

BARBADOS

**IN THE SUPREME COURT OF JUDICATURE
HIGH COURT OF JUSTICE**

**Nos. 1043, 1045 and 1062 of 2011
BA 123, 124 and 125 of 2011
CV 2248 of 2012**

BETWEEN

FREDERICK HAWKESWORTH

SEAN JACKSON

**JOHN WAYNE SCANTLEBURY
aka JOHN WAYNE TROTMAN**

Applicants

AND

THE SUPERINTENDENT OF PRISONS

1st Respondent

THE ATTORNEY GENERAL

2nd Respondent

**THE DIRECTOR OF PUBLIC
PROSECUTIONS**

3rd Respondent

Before the Honourable Sir Marston C. D. Gibson K.A., Chief Justice

2012: April 5

2013: January

Mr. Ralph Thorne, Q.C. in association with Ms. Michelle Forde for the Applicants

Frederick Hawkesworth and Sean Gaskin

Mr. Hal Gollop for the Applicant John Wayne Scantlebury

Mr. Elwood Watts for the Respondents

DECISION

[1] These applications arise out of the extradition proceedings of the applicants Frederick Christopher Hawkesworth, Sean Gaskin and John Wayne Scantlebury. To date, the entire

proceedings have been ongoing for a period in excess of eight years and have already occupied the attention of the Chief Magistrate; the High Court - Nos. 1025, 1028 and 1029 of 2004 [Blackman, J]; and Nos. 1924, 1925 and 1927 of 2005 [Reifer, J]); the Court of Appeal (Civil Appeal Nos. 18, 20 and 21 of 2007), and the Caribbean Court of Justice (CCJ Application Nos. AL 9, 10 and 11 of 2010). The instant *habeas corpus* applications raise, in the main, the construction of certain sections of the **Extradition Act Cap 189** of the Laws of Barbados as they relate to the grant of bail in extradition cases as well as a few other issues. Also determined herewith is the most recent *habeas corpus* application filed by Hawkesworth on 21 December 2012 again seeking bail.

Factual and Procedural Background

- [2] This summary of the facts is gleaned from a number of sources. It begins with the Affidavit in Support of the Request for Extradition of Stephen M. May, Esq., Senior Trial Attorney assigned to the Narcotics and Dangerous Drugs Section in the Criminal Division of the United States (“US”) Department of Justice, which affidavit was sworn to on 19 July 2004 before Hon. Deborah A. Robinson, US Magistrate Judge for the District of Columbia. There is also a second Affidavit in Support of the Request for Extradition of Gordon Patten, Jr., a Special Agent with the Drug Enforcement Agency, then assigned to the Bridgetown Country Office in Bridgetown, sworn to on 9 July 2004 before Magistrate Judge Robinson and a third Affidavit of a Confidential Source (“CS”) sworn to before Magistrate Judge Robinson on 16 July 2004. The name of the CS, who claimed to be a citizen of St. Kitts and Nevis, living in the USA, is redacted.

- [3] The affidavits alleged that Hawkesworth was the head of a drug trafficking organisation based in Barbados which imported multi-kilogram loads of cocaine from Colombia, Guyana and elsewhere into Barbados for onward shipment to the USA, United Kingdom (“UK”) and Canada. It was alleged that Hawkesworth’s cocaine distribution organisation had allowed him to legitimise his illicit proceeds into several businesses and residences located in Barbados. In 2000, the CS, working with the DEA, travelled to Barbados and was introduced to Hawkesworth, who discussed establishing a relationship with the CS to transport cocaine to New York.
- [4] The three affidavits contained very detailed information. Patten’s Affidavit alleged that while Hawkesworth was the head of the drug distribution organisation, Scantlebury was the main associate or “lieutenant” for Hawkesworth and would seek buyers of cocaine and introduce them to Hawkesworth. He would then meet the buyers on behalf of Hawkesworth to negotiate the delivery of the cocaine. Scantlebury was supposed to travel to the USA after “test loads” of cocaine had been successfully delivered to New York. He was to be in charge of overseeing the receipt of the shipments of cocaine from Hawkesworth and another co-accused, Raffel Douglas. Gaskin was described as primarily assisting Scantlebury in meeting with prospective purchasers of cocaine from Hawkesworth and was also supposed to travel to New York to help oversee the shipments of cocaine sent from Hawkesworth and Douglas.
- [5] It is alleged that the DEA had the applicants under surveillance since 2000 which was when its agents contacted the CS and sought information on the drug trafficking activities of the applicants. A few of the details of those activities would suffice. In July 2000, the

CS claimed that he was introduced to Hawkesworth who talked to him about getting shipments of cocaine to New York. Hawkesworth, he said, had told him that he (Hawkesworth) could supply as much cocaine as the CS wanted. In September 2002, the CS alleged that he travelled to Barbados, at the direction of the DEA, for the purpose of purchasing two kilograms of cocaine from Hawkesworth. They met at a hotel and agreed the purchase price of \$17,000 but Hawkesworth had stated that he was uncomfortable with the drugs and the money being in the same hotel room at the same time. At a meeting later that day, the CS agreed to give Hawkesworth the money and Hawkesworth undertook to send someone to pick up the money, but no one came.

[6] At the direction of the DEA, the CS stated, he had recorded drug-related conversations with Hawkesworth and his associates, and had provided fictitious New York identification cards to both Scantlebury and Gaskin. In the summer of 2003, he said that Scantlebury had called him to tell him that he (Scantlebury) had some fictitious travel documents in the name of "Frederick Davis." The CS gave a copy of the identification cards to the DEA. In September 2003, he met both Scantlebury and Gaskin at the Accra Beach Chefette and gave Scantlebury the false identification cards which he had made for Scantlebury. Gaskin provided him with photos, a date of birth and a social security number, and asked him to make false identification cards for him also. Gaskin had informed him that he had been previously arrested and convicted for trafficking cocaine in the US. After his sentence was completed, Gaskin had been deported back to Barbados. Patten stated that he had done a criminal check of Gaskin and determined that the information which Gaskin had provided to the CS was true.

[7] It is alleged in both the affidavits of Patten and the CS that a drug-buy did take place in Barbados. Patten's affidavit alleges that, on 30 March 2004, the CS travelled to Bridgetown and arranged to purchase a kilo of cocaine directly from Hawkesworth. The DEA had given the CS \$8,000 and a recording device. He was picked up at a shopping centre by a member of the drug organisation and taken to Hawkesworth's residence where Hawkesworth and Douglas allegedly took the money and agreed to deliver two kilos of cocaine to the CS, one kilo being "fronted" to the CS. A short time later, the DEA conducted surveillance of the delivery of the drugs to the CS. Patten swore that he had the drugs analysed by the DEA laboratory. The first exhibit was found to have a net weight of 941.5 grams containing cocaine hydrochloride at 90.1%, while the second had a net weight of 921.6 grams containing cocaine hydrochloride at 81.8%.

[8] Paragraph 28 of the CS' affidavit details allegations of what happened next:

The next morning I met HAWKESWORTH at Cave Shepherd's Department Store on Broad Street. HAWKESWORTH drove me to his house where we met with DOUGLAS. DOUGLAS said that if it was that easy for me to get couriers down here (Barbados), we could "promote a show" and make something happen. DOUGLAS told me that he had enough cocaine in Barbados for the next 3-6 months. I told him that I would attempt to get couriers down the next week. Hawkesworth told me that he could deliver an undetermined amount of cocaine to me to be transported to New York by my couriers. HAWKESWORTH said that he could use his contacts at Grantley Adams Airport to place bags containing cocaine on American Airline flights headed for JFK Airport.

[9] On 19 May 2004, criminal complaints were filed in the US District Court for the District of Columbia located in Washington, DC against the three applicants as well as Raffel Douglas and Terence Sugrim, charging them with, *inter alia*, conspiracy to distribute cocaine. On 17 June 2004, a federal grand jury sitting in the District of Columbia

returned an indictment charging the five with the criminal offences. After a protracted hearing in which were interspersed requests for judicial review and consequential appeals right up to the Caribbean Court of Justice (“CCJ”), on 9 June 2011, Chief Magistrate Clyde Nicholls, as he then was, committed the applicants to Her Majesty’s Prison at Dodds as a precursor to their surrender to the United States of America to answer charges in the District Court of the District of Columbia relating to conspiracy to distribute cocaine.

[10] In June 2011, pursuant to s. 19 (a) of the Extradition Act, Cap 189, the applicants filed *habeas corpus* applications supported by affidavits essentially seeking the grant of bail along with some other items of relief relating to the Chief Magistrate’s conduct of the extradition hearing. On 21 June 2011, oral arguments commenced before **Alleyne J (Ag)**¹ and the respondent Director of Public Prosecutions (DPP) sought leave to withdraw on the basis of being an improper party to the proceedings. The matter was adjourned until 20 July 2011 when **Alleyne J (Ag)** gave a partial ruling in which he refused the respondent’s application for leave to withdraw on the basis that it was the proper party to deal with such bail applications.

[11] **Alleyne J (Ag)** then requested the parties to file written responses to the following questions:

- 1) Should s. 17 (2) of the *Extradition Act Cap 189* of the Laws of Barbados be construed as excluding a right to persons who are committed for surrender, pursuant to s. 17 (1) of the *Extradition Act* to apply to the courts for bail?

¹ On 1 November 2012, Hon. Olson DeC Alleyne was appointed a Judge of the High Court, after a number of stints as an Acting Judge of the Court.

- 2) If s. 17 (2) of the *Extradition Act* is construed as excluding an entitlement to apply for bail, what is the effect, if any, of s. 4 of the *Bail Act Cap 122A* on the continued application of that provision?
- 3) In the event that the answers to questions 1 and 2 above are such to lead to the conclusion that the court has jurisdiction to proceed with the application, should the court grant or refuse bail and for what reasons?

[12] The matter was further adjourned for hearing until 10 August 2011. However, the hearing was not held on that date and, in March 2012, the tenure of **Alleyne J (Ag)** ceased. On 5 April 2012, the parties appeared before me on what was, by all appearances, an application for leave to appeal. However, neither a notice of appeal nor an application for leave to appeal had been filed even though, curiously, the matter was listed before the Court of Appeal. However, it is clear that no appeal exists and there is, accordingly, no reason for further discussion on this non-existent appellate proceeding.

Substitution of Hearing Judge

[13] At the conclusion of the argument before me, Mr. Watts for the respondents indicated that he had assumed that what had occurred before me was intended to replace the submissions made before **Alleyne J (Ag)**. Mr. Gollop's response was that it was too late for the respondents to query the nature of the proceeding before me and that such query should have been made *in limine*. Since it was not then clear when the tenure of **Alleyne J (Ag)** would recommence, I indicated to all parties that I would consider assigning the matter to another judge for disposal.

[14] **Rule 2.4 (4) (a)** of the **Supreme Court (Civil Procedure) Rules (CPR)** empowers the Chief Justice “[w]here . . . a trial has been commenced but not completed by a judge . . . [to] nominate some other judge to retry or complete the trial of the claim *or to hear any application* or to exercise the jurisdiction.” (Emphasis added). The arguments of counsel before me were largely a *reprise* of those made before **Alleyne J (Ag)**, except for additional submissions based on **s. 13 of the Barbados Constitution**. In light of the protracted nature of these arguments, the fact that **Alleyne J (Ag)** has only very recently become available, and the fact that I have heard all the arguments and read all the submissions, I nominate myself rather than “some other [third] judge”, in the interest of judicial economy. I now proceed to dispose of these bail applications.

The Bail Submissions

[15] At the heart of the matter before me is an application for bail, post-committal and prior to surrender for extradition. The first submission relates to s. 17 (2) of the **Extradition Act** which provides:

Upon committal of a fugitive to prison pursuant to subsection (1), he *shall* remain there until he is surrendered to the . . . foreign state that is seeking his surrender, or until he is discharged according to law.
(Emphasis added).

[16] Mr. Thorne QC, counsel for applicants Gaskin and Hawkesworth, contends that s. 17(2) of the Act was not meant to usurp or oust the jurisdiction of the High Court to release a fugitive on bail nor was it meant to revoke the right of a person at common law to apply to the High Court for the purpose of securing their freedom. Mr. Gollop, for applicant Scantlebury, submitted that s. 17 (2) did not in any way seek to invoke immunity from

adjudication. In the absence of an ouster clause to that effect, the court had jurisdiction to address the application before it, he contends.

- [17] Mr. Watts for the Crown submitted that s. 17 (2) had to be viewed exclusively in the context of the Extradition Act and the concomitant powers of the magistrate under whose jurisdiction committal to prison and surrender to the requesting state fell, referring generally to Dana Seetahal SC's *Commonwealth Caribbean Criminal Practice and Procedure*, Chapter 19 (3rd ed.). He further contended that the issue of bail post-committal of a fugitive had to be governed by the relevant legislation and that the situation in Barbados was clear and unequivocal: a fugitive had to remain in custody until he was surrendered. He concluded that s. 17 (2), therefore, excluded the right to apply to the courts for bail.

Discussion

- [18] The right to bail is a common law right, now cemented into our law by virtue of the Bill of Rights, more particularly **s. 13 of the Constitution**. The Court therefore, independent of statute, has always had inherent jurisdiction to admit a party to bail: *The Queen v Spilsbury* [1898] 2 QB 615. Any judge in the exercise of discretion, provided that such discretion is not limited by statute, has authority to admit a person to bail in all cases.
- [19] The focus in this matter is specifically whether or not the legislature intended to curtail or circumscribe this well-known power. There is no question as to whether a fugitive can be admitted to bail by a magistrate prior to committal since s. 14(2) of the Extradition Act provides:

The fugitive need not be detained in custody if he establishes to the satisfaction of a magistrate that, having regard (in addition to any other relevant factors) to the length of time the fugitive resided in Barbados,

- (a) his detention is not necessary to ensure his attendance whenever it is required for the purposes of this Act, and
- (b) his detention is not necessary in the public interest or for the protection or safety of the public, having regard to all circumstances, including any substantial likelihood that he might, if released from custody commit a criminal offence or an interference with the administration of justice.

[20] The magistrate, however, lacks the power under the provisions of the Extradition Act to admit the fugitive to bail after committal for surrender. The Act makes no provision for release after committal, other than by discharge under s. 18, and s. 17 (2) ostensibly provides for mandatory post-committal detention.

[21] However, the **Bail Act Cap 122A** specifically provides, by section 3 (b), that it applies “to an extraditable offence under the Extradition Act”, and the Bail Act draws no distinction between pre- and post-committal bail applications in extradition cases. Further, the grant of bail is a right that an accused person is entitled to by virtue of section 4 (1) of the Act which provides, in peremptory terms, that “[s]ubject to this Act, a defendant *shall be* entitled to bail” (Emphasis added).

[22] Hence, the real issue before the Court is whether these two apparently conflicting provisions of the Extradition Act and the Bail Act can be reconciled or, if not, whether there is an implied repeal of the Extradition Act by the Bail Act. In *Ibrahim v The State*

TT 2007 HC 148, the Court considered a bail application of one of the alleged conspirators involved in the notorious plot to blow up the John F. Kennedy International Airport. Moosai J, citing the Privy Council decision *in Hurnam v. The State* [2005] U.K.P.C. 49, referred at [4] of his judgment to “the competing considerations which are likely to emerge in bail applications.” In *Hurnam v. The State*, Lord Bingham of Cornhill observed at para 1:

Bail decisions very often raise questions of importance both to the individual suspect or defendant and to the community as a whole. The interest of the individual is of course to remain at liberty, unless or until he is convicted of a crime sufficiently serious to justify depriving him of his liberty. Any loss of liberty before that time, particularly if he is acquitted or never tried, will inevitably prejudice him and, in many cases, his livelihood and his family. But the community has a countervailing interest, in seeking to ensure that the course of justice is not thwarted by the flight of the suspect or defendant or perverted by his interferences with witnesses or evidence, and that he does not take advantage of the inevitable delay before trial to commit further offences.

[23] Much was made during argument before **Alleyne J (Ag)** and before me, based on *Bennion on Statutory Interpretation*, pp. 304-305, *et seq.* of the doctrine of implied repeal of an earlier statute (i.e., the Extradition Act) by a later one (i.e., the Bail Act) on the strength of the maxim *leges posteriores priores contrarias abrogant* (later laws abrogate earlier contrary laws). The Crown responded by referring to another, opposing, maxim of statutory construction, namely *generalia specialibus non derogant*, contending that the later general provisions in the Bail Act cannot derogate from the special provisions in the Extradition Act.

[24] I shall not venture into any expansive discussion of these varying positions, preferring to content myself with a repetition of the simple axiom that the right to bail is, and has for

some time now, been fundamental in Barbadian jurisprudence and that, if the legislature had meant to limit or abrogate this right in extradition or other cases, its intention to do so would have been carried out by express enactment rather than left to implication from a Latin maxim found in The Institutes of Sir Edward Coke (see, 1 Inst. 25b,cited in **Bennion**, *op cit.*, at 304, fn. 5).

[25] Clear and binding authority for this proposition can be found in **Knowles (Austin) and Others v Superintendent of Fox Hill Prison and Others**, (2005) 66 WIR 1, 2005 UKPC 17. Lord Slynn of Hadley, delivering the advice of the Judicial Committee of the Privy Council (“JCPC”), on appeal from The Bahamas, opined at [22] that it was “clear that the Supreme Court had an inherent jurisdiction to grant bail to a person detained which was additional to the specific power to grant bail given to the magistrates up to the time of committal.” His Lordship cited with approval the language of Lord Russell of Killowen CJ in **The Queen v Spilsbury**, (*supra*, at 622), that “[t]his inherent power to admit to bail is historical, and has long been exercised by the Court, and if the Legislature had meant to curtail or circumscribe this well-known power, their intention would have been carried out by express enactment.” While Lord Slynn noted the differences between the UK Fugitive Offenders Act and the Extradition Act of the Bahamas, he stated that “in the view of the Board on the basis of **Spilsbury**, the Supreme Court had an inherent jurisdiction to grant bail under the Bahamas Extradition Act, the predecessor to which was based on the English Extradition Act 1870” (*id*, at para. 24).

[26] Before proceeding to a fuller discussion of the **Knowles** decision and its implications, it must be noted that, despite Barbados’ acceptance of the CCJ as our highest Court of

Appeal, there are some instances in which our courts are still bound by JCPC decisions. The *Knowles* decision represents such an instance. The advice of the JCPC in *Knowles* was delivered on 23 March 2005. Although both Acts establishing the jurisdiction of the CCJ, namely the Constitution (Amendment) Act and the Caribbean Court of Justice Act, received the Governor-General's assent on 24 April 2003, they did not come into effect until almost two years later, on 8 April 2005, by proclamation in Statutory Instruments Nos. 44 and 45 of 2005. See, *Barbados Rediffusion Service Ltd v Mirchandani et al*, [2005] CCJ 1 (AJ) at [12] *et seq.*, per **de la Bastide P**, as he then was. Hence, on 23 March 2005, exactly 14 days prior to the effective date of the CCJ legislation, the JCPC was still our highest appellate court and *Knowles* is binding on our courts. See, *Joseph and Boyce v Att-Gen*, (2005) 65 WIR 123, at [34] per **Peter Williams JA**, as he then was.

[27] In *Att-Gen et al v Joseph and Boyce*, [2006] CCJ 3 (AJ); (2006) 69 WIR 104, **de la Bastide P** and **Saunders J** opined as follows:

The main purpose of establishing this court is to promote the development of a Caribbean jurisprudence, a goal which Caribbean courts are best equipped to pursue. In the promotion of such a jurisprudence, we shall naturally consider very carefully and respectfully the opinions of the final courts of other Commonwealth countries and, particularly, the judgments of the JCPC which determine the law for those Caribbean states that accept the Judicial Committee as their final appellate court. In this connection we accept that decisions made by the JCPC while it was still the final Court of Appeal for Barbados, in appeals from other Caribbean countries, were binding in Barbados in the absence of any material difference between the written law of the respective countries from which the appeals came and the written law of Barbados. Furthermore, they continue to be binding in Barbados, notwithstanding the replacement of the JCPC, until and unless they are overruled by this court.

[28] The jurisdiction to grant bail in Barbados has not been left merely to the Court's inherent jurisdiction, however, but is now on a firm statutory footing undergirded by the Constitution. The legislature has specifically provided, in s. 3 (b) of the Bail Act, that extraditable offences should be subject to bail and in my judgment it must follow, as the applicants rightly contend, that the ostensibly mandatory language in section 17 (2) of the Extradition Act cannot be construed as entirely excluding a right to apply to the courts for bail in circumstances where a fugitive has been committed for surrender under an extradition warrant. I turn to examine whether this case is an appropriate one for the grant of bail and the extent to which the apparently conflicting statutory provisions can be reconciled.

The Grant or Refusal of Bail

[29] The applicants, while applying for *habeas corpus*, are in reality seeking release on bail. **S. 5 (1) of the Bail Act** sets out the conditions under which bail may be refused by a court, including where the court is satisfied that the defendant, if released on bail, would “fail to surrender to custody”, “commit an offence” or “interfere with witnesses.” Among the “relevant factor(s)” to which “the court shall have regard” under section 5 (2) are “the nature and seriousness of the offence or default”, “the character, antecedents, associations, and community ties of the defendant” and “the defendant’s record as respects the fulfillment of his obligations under previous grants of bail.”

[30] How does this all apply to the field of extradition? As **Sir David Simmons CJ** observed in the prior sojourn of these applicants in the Court of Appeal, “[a]n extradition treaty is a contract between two sovereign states and must be construed as such a contract” (*see*,

Scantlebury, Gaskin and Hawkesworth v Attorney-General and Clyde Nicholls, Appeals Nos. 18, 20 and 21 of 2007, at [22]). Hence, “although (extradition) proceedings are grounded in the criminal law, they are very much *sui generis*” (*id.* at [1]). His Lordship cited with approval the language of Lord Bridge of Harwich in *R v Governor of Ashford Remand Centre ex parte Postlethwaite*, [1988] AC 924, 947, that “the reciprocal rights and obligations which the high contracting parties confer and accept are intended to serve the purpose of bringing to justice those who are guilty of grave crimes committed in either of the contracting states. To apply to extradition treaties the strict canons appropriate to the construction of domestic legislation would often tend to defeat rather than serve this purpose.” For this reason, it does not follow that the principles which apply to bail in criminal cases will automatically apply to extradition cases which derive from treaty provisions between Barbados and other countries and which, in turn, implicate this country’s standing in the international arena.

[31] Since our Bail Act, even though expressly encompassing extraditable offences in s. 3 (1), contains no separate conditions for the grant of bail save those contained in s. 5 of the Act, it is helpful to examine the case-law from the Caribbean, the Commonwealth and elsewhere to extract some guidance as to the factors to be considered, and the conditions to be applied, in the *sui generis* circumstances of a post-committal bail application by a fugitive in an extradition case.

[32] In *R v Phillips* [1922] All E.R. 275, a decision of the English Divisional Court, Lord Hewart CJ entered the caveat that, when dealing with the grant of bail in extradition cases, “there [were] special grounds for care and caution”. His Lordship continued:

[T]his country has entered into an agreement with a foreign country under the comity of nations and has deliberately taken upon itself the obligation, upon a charge properly made, to hand over to that foreign country a person in this country who is charged with the commission of an offence in that country. That is an obligation which this country has entered into, and the scrupulousness of conduct with which that obligation is regarded and performed is not measured by any particular tenderness shown to the foreign country, but is measured by the duty which, having entered into an obligation of that kind, we conceive to be owing to ourselves. It becomes a point of honor when a treaty of this kind has been made that special care should be taken to fulfill it. That does not mean, . . . that in no case under the Extradition Acts is the question of bail to be considered. What it does mean is that where a case is under the Extradition Acts, there is, *in addition to the normal considerations which apply to bail, an added ingredient due to the fact that a treaty has been made with a foreign country.* (Emphasis added).

Concurring with Lord Hewart CJ, Darling J referred to “the peculiar punctilio which this country observes when dealing with applications which involve the consideration of a treaty made with a foreign country that we will surrender in certain circumstances British subjects to be tried abroad” (at 277-278).

[33] Similar reservations were expressed in *Spilsbury, supra*, by Lord Russell of Killowen CJ. Immediately after stating the existence of the inherent power in the Supreme Court to grant bail, Lord Russell asked the question “[b]ut how ought the power to be exercised?” His answer was clear and unequivocal. “Considering the class of cases which are likely to arise under the Fugitive Offenders Act, it is obvious that *the power ought to be exercised with extreme care and caution*” (*ibid*; emphasis supplied). Hence, in *Spilsbury*, where a metropolitan police magistrate had issued an order committing the defendant to prison to await his return to Tangier for trial, the Divisional Court determined “that the

application for a *habeas corpus* fails, that in our opinion the power to admit to bail exists, but its exercise is discretionary, and we think that in this case it ought not to be exercised” ([1898] 2 QB 615, 624).

[34] The issue arose in *Knowles (supra)*. There, each of the appellants was charged in the USA with various offences relating to the possession, importation and supplying of dangerous drugs ‘in the Bahamas and abroad.’ An application was made for their extradition from the Bahamas to the USA and orders were made by the magistrate for their committal to prison to await surrender. With leave of Thompson J, *habeas corpus* proceedings were initiated seeking the appellants’ release from prison. Thompson J, in exercising her discretion to grant bail, noted that the offences charged were serious for which severe sentences of imprisonment were likely upon conviction but her Ladyship also referred to the fact that the appellants had strong connections with the Bahamas; were resident in the Bahamas and had no connections to any other country; had worked there and, with one exception, had children there. One of the accused was a member of the Bahamian Police Force while two others had interests in family businesses.

[35] Lord Slynn of Hadley noted the respondents’ criticisms that “[m]ere residence and having a family in the country do not necessarily lead to the conclusion that there will be no attempt to flee the jurisdiction, particularly in a case where it is possible that substantial sums of money may be available from drug smuggling” and “it is not accepted that the only way out of the Bahamas would be to the USA to which the appellants could not safely go without risk of being arrested there.” His Lordship observed that “[t]he Board considers that there is much force in these criticisms and the judge did not appear to give

sufficient weight either to the nature of the crimes alleged or to the risk of, and the advantage of, their fleeing. It is important that in this particular type of case these considerations should be taken fully into account and it should only be *in exceptional cases* that bail as a matter of discretion is granted” (emphasis added).

[36] This statement of the law by the JCPC is, in my opinion, binding on the courts of Barbados requiring the conclusion that where an order has been made by a magistrate for committal of a fugitive to prison in an extradition case, then only in exceptional cases should bail be granted as a matter of discretion pending surrender to the requesting state.

[37] An instructive discussion on what constitutes exceptional cases or special circumstances occurred in the *United Mexican States v Cabal* 209 CLR 165, where the High Court of Australia had to consider bail applications in which the applicants had been committed to prison by a magistrate for surrender to Mexico. There, Mexico had alleged that the applicants had been guilty of offences involving fraud, tax evasion and money laundering. After a series of dismissals in the lower courts, a single judge in the High Court (Kirby J) had granted bail to one of the applicants. On appeal, the Full Court of the High Court of Australia (Gleeson CJ, McHugh and Gummow JJ) reversed.

[38] Construing the term “special circumstances” in s. 21 (6)(f)(iv) of the Extradition Act of Australia, the Court stated at [61]– [62]:

[B]ail in extradition cases should only be granted when two conditions are fulfilled. First, the circumstances of the individual case are special in the sense that they are different from the circumstances that persons facing extradition would ordinarily endure when regard is had to the nature and extent of the extradition charges. This means that the circumstances relied on must be different in kind from the disadvantages that all extradition defendants have to endure. To constitute special circumstances,

the matters relied on need to be extraordinary and not factors applicable to all defendants facing extradition. Secondly, there must be no real risk of flight. Absence of a real risk of flight is ordinarily a necessary but not a sufficient condition of bail. When there is a real risk of flight, ordinarily bail should be refused. Further, the risk of flight should be considered independently of the effect of the proposed bail conditions. In this area of law, the history and character of the defendant and the potential punishment facing the defendant are likely to be surer guides to the risk of flight than bail conditions - even rigorous conditions. A person, fearing punishment and inclined to flee, is unlikely to be diverted from that course by the prospect that his or her sureties may forfeit their securities or by stringent reporting conditions. Even if the defendant has to report twice daily to the police, he or she will have a period of twelve to fourteen hours in which to leave Australia.

Even when special circumstances are proved and there is no real risk of flight, it does not follow that bail must be granted. For example, the defendant may pose a risk to the community or a particular individual. In addition, bail must become harder to obtain as the case proceeds through the judicial system. Once the magistrate has found that the defendant is eligible for surrender, public interest factors similar to those that require a convicted defendant to be imprisoned also require that a defendant in extradition proceedings be kept in custody. . .[T]he defendant ordinarily *will need to show* that the application for review has strong prospects of success as well as special circumstances and an absence of risk of flight.
(Emphasis added).

- [39] In *Wright v Henkel* (1903) 190 US 40, 62, regarded as “the provenance of the ‘special circumstances’ requirement” (*United Mexican States v Cabal, supra*, at [47]), the United States Supreme Court, noting that there was, at the time, no statute in the United States permitting bail in extradition cases, stated that “the demanding government, when it has done all that the treaty and the law require it to do, is entitled to the delivery of the accused on the issue of the warrant, and the other government is under obligation to make

the surrender, an obligation which it might be impossible to fulfill if release on bail were permitted.” The Court added that, the forfeiture of the security for bail on the flight of the accused “would hardly meet international demand; and the regaining of custody of the accused would be surrounded with serious embarrassment.”

[40] One such example of “serious embarrassment” resulting from a too liberal construction of the “special circumstances” requirement was *Schoenmakers v Director of Public Prosecutions* (1991) 30 FCR 70, a decision of the Federal Court of Australia and an object lesson for any court considering a post-committal bail application in an extradition case. There, the defendant had been committed for surrender to the USA on a number of charges including conspiracy to manufacture drugs and conducting a continuing criminal enterprise. The Federal Court found that a delay of 11 months and the fact that the defendant had not fled from the USA to avoid justice constituted “special circumstances” which justified the grant of bail. However, subsequent events were to undermine the faith reposed in the defendant by the Federal Court. After being granted bail on 21 June 1991, Schoenmakers “departed from Australia for Thailand on 30 July 1991. He was able to do so despite conditions of his bail requiring him to surrender his passport to the Australian Federal Police, remain at all times within the metropolitan area of Perth, report twice daily to the Australian Federal Police and enter into a recognisance with a surety to be approved in the sum of \$100,000.” (*Cabal* at [67]). His whereabouts were unknown up to the date of the *Cabal* decision.

[41] Commenting disapprovingly on both the reasoning and result in *Schoenmakers*, the High Court of Australia in *Cabal* observed (at [65]) that “it is a mistake to think that a person is

unlikely to abscond simply because that person did not leave the extraditing country ‘to avoid justice.’” The High Court continued:

In these days of transnational crime, offences are frequently committed against the laws of a country by persons who do not set foot in that country. This is particularly so with respect to the drug importation cases – the type of case involved in Schoenmakers. Faced with the choice of being taken to the extraditing country to answer serious charges in that country or fleeing Australia, the defendant may prefer the latter choice. And where the defendant has substantial sums of money available to him, flight may easily prove the more inviting and easier alternative.

As to the delay, the High Court noted that “[w]hether or not a delay of one year or more constitutes special circumstances depends on the facts of the case.” The Court added (at para. 66):

No doubt it is a hardship for any innocent person to be held in custody for a lengthy period. But detention for a lengthy period – particularly when the charges are numerous and complex and the defendant exercises his or her right to appeal against the order of committal – is not so special that it constitutes special circumstances. In any contested extradition proceedings, delay is inevitable. Delay will constitute special circumstances only when it is outside what would be regarded as the normal range for offences of the type and complexity the subject of the proceedings.

[42] The Federal Court of Australia had the opportunity to re-examine such an application for bail in *O’Donoghue v Ireland and Calder*, (2009) FCA 394. On 3 April 2009, a magistrate determined that the defendant was eligible for surrender for extradition to Ireland in relation to offences of obtaining property by false pretences and fraudulent conversion, and thereupon committed him to custody. The defendant’s affidavit in support of his application for bail averred that his family was entirely dependent upon his income; if committed, he would be unable to pay the rent on their home; his wife and two

of their children had surrendered their passports and the other two children did not have passports; he had been on bail since December 2004 and had complied with all the bail conditions; while living in Ireland in 2000, he had been interviewed by the Irish police in relation to the offences; that he left Ireland in 2002 and the charges had only been laid two years later in 2004; and that he had suffered from health issues including high blood pressure, loss of consciousness and blackouts which worsened with stress and anxiety.

[43] Notwithstanding these averments, a chastened Federal Court (Barker J), citing the *Cabal* and *Schoenmakers* decisions, “[did] not consider that it can be said that the types of matters that have been highlighted by counsel on behalf of the applicant constitute special circumstances as contemplated by *Cabal*. They are not special, in the sense that they are factors that one might say are generally applicable to all persons in the applicant’s position facing extradition” (see [8]). Barker J noted that “[i]t is important to observe though, as did their Honours in *Cabal*, that when an applicant proceeds to this advanced stage of extradition proceedings. . . , the stakes are raised and it is also important to show that the review application has strong prospects of success.” The application was dismissed by the Federal Court.

[44] The Canadian case of *United States v Edwards* 2010 BCCA 149 is equally instructive. The accused faced a number of charges arising out of a fraudulent telemarketing operation which targeted elderly United States residents. The matter was delayed to allow the trial court to submit reasons for its decision to issue an order extraditing the accused and also to allow counsel to make written submissions. The accused made an application for bail pending the hearing of an appeal. The Court held that the accused had to show

that he had a strong chance of success on appeal, that is, that his appeal was not frivolous; that his detention was not in the public interest and that he would surrender himself into custody as required. It was held that the application failed.

[45] In the recent unreported Trinidad and Tobago case of *Steve Ferguson, Ishwar Galbarabnsingh v Attorney General of Trinidad and Tobago* delivered on 22 December 2010 by Mon Désir J, the court found no new considerations or change of circumstances relevant to the question of bail. There, the applicants, both businessmen and citizens of Trinidad and Tobago were wanted in the United States of America where they both faced a total of 95 counts of conspiracy to defraud, fraud and money laundering charges arising out of the Piarco International Airport development. The applicants made a renewed application for bail and the substance of their submissions was that since their last remand in custody: (1) six (6) months had passed since their detention, (2) leave was granted by the Court of Appeal to judicially review the A-G's decision to make the extradition order and (3) the State gave oral notice of its intention to appeal the recent Court of Appeal decision and that these amounted to "changes in circumstances" sufficient to invoke the Court with jurisdiction to entertain a renewal of their bail applications. Mon Désir J was of the view that change of circumstances or new considerations must of necessity have some relationship to or bearing or impact on the issue of bail and upon the applicants' entitlement to it; they must be material and relevant. At [22] the learned judge went on to say, "it is not therefore, every new event, new circumstance or new consideration that would trigger this Court's jurisdiction to revisit and treat again with the question of an applicant's entitlement to bail." It should be noted

however, that in a later decision, another Justice of the High Court of Trinidad and Tobago (Boodoosingh J) granted the applications of Messrs Ferguson and Galbaransingh to be discharged on the basis that to return them would be unjust and oppressive.

The Extradition Act and the Bail Act Reconciled

[46] In my judgment, the conflict between s. 17(2) of the Extradition Act and s. 3 of the Bail Act is more apparent than real, and the sections can be reconciled. When the two provisions are read together with the principles emanating from the authorities cited above, they should be construed to mean that, after committal for surrender, a fugitive shall be held in custody and not released on bail unless the court hearing the application is satisfied, upon clear and convincing evidence, of the following: first, that it has no basis to refuse bail within the meaning of the requirements set forth in s. 5 (1) of the Bail Act, after a careful and cautious consideration of the factors set forth in s. 5 (2) of the Act; and second, that, in addition to satisfying the conditions in the Bail Act, the fugitive has shown that exceptional or special circumstances exist which justify release on bail. It is self-evident that here, as elsewhere in the law, whether or not exceptional or special circumstances exist must depend on the facts adduced in each individual case and the determination in one case can provide, at best, only persuasive guidance in another. However, under this test, bail will be granted only in exceptional or special cases.

[47] One other issue must perforce arise from the reconciliation proposed above and it relates to the incidence of the burden of proof. A cursory reading of the test in the above paragraph, without more, may lead to the conclusion that the burden of proof in such cases has now shifted to the fugitive. It has not. As made clear in [30] *supra*, bail is a

right which is predicated on the fundamental right to liberty as set forth in the Barbados Constitution. The burden therefore lies on those who seek to deprive the fugitive of his freedom, and the State or the extraditing country must show, initially, that no basis exists within s. 5 of the Bail Act justifying the post-committal release of the fugitive. In *R v Spilsbury*, *supra*, at 625, Kennedy J, concurring with Lord Russell of Killowen CJ, observed that “I entirely concur in the view that the burden lies upon the party who asserts that the ancient and important jurisdiction of this Court to admit to bail is taken away by statute.” However, the “special or exceptional circumstances” constitute peculiar knowledge possessed by the fugitive and it is, accordingly, his or her evidentiary burden to set out clearly the basis upon which the court ought seriously to consider a post-committal release on bail, after it has been established that no basis exists under s. 5 of the Bail Act for a refusal of bail.

[48] When the above principles are applied to the instant applicants, it is clear that the applications must be dismissed. First, there is enough of a basis under s. 5 of the Bail Act for a refusal of the grant of bail. The applicants in this case are in circumstances little different from those of the *Schoenmakers* case above in that they are charged in the USA with multiple offences involving the importation of drugs. I cannot ignore the warnings of the JCPC in *Knowles* and the High Court of Australia in *Cabal* that, with the substantial sums of money which may be available to the applicants, the temptation to abscond, like that to which *Schoenmakers* yielded, may prove a more inviting and easier alternative to surrender.

[49] Although the applicants rightly contend that they had been on bail since the commencement of extradition proceedings, it is my considered view that, since their committal for surrender, the incentive to flee has increased. This Court will not commit this country to the risk of embarrassment of the kind experienced by the Commonwealth of Australia after *Schoenmakers*. I also cannot ignore the affidavit allegation that applicant Gaskin had already been convicted in the United States of a drug offence, had served time in prison and had been deported back to Barbados. That same affidavit evidence suggests that both he and Scantlebury were attempting to procure false identification papers so as to re-enter the USA to carry out the alleged criminal enterprise. The idea that false identification papers could be obtained by the applicants and used to abscond to another jurisdiction, only serves to heighten this Court's suspicions, and strengthen its deep resolve, against considering their release on bail.

[50] Further, nothing in this record shows exceptional or special circumstances justifying post-committal release on bail. *A contra*, the facts militate against such release. The applicants in this matter were free on bail for seven years from May 2004 until June 2011, 18 months ago, when they were committed for surrender. They have been detained in similar circumstances to parties who are subject to remand in Her Majesty's Prison at Dodds. Moreover, they have been detained in circumstances under which any person subject to extradition in Barbados could reasonably expect to face. There is no evidence that the applicants either (1) faced any peculiar disadvantage; (2) have been denied any of their legal rights including the right to counsel and access to the courts or (3) have in any way

been treated differently from any other person subject to detention and indeed, they certainly have not been treated differently because they are subject to surrender.

[51] Although they rightly contend that there has been much delay in general in resolving this case, they must doubtless accept, as was observed in *United States of Mexico v Cabal, supra*, that some of the delay was occasioned by their exercise of their rights including an application in the High Court for judicial review which was appealed to this Court and to the CCJ which dismissed the appeal on procedural grounds. For all the reasons stated in *Spilsbury, Knowles, Cabal* and *O'Donoghue*, and experienced in *Schoenmakers, supra*, there is no basis alleged by the applicants which justifies the grant of bail.

[52] This should suffice to dispose of the matter but, in the interest of completeness, I turn now to consider the additional grounds advanced by the applicants as justifying their discharge. In their June 2011 applications, the applicants alleged, *inter alia*, that: (a) their attorney-at-law was refused permission to address the court; (b) the Magistrate failed to allow or accept further witness evidence; (c) a witness failed to sign the Magistrate's notes of his testimony and (d) the appointment of Ms. Deborah Holder to the post of Chief Magistrate (Ag) rendered the proceedings before Magistrate Nicholls unlawful and (e) their constitutional rights had been breached.

[53] This Court can find little reason to do other than to adopt the responsive, and cogent, submissions of Ms. Beverly Gadsby QC, Deputy Solicitor-General, as supported by the affidavit of His Worship Clyde Nicholls, former Chief Magistrate, sworn to on 16 September 2011. The record indicates that the attorney in question refused to address the court when called upon by the Magistrate to do so. Moreover, it was within the discretion

of the Magistrate to refuse to accept the oral evidence from an alleged co-defendant, Raffel Douglas, who testified that the entire indictment in the District of Columbia had been dismissed with the approval of his attorney and the prosecutor. There was not a single piece of paper or documentary proof, authenticated or otherwise, produced to substantiate this allegation. And even if it was absolutely true, it is axiomatic that the dismissal of a charge against one co-accused does not result in or mandate the dismissal of a charge against another. The applicants argue that a witness failed to sign the Magistrate's notes of his testimony but, contrary to their contention, there is no requirement for a witness to sign the notes of testimony as recorded in the Magistrate book. Finally, Magistrate Nicholls remained the substantive holder of the post of Chief Magistrate until his retirement and no decision on the substantive matter made on the days when Magistrate Holder was acting required the vacatur of the entire proceeding. Consequently, there was no breach of any constitutional rights in the circumstances.

[54] What is clear in the submissions of the applicants is a misapprehension as to the role of the High Court in such cases. As noted by Seetahal in *Commonwealth Caribbean Criminal Practice and Procedure*, *supra*, at 362, "a High Court hearing an application for *habeas corpus* cannot retry or rehear the case. The High Court is not an appeal court." In *Armah v Government of Ghana*, [1966] AC 192, 230, [1966] 3 All ER 177, 184, Lord Reid stated that "[t]he court does not hear the case by way of appeal so as to reverse the magistrate's decision on fact or alter a discretion properly exercised." The sole issue, as stated by Lord Reid in *R v Governor of Brixton Prison, Ex parte Schtraks*, [1964] AC 556, 579, is "whether on the material before the magistrate a reasonable

magistrate would have been entitled to commit the accused.” Since the learned Magistrate’s rulings, and his decision to commit were, in my judgment, unexceptionable, I find no basis to disturb the order of committal.

[55] If I may add another, closing, observation, it is my view that this judgment ought to signal the end or, in the words of that celebrated wartime Prime Minister of Great Britain, Sir Winston Churchill, “the beginning of the end” and not “the end of the beginning” of the litigation saga of this case and these applicants. The Extradition Act only affords an applicant one of two options after committal by a magistrate, namely, an application for leave to appeal or apply for a writ of *habeas corpus*. S. 19 (a) imposes on the magistrate the obligation (“shall”) to “inform the fugitive on so committing him that he will not be surrendered until after the expiration of *fifteen days* and that, within that time, he may under law apply for leave to appeal *or* apply for a writ of *habeas corpus*.” Emphasis added.

[56] The applicants have opted to seek *habeas corpus* and those applications have been granted and, in the case of applicant Hawkesworth, granted twice to the limited extent that the applicants have been produced for hearing in this Court. Despite the robust statement by Hawkesworth, in para. 9 of his Affidavit in Support of the second *Habeas Corpus* application that he “intend(s) to continue to contest the said extradition proceedings to the full extent of the recourse that is available to me”, it is my considered view that the recourse has run its course. If, as he and his co-applicants assert, they are innocent of all charges, that determination ought to be made in the US District Court in the District of Columbia, and not by serial applications in the Barbadian Courts which

seek, not a determination of guilt or innocence, but a hope of discharge by dint of attrition. This further stretches already stretched judicial resources when the final chapter in this saga should be written not here, but elsewhere. This is also true “bearing in mind that it rests largely with the [applicants themselves] how long [they] are detained before [they] are sent abroad, and that, when [they] are sent abroad, [they] can apply there to be admitted to bail” (*per* Lord Russell of Killowen CJ in *Spilsbury*, *supra*, at 623).

DISPOSAL

[57] If I may, even here, respectfully borrow, again, the language from the judgment of Lord Russell of Killowen CJ in the Divisional Court in *Spilsbury*, *supra*, at 624, applying it *mutatis mutandis* to the instant proceedings, “[t]he result is that the application(s) for habeas corpus fail, that in [my] opinion the power to admit to bail exists, but its exercise is discretionary, and [I] think that in this case it ought not to be exercised.” The Order of Committal of the former Chief Magistrate stands, and the applicants are directed to be surrendered to the United States authorities. Finally, the additional grounds seeking a reversal of the committal order of the former Chief Magistrate lack merit and are dismissed.

[58] There shall be no order as to costs.

Chief Justice