Privy Council Appeals Nos. 7 and 25 of 1988

The Government of the United States of America *Appellant*

v.

Frederick Nigel Bowe *Respondent*

FROM

THE COURT OF APPEAL OF THE COMMONWEALTH OF THE BAHAMAS

REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL OF THE 27TH JULY 1989, DELIVERED THE 4TH AUGUST 1989

Present at the hearing:-

LORD KEITH OF KINKEL
LORD BRIGHTMAN
LORD TEMPLEMAN
LORD GRIFFITHS
LORD LOWRY

*[Delivered by **Lord Lowry**]*

On Thursday 27th July their Lordships reported that they would humbly recommend to Her Majesty that the U.S. Government's appeals in the extradition appeal, case No. 332/1987, and in the costs appeal, case No. 738/1986 ought to be allowed and the order of the Supreme Court dated 31st August 1987, including the order for costs, restored and that the respondent's appeal in case No. 626/1987 (in which special leave to appeal was granted during the hearing) ought to be dismissed. In accordance with their Lordships' advice on the question of the Court of Appeal's jurisdiction to award costs, their Lordships recommend that no costs ought to be payable in that court in any of the appeals. The respondent was however directed to pay the U.S. Government's costs of all the appeals before the Board. There now follow their Lordships' reasons for their report.

Before the Board are two appeals by the Government of the United States ("the U.S. Government") from orders of the Court of Appeal of the Commonwealth of The Bahamas in proceedings brought by the U.S. Government, which has since 1985 been trying to obtain the extradition of Frederick Nigel Bowe ("the fugitive") for alleged drug offences.

[32]

The only question in one appeal ("the costs appeal") is whether the Court of Appeal had jurisdiction by its order dated 24th February 1987 to order the U.S. Government to pay the costs of the fugitive's successful appeal (No. 24 of 1986) against an order of the Supreme Court, in case No. 738/1986 on the ground that the appeal, as the U.S. Government contends, was in a criminal cause or matter. The main question in the other appeal ("the extradition appeal") is whether conspiracy to import dangerous drugs is a crime contemplated by paragraph 24 of Article 3 of the Extradition Treaty dated 22nd December 1931 ("the Treaty") made between the United Kingdom and the United States of America, and thus an extraditable offence. It will be convenient to deal first with the extradition appeal since, as well as the main question, it is concerned with the point which falls for decision in the costs appeal.

On 2nd October 1985 the Embassy of the U.S. Government presented a request to the Ministry of Foreign Affairs of The Bahamas for the extradition of the fugitive under the Treaty "continued in force between the United States of America and the Commonwealth of The Bahamas by an exchange of notes at Nassau and Washington D.C. on March 7, June 19 and August 17, 1978", stating that the fugitive was the subject of an indictment returned on 13th September 1985 in the United States District Court for the Southern District of Florida (Miami) charging him with -

(1) conspiracy to import cocaine and distribute it in Colombia and The Bahamas with the intent that it subsequently be distributed in the United States in violation of Title 21 United States Code (U.S.C.) 963;

(2) distribution of cocaine in Colombia and The Bahamas with the intent that it subsequently be distributed in the United States in violation of U.S.C. 959 (seven counts);

(3) operating a continuing criminal enterprise (drug trafficking) in violation of U.S.C. 848;

(4) travelling or causing travel in interstate commerce in furtherance of unlawful enterprise in violation of U.S.C. 952 (five counts);

and that a warrant of arrest ("the American warrant") was issued the same day. (The warrant alleged that the fugitive "did knowingly and intentionally conspire to import cocaine and to distribute cocaine in violation of Title 21, U.S.C., section 952(a) and Title 21, U.S.C., Section 959"). The evidence to be adduced in support of the U.S. Government's request was served on the Bahamian Government at the same time.

The affidavit dated 29th June 1987 of Claire Hepburn describes in detail all the proceedings which arose from the request and which are described by her under three headings.

1. On 4th October 1985 the fugitive was arrested on a magistrate's warrant of the same date issued under section 8 of the Extradition Act 1870 ("the Act") which recited a purported order of the Minister of Foreign Affairs under section 7 of the Act and stated that the fugitive was "accused of the offence of conspiracy to import cocaine and distribute it in Colombia and The Bahamas with intent that it subsequently be distributed in the United States within the jurisdiction of the United States District Court for the Southern District of Florida (Miami) one of the United States of America".

On 28th October 1985 the Supreme Court refused the fugitive leave to move for orders of certiorari and prohibition to quash the warrant and to quash and prohibit the extradition proceedings commenced on foot of it, the fugitive contending that -

(a) the section 7 order, having been signed by the Minister and not the Governor-General, was invalid;

(b) the offence of conspiracy to import cocaine was neither an extradition crime nor an extraditable offence ("the drugs conspiracy point");

(c) arrangements for extradition purporting to be made between The Bahamas and the United States did not have the force of law;

(d) the offence before the magistrate did not allege an offence against the laws of The Bahamas; and

(e) the offences, being alleged to have been committed within the jurisdiction of the United States District Court, were not alleged to have been committed within the jurisdiction of the United States of America.

On 25th November 1985, at a hearing pursuant to section 10 of the Act, the magistrate decided that the conspiracy alleged against the fugitive did not constitute an extradition crime and discharged him. The U.S. Government moved to quash the magistrate's ruling and the fugitive at the same time sought to quash the magistrate's warrant of 4th October 1985 on the ground (1) that the order under section 7, having been signed by the Minister, was invalid (point (a) above) and (2) that the offence before the magistrate did not allege an offence against the laws of The Bahamas (point (d) above). On 5th February 1986 the Supreme Court quashed the proceedings before the

magistrate, holding that the offence specified in the section 7 order and the offences considered by the magistrate at the hearing under section 10 were offences against the law of the United States but, relying on *In re Nielsen* [1984] A.C. 606, that the magistrate had no jurisdiction to proceed pursuant to the order of the Minister or to issue the warrant, because the crime specified therein was not an offence against the law of The Bahamas. The Court held obiter on the drugs conspiracy point that the offence of conspiracy to import drugs fell within paragraph 24 of Article 3 of the Treaty and was therefore an extraditable offence but, it seems, said nothing about the clearly insuperable objection that the order of 4th October 1985 was invalid as having been made by the Minister and not by the Governor-General.

11. The court's omission to advert to this difficulty may partly explain the fact that a second order under section 7, signed by the Minister, was issued on foot of the request of 2nd October 1985, reciting that the fugitive was "accused of the offence of conspiracy to import cocaine within the jurisdiction of the United States District Court for the Southern District of Florida (Miami) one of the United States of America". This purported order was dated 4th March 1986 and on the same day the fugitive was arrested in pursuance of a magistrate's warrant under section 8 of the Act. On 16th June 1986 the magistrate, having heard evidence and legal argument, ruled that the fugitive had a case to answer and, the fugitive having sought leave to apply for orders of certiorari and prohibition, the Supreme Court on 8th July 1986 ruled that his application was premature since the proceedings before the magistrate were incomplete. On 24th February 1987 the Court of Appeal allowed an appeal by the fugitive against this ruling and remitted the matter to the Supreme Court for hearing. On 13th March 1987 the Supreme Court quashed the magistrate's court proceedings on the ground that an order to the magistrate under section 7 must be signed by the Governor-General and not by the Minister and held obiter that the offence of conspiracy to import cocaine as alleged was an extraditable offence.

Their Lordships are not further concerned with the merits of the proceedings which commenced with the purported order of 4th March 1986 and concluded with the order of the Supreme Court on 13th March 1987, but by its order of 24th February 1987 the Court of Appeal ordered the U.S. Government to pay the fugitive's costs of the appeal and that order for costs is the subject of the costs appeal.

The events hereinafter described form the background to the extradition appeal.

III. On 19th March 1987 a third section 7 order to the magistrate was made on foot of the U.S. Government's request of 2nd October 1985, this time signed by the Governor-General and again reciting that the fugitive was "accused of the offence of conspiracy to import cocaine within the jurisdiction of the United States District Court for the Southern District of Florida (Miami) one of the United States of America", and on 20th March 1987, pursuant to a magistrate's warrant of that date ("the first warrant"), the fugitive was arrested. On 6th April 1987 the fugitive sought leave to apply for orders of certiorari and prohibition to quash the warrant and the proceedings before the magistrate's court and leave was granted on 15th April.

On 18th May 1987, in support of its request of 2nd October 1985 for the fugitive's extradition, the U.S. Government served further evidence which was related to the further order to be made on 9th June 1987. The conduct alleged in the further evidence was that the fugitive was guilty of four substantive offences of importing drugs into the United States of America between September 1982 and March 1983 in concert with two other persons.

On 9th June 1987 the Governor-General issued a further and supplemental order under section 7, reciting that the fugitive was accused of the crimes of conspiracy to import dangerous drugs unlawfully contrary to section 15[5], 25[1], 25[2] and 26[1] of the Dangerous Drugs Act (Chapter 223), importing restricted goods contrary to section 114 of the Customs Management Act 1976, and unlawfully importing dangerous drugs contrary to sections 15[5], 25[1] and 25[2] of the Dangerous Drugs Act (Chapter 223) within the jurisdiction of the United States of America. On 24th June 1987 the fugitive was further arrested upon a warrant dated 12th June 1987 ("the second warrant"), which recited that he was accused in the terms set out above.

In the Supreme Court before Adams J. the fugitive moved for an order of certiorari to bring up and quash the first warrant and the proceedings pursuant thereto. On 31st August 1987 Adams J. refused the motion, which was listed as "Civil Side case No. 332 of 1987". Then in the Supreme Court, again before Adams J., the fugitive moved for an order of certiorari to bring up and quash the second warrant and the proceedings pursuant thereto. On 19th October 1987 Adams J. also refused that further motion, which was listed as "Civil Side case No. 626 of 1987". The fugitive appealed to the Court of Appeal against those two decisions of the Supreme Court. By judgments delivered on 29th February 1988 the Court of Appeal (K.C. Henry, P., and Melville J.A., Smith J.A. dissenting) allowed the appeal against the judgment of Adams J. dated 31st August 1987 and granted an order of certiorari to bring up and quash

the first warrant and the proceedings pursuant thereto and ordered the U.S. Government to pay the costs of the fugitive of that appeal. By the same judgment the Court of Appeal unanimously dismissed the fugitive's appeal against the judgment of Adams J. dated 19th October 1987 and ordered the fugitive to pay the costs of the U.S. Government of that appeal. The extradition appeal is an appeal from the Court of Appeal's order to quash the first warrant and the proceedings pursuant thereto and from the order that the U.S. Government pay the costs of the fugitive of that appeal.

As their Lordships have noted, the main question in the extradition appeal is whether conspiracy to import dangerous drugs is a crime contemplated by paragraph 24 of Article 3 of the Treaty and therefore an offence in respect of which a warrant may be issued under section 8 of the Act. In order to consider this point, as well as other arguments submitted on behalf of the fugitive, it is necessary to describe the scheme of extradition under the Act, as applied to and subsisting in the Commonwealth of the Bahamas.

The Act provides by section 2:-

> " 2. Where an arrangement has been made with any foreign state with respect to the surrender to such state of any fugitive criminals, Her Majesty may, by Order in Council, direct that this Act shall apply in the case of such foreign state.
>
> Her Majesty may, by the same or any subsequent order, limit the operation of the order, and restrict the same to fugitive criminals who are in or suspected of being in the part of Her Majesty's dominions specified in the order, and render the operation thereof subject to such conditions, exceptions, and qualifications as may be deemed expedient.
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> Every such order shall recite or embody the terms of the arrangement, and shall not remain in force for any longer period than the arrangement.
>
> ..."

By The United States of America (Extradition) Order in Council 1935 No. 574, dated 6th June 1935 and reciting the terms of the Treaty, it was ordered as follows:-

> " (1) From and after the 24th day of June, 1935, the Extradition Acts, 1870-1932, shall apply in respect of the United Kingdom of Great Britain and Northern Ireland, the Channel Islands, the Isle of Man, and all British Colonies in the case of the United States of America under and in accordance with the said Treaty of the 22nd December, 1931;"

Article 3 of the Treaty contained a list of 27 offences and, so far as relevant, provided as follows:-

" ARTICLE 3

Extradition shall be reciprocally granted for the following crimes or offences:-

1. Murder (including assassination, parricide, infanticide, poisoning), or attempt or conspiracy to murder.

...

5. Unlawful carnal knowledge, or any attempt to have unlawful carnal knowledge, of a girl under 16 years of age.

...

21. Crimes or offences against bankruptcy law.

...

24. Crimes or offences or attempted crimes or offences in connection with the traffic in dangerous drugs.

...

26.(a) Piracy by the law of nations.

(b) Revolt, or conspiracy to revolt, by two or more persons on board a ship on the high seas against the authority of the master; wrongfully sinking or destroying a vessel at sea, or attempting to do so; assaults on board a ship on the high seas, with intent to do grievous bodily harm.

...

Extradition is also to be granted for participation in any of the aforesaid crimes or offences, provided that such participation be punishable by the laws of both High Contracting Parties."

(Their Lordships have included all the paragraphs of Article 3 in which conspiracy or an attempt to commit an offence is specifically mentioned.)

Sections 7 to 10 of the Act read as follows:-

" 7. A requisition for the surrender of a fugitive criminal of any foreign state, who is in or suspected of being in the United Kingdom, shall be made to a Secretary of State by some person recognised by the Secretary of State as a diplomatic representative of that foreign state. A Secretary of

State may, by order under his hand and seal, signify to a police magistrate that such requisition has been made, and require him to issue his warrant for the apprehension of the fugitive criminal.

If the Secretary of State is of opinion that the offence is one of 9 political character, he may, if he think fit, refuse to send any such order, and may also at any time order a fugitive criminal accused or convicted of such offence to be discharged from custody.

8. A warrant for the apprehension of a fugitive criminal, whether accused or convicted of crime, who is in or suspected of being in the United Kingdom, may be issued -

1. by a police magistrate on the receipt of the said order of the Secretary of State, and on such evidence as would in his opinion justify the issue of the warrant if the crime had been committed or the criminal convicted in England; and

2. by a police magistrate or any justice of the peace in any part of the United Kingdom on such information or complaint and such evidence or after such proceedings as would in the opinion of the person issuing the warrant justify the issue of a warrant if the crime had been committed or the criminal convicted in that part of the United Kingdom in which he exercises jurisdiction.

Any person issuing a warrant under this section without an order from a Secretary of State shall forthwith send a report of the fact of such issue, together with the evidence and information or complaint, or certified copies thereof, to a Secretary of State, who may if he think fit order the warrant to be cancelled, and the person who has been apprehended on the warrant to be discharged.

A fugitive criminal, when apprehended on a warrant issued without the order of a Secretary of State, shall be brought before some person having power to issue a warrant under this section, who shall by warrant order him to be brought and the prisoner shall accordingly be brought before a police magistrate.

A fugitive criminal apprehended on a warrant issued without the order of a Secretary of State shall be discharged by the police magistrate, unless the police magistrate, within such reasonable time as, with reference to the circumstances of the case, he may fix, receives from a Secretary of State an

order signifying that a requisition has been made for the surrender of such criminal.

9. When a fugitive criminal is brought before the police magistrate, the police magistrate shall hear the case in the same manner, and have the same jurisdiction and powers, as near as may be, as if the prisoner were brought before him charged with an indictable offence committed in England.

The police magistrate shall receive any evidence which may be tendered to show that the crime of which the prisoner is accused or alleged to have been convicted is an offence of a political character or is not an extradition crime.

10. In the case of a fugitive criminal accused of an extradition crime, if the foreign warrant authorising the arrest of such criminal is duly authenticated, and such evidence is produced as (subject to the provisions of this Act) would, according to the law of England, justify the committal for trial of the prisoner if the crime of which he is accused had been committed in England, the police magistrate shall commit him to prison, but otherwise shall order him to be discharged.

In the case of a fugitive criminal alleged to have been convicted of an extradition crime, if such evidence is produced as (subject to the provisions of this Act) would, according to the law of England, prove that the prisoner was convicted of such crime, the police magistrate shall commit him to prison but otherwise shall order him to be discharged.

If he commits such criminal to prison, he shall commit him to the Middlesex House of Detention, or to some other prison in Middlesex, there to await the warrant of a Secretary of State for his surrender, and shall forthwith send to a Secretary of State a certificate of the committal, and such report upon the case as he may think fit."

In section 26 the term "British possession" is defined as:-

"... any colony, plantation, island, territory, or settlement within Her Majesty's dominions, and not within the United Kingdom, the Channel Islands, and Isle of Man; and all colonies, plantations, islands, territories, and settlements under one legislature, as herein-after defined, are deemed to be one British possession:"

and "extradition crime" is defined as:-

> "... a crime which, if committed in England or within English jurisdiction, would be one of the crimes described in the first schedule to this Act."

The first schedule as amended from time to time is headed "List of Crimes" and commences with these words:-

> "The following list of crimes is to be construed according to the law existing in England, or in a British possession, (as the case may be,) at the date of the alleged crime, whether by common law or by statute made before or after the passing of this Act:"

There follows a list of extradition crimes, starting with "Murder, and attempt and conspiracy to murder" and including "Sinking or destroying a vessel at sea, or attempting or conspiring to do so" and "Revolt or conspiracy to revolt by two or more persons on board a ship on the high seas against the authority of the Master". (These are the only listed crimes in connection with which attempt or conspiracy is mentioned.)

Additions to the list were made by section 8 of the Extradition Act 1873 and section 1 of the Extradition Act 1906. Section 1 of the Extradition Act 1932 provided that the Act should be construed "as if offences against any enactment for the time being in force relating to dangerous drugs, and attempt to commit such offences, were included in the list of crimes in the First Schedule to that Act". And finally section 33 of the Misuse of Drugs Act 1971 (which by virtue of the Misuse of Drugs Act 1971 (Commencement No. 2) Order S.I. 1973 No. 795 came into force on 1st July 1973) provided:-

> " 33. The Extradition Act 1870 shall have effect as if conspiring to commit any offence against any enactment for the time being in force relating to dangerous drugs were included in the list of crimes in Schedule 1 to that Act."

The Act by virtue of section 17 applied to The Bahamas and the powers vested by the Act in the police magistrate were by the Bahamas Extradition Act 1926 vested in any magistrate in the colony. The Act of 1926 was directed to have effect, in accordance with section 18 of the Act, by Statutory Rule and Order 1926 No. 974, as if it were part of the Act. When the Act was applied to the Treaty by Order in Council, Article 2 of the Treaty extended it to the Bahamas in accordance with section 17 of the Act. Therefore, on 9th July 1973, the eve of independence, the Act, as applied to the United States of America, and the 1935 Order in Council were in full force and effect in The Bahamas.

The Bahama Islands (Constitution) Act 1963 enabled Her Majesty by Order in Council to make provision for the government of The Bahamas. The Bahama Islands (Constitution) Order 1969 (S.I. 1969 No. 590) conferred a new constitution on The Bahamas, thereafter to be known as the Commonwealth of The Bahamas, and section 4(1) provided for the existing laws to have effect after the appointed day as if they had been made in pursuance of the Constitution. The Bahamas Independence Order 1973 No. 1080 revoked the 1969 Order, but by section 2 provided that:-

> "... the revocation ... shall not affect the operation on and after the appointed day of any law ... continued in force thereunder and having effect as part of the law of the Bahama Islands immediately before the appointed day (including any law made before the appointed day and coming into operation on or after that day)."

Section 4(6) of the Independence Order 1973 defined "existing law" as "any law having effect as part of the law of the Bahama Islands immediately before the appointed day", and the Act and the United States of America (Extradition) Order in Council 1935 were thus existing laws which continued in force after the appointed day, 10th July 1973. The Bahama Islands (Constitution) Act 1963 was repealed by the Bahamas Independence Act 1973, section 7(2), but "not so as to affect the operation as part of the law of the Bahamas of any Order in Council made by virtue of the Act before that day". The effect of this provision is that the Bahamas Independence Order 1973, made under the Bahama Islands (Constitution) Act 1963, was saved as part of the law of The Bahamas. It may further be noted that section 5 of the Act makes the 1935 Order in Council conclusive evidence that the Treaty complies with the Act and that the Act applies to the United States of America. Their Lordships have deemed it best to trace the course of this legislation in order to refute the fugitive's contention, which they will presently advert to, that at the material time no extradition arrangements existed between the United States and the Commonwealth of the Bahamas.

Section 4(3) of the Independence Order conferred power on the Governor-General by Order to make such amendments to any existing law as might appear to him to be necessary or expedient and in exercise of that power the Governor-General made the Existing Laws Amendment Order 1974, effective from 9th July 1974, which provided that a reference in an existing law to the Colony should be construed as a reference to the Commonwealth of the Bahamas and that a reference in an existing law to the Governor should be construed as a reference to the Governor-General. Paragraph 9(3) provided:-

> "Where it is provided in any existing law that any matter or thing ... is required to be or may be done by a Secretary of State, such provision shall have effect as if that matter or thing were required to be or might be done by the Governor-General."

In order that a fugitive may be extradited to stand trial in the requesting state it is necessary that the offence in respect of which his extradition is sought shall be (1) an extradition crime within the meaning of the first schedule to the Act and (2) an extraditable offence within the meaning of the list of offences the subject of the arrangement between the requesting and the requested state, in this case the list annexed to Article 3 of the Treaty. As to the first requirement, there can be no doubt, when regard is had to the first schedule, as amended by section 1 of the Extradition Act 1932 and section 33 of the Misuse of Drugs Act 1971, that the offences in respect of which the fugitive's extradition was requested are extradition crimes. Their Lordships are equally clear that those offences are also extraditable offences covered by paragraph 24 of Article 3 of the Treaty. The argument to the contrary on behalf of the fugitive was related to the conspiracy charge and sought to say that conspiracy to commit a drug offence was not caught by the words of paragraph 24, namely, "Crimes or offences or attempted crimes or offences in connection with the traffic in dangerous drugs". In so arguing the fugitive's counsel pointed to the components of the list which their Lordships have noted above and contended that a conspiracy to commit a listed offence was not itself an extraditable offence except where the word conspiracy was specifically mentioned as, for example, with the first item in the list, "Murder ... or attempt or conspiracy to murder".

Their Lordships reject this argument for the following reasons:-

1. The words of Article 3 paragraph 24 in their ordinary and natural meaning include a conspiracy (which is itself an offence) to commit an offence in connection with the traffic in dangerous drugs.

2. Conspiracy to import cocaine is "an offence in connection with the traffic in dangerous drugs".

3. The conclusion that the words of paragraph 24 cover a conspiracy is strengthened by the fact that a conspiracy to commit a drug-related offence is a statutory offence in the United States.

The fugitive's only point, as indicated above, is derived from the use elsewhere in the Treaty list of the words "conspiracy" and "attempt" and of the phrase "attempted crimes or offences" in paragraph 24 itself. But an analysis of each paragraph shows why the words

"conspiracy" and "attempt" are used. Where the description of the listed offence is specific, as with rape, perjury, arson, burglary or murder, the offence of a conspiracy or an attempt to commit those specific offences cannot be included in the list by implication, but where the description of the offence is general, as with "crimes or offences ... in connection with the traffic in dangerous drugs", then conspiracy to commit one of those offences is a specific offence coming within the general description. It is fallacious to suppose that the specific mention of "attempted crimes or offences" indicates that conspiracies to commit offences are excluded: the answer to this point is that a conspiracy to commit an offence is itself a substantive offence; whereas, in the absence of a statutory provision, an attempt to commit an offence is not.

The point was well expressed by Malone Snr. J. in his judgment delivered on 5th February 1986 in an earlier phase of this litigation (when he was obliged to decide an application for habeas corpus in favour of the fugitive because the section 7 order was signed by the Minister and not by the Governor-General). Disagreeing with the magistrate, he said, referring to the Treaty:-

> "Since the item in question [item 24] refers to 'crimes' and conspiracy is a crime, and since a conspiracy to import cocaine, for example, must be regarded as a crime in connection with the traffic in dangerous drugs, then *prima facie*, to my mind, such a conspiracy falls within the language of item 24. ... To arrive at his decision, discharging Mr. Bowe, the magistrate held that conspiracies and attempts were only recognised as crime by the treaty if they were specifically mentioned. That reasoning, it seems to me, is founded upon two misconceptions. One is that the items listing the crimes under Article 3 are to be read as a whole. The other is that because they are to be read as a whole, the rule expressed in the maxim *expressum facit cessare tacitum*, applies to each item. That is to say, that the law will assume, where the parties to a document condescend to particular stipulations, that they have stated all the provisions they intend to include and, therefore, intend to exclude the implications which the law, in the absence of those stipulations, would have allowed to the provisions of the document.
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> In considering the items under Article 3 it has, I think, in the first place, to be borne in mind that they are items listed in a treaty. Such instruments as Brierly points out in *The Law of Nations* 3rd Ed. at p. 199:
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> 'do not as a rule invite the very strict methods of interpretation that an English court applies, for example, to an Act of Parliament.'
>
> ...

> Indeed, as I mentioned earlier, a conspiracy to import cocaine, *prima facie*, falls within the language of item 24. I think in those circumstances it is an error to hold that because an 'attempt' is mentioned in item 24, but 'conspiracy' is not, that conspiracy is excluded. To my mind, the inclusion of the words:
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> 'or attempted crimes or offences'
>
> neither adds to nor detracts from the wide scope of the words:
>
> 'crimes or offences ... in connection with the traffic in dangerous drugs.'
>
> On the other hand, the inclusion of the words 'conspiracy' and 'attempt' in items 1 and 26(b) and the inclusion of 'attempt' in item 5 constitutes a significant addition. The reason being that those items, unlike items 21 and 24 are not expressed in general terms but in specific terms. Without specific reference to attempt or conspiracy, as the case may be, the language of items 1, 5 and 26(b) is not of wide enough scope to include conspiracy and attempt, whereas the language of items 21 and 24 is sufficiently wide in scope to do so. Therefore, I agree with Henderson, C.J., who in *In the matter of George Brisbois*, No. 39 of 1960, said at p. 7 of his judgment:
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> 'The Treaty in its item 24 says, it will be remembered, "Crimes or offences or attempted crimes or offences in connection with the trafficking in dangerous drugs". This is a very loosely worded phrase and affords a very wide scope indeed. So much so that I am constrained to think that on the wording of this item there could be little doubt but that the offence of conspiring to import narcotics or dangerous drugs would be included.'"

Similar reasoning was adopted in *Cotroni v. Attorney-General of Canada* (1975) 50 D.L.R. (3d.) 291, which decided that conspiring to import a narcotic is one of the "crimes and offences against the laws for the suppression of the traffic in narcotics" within the meaning of the 1925 Supplementary Convention pertaining to extradition between the United States and Canada.

Although their Lordships do not find it necessary to call it in aid, the liberal principle on which extradition treaties should be construed (consistently with that expounded in Brierly's "Law of Nations" cited above) is authoritatively expounded by Lord Bridge of Harwich in *Government of Belgium v. Postlethwaite* [1988] 1 A.C. 924, 946 applying dicta of Lord Russell of Killowen in *In re Arton (No. 2)* [1896] 1 Q.B. 509, 517.

The fugitive relied on *R. v. D.P.P., ex parte Schwartz* (1976) 24 W.I.R. 491, a case decided by the Supreme Court of Jamaica in which the arrested person, who had been convicted in the United States of "conspiracy with others to import and to sell and to transport dangerous drugs within the jurisdiction of the United States District Court Eastern District of New York" was committed in extradition proceedings to await her return to the United States. Her application for a writ of habeas corpus was granted on the ground that conspiracy to commit an offence relating to dangerous drugs was not an extraditable offence. The judgment of Melville J. referred to section 174 of Title 21, United States Code under which conspiracy to commit an offence relating to narcotic drugs is a statutory offence, but stress was laid on Article 3.24 of the Treaty and on the 1932 Amendment of the First Schedule to the Act, both of which mentioned substantive drug offences and attempts (but not conspiracies) to commit such offences. The inference was drawn that conspiracies are not within the First Schedule unless they are expressly mentioned, but the judgments contained no reference to section 33 of the Misuse of Drugs Act 1971; Melville J. said at p. 497C:-

> "The applicant was convicted of a statutory offence by the laws of the United States whilst such an offence would, under our laws, be a commonlaw misdemeanour only, as there is no statutory offence of 'conspiracy' under our Dangerous Drugs Act, at least not so far as I can ascertain."

Still referring to the Schedule, he said at p. 498G:-

> "'Attempts' are expressly listed in relation to dangerous drugs offences, but 'conspiracies' are not. In my opinion, they ought to have been listed as was done in the case of murder, for example, if they are to be regarded as extraditable crimes."

Strictly speaking, this case was simply an authority on extradition crimes, as appears from the reference to the First Schedule of the Act.

Adams J. held the conspiracy charge to be both an extradition crime and an extraditable offence. The Court of Appeal agreed with him on the first point, but the majority held that the conspiracy charge was not within Article 3.24 and was, accordingly, not an extraditable offence. Henry P., having adverted to *In the matter of George Brisbois*, Malone Snr. J.'s judgment, *Cotroni v. Attorney-General of Canada (supra)* and *Ex parte Schwartz (supra)*, then concluded:-

> "If, however, the framers of the treaty intended this wide interpretation, presumably they would not have included the words 'or attempted crimes or offences' in item 24. Considering the item in isolation it seems to me that the inclusion of those words indicates an intention on the part of the

framers of the treaty that conspiracies to commit crimes or offences in connection with the traffic in dangerous drugs be excluded from item 24 since, unlike attempts they are not specifically mentioned. This conclusion is strengthened when one observes that attempts and conspiracies are specifically mentioned in item 1 'murder (including assassination, parricide, infanticide, poisoning) or attempt or conspiracy to murder'. For these reasons I am of the view that conspiracy to import cocaine is not an offence for which extradition may be reciprocally granted under the treaty."

Melville J.A. delivered a concurring judgment on this point:-

"The words considered by Spencer J. in Cotroni would seem to be wide enough to include an offence of attempting to import a narcotic and also the offence of attempting to commit any offence against the laws for the suppression of the traffic in narcotics. Similar considerations would in my view apply to the words 'crimes or offences in connection with the traffic in dangerous drugs'. One wonders therefore what was the purpose of including the words 'or attempted crimes or offences' after 'offence' when that word first appears in item 24.

The answer seems to be that it was intended by the inclusion of the words 'or attempted crimes or offences' to limit the very wide meaning that the other words of the item would ordinarily convey. Despite the very forceful arguments advanced on this matter I will still abide by what I said in *Ex parte Schwartz* on the question of an extraditable offence. I therefore take the view that conspiracies to commit crimes or offences in connection with the traffic in dangerous drugs are not included in Item 24. The Magistrate would consequently lack jurisdiction to issue a warrant or to conduct extradition proceedings relating to this offence."

For the reasons already stated, their Lordships prefer the dissenting judgment of Smith J.A., who said (*inter alia*):-

"In the *Brisbois* case (*supra*), Henderson C.J. said that this description of offences was "a very loosely worded phrase and affords a very wide scope indeed' and that 'there could be little doubt but that the offence of conspiring to import narcotics or dangerous drugs would be included'. As indicated above, Malone J came to the same conclusion. I am afraid that I have not been able to find in the argument even a plausible basis for the contention that the conspiracies of which the appellant is accused are not within the crimes or

> offences specified in the Treaty. It was submitted that Malone J interpreted the Treaty and included an offence which was not negotiated or inserted by the parties. The answer to this is that item 24 in the Treaty is a description of offences in what Lord Diplock, in *In re Nielsen (supra)*, calls 'general terms and popular language'. If it is said, as it was, that the conspiracies do not fall within this general description then a reason why they do not should be given. None was suggested."

In case their Lordships might deem the conspiracy charge to be both an extradition crime and an extraditable offence, Mr. Macaulay Q.C., for the fugitive, sought to uphold the Court of Appeal's decision against the U.S. Government in case No. 332/1987 on other grounds by reference to arguments which that court and Adams J. had rejected and which were set out in the fugitive's case. Any of these arguments, if successful, would have been relevant to the decision of case No. 626/1987, in which neither side had appealed, but in the interests of justice their Lordships agreed during the hearing that the fugitive ought to be granted special leave to appeal.

The first contention advanced was that after independence on 10th July 1973 the Act and the Treaty ceased to have effect and that there were henceforth no extradition arrangements between the U.S. Government and the Government of the Bahamas. Mr. Macaulay disclaimed reliance on the "clean slate" theory which, as its name implies, is a doctrine embodying the proposition that a newly independent state makes a fresh start in its international relations and is not considered to be as a "successor state" in regard, for example, to extradition rights and obligations. The theory was discussed in *Ex parte Schwartz (supra)* at p. 494 in relation to Jamaica by Melville J., who drew attention to Lord Atkin's statement in *Chung Chi Cheung v. R.* [1939] A.C. 160 at p.168 that a rule of international law is incorporated into the domestic law only so far as it is not inconsistent with rules enacted by statutes etc. and concluded:-

> "To apply the clean slate theory would therefore seem to me to be flying in the face of our statutory provisions."

Having regard to the statutory provisions which they have already noted, their Lordships would adopt the same reasoning in the instant case.

Counsel referred to an exchange of notes in 1978 which he attempted to identify as a new "arrangement" for extradition within the meaning of section 2 of the Act. On this basis the new arrangement would not be effective, since it was not incorporated in an Order, laid before Parliament and published in the Gazette.

The fallacy underlying this reasoning is, in the clear view of their Lordships, that the notes do not constitute a new arrangement but are a mutual acknowledgment of the continuance of the extradition arrangements under the Act and the 1935 Order as existing laws of the Bahamas and an express agreement to this effect.

Their Lordships cite three short extracts from this correspondence -

(1) 7th March 1978 from the Minister of External Affairs to the Secretary of State of the U.S. Government:-

"... it is the desire of the Government ... that the aforesaid Treaty should be regarded as in force between our respective countries and continuing to regulate extradition arrangements between them pending any new treaty which might be concluded."

(2) 19th June 1978 Secretary of State's reply:-

"... the Government of the United States considers that the above mentioned Treaty continues in force between the United States of America and The Bahamas from July 10, 1973, the date on which The Bahamas became independent ... If the foregoing understanding is acceptable to your Government, I have the honour to propose that your note of March 7, 1978, this note and your reply concurring therein shall constitute an agreement to that effect."

(3) 17th August 1978 from the Minister of External Affairs:-

"... the foregoing understanding is acceptable to the Government ... who therefore agree that my Note of March 7, 1978, your Note of 19th June, 1978 and his reply concurring therein shall constitute an agreement to that effect."

If that were not enough, the two Governments have shown by their conduct, including their conduct in the present proceedings, that they both intend their extradition arrangements to remain in force.

With regard to the other points raised on behalf of the fugitive in the Supreme Court and the Court of Appeal, their Lordships express their complete concurrence in the rulings given, with the sole exception of the decision of the majority in the Court of Appeal that the conspiracy charge was not an extraditable offence.

The way in which the proceedings before the magistrate were interrupted in order that the fugitive might apply to the Supreme Court for orders of certiorari and prohibition has meant that their

Lordships' decision in the extradition appeal does not achieve finality, since the evidence against him remains to be heard and considered. Their Lordships here take the opportunity of saying that, generally speaking, the entire case, including all the evidence which the parties wish to adduce, should be presented to the magistrate before either side applies for a prerogative remedy. Only when it is clear that the extradition proceedings must fail (as where the order to proceed is issued by the wrong person) should this practice be varied.

It may afford guidance in these proceedings and also in other extradition proceedings for their Lordships to make as part of their recommendation in this case the following considered observations:-

1. The extradition arrangements under the Act and the 1935 Order in Council are, until revoked or replaced, of full effect between the Commonwealth of the Bahamas and the United States of America.

2. A request for extradition is properly addressed, as it was in this case, to the Minister or Ministry of Foreign Affairs, the correct diplomatic channel, but the order under section 7 must be made by the Governor-General.

3. Several section 7 orders can lawfully be made on foot of the same request, even if the fugitive has been discharged in the meantime, and a supplemental order, such as that made on 9th June 1987, can be made if the order to which it is supplemental is in existence: *In re Rees* [1986] 1 A.C. 937, 961.

4. If examination of the requesting state's requisition and supporting evidence discloses crimes in addition to those originally specified, the crimes so disclosed can be included in a further order: *In re Rees (supra)*.

5. The Governor-General's orders under section 7 and the magistrates' warrants under section 8 of the Act in this case disclosed offences in Bahamian terms in accordance with the principles enunciated in *In re Nielsen (supra)* and it was unnecessary for those orders or warrants to specify any relevant statutory provisions of either Bahamian or U.S. law.

6. To allege that an offence has been committed "within the jurisdiction of the United States District Court for the Southern District of Florida one of the United States of America" is no less effective a way of describing jurisdiction than to say that the offence was committed "within the jurisdiction of the United States of America".

7. The magistrate is not concerned with the requisition of the requesting state or with foreign law: *R. v. Governor of Pentonville Prison, Ex parte Budlong* [1980] 1 AER 701; *In re Nielsen (supra)*.

8. Both the conspiracy charge and the other offences mentioned in the order of 9th June 1987 and the warrant of 12th June 1987 were extradition crimes and extraditable offences.

Their Lordships now come to the question of costs in the Court of Appeal, which is the only issue in the costs appeal taken from the order as to costs in the decision of the Court of Appeal given on 24th February 1987 in case No. 738/1986 but is also an issue in the extradition appeal (in case No. 332/1987) and in the fugitive's appeal by special leave (in case No.626/1987.)

The Court of Appeal awarded the costs of the proceedings in that court in all three appeals to the successful party. The U.S. Government has submitted that the Court of Appeal had no power to award those costs because of the provisions of Sections 17(1) and 23 of the Court of Appeal Act, which provide:-

> "17.(1) Any person aggrieved by any judgment, order or sentence given or made by the Supreme Court in its appellate or revisional jurisdiction, whether such judgment, order or sentence has been given or made upon appeal or revision from a magistrate or any other court, board, committee or authority exercising judicial powers, and whether or not the proceedings are civil or criminal in nature may, subject to the provisions of the Constitution and of this Act, appeal to the court on any ground of appeal which involves a point of law alone but not upon any question of fact, nor of mixed fact and law nor against sentence:
>
> Provided that no such appeal shall be heard by the court unless a Judge of the Supreme Court or of the court shall certify that the point of law is one of general public importance.
>
> ...
>
> 23. No costs shall be allowed by the court on either side in connection with the hearing and determination of an appeal in any criminal cause or matter under Parts IV or V of this Act."

(Part IV deals exclusively with appeals against conviction or sentence by persons convicted on indictment.)

The basis of the U.S. Government's submission is that the orders made by the Supreme Court on the fugitive's applications for certiorari and prohibition pursuant to Order 53 were orders made on appeals

under Part V of the Court of Appeal Act in the exercise of the "revisional jurisdiction" of the Supreme Court in a criminal cause or matter within the meaning of section 17(1) and that in consequence section 23 prohibits the award of costs to either party. The fugitive has submitted that the proceedings before the Supreme Court did not involve an exercise of the "revisional jurisdiction" but were proceedings in respect of his constitutional rights in which the Supreme Court has original jurisdiction pursuant to Article 28 of the Constitution from which jurisdiction an appeal lies as of right to the Court of Appeal under Article 104 and in respect of which the Court of Appeal has an unfettered discretion as to costs.

The fugitive's appeal in case No 738/1986 was from a decision of the Supreme Court refusing to deal with his application for orders of certiorari and prohibition on the ground that the application was premature. The appeal proceedings were intituled on the civil side of the Court (although Their Lordships have no doubt that they were proceedings in a criminal cause or matter) and the judgments delivered in the Court of Appeal were devoted to the questions whether prerogative applications (other than an application for a writ of habeas corpus) lay at the suit of a fugitive in extradition proceedings and, if so, when and in what circumstances they could be made. The Court of Appeal decided that the judge of the Supreme Court ought to have heard the fugitive's application and, when remitting the case to him, awarded the costs of the appeal to the fugitive.

On 4th June 1987 the Court of Appeal (Luckhoo P., Henry J.A. and Smith J.A.), giving the reasons for its decision of 24th February 1987 on the question of costs, stated that the fugitive's counsel had asked for the costs of the appeal and that counsel for the U.S. Government had opposed that application on the ground that, the certiorari proceedings being criminal proceedings, the Court had no authority to award costs. The statement proceeded:-

> "Mr. Ducille's argument ran thus: The certiorari proceedings arose out of the extradition proceedings brought by the respondent against the appellant; extradition proceedings and by their nature criminal proceedings and the motion for certiorari did not change the nature of the proceedings. He referred the Court to the cases of *McGann v. the United States of America* (1971) 18 W.I.R. 58 and *Bonalumi v. Secretary of State for the Home Department* [1985] 1 All E.R.797 in support of his contention. In both cases the appellate court had to decide whether an appeal lay to it against the making of the order challenged. In the *McGann* case,, an order for extradition had been made in respect of the appellant and it was held by the Jamaican Court of Appeal . that there was no right of appeal, as the

> order challenged was an order 'in a criminal cause or matter'. In the *Bonalumi* case, the order challenged was an order for inspection of banker's books made for the purpose of providing evidence in extradition proceedings and pending criminal proceedings abroad. The Court of Appeal in England held that since the order had been sought and made for the purposes of both the magistrates' court proceedings under the Extradition Act, 1873 and the criminal proceedings in Sweden, both of which were criminal proceedings, the order had been made in a criminal cause or matter and no appeal lay to the Court of Appeal against the making of the order."

The Court pointed out that Mr Ducille had not objected to the Court's jurisdiction to hear the appeal on the ground that the certiorari proceedings were in a criminal cause or matter: the case had been intituled on the civil side both in the Court of Appeal and below, and it had not been suggested that the Court could not award costs in civil proceedings. The statement continued:-

> "It was on that basis that the Court awarded costs to the appellant. Had objection been taken to the Court's jurisdiction to entertain the appeal and had the Court held that such objection was well taken, different considerations would have arisen."

The fugitive's appeals in cases 332/1987 and 626/1987 were by consent heard together because they involved many points of law in common. Like case No. 738/1986 they were intituled on the civil side throughout.

At the commencement of the hearing the Court itself raised the question of whether there was jurisdiction to hear the appeals and referred to the decision of the Jamaican Court of Appeal in *McGann v. The United States* (1971) 18 W.I.R. 58, as well as to the cases of *Ex parte Alice Woodhall* (1888) 20 Q.B.D. 832 and *Amand v. Home Secretary and Minister of Defence of Royal Netherlands Government* [1943] A.C.147. Those cases are clear authority that the proceedings were in a criminal cause or matter. Mr Macaulay Q.C., for the fugitive, submitted that *McGann's* case was decided *per incuriam* because the decision of this Board in *Madzimbamuto v. Lardner-Burke* [1969] 1 A.C. 645 had not been cited to the court and relied on Articles 25, 28 and 104 of the Bahamian Constitution as giving the fugitive a right of appeal from the Supreme Court which was independent of section 17 of the Court of Appeal Act and of the authorities referred to by the Court. Mr. Clive Nicholls Q.C., who, like Mr. Macaulay, appeared in the Court of Appeal as well as before their Lordships, submitted for the U.S. Government that, since the Supreme Court was not exercising appellate jurisdiction, any appeal by the fugitive could only be by virtue of section 17 as an appeal from the Supreme Court in its revisional

jurisdiction. He did not contend, and before the Board has expressly refrained from contending, that the fugitive had no right of appeal to the Court of Appeal under section 17(1).

There was no certificate as required by the proviso to section 17(1), but here again Mr. Nicholls does not rely on its absence. It seems that a certificate could have been had for the asking, but the fugitive was relying on Article 28 of the Constitution under which, if it applies, a certificate is not needed.

Henry P. took the view that the reference in section 17(1) to the revisional jurisdiction of the Supreme Court was a reference to the provisions of section 223 and 224 of the Criminal Procedure Code Act 1968 which, so far as relevant, are as follows:-

> "223. Every Magistrate's Court shall make a monthly return, under the hand of the Magistrate, of all proceedings had before the court under this Part of this Code to the Registrar and, if so required by the Supreme Court, shall forward to such court, without delay, a complete copy of the record of any such proceedings for the purpose of enabling the court to satisfy itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to the regularity of any such proceedings.
>
> 224.(1) In the case of any proceedings a copy of the record of which has been required under the provisions of section 223 of this Code, when it appears that in such proceedings an error material to the merits of any case or involving a miscarriage of justice has occurred, the Supreme Court may review any finding, sentence or order recorded or passed in such proceedings and in so doing may have and exercise all the powers of the court on hearing appeals under the provisions of Section 243 of this Code."

He then observed:-

> "It is clear that the proceedings by the Appellant by way of certiorari and prohibition which were taken in this case were not proceedings by way of revision under those Sections which are initiated by the Supreme Court itself. I do not therefore, accept that these appeals arise by virtue of section 17."

Articles 19(1), 25, 28 and 104 of the Constitution, so far as relevant, read as follows:-

> 19.-(1) No person shall be deprived of his personal liberty save as may be authorised by law in any of the following cases:-

(g) for the purpose of preventing the unlawful entry of that person into The Bahamas or for the purpose of effecting the expulsion, extradition or other lawful removal from The Bahamas of that person or the taking of proceedings relating thereto;

...

25.-(1) Except with his consent, no person shall be hindered in the enjoyment of his freedom of movement, and for the purposes of this Article the said freedom means the right to move freely throughout The Bahamas, the right to reside in any part thereof, the right to enter The Bahamas, the right to leave The Bahamas and immunity from expulsion therefrom.

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this Article to the extent that the law in question makes provision-

...

(b) for the removal of a person from The Bahamas to be tried outside The Bahamas for a criminal offence or to undergo imprisonment in some other country in respect of a criminal offence of which he has been convicted;

...

28.-(1) If any person alleges that any of the provisions of Articles 16 to 27 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the Supreme Court for redress.

(2) The Supreme Court shall have original jurisdiction -

(a) to hear and determine any application made by any person in pursuance of paragraph (1) of this Article; and

(b) to determine any question arising in the case of any person which is referred to it in pursuance of paragraph (3) of this Article,

and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of the said Articles 16 to 27 (inclusive) to the protection of which the person concerned is entitled:

> Provided that the Supreme Court shall not exercise its powers under this paragraph if it is satisfied that adequate means of redress are or have been available to the person concerned under any other law.
>
> ...
>
> 104.-(1) An appeal to the Court of Appeal shall lie as of right from final decisions of the Supreme Court given in exercise of the jurisdiction conferred on the Supreme Court by Article 28 of this Constitution (which relates to the enforcement of fundamental rights and freedoms)."

The learned President accepted the fugitive's submission that, since his case throughout had been that he had been and was likely to be hindered in the enjoyment of his freedom of movement in a manner not authorised by law, Article 28 would be brought into operation and an appeal to the Court of Appeal would lie under Article 104(1), notwithstanding the fact that the proceedings in the Supreme Court were "brought in connection with a criminal matter": accordingly cases like *McGann* and *ex parte Alice Woodhall (supra)* had no application. He concluded:-

> "It is true that none of the provisions of the Court of Appeal Act are apt to provide for an appeal in these circumstances. That cannot however derogate from the right conferred by Article 104(1) or deprive the court of jurisdiction to entertain the appeals. In my view this court has jurisdiction to hear the appeals."

Melville J.A. gave judgment to the same effect and attributed the Court's jurisdiction to hear the appeal to Article 28. He observed that Mr. Macaulay appeared to say that the proceedings were or might be in a criminal cause or matter, but that they were civil proceedings, in which accordingly an appeal lay under section 9 of the Court of Appeal Act, but later in the judgment he cited a passage from the speech of Viscount Simon in *Amand v Home Secretary* [1943] A.C.147,156 (where a writ of habeas corpus was sought in relation to criminal proceedings) which, by emphasising the need to look at the nature and character of the proceedings, clearly contradicts the fugitive's argument:-

> "If the matter is one the direct outcome of which may be trial of the applicant and his possible punishment for an alleged offence by a Court claiming jurisdiction to do so, the matter is criminal."

The judge expressly agreed with the President that the fugitive's certiorari and prohibition proceedings were not proceedings by way of revision and that section 17 did not apply.

Smith J.A., who dissented on the jurisdiction question as well as on the main substantive point, recalled that the fugitive's counsel had submitted that the proceedings before Adams J. were civil proceedings and appealable under section 9 and that the test of whether proceedings were civil or criminal was their form, whereas the U.S. Government, consistently with the cases cited, had argued that it was necessary to look at content. He held that the fugitive had no right of appeal either under section 9 or Section 17 of the Court of Appeal Act or under Article 104(1) of the Constitution.

The success of the fugitive's submission based on Articles 28 and 104 (1) had a twofold effect. So far as the majority in the Court of Appeal were concerned, it meant that the Court had a jurisdiction which in the opinion of every member of the Court it would otherwise have lacked to hear the fugitive's appeals from the orders of Adams J. (Emphasis added). Secondly, if the appeals were under Article 104(1), and not under section 17(1), the Court could award costs. Their Lordships, however, find themselves in complete agreement with the conclusion of Smith J.A. that the Supreme Court was not exercising the special jurisdiction under Article 28 of the Constitution and that the fugitive had no right of appeal under Article 104(1). Their Lordships' reasons for this view may be stated as follows:-

1. The fugitive's applications to the Supreme Court in cases No. 332/1987 and 626/1987 were brought under Order 53, leave to apply under that Order having been obtained. It is, moreover, clear from the documentation and from the presentation of the fugitive's case that his applications to the Supreme Court were not made under Article 28(1). Their Lordships draw attention to the terms of Article 28(2):-

   "(2) The Supreme Court shall have original jurisdiction -

   (a) to hear and determine any application made by any person in pursuance of paragraph (1) of this Article." (emphasis added.)

2. Both Article 19(1) and Article 25(2)(b) contemplate the lawfulness of extradition and extradition proceedings. The fugitive may argue that only lawful action is protected from the Article 28 jurisdiction, but this argument and, it would appear, the reasoning of the majority in the Court of Appeal give no effect whatever to the proviso to Article 28(2):-

   "Provided that the Supreme Court shall not exercise its powers under this paragraph"

(emphasis added) "if it is satisfied that adequate means of redress are or have been available to the person concerned under any other law."

3. It was fallacious reasoning to import Article 28 merely because the arrest and proposed extradition of the fugitive involved interference with his freedom of movement.

4. The cases relied on by the fugitive should be distinguished. In *Chikwakwata v. Bosman* [1965 (4)] S.A.L.R.57, which was concerned with an application for leave to appeal to this Board from the Appellate Division of the High Court of Southern Rhodesia, the facts were stated by Beadle C.J:-

> "The applicant was convicted in the General Division of the High Court of contravening sec. 37(1)(b)(ii) of the Law and Order (Maintenance) Act, Chap.39, and, in the circumstances of the case, the High Court was compelled to pass the mandatory death sentence. The applicant appealed to this Court and then for the first time raised the question of the validity of sec.37 of the Law and Order (Maintenance) Act. He argued that the mandatory death sentence, prescribed in this section, contravened sec. 60 of the Declaration of Rights of the Constitution of Southern Rhodesia, 1961, because this mandatory death penalty was an inhuman and degrading punishment within the meaning of sec. 60 of the Constitution. His appeal to this Court was dismissed and, in the course of its judgement, this Court held that sec.37 (1)(b)(ii) of the Law and Order (Maintenance) Act did not contravene sec. 60 of the Constitution and was validly made. It is against the decision on this constitutional point that the applicant now wishes to appeal to the Privy Council."

The matter was governed by section 71 of the Constitution:-

> "71.(1) If any person alleges that any of the provisions of secs. 57 to 68 has been or is being contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, but subject to sub-sec. (3) of this section, that person may apply to the Appellate Division of the High Court for redress.
>
> (2) If in any proceedings of the General Division of the High Court or in any court subordinate to the High Court any question arises as to the contravention of any of the provisions of the said secs.57 to 68, the person presiding in that court may, and if so requested by any party

to the proceedings shall, refer the question to the High Court, so, however, that he shall not be required to comply with any such request which in his opinion is merely frivolous or vexatious.

(3) Where in any proceedings such as are mentioned in sub-sec. (2) of this section any such question as is therein mentioned is not referred to the Appellate Division of the High Court, then, without prejudice to the right to raise that question on any appeal from the determination of the Court in those proceedings, no application for the determination of that question shall lie to the Appellate Division of the High Court under sub-sec. (1) of this section.

(4) The Appellate Division of the High Court shall have original jurisdiction -

(a) to hear and determine any application made by any person in pursuance of sub-sec. (1) of this section; and

(b) to determine any question arising in the case of any person which is referred to it in pursuance of sub-sec. (2) thereof,

and for the purposes of that jurisdiction or of the determination on such an appeal as is mentioned in sub-sec. (3) of this section of any question such as is therein mentioned, the Appellate Division of the High Court may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of the said secs. 57 to 68 to the protection of which the person concerned is entitled:

Provided that the Court shall not exercise its powers under this sub-section if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law.

(5) Any person aggrieved by any determination of the Appellate Division of the High Court under this section may appeal therefrom to Her Majesty in Council:

Provided that no appeal shall lie by virtue of this sub-section from any determination that any application, or the raising of any question, is merely frivolous or vexatious."

The Court there held that an appeal lay to the Privy Council and the fugitive's contention here is that, as section 71 led to this result, so Article 28 applies to

the present case although his application to the Supreme Court was not in form an Article 28 application. But there is a crucial distinction between section 71 and Article 28 (which admittedly resembles section 71 closely in several respects). A question under section 71 could become justiciable by the Appellate Division in three different ways. First, under sub-sections (1) and (4)(a) by original application; secondly, under sub-sections (2) and (4)(b), through a reference by another court; thirdly, under sub-section (3) and the words of sub-section (4) which follow "(a)" and "(b)" (namely, "and for the purposes..... of the determination on such an appeal as is mentioned in sub-section (3) of this section of any question such as is herein mentioned, the Appellate Division of the High Court may make such orders, etc etc."), on the hearing of an appeal from a judgment which had not been given in the exercise of jursdiction under section 71. As Beadle C.J. put the matter at p. 59A:-

> "and thirdly, the point may be raised in an appeal brought before [the Court] in the normal way notwithstanding the fact that the point had not been raised in the Court *a quo*. This is implicit from the language of section 71 (3)."

Under Article 28 there is no "third way" and therefore the fugitive's reliance on *Chikwakwata* and also on *Madzimbamuto v. Lardner-Burke* [1969] 1 A.C. 645, which approved Chikwakwata at p.720, is in vain.

5. (which echoes point 1 above). Article 104 (1) confers a right of appeal "from final decisions of the Supreme Court given in exercise of the jurisdiction conferred on the Supreme Court by Article 28....." Their Lordships again point out that Adams J. was not exercising "the jurisdiction conferred..... by Article 28". It should also be noted that Article 104 (1), by conferring an Article 28 appeal in narrow and specific terms, is in contrast with section 71 of the Constitution of Southern Rhodesia.

Article 28 having been disposed of, the fugitive's right of appeal must depend on the proposition which was unanimously rejected by the Court of Appeal, namely, that the Supreme Court was exercising revisional jurisdiction. In the circumstances, the U.S. Government having expressly not argued against jurisdiction, their Lordships will assume, without deciding, that the Court of Appeal could properly adjudicate. In the absence of full argument on both sides directed to section 17(1),their Lordships would be most reluctant to hold that there was no jurisdiction to hear these and similar appeals, because -

(1) there appears to be a reasonably strong argument for construing the words "revisional jurisdiction" so as to apply in a wider context than that of sections 223 and 224 of the Code already cited;

(2) the exercise of the prerogative jurisdiction by the Supreme Court is a revisional jurisdiction, as distinct from an appellate one;

(3) while the inference is somewhat speculative, the introduction in 1964 of a right of appeal from the Supreme Court in criminal matters (together with a requirement for a certificate that a point of law of general public importance is involved) reminds their Lordships forcibly of the new right of appeal introduced by section 1(1) of the Administration of Justice Act 1960.

Ultimately the question for decision admits of, and indeed demands, a simple answer. The certiorari and prohibition proceedings constituted a criminal cause or matter, as would a habeas corpus application if the subject matter were criminal in the sense described in *Amand v. Home Secretary*. Therefore section 23 prohibits the award of costs to either side and the civil title of the proceedings is irrelevant.