPLICATION BY THE UNITED STATES GOVERNMENT FOR THE EXTRADITION OF EDWARD CARDINAL BODDEN

AND

IN THE MATTER OF THE EXTRADITION ACTS 1870-1935 AND THE UNITED STATES OF AMERICA EXTRADITION ORDER IN COUNCIL 1976

AND

IN THE MATTER OF AN APPLICATION BY EDWARD CARDINAL BODDEN FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND

IN THE MATTER OF AN ORDER DATED THE 16TH DAY OF DECEMBER 1988 MADE BY THE HONOURABLE JUSTICE R.O.C. WHITE, Q.C. IN THE SUMMARY COURT OF THE CAYMAN ISLANDS REGARDING THE UNITED STATES GOVERNMENT V. EDWARD CARDINAL BODDEN

COLLETT C.J.

SUPPLEMENTARY REASONS FOR JUDGMENT

This was an application pursuant to leave for an order of Certiorari directed to the Summary Court (Acting Magistrate, Hon. R.O.C White Q.C.) to bring up and quash a decision made by him on 9th December, 1988 in the course of certain extradition proceedings commenced against the Applicant at the instance of the Government of the U.S.A. The factual background and chronology of the case is fully set out in the opening paragraphs of the Magistrate decision and need not be repeated here. Suffice it to say that this extradition request was presented through diplomatic channels on 18th August, 1987 and an order to proceed notifying the receipt of that request was made to the Summary Court on 14th September, 1987 by H.E. the Governor.

Thereafter the Senior Magistrate heard evidence in support of the request on various dates in 1987 and 1988 and, on 6th April, 1988 he made an order committing the Applicant to prison to await extradition to the U.S.A. The applicant then moved for a writ of habeas corpus to question the legality of that order in the Grand Court and, on 22nd July 1988 the return

to the writ was quashed and the Applicant was set at liberty unconditionally. The judgment which I delivered on that occasion in C/344/88 clearly shows that this outcome was based upon a procedural irregularity in the conduct of the proceedings before the Senior Magistrate which had created the appearance of unfairness in these proceedings. At no stage during the hearing of that habeas corpus application was any question raised as to the validity of the request for extradition of the Applicant or as to the adequacy of the evidence placed before the Senior Magistrate in its support.

The same day that the Applicant was released by order of this Court he was re-arrested and bailed upon a fresh warrant issued by a Magistrate after receipt of a fresh order to proceed issue that day by the Acting Governor. No further formal request had been received from the United States Government for the Applicant's reduction to America. The fresh order and the fresh warrant each specified the identical same charges against the Applicant as those specified in the first order to proceed and the United States Government was intending to place before the Summary Court the same depositions and other testimony as it had used in the first set of proceedings. Hon. R.O.C. White Q.C., sat as an acting Magistrate of the Cayman Islands to hear this evidence. Submissions were made to him on behalf of the Applicant that he had no jurisdiction to do so. After full argument he ruled on 9/12/88 that he did have such jurisdiction and overruled those submissions. It is to that decision that the present certiorari proceedings were directed.

The exercise of jurisdiction in extradition cases pursuant to the 1972 treaty between the United States and the United Kingdom is governed here by the provisions of the Extradition Act 1870 of the United Kingdom which have been extended with modifications to the Cayman islands by order-in-council under the Act. As so modified, section 7 of that Act reads as follows:-

> "7" A requisition for the surrender of a fugitive criminal of any foreign state

> who is in or suspected of being in the Cayman Islands shall be made to the Governor by some person recognised by the Governor as a diplomatic representative of that foreign state. The Governor may by order under his hand and seal signify to a magistrate that such requisition has been made and require him to issue his warrant for the apprehension of the fugitive criminal".

It was contended for the Applicant that the Governor cannot lawfully issue a second order to proceed under this section in relation to the same fugitive once proceedings which he had initiated by an earlier order to proceed under the same section pursuant to a requisition received from a foreign government had run their course and been terminated; unless or until a further formal requisition for his surrender has been received from that foreign government. In the course of the argument on that submission the decision of the House of Lords in Rees v. Secretary of State for the Home Department (1986) 2 AER 321 was cited. That was a case in which the Federal Republic of Germany sought the extradition from the United Kingdom of a fugitive, accused of kidnapping contrary to German laws, by means of a requisition received in the United Kingdom and acted upon under section 7. An order to proceed was issued and a magistrate began to hear evidence tendered in its support. While this hearing was still pending before that magistrate certain technical defects were discovered in the way the evidence had been presented and in order to overcome possible technical objections, a second order to proceed was then issued without there having been sent or received any furhter formal requisition from the German Government. The first set of proceedings were then abandoned.

The fugitive concerned applied for judicial review in respect of the second order to proceed, but his application was dismissed. On appeal the House of Lords held , inter alia, that the second order to proceed had been lawfully issued, since once a requisition had been received in proper form from the requesting state, the Secretary of State (who in the United Kingdom performs equivalent functions to the Governor) could lawfully issue such an order and was not precluded from making it

merely because he had made an earlier order following the same requisition.

Strenuous efforts were made by counsel for the Applicant here to distinguish that decision from the instant case on the ground that here, unlike in Rees case, the proceedings consequent upon the first order to proceed had entirely terminated before the issue of the second order to proceed on the Senior Magistrate's decision and order to commit the Applicant to prison to await surrender and/or the subsequent decision and order of this court quashing that decision. It is true that in formulating the question for the opinion of the House of Lords in Rees the Court below had asked whether or not the Secretary of State could lawfully issue an order under section 7 "during the currency of an existing order" and without any further requisition by the requesting state. However, in dealing with this question Lord MacKay who delivered the leading speech observed (at p. 331 letter f) that the concept of the 'currency' of an order under the section was not particularly appropriate. Moreover in formulating the answer to the question he said (at p.333 letter a).

> "For these reasons in my opinion question 3 falls to be answered by saying that the Secretary of State can lawfully issue an order under section 7 of the 1870 Act once a requisition has been made to him by a person recognised by Law as a diplomatic representative of the German government and he is not precluded from making an order following on a requisition merely because he has made an earlier order following on the same requisition,....."

It is to be observed that reference to the currency of an existing order has disappeared altogether in Lord Mackays formulation which in view of his earlier observations is not surprising. In these circumstances the ratio of the decision of the House which he articuled must be regarded as having general application to any situation where, for whatever reason, the Secretary of State or a colonial governor (as the case may be) has seen fit to issue a second or subsequent order to proceed based on the same diplomatic requisition from a foreign state.

This ratio squarely covers the facts of the present case and must be regarded as a decision binding upon this Court as to the proper interpretation of a United Kingdom Statute by the highest Judicial authority competent to pronounce upon it. I should add that quite apart from binding authority I could not discover any good reason in principle why a further requisition from the foreign state concerned should be insisted upon before a further order to proceed may be made. Such a requirement would be productive only of extra expense and delay without visibly securing any meaningful protection of the rights of a suspected fugitive.

I turn now to the second submission advanced in favour of this Certiorari application. It was that this Courts decision of 22nd July, 1988 quashing the return to the writ of habeas corpus and ordering that the Applicant be unconditionally set at liberty, is an absolute bar to any further proceeding by the United States Government to secure his extradition on identical charges. Reliance was placed upon section 5 (formerly section 6) of the Habeas Corpus Act 1679 although it was said that that section was merely a statutory declaration of pre existing Common Law principles. Section 5 reads as follows:-

> "5" And for the prevention of unjust vexation by reiterated commitments for the same offence.....noe person or persons which shall be delivered or sett at large upon any habeas corpus shall at any time hereafter bee againe imprisoned or committed for the same offence by any person or persons whatsoever other then by the legall order and processe of such court wherein he or they shall be bound by recognizance to appeare or other court having jurisdiction of the cause and if any other person or persons shall knowingly contrary to this Act recommitt or imprison or knowingly procure or cause to be recommitted or imprisoned for the same offence or pretended offence any person or persons delivered or sett at large as aforesaid or be knowingly aiding or assisting therein then he or they shall forfeite to the prisoner or party grieved the summe of five hundred pounds any colourable pretence or variation in the warrant or warrants of commitment notwithstanding to be recovered as aforesaid".

The Common Law principle is said to be exemplified by

Searche's case (1588) 1. Leon 70 in which it was held that a prisoner who has been discharged from illegal custody by habeas corpus cannot again be imprisoned or committed for or in respect of the same offence: see Halsburys Laws of England 4th Ed Vol. 11 para. 1504. The suggested construction which is placed upon this section by counsel for the Applicant would require this Court merely to inquire, firstly whether there had been on 22nd July, 1988 a discharge of the Applicant from illegal custody and secondly, whether there had been a second arrest for the same offence(s); having answered both question affirmatively it would then conclude that there had been a contravention of the section.

The attractive simplicity of this approach ignores the considerable volume of modern authority in which the meaning of the section has been examined. It also ignores the historical context. The Habeas Corpus Act 1679 was not passed with extradition proceedings in mind and it was, moreover, passed at a time when habeas corpus provided the only means merely a person arrested and committed for trial upon a criminal charge by justices could obtain his release or bail, that is to say conditionally, pending trial on indictment.

The decision of the judicial committe of the Privy Council in A.G. for Hong Kong v. Kwok-a-Sing (1874) L.R..5.PC.178 was the first occasion upon which the meaning of section 5 of the 1679 Act fell to be considered in an extradition context. In that case a Chinese national had been arrested for piracy and was then committed by a magistrate in Hong Kong to await his rendition to China pursuant to a request made by the Chinese Government based on an Anglo-Chinese treaty which provided in the arrest and return of Chinese nationals from in Hong Kong on charge of an offence against Chinese Law. The fugitive applied for a writ of habeas corpus which was granted by the Chief Justice of Hong Kong on the ground that the charges against him did not fall within the scope of the Treaty. He was subsequently charged before the same magistrate with the offence of piracy arising out of the same criminal conduct and committed to stand trial in the courts of Hong Kong. The Chief Justice again

released him on a habeas corpus, this time upon the ground that the second committal was for the same offence as the first. The Attorney General appealed and the appeal succeeded: the Judicial committee, while upholding the first release of the fugitive, held that the return to the second writ of habeas corpus was good despite the wording of section 5 on which the Chief Justice had relied.

In delivering the opinion of the Judicial Committee Mellish L,J. at p. 201 referred to the section in its historical context as follows:-

> "Their Lordships... cannot agree with the construction which the Chief Justice has put upon this section of the statute. The principal object of the section seems to have been to prevent persons who had been brought up on a writ of habeas corpus and discharged on giving bail and entering into their own recognizance from being again arrested for the same offence and obliged to sue out a second writ of habeas corpus. This appears from the provision by which the person discharged may be again arrested by order of the court wherein he shall be bound by recognisance to appear or other court having jurisdiction of the cause. The words "other court having jurisdiction of the cause" were probably added to meet the case of an indictment having been moved by certiorari from one court to another.
>
> They do not say, however that the section may not also apply to cases where the prisoner is discharged unconditionally on the ground that the warrant on which he is detained shows no valid cause for his detention. They think however that it can only apply when the second arrest is substantially for the same cause as the first, so that the return to the second writ of habeas corpus raises for the opinion of the Court the same question with reference to the validity of the grounds of detention as the first."

That principle stated in the words underlined from the speech of Mellish L.J. was affirmed and adopted by the English Divisional Court in Rex v Governor of Brixton Prison exparte Stallman (1912) 3 KB 424. In that case the fugitive had been committed to prison by a Magistrate in England to await rendition to Germany on charges comprised within the Anglo-German Extradition Treaty of 1872. He applied for habeas corpus on the ground that earlier proceedings for his extradition to Germany in

the same charges had been before a magistrate in India and had led to his discharge on account of irregularity in those proceedings. (The irregularity in question bears a striking resemblance to that which led this Court on 22nd July 1988 to quash the committal order of the learned Senior Magistrate in the instance case.) It was held by the Divisional Court that the fugitive could lawfully be re-arrested in England and committed for extradition on those charges in England although they were the same as those which formed the subject matter of the charges in the Indian proceedings and the evidence in support was also the same.

In delivering judgment Lord Alverstone C.J. cited the passage from the speech of Mellish L.J. in Kwok-a_Sing to which I have just referred and continued at p. 443:-

> "Therefore we have to consider the ground upon which the applicant was sought to be detained, and upon the ground that this court has jurisdiction and power to deal with him notwithstanding that he succeeded in showing that the procedure in India was such that he could not longer be detained there, I am clearly of opinion that the objection taken that there has been a previous decision in India is no answer to these proceedings".

In the same case Phillimore J. concurring said, at p.449:-

> "But through the second arrest is for the same cause if the prisoner's discharge was because the warrant on the return to the writ of habeas corpus was bad, then it would be lawful to re-arrest for the same offence with a proper warrant upon which a different return would be made."

Again, in Rex v Secretary of State for Home Affairs, exparte Budd (1942) 2 K.B. 14, the English Court of Appeal upheld the legality of the detention of an applicant under wartime emergency legislation despite his earlier release on habeas corpus from a detention ordered under the same emergency regulation by the Secretary of State. Although the Kwok-a-Sing case was not referred to in the judgments it was cited to the Court in argument and was well in the mind of Lord Green M.R. who delivered the leading judgment, as appears from a passage at p. 25. He said:-

> "The argument presented to us was based on the proposition that a person who has been released from custody on a writ of habeas corpus cannot be subjected to a second detention for the same cause. This argument is in our opinion misconceived. The first detention of the applicant was illegal in that the prerequisites of a lawful detention had not been complied with. In the case of the present detention those prerequisites have been complied with and the detention is lawful. The decision in the first case was not that the real order made by the Home Secretary was one which he had no power in law to make but on the ground that the terms of that order had not been communicated to the applicant in such a way as to enable him to make him representations to the Secretary of state..... There is nothing in principle or authority to justify the view that the result of the earlier proceedings can assist the applicant in any way."

It was suggested by counsel for the applicant in the present case that Stallman's and Budd's cases add a "gloss" to the statement of principle of Mellish L.J. in Kwok-a-Sing. I cannot agree. Properly considered in the light of their own facts and circumstance, these decisions can only be regarded as clear endorsements and applications of that principle. It is moreover a principle which was unanimously endorsed by the High Court of Australia in Wall v The King (1927) 39 C.L.R. 266. Although one may prefer the powerful dissenting judgment of Issacs J. in that case to the reasoning of the majority as to the application of that principle to the facts, the Court was in no doubt as to the validity of the principle. Issacs J. in examining the earlier authorities indeed referred to Stallmans case as one "strictly following" Kwok-a-sing.

As against this formidable body of judicial opinion the only authority which at first sight appears to support the applicant's content in here is Exparte Duvernay (1875) 19 L.C.J. 248, a decision of the full court of Queen Bench of Quebec. It appears that the applicant there had been arrested or a warrant issued by the speaker of the legislature for alleged contempt and that a previous application to secure his release from a warrant issued by the same authority in identical terms had been successful. There was before the court an uncontroverted affidavit to the effect that nothing had occurred since the first

warrant had been quashed to justify the re-arrest. In these circumstances the majority of the court held that the second warrant must also be quashed and the applicant released. Monk J. observed in the cause of his judgment that the difficulty in the case was to ascertain whether the cause of the arrest was identical.

Although this decision was rendered some 18 months after the decision in Kwok-a-sing, there is no indication in the report that the latter was cited during the argument, let alone referred to in the judgments. It would appear likely that the return to the second writ of habeas corpus in Duvernay's case would have raised the same issue for the Courts decision as the return to the first writ had done, namely the sufficiency of the form of the speakers' warrant of arrest, so that if the principle emaciated in Kwok-a-sing had been applied to the facts of that case, the decision of the court would still have been the same is it actually was.

The views of certain learned authors on this point were also referred to in the course of argument. On the one hand Paley on Habeas Corpus 9th Edition somewhat galdly states at p. 793 that the discharge on a habeas corpus is an absolute bar to any liability to subsequent imprisonment or committal for or in respect of the same offence, citing section 5 of the 1679 and Kwok-a-Sing. As we can see that case is not an authority for any such wide proposition. Moreover in the 10th Edition of Paleys work this passage was not reproduced. Little reliance in these circumstances can be placed upon it.

There is a passage in Spenser Bower and Turner on Res Judicata, 2nd Edition at p. 215 to the effect that a decision on habeas corpus that there is no legal ground or justification for an arrest and an order for discharge from custody is a determination of the applicants night to his liberty and the legality of his discharge "which is conclusive upon all subjects of the Queen" both at common law and under the 1679 Act. The learned authors do not however go on to suggest what, if any,

effect such a finding and order has upon the legality of any further arrest for the same cause and their views are therefore of little assistance on the present occasion. Res judicata was not originally regarded as applicable to habeas corpus proceedings.

Friedland on Double Jeopardy, 1969 Edition at pp. 267-271 discusses the historical background to section 5 of the 1679 Act in terms which lend support to the views expressed by Mellish L.J. in Kwok-aSing as to its original purpose and observes that the test there approved by the Judicial Committee is really a test for determining when res judicata should bar a second committal. It goes on to state that if the accused is released on a habeas corpus because he was not allowed to put forward a defence at the first hearing or because he was not served with the proper documents or because an extradition judge failed to take down or verify the depositions, a second properly conducted proceeding is permissible. The cases of Stallman and Budd are cited in support of that proposition. The learned authors' argument is convincingly supported.

Finally at p.122 of V.E. Hartley Booth's British Extraditon Law and Procedure there is the statement that if a fugitive is discharged by the court from custody upon an application in habeas corpus or an appeal, he maybe arrested again for the same offence. Mention is made of Kwok-a-sing while the learned author observes that although the principle there stated has been re-iterated manytimes no case has resulted in a fugitive's discharge because of it.

From the sources thus reviewed, I was satisfied that the test propounded in Kwok-a-Sing, which is a decision binding upon this Court, was a correct statement of the principle to be applied in the interpretation of section 5 of the 1679 Act in the instant case. Since the present application is one for Certiorari rather than for Habeas Corpus, we do not of course have the advantage of a second return to a habeas corpus writ before this court for purposes of comparison. However, unless

the identical errors of procedure were to occur in the conduct of the second set of proceedings before Hon. White as occurred in the first set of proceedings before the Senior Magistrate, it must logically follow that the return to my future writ of habeas corpus in connection with thus extradition would not raise for that courts determination the same question with regard to the validity of the grounds of the Applicants detention as were raised for my determination in the Habeas Corpus proceedings ending on 22nd July, 1988. So the Court is entitled on this occasion to assume that the test propounded in Kwok-a-Sing, which is the correct and proper test to apply has not been satisfied upon the facts before the Court and that section 5 of the 1679 Act therefore does not constitute a bar to the continuance of the proceedings presently before the Acting Magistrate. It follows also that Hon. White reached a correct determination when he overruled the Applicants submission and found that the proceedings before him were within his jurisdiction.

It was for these reasons, in amplification of the reasons given on 13th January, 1989, that I dismissed the present certiorari application.

Dated this 19 day of Jan 1989

Chief Justice