In The Supreme Court of Bermuda

APPELLATE JURISDICTION
2019: 27

PAUL DOUGLAS MARTIN

Appellant

-v-

GOVERNMENT OF THE UNITED STATES OF AMERICA

Respondent

JUDGMENT

Appeal against Order of Extradition in the Magistrates' Court- The Extradition Act 1877 and the Extradition Act 2003 (Overseas Territories) Order 2016 -Relevance and applicability of culpable delay under s.82 Passage of Time provision - (whether extradition would be unjust or oppressive) - Non-Compliance with Court Directions

Date of Hearing: 10 January 2020
Date of Judgment: 27 February 2020

Appellant Ms. Susan Mulligan, Christopher's
Respondent Mr. Alan Richardson, for the Director of Public Prosecutions

JUDGMENT delivered by S. Subair Williams J

Introduction and Procedural Background

1. The Appellant is a Bermudian national having been born in Bermuda on 10 July 1955. On 7 December 2005 he was residing and employed in the United States of America ("the United States" / "the US") where and at which time he caused a serious-injury road traffic collision. The victim, Mr. Christian Dobson, was 18 years of age at the time of the accident.

2. Moments prior to the accident, Mr. Dobson was seated in a stationed and disabled motorcar parked on Sprain Brook Parkway in the State of the New York. There he awaited assistance with his vehicle warning flashers alighted when the Appellant struck

the rear of his car with such force that the Appellant's car ended up at an approximate 100 foot distance from the victim's car. Mr. Dobson sustained severe brain damage and was temporarily rendered comatose. He was fitted with a tracheotomy and suffered permanent damage to his vocal cords resulting in slurred speech. He is also said to have permanent limp. The Appellant, on the other hand, did not sustain any known or notable physical injury.

3. On 22 September 2006 the Appellant was indicted and convicted upon his guilty plea to the offence of vehicular assault in the second degree, contrary to Penal Law S120.03 (1).

4. The Appellant having absconded to Bermuda and failed to reappear in the Westchester County Court for his subsequent sentence hearing, was made the subject of a bench arrest warrant issued on 9 November 2006. On 15 December 2006 he was sentenced *in absentia* to a custodial term of 1-3 years in a state prison.

5. On 25 May 2018 the US Government issued a request for extradition from Bermuda ("the Request") under the authority of the Extradition Act 2003 (Overseas Territories) Order 2016 ("the 2016 Order").

6. On 7 June 2018 the Senior Magistrate issued a provisional warrant pursuant to section 73 of the United Kingdom Extradition Act 2003 a modified under the 2016 Order ("the 2003 Act") and some two weeks thereafter on 22 June His Excellency the Governor of Bermuda, Mr. John J. Rankin CMG ("the Governor") certified the Request to the Magistrates' Court.

7. On 20 June 2018 the Appellant first appeared in the Magistrates' Court opposing his extradition. In a thoroughly outlined chronology, Magistrate Craig Attridge provides a helpful narrative in his 15 August 2019 written judgment of the reasons for the one year delay leading up to the final hearing before him on 3 May 2019.

8. Magistrate Attridge in his judgment upheld the Request for extradition and ordered that the matter to be sent to the Governor pursuant to section 87(3) of the 2003 Act and remanded the Appellant into custody until such time.

9. By Notice of Appeal dated and filed in this Court on 4 September 2019, the Appellant pleaded seven substantive grounds of complaint with which I am presently concerned.

10. By letter to the Appellant, dated 1 October 2019, the Governor confirmed his decision to order the extradition of the Appellant to the US.

11. On 24 October 2019 Crown Counsel, Mr. Loxely Ricketts, and Ms. Susan Mulligan on behalf of the Appellant appeared before me for case management directions. Counsel urged for a near hearing date prior to the start of the Christmas holiday. Accordingly, I

directed for the Appellant to file a written skeleton argument within seven (7) days i.e. no later than Friday 1 November and for the Respondent to file a written reply skeleton argument within seven (7) days thereafter. The hearing of this appeal was then fixed to be heard before me on 8 November 2019.

12. However, on 8 November 2019, due to an administrative oversight on the part of the Supreme Court Registry, the prison authorities were not made aware of their obligation to produce the Appellant from Westgate Correctional Facility under the authority of a production order. Additionally, Ms. Mulligan was non-compliant in filing her skeleton argument by 1 November.

13. At the 8 November hearing I addressed Ms. Mulligan on the late filing of her skeleton arguments and she explained that due to her Court of Appeal commitments she was unable to meet the ordered timeframe, despite her best efforts. When pressed further about the details of her Court of Appeal commitments, Ms. Mulligan stated that she had conduct of two matters one of which had adjourned and the other which was set to proceed for the following week. (The appeals to which she was referring were Alex Wolffe Criminal Appeal No. 3 of 2019 and William Franklyn Smith No. 5 of 2019.) These two appeals were the subject of the Court of Appeal's Ruling in *Dill; Wolffe; Franklyn Smith; Tucker v The Queen* [2019] CA (Bda) 14 Crim. (Passages from this Ruling on Counsel's non-compliance with Court directions are cited further below.)

14. Consequently, it was resolved that the matter would be adjourned. However, prior to adjourning Ms. Mulligan produced some new case authorities, explaining that she had only recently discovered them. Crown Counsel, Mr. Loxely Ricketts, informed the Court that he had not previously been made aware or served with these previous cases which imported new arguments as to the applicability of the ECHR. Accordingly, I urged Ms. Mulligan to ensure that the Crown was promptly served with all of the case law and materials which she proposed to rely on prior to the return hearing date.

15. I further directed the Appellant to file hardcopies of the legislation she proposed to rely on and specified that such materials should contain the relevant exerts from the 2003 Act, the 2016 Order, the Bermuda Constitution, Human Rights Act 1981 and the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 ("the ECHR"). The return date was the fixed for 10 January 2020.

16. Astonishingly, on the 10 January 2020 return date the Court was informed that Ms. Mulligan failed to comply with my 8 November 2019 directions. Ms. Mulligan never filed the ordered legislation bundle and she failed to ensure that the Crown was served with a copy of her written submissions and authorities. I am inevitably reminded of the remarks of the learned President of the Court of Appeal, Sir Christopher Clarke, in *Dill; Wolffe; Franklyn Smith; Tucker v The Queen* where Ms. Mulligan was the offending Counsel for two of the four appeals made subject of the Court's Ruling. At paragraph 3 of the Ruling Clarke P states:

"*We would not normally publish a ruling of this nature setting out the sequence of events in respect of each of the four appeals where an application to adjourn was made. We do so in order to draw attention to the lamentable failures which compelled us to take the course that we did; to explain to a wider audience why we have been unable to sit for three days of the current session; and to indicate that this state of affairs must not be allowed to be repeated. We set out at the end of this ruling at paragraphs 45-58 some of the lessons which we think are to be learned for the future*."

17. At paragraphs 47-51 Clarke P not only identifies some of the various delinquencies of Counsel which plague the general efficiency of the upper and lower Courts but goes on to explain the conduct expected. I wish to make it widely known that the points stated in the below passages equally apply to appeals from the Magistrates' Court to the Supreme Court:

"*The Future*

47. The history of the events in the four cases display some disturbing features. These include (a) either an apparent preparedness simply to ignore the mandatory intent of the Court's orders, or a failure so to plan matters as to be able to comply with them, or both; (b) a failure of communication with either the Court or the Crown as to any difficulties in producing submissions until a very late stage; (c) a failure timeously to address the question of what transcripts other than those specified by Order 3 Rule 10 may be needed for the appeal so as to ensure that they are transcribed in time; and (d) a failure of adequate communication between counsel when more than one counsel had been involved.

48. For the future a number of things are required.

49. First, Counsel must appreciate the obvious, namely that the Court's orders are there to be obeyed. If difficulties are foreseen, they should be raised with the Court before the order is made; and, if they arise later, the Court and the Crown should be appropriately informed.

50. We are conscious of the burden that rests on Counsel in the preparation of submissions. But it is not an acceptable excuse for noncompliance for the Court to be told that Counsel has a myriad of things to do and has been working day and night (unsuccessfully) to comply with the order. If the work cannot be done in accordance with the order of the court it should not be taken on.

51. Second, it is important for appeals to be planned for. When a notice of appeal is filed counsel will need to consider what transcripts other than those automatically provided pursuant to Order 3 Rule 10 are likely to be needed and make a timeous application for them. Asking for them a fortnight before the hearing is not acceptable.

He or she will also need to arrange space in his or her timetable to accommodate the drafting of submissions.

…"

18. Notwithstanding, Crown Counsel Mr. Allan Richardson, having been handed the Appellant's written submission in the face of the Court, graciously agreed for the matter to proceed on the basis that his arguments would be heard in the form of supplemental written reply submissions to be filed on the next business day, in lieu of oral arguments. The Crown's written submissions were promptly filed on Monday 13 January 2020 and placed before me for my due consideration.

19. Having now considered the oral and written arguments ably made by both sides, I now give my judgment and reasons.

The Grounds of Appeal

20. The Appellant advanced the following grounds of appeal:

(i) *The Learned Magistrate erred in failing to find that the requesting State failed to request my extradition in a reasonable time and that the delay was culpable;*

(ii) *The Learned Magistrate erred in not finding the delay to be unreasonable and therefore presumptively prejudicial and oppressive;*

(iii) *The Learned Magistrate erred by incorrectly and/or incompletely applying the tests set out in the Extradition Act 2003 (Overseas Territories) Order 2016;*

(iv) *The Learned Magistrate erred in considering whether the Bermuda Police authorities bore any portion of responsibility for the delay. It was never the Respondent's position that the Bermuda Police Service had any obligation, or indeed any authority or power, to assist in locating and/or arresting the Respondent unless and until the Requesting State made a proper request for assistance or sought a provisional arrest warrant. Upon concluding that the Respondent turned to Bermuda and had not left Bermuda, the requesting State did neither.*

(v) *The Learned Magistrate erred by determining that the onus was on the Respondent to satisfy the Court that his case was "most exceptional" before the Court could deny the application by the Requesting State;*

(vi) *The Learned Magistrate erred in that he misunderstood and misapprehended the law as set out in the affidavits filed by the Requesting States and, as a result,*

found as a fact that the Respondent would have some remote and unlikely opportunity to appeal to a higher Court in the United States;

(vii) *The Learned Magistrate erred in finding that the sentence imposed in the United States would not constitute an unlawful and unconstitutional sentence in Bermuda;*

(viii) *Such further and other grounds as Counsel may advise and this Honourable Court permit.*

21. It is premised on these grounds that the Appellant seeks an Order of this Court for the extradition ordered by the learned magistrate to be overturned and for an order denying the application for extradition.

Summary of the Evidence

22. The evidence of the Appellant's 22 September 2006 plea hearing before DiBella J is given by Mr. Steven Bender who is the Second Deputy District Attorney and Chief of the Appeals and Special Litigation Division of the Westchester District Attorney's Office ("SDDA Bender").

23. SDDA Bender's description of the thoroughness of the Appellant's plea colloquy is supported by the additional and uncontroverted evidence of a 13-page transcript of the said hearing. During that hearing the Appellant was questioned extensively on his satisfaction with his legal representation; his right to trial by jury; his knowledge of the offences to which he was to plead guilty and the surrounding facts. A short exert of the transcript on the voluntariness of the Appellant's plea reports the following Q & A exchanges between the Court and the Appellant [page 5/page 343 of the Record of Appeal]:

Q. Has anyone threatened, coerced or forced you in any way to plead guilty?
A. No
Q. Are you entering this plea of guilty freely and voluntarily?
A. Yes
Q. And are you pleading guilty because you are in fact guilty?
A. Yes

24. On the controversial subject of the sentence which would be imposed [page 5/page 343 of the Record of Appeal]:

Q. Do you understand that you are pleading guilty to a Class E felony for which the maximum sentence could be up to four years in state prison?
A. Yes

…

Q. Do you understand that your plea of guilty may result in a revocation or suspension of your driver's license?

A. Yes

…

Q. I indicated to your attorney that the sentence promise would be a cap of six months incarceration followed by the balance of five years probation. When I say cap, that means that's as much as I will give you.

I will consider less depending on the presentence report and some other factors, any other information that's provided. But I'll be guided by that additional information as to within the range underneath the cap of six months what sentence I might impose. So you can get less but not more than six months shock incarceration, balance of five years probation.

…

…

Do you understand…if you fail to appear on the sentence date, that promise and commitment is no longer binding on the Court and you can receive an enhanced sentence on the instant conviction as well as be sentenced in your absence?

A. Yes

[page 10/page 347 of the Record of Appeal]

Q. …do you understand, sir, that if I accept your guilty plea today and I stand by my sentence promise to you, that you will not later be allowed to withdraw this plea?

A. Yes, sir.

Q. In addition, sir, there are three circumstances under which I would not allow you to withdraw this plea, and yet, I wold not keep my sentence promise to you. I would in fact sentence you to an enhanced, that is, greater sentence, including state's prison time. These three circumstances are as follows: First, sir, I'm going to be adjourning this matter until December 15th if that's an available date with your attorney for sentence.

If you fail to appear here on the date of sentence, I'll issue a warrant for your arrest. When you are brought back before me, I will not allow you to withdraw this plea and, in fact, I won't keep my sentence promise to you. I will in fact sentence you to an enhanced sentence and I will sentence you to state's prison. Do you understand that?

A. *I understand.*

25. The Request was also supported by the affidavit evidence of Ms. Christine O'Connor, Assistant District Attorney for Westchester County, New York. As an exhibit to her affidavit, Ms. O'Connor produced a hardcopy of an email from Mr. Martin to his employment supervisor sent on 23 October 2006:

"Dear Joe,

Circumstances have forced me to leave the country. These same circumstances have also forced me to resign my position with TBS effective immediately.

I deeply regret having to do this, my time with TBS has been great and I had hoped to stay. The company has treated me very well during this ordeal with constant support and understanding and I fully intend to pay back everything I owe once I am settled somewhere.

Please accept my deepest apologies for having to do this but I have no choice.

Sincerely,
Doug Martin"

26. Ms. O'Connor deposed that the discovery of the above email led to the United States Warrant Squad's contact with the U.S. Department of Homeland Security Immigration and Customs Enforcement ("the ICE") which disclosed that the Appellant had left the United States via flight from Philadelphia '*heading for Bermuda*'. Consequently, Judge DiBella issued a bench warrant for Mr. Martin's arrest which was sent to the ICE on 13 November 2006.

27. Ms. Mulligan pins her thumbtack to Ms. O'Connor's evidence that on 5 December 2006 a letter of intent to extradite was signed by a supervisor in the Westchester County District Attorney's Office. Ms. O'Connor states in her affidavit that this letter together with a copy of the bench warrant was sent to the Bermuda Police Service ("the BPS").

28. Having given this evidence, Ms. O'Connor goes on to say [page 6]; "*Over the years, state and federal authorities made attempts to locate defendant Martin. Finally in September 2017, a U.S. Social Security Administration notification came through to the Warrant Squad that defendant MARTIN was listed with an address in Bermuda*…"

29. In December 2006 a warrant squad detective, Mr. Robert Giordano, was assigned to investigate the whereabouts of the Appellant in December 2006, having first been assigned to the warrant squad in October 2006. Detective Giordano's evidence corroborates Ms. O'Connor's evidence of the Appellant's employment termination and the service of the bench warrant on the ICE and on the BPS on 8 January 2007 when it was confirmed that the Appellant entered Bermuda. Ms. Mulligan flagged this date as the most significant starting point of the US authorities' culpable delay.

30. Detective Giordano then states in his evidence; "…*Over the next several months, the investigation led me to contact police in Bermuda and the United Kingdom, as it appeared that defendant had travelled to the United Kingdom; however the information*

was never confirmed. Over the years, state and federal authorities exhausted all available investigative avenues in their successful attempts to locate defendant. Finally in September 2017, a US Social Security Administration notification came through to the Warrant Squad that defendant was listed with an address in Bermuda. Upon investigation of this information, the United States Marshals Service Task Force confirmed that defendant is currently residing at that address in Bermuda. The notes related to my efforts to track and locate defendant are attached to this affidavit…"

31. By affidavit evidence sworn on 22 April 2019, the Appellant deposed, *inter alia*, the following [paras 2-5]:

"*I had a lawyer in the United States in relation to a charge against me in 2006 of Vehicular Assault in the Second Degree. I told the lawyer I was not guilty of this offence and I wanted to fight it. The lawyer's bills were very high and I changed lawyers once. Again the bills mounted up. I wanted to defend myself against this charge but I could no longer afford to pay the lawyers. My last lawyer told me I would have to plead guilty because I could not afford a trial. He advised me that he had worked out a plea agreement and I would not do more than 30 days in custody. I did not want to do this but I had no choice and, in September 2006, I entered a guilty plea.*

In October or November 2006, my lawyer advised that I would receive a sentence of 3 years imprisonment. I was stunned. I had lived 23 years in the United States and I had no criminal record. I was not guilty of the offence and had only agreed to enter a plea for a short sentence because I could not afford to keep paying lawyers and experts. My lawyer had no explanation for the changed agreement.

I was terrified about doing that amount of time in prison for something I had not done so when I was told there was nothing the lawyer could do about it, I decided to return to Bermuda. I am a Bermudian Citizen. I planned to seek legal advice here when I could afford it.

I returned home to Bermuda and stayed with a family for a while. I did apply for a UK passport but I never used it. I have not left Bermuda since I arrived back home in 2006. I had to get settled in Bermuda and find work before I could do anything about the matter in the United States."

32. The Appellant then continued in his evidence to state that he later secured employed by establishing a shipping company before the industry crashed in 2008. He said that it was just up until that point that he had gotten back on his feet and became able to consult a lawyer in relation to this matter. He then went on to do general contracting work which led him to gaining a steady and reliable customer base.

33. On the Appellant's evidence he was registered to vote in his own name and did so for three elections. He also spoke of other examples where he was registered in his own

name e.g. banking, vehicle licence and insurance and utility bills in addition to a leasehold agreement in his name. This and further examples stated in his evidence was given as probative value for his contention that he was never hiding from the US authorities.

34. At paragraphs 15 – 18 of his affidavit he states:

"*My life is entirely in Bermuda now. It has been over 12 years since I left the United States. I am now 63 years old. I have some health and mobility issues that I didn't face 12 years ago. I was lead to believe by the inaction of the United States that the matter was finished and no further steps would be taken against me.*

It seems most unfair to me to have my entire life disrupted, to lose everything I have here, to leave my family and friends, and to lose my business after having worked hard for the past 12 years to establish myself here. I have no contacts in the United States now and would be entirely on my own in prison. I am not able to protect or defend myself in a United States prison as I might have been able to do had the United States acted earlier.

Had the authorities, either here or in the United States, even contacted me at any point to let me know that they were still interested in the case in the United States, I would have had a chance to consult a lawyer and put my affairs in order. It (sic) believe it is possible a lawyer here could have spoken with the District Attorney in the United States and come to some agreement that would not have required me to return to a prison cell in the United States, given my innocence, the plea agreement issues and the passage of time since I was sentenced in my absence. However, no one even called me in almost 13 years to indicate any interest in the matter.

I, am, therefore, respectfully asking that this Court not require me to return to the United States. It would be a terrible hardship at this point in my life and I do not believe it is just for the authorities there to have waited so long and done so little to locate or contact me."

35. In answer to the Appellant's evidence, SDDA Bender described the Appellant's claim that he was coerced to plead guilty as self-serving and worthy of discredit as such a claim was first made some 13 years after the fact only to avoid extradition and his outstanding service of sentence.

36. Ms. Lisa Denig, the Bureau Chief of Special Litigation in the Westchester County, New York, District Attorney's Office ("BCDA Denig"), gave affidavit evidence of what transpired on 15 December 2006 at the sentence hearing [paras 12]:

"*Defendant was sentenced in absentia to one to three years imprisonment. Pursuant to New York Penal Law §70.00, "Except as provided in subdivisions four, five and six of*

this section or section 70.80 of this article, a sentence of imprisonment for a felony, other than a felony defined in article two hundred twenty or two hundred twenty-one of this chapter, shall be an indeterminate sentence. When such a sentence is imposed, the court shall impose a maximum term in accordance with the provisions of subdivision two of this section and a minimum period of imprisonment shall be provided in subdivision three of this section" (Exhibit 9).

In 2006, when defendant was sentenced in absentia, the maximum prison term for a conviction of Vehicular Assault in the Second Degree, a Class E felony, was four years (New York Penal Law §70.00[2][e]). The minimum term of such a sentence was one year (New York Penal Law §70.00[3])(Exhibit 9).

A defendant is eligible for parole after expiration of the minimum period of imprisonment (Penal Law §70.40[1][a]) (Exhibit 10). Thus, because defendant negotiated a plea agreement instead of going to trial, the court sentenced him to three years less than the maximum sentence allowed by law."

37. As for the possibility of an appeal, BCDA Denig deposed [paras 5-7]:

"*Because the subject, in this matter, absconded before sentencing, he was sentenced in absentia, on December 15, 2006. This is the date his judgment became final, not the date that his sentence will be executed, should he be returned to the USA. People v Torres, 179 AD2d 358 (1st Dept. 1992) (Exhibit 4).*

Neither the subject nor his counsel filed a notice to appeal or an application for a late notice to appeal within one year of his judgment. Thus, should the subject seek to file an application for a late notice of appeal, this Office would argue that he has waived that right and his appeal should be dismissed.

The Appellate Division, in its broad discretion, would decide if subject, due to his absconding from the jurisdiction before sentencing, should be permitted to proceed with an appeal. N.Y. Crim. Proc. Law § 470.60(1) (Exhibit 5)…"

38. The corroborating evidence before the Court from SDDA Bender on the Appellant's right to appeal sentence is contained in his second affidavit [paras 4-5]:
"*Defendant Martin's right to file a direct appeal to an intermediate appellate court from his judgment of conviction and sentence is now time-barred. Martin had 30 days from the imposition of sentence in which to file a notice of appeal. He also had an additional 1 year thereafter in which to seek court permission, by motion, to file a notice of appeal; after the passage of 1 year, however, a jurisdictional bar prohibits that relief (see CPL 460.10[1]; 460.30[1]; a copy of the statutes are attached as Exhibit "SB1")).*

But Martin is not without other potential remedies. A defendant, at any time, can pursue a motion to vacate his conviction under CPL 440.10 (see CPL 440.10[1] [a]-[i]; a copy

of the statute is attached as Exhibit "SB2"). And in rare circumstances, a defendant can pursue a writ of error coram nobis to obtain permission by an appellate court to file a notice of appeal outside the 1-year period (see, e.g., People v Syville, 15 NY3d 391, 400 [2010]; a copy of the decision is attached as Exhibit "SB3")…"

The Relevant Law

39. In a reported review paper on the UK's extradition arrangements presented to the Home Secretary on 30 September 2011, the learned authors (consisting of the Rt Hon Sir Scott Baker, Mr. David Perry QC and Mr. Anand Doobay) gave the following description of the underlying purpose of extradition at para 2.3:

"*Extradition is based on the principle that it is in the interest of all civilised communities that offenders should not be allowed to escape justice by crossing national borders and that States should facilitate the punishment of criminal conduct. It is a form of international cooperation in criminal matters, based on comity (rather than any overarching obligation under international law), intended to promote justice*."

40. In a footnote to the above remarks, the learned authors cited Lord Russell of Killowen C.J. in ***R v Arton*** (No. 1) [1896] 1 Q.B. 108 [page 111]:

"*The law of extradition is without doubt founded upon the broad principle that it is to the interest of civilised communities that crimes acknowledged as such should not go unpunished and it is part of the comity of nations that one State should afford to another every assistance towards bringing persons guilty of such crimes to justice*."

41. These statements of principle are firmly endorsed by this Court.

Overview of Statutory Background and Applicable Legislation

42. The United Kingdom Extradition Acts 1870 and 1873 ("the 1870 and 1873 Acts") were previously administered under the Bermuda Extradition Act 1877 ("the Bda 1877 Act"). The 1870 and 1873 Acts were later repealed in 1989 by a new Extradition Act ('the 1989 Act"). This implemented various recommendations made in a joint report by the Law Commission (chaired by Mr. Roy Beldam) and the Scottish Law Commission (chaired by Mr. C.K. Davidson) on the Bill which preceded the 1989 Act.

43. The 1989 Act was further repealed by the United Kingdom Extradition Act 2003 ("the UK 2003 Act"). By an Order-in-Council the UK 2003 Act was broadly extended to Bermuda in 2016. I have earlier herein termed this Order-in-Council as "the 2016

Order" and the modified and applicable parts of the UK 2003 Act have been referred to herein as "the 2003 Act".

44. Under section 11(n) of the Computerization and Revision of Laws Act 1989 section 1 of the Bda 1877 Act was modified to read as follows:

Powers of magistrates

1. All powers vested in, and acts authorized and required to be done by a Magistrate or any Justice of the Peace in relation to the surrender of fugitive criminals in the United Kingdom under the Extradition Act 2003, are (insofar as the said Act extends to Bermuda) hereby vested in, and may in Bermuda be exercised and done by, any magistrate, in relation to the surrender of fugitive criminals under the said Act.

45. To summarise, the 2003 Act governs the legal process under which persons in Bermuda may be extradited to a foreign jurisdiction. The powers of a Bermuda magistrate to exercise authority under the 2003 Act are statutorily sourced from our domestic legislation under the Bda 1877 Act.

The Relevant Provisions of the Governing 2003 Act

46. Ms. Mulligan's principal case was that the Appellant is time-barred under section 82 the 2003 Act on the grounds that his extradition would be unjust or oppressive. Section 82 provides:

Passage of time

82. - *A person's extradition to a category 2 territory is barred by reason of the passage of time if (and only if) it appears that it would be unjust or oppressive to extradite him by reason of the passage of time since he is alleged to have-*

(a) committed the extradition offence, (where he is accused of its commission) or

(b) becoming unlawfully at large (where he is alleged to have been convicted of it).

47. Section 85 invokes the applicability of section 87 for cases where the fugitive offender was present at the proceedings under which he or she was convicted. Section 87 requires a person's extradition to be compatible with the Human Rights Convention as defined in the Interpretation portion of the 2003 Act:

Human rights
87. - *(1) If the judge is required to proceed under this section (by virtue of section 84, 85 or 86) he must decide whether the person's extradition would be compatible with the Human Rights Convention.*

(2) If the judge decides the question in subsection (1) in the negative he must order the person's discharge.

(3) If the judge decides that question in the affirmative he must send the case to the Governor for his decision whether the person is to be extradited.

"*"Human Rights Convention" means the Convention for the Protection of Human Rights and Fundamental Freedoms agreed by the Council of Europe at Rome on 4 November 1950*…"

The Relevant Case Law

48. Ms. Mulligan pointed to the English High Court decision in *Government of the United States of America v Tollman and another* [2008] EWHC 184 (Admin) where the extradition sought by the United States Government related to fraud-type offences which had allegedly been committed some sixteen years prior by a fugitive married couple.

49. The husband in the *Tollman* case was indicted before a grand jury in the United States in April 2002 for offences which were alleged to have occurred between the years 1991-1996. Subsequent indictments were laid against the husband's co-offenders who were later convicted and sentenced between the years 2003 and 2004.

50. Prior to his fixed arraignment hearing on 24 April 2002, however, the husband left the United States. On 18 March 2003 a request was made for his extradition under the UK 1989 Act only to be formally withdrawn on 19 April 2004. Months later in October, another extradition request by the United States Government was received. This was followed by the husband's application for a stay for abuse of process at Bow Street Magistrates' Court. An application for judicial review was also filed on behalf of the requesting state resulting in an order by the Divisional Court for the matter to be remitted to the Magistrates' Court.
51. The husband successfully asserted to the district judge, in reliance on section 82 of the UK 2003 Act, that he was prejudiced in the conduct of his defence by reason of the passage of time. The district judge also ordered the discharge of the wife under section 91 which is a defence against extradition for persons with a physical or mental condition which would make it unjust or oppressive to proceed with an extradition.

52. On appeal, Moses LJ upheld the decision to discharge the wife but remitted the husband's case to the Magistrates' Court having found that the passage of time did not itself cause injustice. It was thus left for the magistrate to consider whether the discharge of the husband could be sustained on the sole ground that the impact of his extradition would be oppressive as it would endanger his wife's mental health and possibly her life.

53. Ms. Mulligan directed my attention to the following passages from the judgment of Moses LJ [p 91] and [94]:

"…*We have to consider the fact that the allegations themselves concern events going back as long as 16 years may itself cause injustice. The concept of injustice overlaps with the concept of oppression, (Kakis v Government of Republic of Cyprus [1978] 2 ALL ER 634 at 638…) There is no want of authority that the proposition that delay by itself can cause injustice, particularly where such delay is culpable. In re Sagman [2001] EWHC Admin 474…) a delay of 15 years , coupled with the absence of any significant attempt to obtain extradition, was regarded as, in itself, oppressive and unjust*…

However,… we do not regard that passage of time as by itself the cause of injustice. Unlike cases in which accusations emerge after many years out of the blue, Mr. Tollman cannot have been surprised at a request for his extradition. He had chosen not to attend the arraignment hearing in April 2002 after many years during which lawyers had been instructed to follow the process of investigation and make representations as to why he should not be charged. When he chose not to attend the arraignment he knew he was leaving behind Hundly, Freedman and Cutler (the co-accused)…Of course he cannot be regarded as a fugitive in the sense meant by Lord Diplock in Kakis' case. But his behaviour is relevant to consideration of whether it is unjust to expect him to face trial. As each year passed, the burden of his years grew heavier. But it must be recalled that at the time he chose to pay so little attention to his commercial affairs, as he himself asserts, he was already in his sixties. To expect a man of 77 to face trial in relation to offences alleged to have been committed when he was already over 60, does not lead us to the conclusion that it would be unjust to do so. He had the opportunity to identify material to support his case during the course of the investigation; he had the opportunity to participate in the trial in which a conclusion of conspiracy to defraud was made, but chose not to do so and left others to face the consequences. In those circumstances, we do not conclude that the passage of time has caused him an injustice."

54. In construing and determining the proper approach to section 82, the *Tollman* case is of limited assistance since the issue of prejudice in that case was factually anchored on the question of a whether or not is was still possible for the husband to have a fair trial e.g. witness availability etc.

55. While the earlier High Court decision in <u>*Gomes and Goodyear v Trinidad and Tobago*</u> [2007] EWHC 2012 Admin [17], per Sedley LJ was cited by Mr. Fitzgerald QC on behalf of Mr Tollman in addressing the test as to whether Mr. Tollman left the United States lawfully; Moses LJ did not have the benefit of the subsequent unanimous judgment of the House of Lords delivered by Lord Brown in the conjoined appeal cases of <u>*Gomes v Government of Trinidad and Tobago; Goodyer v Government of Trinidad and Tobago*</u> [2009] 3 ALL ER 549.

56. In the *Gomes* and *Goodyer* appeals, the House was specifically concerned with section 82 i.e. when an extradition is time-barred on the grounds that it would be unjust or oppressive to extradite. This judicial analysis, undertaken as a reply to a certified question by the Divisional Court of general public importance, has an especially persuasive effect on Bermuda law given the then hierarchical status of the House of Lords (prior to its subsequent disbandment) and the parallel wording between section 82 of the UK 2003 Act and section 82 of the 2003 Act (as modified under the 2016 Order).

57. In the case of both *Gomes* and *Goodyer*, the appellant breached his bail conditions and fled trial for drug trafficking charges in Trinidad. Both appellants were arrested in the UK following an extradition request by the Government of Trinidad and Tobago.

58. At first instance, both Mr. Rick Gomes and Mr. Benjamin Goodyer argued that, pursuant to sections 79(1)(c) and 82 of the UK 2003 Act, their extradition would be unjust or oppressive by reason of the passage of time since the alleged offences. In the case of Mr. Gomes, a period just in excess of five years had lapsed and in the case of Mr. Goodyer eight-and-a-half years had lapsed.

59. The two appellants further argued that their extradition could not withstand section 87 because their extradition would be incompatible with their convention rights under Article 3 of the ECHR. The underlying human rights complaint related to the physical state and conditions of the prison facility in Trinidad.

60. Lord Brown of Eaton-under-Heywood referred to an earlier decision of the House in *Kakis v Government of Republic of Cyprus* [1978] 2 ALL ER 634 for the meaning of the terms 'unjust' and 'oppression' where by Lord Diplock stated in the leading majority judgment [pages 638-639]:

"*"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 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 the 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 s8(3) is based upon 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."

61. However, Lord-Edmund Davies was said to be 'unable to concur' with Lord Diplock in the *Kakis* case [page 640]:

"*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 avert to that factor*…"

62. While Lord-Edmund Davies does not appear to have gone so far as to disregard a fugitive's culpable delay as a consideration where there is inexcusable delay on the part of the requesting state, he determined that delay at the doorstep of the government authorities should never be ignored. Lord Keith of Kinkel in his dissenting judgment in *Kakis* is reported to have endorsed similar remarks made by Lord-Edmund Davies' in his dissenting judgment in *R v Governor of Pentonville Prison, ex p Narang* [1977] 2 ALL ER 348.

63. Returning to the judgment of Lord Brown of Eaton-under-Heywood in the *Gomes* and *Goodyer* appeals, with which all the sitting Law Lords agreed, Ms. Mulligan alighted to the latter part of the following statement on the relevant stage in assessing delay [paras 21-22]:

"*The certified question principally concerns Diplock para 1, notably that part of it which states that, '[s]ave in the most exceptional circumstances', [d]elay 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… be relied upon as a ground for holding it to be either unjust or oppressive to return him'. In other words, the accused cannot pray in aid what would not have happened but for the additional passage of time for which he is responsible. (In speaking of '[d]elay in the commencement or conduct of extradition proceedings' Lord Diplock was clearly referring to delay in the overall process of bringing the suspect to justice, including delay before any question of extradition arose. That, after all, was*

the position in Kakis's case itself: the 15 months to be disregarded was the period the suspect was hiding out in Cyprus before ever he left for the United Kingdom.)

Diplock para 2, raising as it does the question whether dilatoriness on the part of the requesting state can ever be of relevance (the question which divided the House), expressly postulates that the delay 'is not brought about by the acts of the accused himself'. If it is, then the question of blameworthiness on the state's part simply does not rise."

64. Lord Brown's take on Lord Diplock's meaning of delay is made with reference to a 15-month hiding period in the *Kakis* case when the appellant, Mr. Kyriakos Kakis, retreated to a mountainous terrain in Cyprus, having participated in a military coup which ousted the government of that period. Mr. Kakis, equipped with a permit from the new government, left Cyprus and resettled in England. Under the authority of an entry visa and exit permit issued by the former government who had since which resumed power, Mr. Kakis later returned to Cyprus for a short period with the comfort of an amnesty declaration for those with whom he appeared to belong. It is reported, however, that after his subsequent departure from Cyprus the House of Representatives rejected the amnesty and considered Mr. Kakis a fugitive offender suitable for extradition. These are the broadly stated facts which constitute the delay in the *Kakis* case.

65. In the unanimously agreed judgment delivered by Lord Brown in the *Gomes* and *Goodyer* appeals, the House of Lords reaffirmed their approval of Lord Diplock's reasoning in the *Kakis* case.

66. Paragraphs 26-30:

"*True it is that Laws LJ*[1] *then added: 'An overall judgment on the merits is required, unshackled by rules with too sharp edges.' If, however, this was intended to dilute the clear effect of Diplock para 1, we cannot agree with it. This is an area of the law where a substantial measure of clarity and certainty is required. If an accused like Goodyer deliberately flees the jurisdiction in which he has been bailed to appear, it simply does not lie in his mouth to suggest that the requesting state should share responsibility for the ensuing delay in bringing him to justice because of some subsequent supposed fault on their part, whether this be, as in his case, losing the file, or dilatoriness, or as will often be the case, mere inaction through pressure of work and limited resources. We would not regard any of these circumstances as breaking the chain of causation (if this be the relevant concept) with regard to the effects of the accused's own conduct. Only a deliberate decision by the requesting state communicated to the accused not to pursue the case against him, or some other circumstance which would similarly justify a sense of security on his part notwithstanding his own flight from justice, could allow him*

[1] Lord Brown was referring to Laws LJ's judgment in *La Torre v Italy* [2007] All ER (D) 217) (Jun).

properly to assert that the effects of further delay were not 'of his own choice and making'

There are sound reasons for such an approach. Foremost amongst them is to minimise the incentive on the accused to flee. There is always the possibility, often a strong possibility, that the requesting state, for want of resources or whatever other reason, may be dilatory in seeking a fugitive's return. If it were then open to the fugitive to pray in aid of such events as occurred during the ensuing years- for example the disappearance of witnesses or the establishment of close-knit relationships- it would tend rather to encourage fight than, as must be the policy of the law, discourage it. Secondly, as was pointed out in Diplock para 2, deciding whether 'mere inaction' on the part of the requesting state 'was blameworthy or otherwise' could be 'an invidious task'. And undoubtedly it creates practical problems. Generally it will be clear one way or the other whether the accused has deliberately fled the country and in any event, as was held in Krzyzowski's case, given that flight will in all save the most exceptional circumstances operate as an almost automatic bar to reliance on delay, it will have to be proved beyond reasonable doubt (just as the issue whether a defendant has deliberately absented himself from trial in an inquiry under s. 85(3) of the 2003 Act). But it will often be by no means clear whether the passage of time in requesting the accused's extradition has involved fault on the part of the requesting state and certainly the exploration of such a question may not only be invidious (involving an exploration of the state's resources, practices and so forth) but also expensive and time consuming. It is one thing to say—as Lord Edmund-Davies said in Kakis's case and later Woolf LJ said in Osman's case and Laws LJ in La Torre's case—that in borderline cases, where the accused himself is not to blame, culpable delay by the requesting state can tip the balance; quite another to say that it can be relevant to and needs to be explored even in cases where the accused is to blame.
The Divisional Court's suggestion that there would be 'an asymmetry' in a 'concurrent fault' case in taking account of the accused's fault but leaving out of account the requesting state's fault seems to us, with respect, misconceived. In the ordinary way the accused gets the benefit of the passage of time (unless he has caused it) irrespective of any blameworthiness on the part of the requesting state. Why then, save perhaps in a rare borderline case, consider whether the requesting state itself should in addition be found at fault?

We are accordingly in no doubt that it is Krzyzowski's case, rather than the Divisional Court's judgment in the present case, which correctly states the law on the passage of time bar to extradition. The rule contained in Diplock para 1 should be strictly adhered to. As the rule itself recognises, of course, there may be 'most exceptional circumstances' in which, despite the accused's responsibility for the delay, the court will nevertheless find the s. 82 bar established. The decision of the Divisional Court (Hobhouse LJ and Moses J) in Re Davies (30 July 1997, unreported), discharging a defendant who had become unfit to plead notwithstanding his responsibility for the relevant lapse of time, may well be one such case. In the great majority of cases where

the accused has sought to escape justice, however, he will be unable to rely upon the risk of prejudice to his trial or a change of circumstances, brought about by passing years, to defeat his extradition.

We recognise, of course, that in a s. 82(b) case the defendant will by definition have been 'unlawfully at large' and will generally, therefore, be subject to the rule in Diplock para 1. Given, however, that in these cases he will by flight have brought upon himself such difficulties as may then ensue from the passage of time, we see no reason why he should not be required to accept them- again, save in the most exceptional circumstances. He, after all, will not merely be accused of the crime but will actually have been convicted of it."

Analysis and Decision

67. In his first five grounds of appeal, the Appellant, at the core of it all, complains that Magistrate Attridge erred in his findings that Appellant's extradition was not time-barred by operation of section 82 of the 2003 Act.

68. Specifically, Ms. Mulligan criticised the learned magistrate for his misplaced attention to the degree of inaction by the BPS in bringing the Appellant to justice, as recorded at paragraphs 23-27 of his judgment [page 15-16 of the Appeal Record]. Correctly, Ms. Mulligan submitted that when assessing whether or not there has been culpable delay on the part of the requesting state, the magistrate ought to have focused his assessment to the conduct of the US authorities.

69. However, applying the approach stated by the House of Lords in the *Gomes and Goodyer* case in favour of Lord Diplock's *ratio* in the *Kakis* case: As a starting point it matters not whether the US authorities were slow-paced in their investigation, even if it was to the point of extreme inefficiency. In circumstances such as the present case, a fugitive offender who deliberately fled the jurisdiction of the requesting state is in no position to later shield his culpability by pointing to the inadequacies of the extradition process.

70. Mr. Martin, undeniably on the evidence before the magistrate, absconded from the US to avoid his pending sentence. So, it is hardly open to him to now suggest that the US authorities should share in his responsibility for the ensuing delay, notwithstanding any fair criticism that they delayed in locating the Appellant since January 2007 when it was confirmed that he entered Bermuda. The chain of causation, in my judgment, is unbroken. It was he, Mr. Martin, that authored the 13 year delay which has lapsed since he first fled the US in breach of his bail conditions.

71. Having carefully reviewed the transcript of the verbal warnings issued by DiBella J to Mr. Martin at the 22 September 2006 plea hearing, I find that it was open to the

magistrate to find that the Appellant was to be blamed for the effect of the delay which he brought upon himself by his own conduct.

72. In this case, the requesting state never communicated to Mr. Martin that he would not be pursued for sentence following his conviction on 22 September 2006. The magistrate was correct in saying at paragraph 29 of his judgment; "*It is not in the Court's view apt to describe a unilateral belief in the person unlawfully at large that simply by reason of the passage of time he is no longer being pursued.*" I find that any sense of security felt by Mr. Martin during his period of abscondment was unjustified.

73. If there was some other circumstance which would similarly justify Mr. Martin's sense of security, notwithstanding his own flight from justice, it would have been for him to raise that evidentially and for the prosecution to disprove it beyond a reasonable doubt. In this case, I find that the magistrate cannot be properly faulted for having found on the evidence that there was no factual basis whatsoever to justify such a sense of security. To the contrary, Mr. Martin has sought to exploit the dilatory efforts of the US authorities as a means of avoiding his extradition and service of sentence.

74. Save only in the most exceptional of circumstances, a fugitive offender who has wilfully and knowingly taken flight from his prosecution will be estopped from claiming relief under the time-bar fixed by section 82 of the 2003 Act. The fact that the US authorities, according to Mr. Martin's case, did not need to navigate the Bermuda Triangle to find him living here in open sight is hardly capable of being regarded as a 'most exceptional circumstance' or any other kind of defence to his extradition. After all, this is far from a borderline case where culpable delay by the requesting state can tip the balance in favour of Mr. Martin.

75. This Court is persuaded by the correctness of the approach and reasoning applied in the *Gomes and Goodyer* case importing Lord Diplock two part test in *Kakis*. The test as to whether the section 82 delay is oppressive or unjust is subsumed in the 'most exceptional circumstances' test. In this case, I find that the evidence before the magistrate did not support any finding that the delay would be unjust or oppressive at such a threshold so to invoke a time-bar under section 82.

76. I now turn to the ground of appeal where it is pleaded that the magistrate erred in finding that the Respondent would have some remote and unlikely opportunity to appeal to a higher Court in the United States. Firstly, it must be reiterated that the loss of any opportunity to appeal was of the Appellant's own making. It cannot be said that he was deprived of the benefit of the appeal provisions under New York law. Rather, he failed or refused to avail himself of those provisions. It is hardly open to him now to explore, as a ground of defence against his extradition, that he is now unable to appeal. Secondly, the evidence of BCDA Denig and SDDA Bender was uncontroverted factual evidence which the magistrate was fully entitled to rely on.

77. I have also considered the Appellant's contention that the order of extradition should have been withheld by the learned magistrate on the ground that the sentence imposed was unconstitutional under Bermuda law. This submission is flawed on its face.

78. Under Bermuda law, custodial sentences (where service of a Court-specified minimal period of imprisonment is required before eligibility for parole) is well known to our criminal justice system. This is to be distinguished from unlawful indeterminate sentences (see DS (young offender) v R (Sentence) [2018] Bda LR 11, per Subair Williams AJ (as I then was)).

79. More so, it is important not to confuse arbitrary and unconstitutional provisions of statute law (where a minimum mandatory period of imprisonment is legislated), with the Court's powers to order a minimal period of incarceration to be served before eligibility for parole coupled with a maximum period of service in the event that parole is not granted. In *Selassie v The Queen; Pearman v The Queen* [2013]UKPC 29, Lord Wilson stated [para 20]:

> *20. At a level of generality the Director's argument is right: it is as arbitrary to impose a maximum as it is to impose a minimum. Nevertheless the argument misses the point. For it is through the prism of a deprivation of liberty that the analysis must be conducted. In Engel v The Netherlands (No1) (1976) 1 EHRR 647 the ECtHR stated at para 58 (and it has repeated it many times since) that the aim of article 5(1) "is to ensure that no one should be dispossessed of [his] liberty in an arbitrary fashion". A period of detention will be arbitrary if it is not proportionate to the offence and other relevant circumstances: R v Governor of Brockhill Prison, ex p Evans (No2), [2001] 2 AC 19, 38 (Lord Hope). An arbitrary provision, such as the specification of a minimum period, which deprives a person of his liberty (or, in this case, of the chance of regaining it), irrespective of the circumstances, offends against article 5(1) and, more relevantly, against section 5(1) of the Constitution. An arbitrary provision, such as the specification of a maximum period, which disables a court from depriving a person of his liberty (or, in this case, of the chance of regaining it) for longer than the specified period, even in the light of the circumstances, is entirely, and inversely, different. Maximum periods, albeit usually of terms of imprisonment rather than of periods prior to eligibility for release, are written across large tracts of criminal legislation. There is no vice in them.*

80. I further reject Ms. Mulligan's submission that the sentence imposed is unconstitutional because it was increased from the initial promise of sentence consisting of a cap of six months incarceration followed by the balance of five years' probation. This does not offend any sentencing principles under Bermuda law, to which the US criminal justice system is not strictly bound in any event. Having absconded as the Appellant did, the US Court clearly determined that the Appellant could no longer be treated as a resident in the US who was suitable for the probation sentence which largely featured in the combined sentence originally envisaged. Thus the sentence passed was converted to a

pure prison sentence in circumstances where the alternative to an imprisonment-only sentence was no longer suitable. I find nothing constitutionally offensive about this, as a matter of Bermuda law or as a matter of the law under the ECHR..

81. The sentence imposed *in absentia* is also described by the Appellant to be disproportionate and an infringement of section 54 of the Criminal Code which provides:

"*A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender*."

82. The US criminal justice system is exceptionally different from that of this jurisdiction. It was no more open to the magistrate then as it is to me now to speculate on the evidence as to whether or not the sentence was proportionate, as a matter of law. Such scrutiny should be reserved for a US Court, barring the most extreme cases which this case is not.

Conclusion

83. The appeal is accordingly dismissed on all grounds and the order of extradition is confirmed.

Dated this 27th day of February 2020

THE HON. MRS JUSTICE SHADE SUBAIR WILLIAMS
PUISNE JUDGE