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IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN
BEFORE THE HON. THE CHIEF JUSTICE
ON 18th and 19th JULY, 1988

CAUSE No. 99 of 1988

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

BETWEEN	EDWARD CARDINAL "JILL" BODDEN	PLAINTIFF
AND	COMMISSIONER OF ROYAL CAYMAN ISLANDS POLICE FORCE	FIRST DEFENDANT
	and	
	DIRECTOR OF PRISONS OF THE CAYMAN ISLANDS	SECOND DEFENDANT

Mr. Ramon Alberga Q.C. instructed by Mr. Charles Quin of Bruce Campbell & Co. for the Plaintiff

Mr. Anthony Smellie, Senior Crown Counsel for the Defendants

COLLETT C.J. **JUDGEMENT**

On the 6th April, 1988 the Senior Magistrate made an order committing the Applicant, Edward Cardinal "Jill" Bodden to prison to await his extradition to the United States of America upon four

narcotics charges for which his return had been requested through diplomatic channels on 18th August, 1987. On the 7th April, 1988 the Applicant obtained leave of the Court for the Writ of Habeas Corpus ad subjiciendum to issue directed to the Respondents, the Commissioner of Police and the Director of Prisons for the purpose of examining the legality of that detention.

At the hearing of the matter learned counsel for the Applicant moved this Court to quash the return to the Writ and to order the immediate release from custody of the Applicant on the preliminary ground that the Magistrate wrongly and prematurely determined to commit the Applicant before hearing and considering the the evidence which he wished to give on his own behalf or that of the witnesses which he intended to call and without determining an application to cross-examine witnesses in United States whose depositions had been put in evidence before him. Counsel expressly reserved the right to make further submissions directed towards the eventual quashing of the return to the Writ if this preliminary point should not succeed and counsel for the Respondents did not object to that course of action in this case.

In consequence I have now to determine what, if any, legal consequence should follow from the course of procedure adopted by the learned Magistrate on 6th April, 1988. Prior to that date he had on no less than fourteen separate occasions sat to receive evidence bearing upon this request for extradition tendered to him by Senior Crown Counsel appearing on behalf of the United States Government and to hear submissions on both sides in connection therewith. At the close of the case for the United States, counsel for the Applicant had submitted on seven separate grounds to the learned Magistrate that the Applicant ought to be discharged forthwith. Six of those grounds raised issues of law and the seventh alleged that the evidence produced in support of the extradition request was so vague, weak and inconsistent that a properly directed jury could not have properly convicted in reliance upon it. The learned Magistrate reserved his decision at the conclusion of that argument on 31st March 1988

until 6th April 1988. On the latter day he commenced to read out his reserved decision which was to reject each of counsel's submissions seriatim. He then, as it is clear, went on to say, in accordance with the substance of the last paragraph of his written judgement, that he was satisfied that all the charges for which the United States Government had requested extradition had been proved to the standard required by law and that the Applicant would therefore now be committed to prison to await extradition.

Counsel for the United States Government then rose to object that the learned Magistrate ought not at that stage to be committing the Applicant as the Defence had indicated they proposed to call evidence. Counsel for the Applicant also rose to protest that the committal was premature and requested an adjournment until the afternoon, which was granted. When the court resumed its sitting in the afternoon, counsel for the Applicant followed this up by reiterating that the committal had been premature and intimated that in these circumstances the applicant would neither give nor call evidence as he had intended to do. Counsel for the United States Government invited the Magistrate to proceed in accordance with section 87 of the Criminal Procedure Code, to ask the Applicant whether he wished to give evidence and/or call witnesses and, over the objection of counsel for the Applicant this was then done. The Applicant declined to give evidence and no further witnesses were in fact called. After that the learned Magistrate formally committed the Applicant to prison to await extradition and counsel indicated that his client would be applying for habeas corpus and for further bail.

This being what occurred, it was at one point during the hearing before this Court suggested that the learned Magistrate had actually committed the Applicant to prison to await his extradition by what he read out on the morning of 6th April 1988, so that thereafter he had become functus officio in the matter and without any jurisdiction to proceed in the afternoon as he purported to do under sections 86 and 87 of the Criminal Procedure Code. Crown Counsel submitted that this was not the effect of what occurred since the Magistrate had not in the morning pronounced the

formal order committing the Applicant to prison, which he did not do until after complying with those sections of the Criminal Procedure Code in the afternoon. According to the evidence, what the Magistrate actually said was that the Applicant "will therefore now be committed to prison to await extradition", a phraseology which indicates that he, the Magistrate, was announcing his intention to make a formal order at the end of his reading but had not yet done so before he was interrupted. I am satisfied that Crown Counsel's submission is correct and that, as a matter of jurisdiction the Magistrate had not become functus officio in regard to the matter at the stage which had been reached when he was interrupted. He therefore retained jurisdiction to proceed in the way he did during the afternoon session of his court.

The main thrust of counsel's submissions on behalf of the Applicant was, however, that by arriving at and announcing his conclusion without having given him an opportunity to testify on his own behalf or to call witnesses, the learned Magistrate had deprived the Applicant of a fair hearing. There is no doubt that the Applicant had the right both to give and call such evidence, since S 9 of the Extradition Act 1870 of the United Kingdom as extended and applied to the Cayman Islands by the United States of America (Extradition) Order 1976 of Her Majesty in Council, requires a magistrate to hear such an application in the same manner as if the defendant before him were charged with an indictable offence committed in the Islands. Compliance with sections 86 and 87 of the Criminal Procedure Code is, therefore, mandatory as it is in domestic committal proceedings: see R v Horseferry Road Magistrates' Court, ex parte Adams (1978) 1 All E.R. 373 where an order of certiorari was granted to quash a committal for trial on account of a magistrate's refusal to hear the defendant or his witnesses give evidence at the preliminary inquiry before him.

Crown Counsel however contends that, since the learned Magistrate here corrected himself in the afternoon of 6th April 1988 and proceeded to invite the Applicant to give his evidence and to call witnesses before him, which I have held he still had jurisdiction to do, there was no refusal on

on his part to hear such evidence and the Horseferry Road decision is distinguishable on its facts. There is considerable force in that submission since it seems quite clear that the applicant, if he ahd chosen to give evidence in the afternoon of 6th April 1988 would have been allowed to do so and would likewise have been given a reasonable opportunity of calling witnesses on his behalf. Unlike in the Horseferry Road Case there was, at the end of the day, no breach of the audi alteram partem rule of natural justice, therefore.

This, however, by no means disposes of the allegation that in effect the applicant was deprived of a fair hearing of his case. Here it is abundantly clear that the learned Magistrate arrived at and announced his conclusion that the Applicant should be committed to prison to await extradition without giving him as he should have done, the opportunity to give personal evidence and to call witnesses before arriving at his conclusion. The analogy has been drawn of a decision to find a defendant guilty of the offence charged against him at his trial without having afforded him any opportunity of giving evidence in his defence or of calling defence witnesses. In Richard Delepanha v Regina S.C.A. No. 126 of 1987 I described such a failure by a court to follow the mandatory procedural requirements as one going to the root of the proceedings and vitiating the conviction. The question at issue here is whether or not, bearing in mind the nature of the proceedings upon an application for extradition of a suspect and the difference between it and a criminal trial, what the Magistrate did by way of seeking the follow the correct procedure in the afternoon of 6th April 1988 was sufficient to cure the irregularity which had occurred on the morning of that day.

In Whittaker and Watler v R (1984) C.I.L.R. 153 a remark made by the presiding magistrate to counsel in the course of an exchange during a trial was held by Summerfield C.J. to be capable of conveying the impression that the guilt of the appellant had been prematurely determined and where such an impression has been given it destroys the appearance of a fair trial. It was, as the Chief Justice there pointed out, the impression which matters, that is to say, whether a reasonable and fair minded person sitting in the

court and knowing all the relevant facts would have a reasonable suspiciion that a fair trial of the appellant was not possible. This is, of course, the classic test of the appearance of bias where breach is alleged of that other rule of natural justice. To the same effect is the decision of the Cayman Islands Court of Appeal in Jeffrey de Witt v Regina C.I.C.A. No.11 of 1987.

It is true, as Crown Counsel submits, that there are real differences between proceedings such as this and a criminal trial, not least in the nature of the decision which the presiding magistrate has to reach at the conclusion of the matter. In a trial he is required at the conclusion of the evidence on both sides and submissions to assess the evidence as a whole and to decide whether or not it satisfies him so that he feels sure of the defendant's guilt. At the end of the prosecution case his function is only to consider whether or not a prima facie case has been established, in the sense of evidence upon which a reasonable jury properly directed would, upon a certain view of it, be entitled to convict. In extradition proceedings of this kind, by contrast, the presiding magistrate is never required to reach any conclusion as to the guilt or innocence of the defendant and the final decision which he has to make is still at the end of the inquiry whether or not the prosecution have produced evidence of a prima facie case sufficient, if the charge was a domestic one, to warrant his committal for trial. This is precisely the same test as the presiding magistrate is required to apply at the end of the prosecution case in order to determine whether the defendant should be asked whether or not he wishes to gives evidence and/or call witnesses.

Bearing in mind the difference in function which would be apparent to an intelligent and fair minded observer in court, Crown Counsel invited me to conclude that there was no apparent good reason why the learned Magistrate here should be thought to be unable to give fair consideration to any defence evidence which might have been put before him in the afternoon of 6th April 1988. Such a view, in my estimation, takes too little account of the effect which the premature announcement of his conclusion would reasonably be expected to have had upon the mind of the Applicant himself. Although it is true that the

Magistrate was not invested with jurisdiction to pronounce finally upon his guilt or innocence of the serious charges laid against him by the United States Government, he undoubtedly had jurisdiction to determine whether or not the Applicant should be obliged to forego the protection of the familiar laws of his home country and to face trial and likely incarceration pending trial in a foreign state at which he should be at great expense to afford foreign lawyers to defend him. The decision was, therefore, one of greate consequence to the Applicant. To hear that decision pronounced against him without affording him his rightful opportunity to give evidence on his own behalf and to call witnesses could hardly fail to undermine his confidence, when, some few hours later, he was invited after all to testify and call his witnesses before the court. Should the Applicant in those circumstances have reasonably felt the necessary confidence that his evidence and that of his witnesses would be properly considered by the Court rather than fall upon deaf ears? Would the fair-minded and reasonable observer in the courthouse have expected him to feel such confidence? Surely the answer to both those questions must be negative. What had occurred had indeed undermined the expectation of a fair hearing and a fair result.

There is the further consideration that the announcement of the premature decision on the morning of 6th April 1988 posed an acute dilemma for the Applicant and his advisers. If he should non-the-less give evidence and call his witnesses as originally intended, might not that course of action on his part have been later prayed in aid against him as a waiver of the irregularity which had occurred, or at the very least as an indication that no prejudice had been caused to him thereby? If on the other hand, he should decide (as in fact he did) not to give evidence or to call witnesses as he had intended, then he is obliged to abandon any attempt to destroy the basis of the prosecution evidence and to induce the Magistrate to reverse his view that a good prima facie case had been established. There can be no presumption that the evidence he might have given or adduced would not have been sufficient to have affected the learned Magistrate's eventual decision. Such a dilemma is indeed one in wich an accused person ought not to be placed and is another reason for concluding that justice was not manifestly seen to

have been done.

I have considerable sympathy for the learned Magistrate who, as a result of the protracted and fragmented manner in which this application for extradition had been proceeded with before him over the course of more than six months, could well be excused for having temporarily lost sight of the stage at which it had reached after his consideration of the various submissions. There can be no basis for any suggestion that he did not approach the case with an open mind or that, until the morning of 6th April 1988 he did not conduct the inquiry strictly in accordance with the procedure laid down. It is, therefore, most unfortunate that because of what occurred on that morning by reason of inadvertence, I have felt obliged to reach the conclusion that the committal to prison to await deportation was illegal being in breach of the rules of natural justice because the appearance was created that the Applicant did not obtain a fair hearing of his case against the application for his extradition.

I would merely add, although it is strictly speaking unnecessary, that the secondary point raised by counsel for the Applicant, as to the deprivation of an opportunity to apply for cross-examination of overseas deponents is, in my judgement, devoid of merit. Regardless of whether or not a magistrate hearing an extradition application either has jurisdiction to order such cross-examination or should have exercised any such jurisdiction in the applicant's favour in the present case, as to which I express no opinion, it is abundantly clear here that no such application had been made to the leaarned Magistrate during the course of the prosecution case on the present application. He was not therefore obliged to rule upon it. It would have been too late for counsel for the Applicant to have made it after the prosecution had closed its case and he had invited the court to dismiss the request for extradition on a submission of no case to answer.

In the result I quash the return to the Writ of Habeas Corpus and, in pursuance of that Writ I order the immediate release of the Applicant from custody and discharge his bail.

Dated the 22nd July, 1988.

CHIEF JUSTICE.