

**(1) Noel Heath
(2) Charles Miller and
(3) Glenroy Matthew**

Appellants

v.

The Government of the United States of America

Respondent

FROM

**THE EASTERN CARIBBEAN COURT OF APPEAL
(SAINT CHRISTOPHER AND NEVIS)**

JUDGMENT OF THE LORDS OF THE JUDICIAL
COMMITTEE OF THE PRIVY COUNCIL,

Delivered the 19th June 2002

Present at the hearing:-

Lord Slynn of Hadley
Lord Nicholls of Birkenhead
Lord Hutton
Lord Hobhouse of Woodborough
Lord Millett

[Delivered by Lord Hutton]

1. On 24 May 1996 the Government of the United States of America requested the Minister of Foreign Affairs of St Christopher and Nevis to extradite from St Christopher to the United States of America the appellants, Noel Heath, Charles Miller and Glenroy Matthew.

2. Noel Heath's extradition was sought in respect of charges brought against him in New York of conspiracy to supply and import cocaine into New York. The extradition of Charles Miller and Glenroy Matthew was sought in respect of charges brought against them in Florida of conspiracy to supply and import cocaine into Florida.

3. On 24 June 1996 the Minister of Foreign Affairs issued separate orders to the Senior Magistrate of Magisterial District "A" of St Christopher and Nevis in respect of each respective appellant

requiring the magistrate to issue a warrant for the apprehension of each appellant. The three appellants appeared before the magistrate, Dr Haynes Blackman, and preliminary objections which were taken on behalf of the three appellants were overruled by him on 1 July 1996. The hearing was continued on 19, 20, 21, 22 and 23 August 1996 when the magistrate reserved his decision. On 28 October 1996 the magistrate delivered a lengthy decision in which he ruled that the evidence presented by the respondent did not justify the committal for trial of any of the appellants and he ordered that the three appellants be discharged in purported pursuance of section 10 of the Extradition Act 1870 which provides that the fugitive shall be committed to prison if such evidence is produced as would justify committal for trial, but otherwise the magistrate shall order him to be discharged.

4. On 22 April 1997 the respondent applied to the High Court for an order of certiorari to quash the decision of the magistrate to discharge the appellants and for an order of mandamus directing the magistrate to commit the appellants to prison under section 10 of the Extradition Act 1870.

5. The grounds upon which these orders were sought were that:

“(1) In determining that there was insufficient evidence to justify the committal of the three defendants, the magistrate took into account irrelevant factors and failed to take into account relevant factors.

(2) No reasonable magistrate, properly directing himself, could have failed to find that there was sufficient evidence to justify the committal of the three defendants to prison under section 10 of the Extradition Act 1870.”

6. On the hearing of the application before the High Court Smith J rejected the submission on behalf of the appellants that the requisitions issued by the Minister of Foreign Affairs on 24 June 1996 were invalid and that such requisitions should have been issued by the Governor-General and not by the Minister. He further upheld the grounds upon which the respondent sought certiorari and at the conclusion of his judgment delivered on 17 April 1998 he stated (Record Volume I pp 123-125):

“In my judgment the Senior Magistrate considered matters that he ought not to have considered and did not consider the matters and evidence he ought to have considered; and he sought to weigh and weigh up what evidence he did accept

as if he were trying the respondents as to their guilt or innocence.

In the circumstances therefore I find that the Senior Magistrate erred in law. This I have shown in this judgment and it also appears on the face of the record as I have also indicated. In the proceedings he heard on the request for the committal of the respondents to await extradition, the Senior Magistrate exceeded his jurisdiction by considering matters which did not call for his consideration and assuming the power to weigh and weigh up the evidence adduced before him when he was only to consider the admissible evidence before him as an examining magistrate in committal proceedings.

I have already indicated herein the jurisdiction which I decided this court has to bring up and quash on an order of certiorari the decision of the Senior Magistrate in the circumstances set out above.

I will grant the orders sought by the applicant and quash the decision of the Senior Magistrate to discharge the respondents. The orders of the Senior Magistrate made on the 28th October, 1996 discharging Noel Heath, Charles Miller and Glenroy Matthew are set aside.

During the course of the hearing of this matter, Counsel for the applicant indicated to the court that he was also seeking orders of mandamus for the applicant. Leave had been granted by the court to apply for orders of certiorari only and this would have been proper since at the time the applicant approached the court there could have been no good grounds for applying to the court to order the Senior Magistrate to do anything further. He had already heard and completed the inquiry.

Now that it has been shown that the orders to discharge the respondents should be set aside there would be incomplete proceedings which only the Senior Magistrate could complete; and in light of what is provided in section 20 of the Eastern Caribbean Supreme Court (St Christopher and Nevis) Act 1975 it could be convenient if I made a further order requiring the Senior Magistrate to resume the hearing and complete it.

Counsel for the applicant would want this court to order the Senior Magistrate to commit the respondents but I have not heard the issue of that further action dealt with by the parties for me to make such an order. The Senior Magistrate would still have to exercise his own judgment in relation to the charges which have not been specifically treated before me. In the circumstances I would make the order at this stage requiring the Senior Magistrate to resume the hearing promptly and proceed according to law.”

7. However the formal order of the High Court dated 17 July 1998 omitted to direct that the orders of the magistrate be quashed on their removal into the High Court and was in these terms:

“IT IS ORDERED that the Orders dated the 28th day of October, 1996 under the hand of Dr Haynes Blackman the Senior Magistrate for District “A” Magistrate Court in the Town of Basseterre whereby the Respondents Noel Heath, Charles Miller and Glenroy Matthew were discharged after hearing for their extradition from St Christopher to the United States of America be removed into the High Court of Justice and that the Clerk to the said Senior Magistrate do send forthwith the said orders or copies of the same under the hand of the said Senior Magistrate to the Registrar of the High Court of Justice.

AND IT IS FURTHER ORDERED that this matter be remitted to the said Senior Magistrate Dr Haynes Blackman for him to resume the hearing of the matter and for his further consideration thereof in light of the judgment of this Court and to determine whether to commit all or any of the said Respondents in accordance with section 10 of the Extradition Act, 1870.”

8. The proceedings thereafter took an unfortunate course. The matter came on again before the magistrate Dr Haynes Blackman, on 11 August and 12 October 1998 when further argument took place, including argument about the terms of the High Court order. The magistrate gave his decision on 26 January 1999. He ruled that the High Court order had not quashed the orders of discharge which he had made on 28 October 1996 and that therefore it was not possible to resume the hearing and that accordingly the appellants continued to stand discharged pursuant to the orders of 28 October 1996.

9. On 9 June 1999 the respondent brought a further application before the High Court for:

- “(a) An Order ... of Certiorari to remove into the court and quash the decision of Dr Haynes Blackman of 26 January, 1999 to discharge the [appellants] under section 10 of the Extradition Act 1870. ...
 - (b) An order ... of Mandamus directing the Magistrate forthwith to convene a court hearing and to commit [the appellants] to prison under section 10 of the Extradition Act 1870. ...
 - (c) A declaration that the evidence against the [appellants] is sufficient to justify and require their committal to prison under the said section 10.
 - (d) A declaration that any reasonable Magistrate would find that the evidence against the [appellants] is sufficient to justify and require their committal to prison under the said section 10.
- ...”

10. Smith J delivered a further judgment on 19 January 2000 in which he criticised the decision of the magistrate made on 26 January 1999 and at the conclusion of his judgment he stated:

- “(19) In the circumstances, I shall do in this exercise only what may properly be done and not permit a magisterial aberration to excite a judicial mis-step. If I make the order quashing the decision of the Senior Magistrate made on 26 January, 1999 and I now do so, the way would be pellucid for the Magistrate to get the respondents back before the court for the purpose of having the law followed which would mean that the Magistrate would be bound to commit the respondents on the evidence which had also already been the subject of some scrutiny in this court.
- (20) For the avoidance of doubt therefore I confirm that the orders made by the Senior Magistrate on 28 October, 1996 whereby the respondents were discharged in the hearings on their requested extradition were quashed and set aside by my judgment of the 17 April 1998; and despite what was said by the Senior Magistrate in his decision on the 26 January, 1999 the orders remain quashed without the possibility of revival.

- (21) The decision made by the Senior Magistrate on 26 January, 1999 whereby he indicated that his orders made on 26 October, 1996 were extant is itself quashed and set aside and is to be viewed as having never been made.
- (22) That would mean that the Magistrate is still to effect and carry out the order of this court made on 17 April 1998 and identified in the document perfected and entered on 17 July, 1998. That order was that the Magistrate must, in effect, follow the law in this case, that is, to get the respondents before the court, consider the matter in the light of the judgment of the court delivered on 17 April, 1998 and commit the respondents under the provisions of section 10 of the Extradition Act, 1870.”

It appears that a formal order of the High Court was not made following Smith J’s judgment on 19 January 2000 and no such order appears in the record before the Board.

11. Their Lordships consider that the difference of opinion between the magistrate and Smith J arising from the absence of the words “and thereupon the said orders be quashed” in the High Court order of 17 July 1998 was regrettable, and that the resultant difficulty should have been avoided by the simple step of the order being amended by the addition of those words.

12. Four principal submissions were advanced to the Board on behalf of the appellants.

I. The validity of the requisitions issued by the Minister of Foreign Affairs

13. It was submitted that the Minister of Foreign Affairs had no power to issue the three requisitions to the magistrate dated 24 June 1996 in purported exercise of the power under section 7 of the Extradition Act 1870 and that accordingly the magistrate had no jurisdiction to conduct a hearing to decide whether the appellants should be committed into custody. The appellants submitted that a requisition pursuant to section 7 could only be issued by the Governor-General.

14. It is therefore necessary to consider the manner in which the provisions of the Extradition Act 1870 applied to St Christopher

and Nevis when they were a British possession and the legislative changes made when they attained independence and became a sovereign democratic federal state on 19 September 1983.

15. Section 2 of the 1870 Act provided:

“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.”

Paragraph 3 of the United States of America (Extradition) Order 1976 provided:

“The Extradition Acts 1870 to 1935, as amended or extended by any subsequent enactment, shall apply in the case of the United States of America in accordance with the [Treaty concluded on 8 June 1972 between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America for the reciprocal extradition of offenders.]”

Paragraph 4 provided:

“The operation of this Order is limited to the United Kingdom of Great Britain and Northern Ireland, the Channel Islands, the Isle of Man, and the other territories (including their dependencies) specified in Schedule 2 to this Order.”

St Christopher and Nevis were included in the territories specified in Schedule 2 to the Order.

16. Section 7 of the 1870 Act provided:

“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 a requisition has been made, and require him to issue his warrant for the apprehension of the fugitive criminal.”

17. Section 17 provided:

“This Act, when applied by Order in Council, shall, unless it is otherwise provided by such order, extend to every British possession in the same manner as if throughout this Act the

British possession were substituted for the United Kingdom or England, as the case may require, but with the following modifications: namely,

- (1) The requisition for the surrender of a fugitive criminal who is in or suspected of being in a British possession may be made to the governor of that British possession by any person recognised by that governor as a consul general, consul, or vice-consul, or (if the fugitive criminal has escaped from a colony or dependency of the foreign state on behalf of which the requisition is made) as the governor of such colony or dependency:
- (2) No warrant of a Secretary of State shall be required, and all powers vested in or acts authorized or required to be done under this Act by the police magistrate and the Secretary of State, or either of them, in relation to the surrender of a fugitive criminal, may be done by the governor of the British possession alone:
- (3) Any prison in the British possession may be substituted for a prison in Middlesex.”

18. Section 26 provided:

“In this Act, unless the context otherwise requires, —

The term ‘British possession’ means 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: ...

The term ‘governor’ means any person or persons administering the government of a British possession ...”

19. Therefore prior to the coming into operation of the St Christopher, Nevis and Anguilla Constitution Order 1967 on 27 February 1967 which provided a new constitution for St

Christopher, Nevis and Anguilla upon the assumption by that territory of the status of association with the United Kingdom under the West Indies Act 1967, the extradition of persons from St Christopher and Nevis to the United States of America was governed by the provisions of the 1870 Act and under sections 7 and 17 of that Act the requisition from the United States of America for the surrender of a fugitive criminal was to be made to the Governor and the requisition to the magistrate for the apprehension of the fugitive criminal could be issued by the Governor. After the coming into operation of the St Christopher, Nevis and Anguilla Constitution Order 1967 the procedure for extradition remained the same and section 49 of the 1967 Constitution provided:

“(1) The executive authority of Saint Christopher, Nevis and Anguilla is vested in Her Majesty.

(2) Subject to the provisions of this Constitution, the executive authority of Saint Christopher, Nevis and Anguilla may be exercised on behalf of Her Majesty by the Governor, either directly or through officers subordinate to him.

(3) Nothing in this section shall prevent the Legislature from conferring functions on persons or authorities other than the Governor.”

20. On 19 September 1983, pursuant to the St Christopher and Nevis Constitution Order 1983, St Christopher and Nevis became a sovereign democratic federal state and the St Christopher, Nevis and Anguilla Constitution Order 1967 was revoked with effect from 19 September 1983. The 1983 Order provided that the Constitution of St Christopher and Nevis set out in Schedule 1 to the Order would come into effect on 19 September 1983 subject to the transitional provision set out in Schedule 2 to the Order. Schedule 2 makes provision for existing laws to continue in force and states in paragraph 2:

“(1) The existing laws shall, as from 19 September 1983, be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution and the Supreme Court Order.

(2) Any existing law enacted by any legislature with power to make laws at any time before 19 September 1983 shall have effect as from that date as if it were a law enacted by Parliament: ...

(4) Where any matter that falls to be prescribed or otherwise provided for under the Constitution by the legislature or by any other authority or person is prescribed or provided for by or under an existing law (including any amendment to any such law made under this paragraph), that prescription or provision shall, as from 19 September 1983, have effect (with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity with the Constitution and the Supreme Court Order) as if it has been made under the Constitution by the legislature or, as the case may require, by the other authority or person. ...

(7) For the purposes of this paragraph the expression ‘existing law’ means any Act, Ordinance, rule, regulation, order or other instrument made in pursuance of or continued in force by or under the former Constitution and having effect as law immediately before 19 September 1983 and includes any Act of the Parliament of the United Kingdom or Order in Council or other instrument made under such Act (except this Order and the Supreme Court Order) and any order made under section 4(2) of this Order to the extent that it so had effect on that date.”

21. The Extradition Act 1870 was an “existing law” and by virtue of Schedule 2 it continued to have effect after 19 September 1983 but it was to be construed “with such modifications, adaptations, qualifications and exceptions as may be necessary to bring [it] into conformity with the Constitution ...”. Therefore the question which arises is what modifications and adaptations to section 17 of the 1870 Act are necessary to bring it into conformity with the Constitution.

22. The relevant provisions of the Constitution which fall to be considered are the following:

Section 21:

“There shall be for Saint Christopher and Nevis a Governor-General who shall be a citizen appointed by Her Majesty and shall hold office during Her Majesty’s pleasure and who shall be Her Majesty’s representative in Saint Christopher and Nevis.”

Section 51:

“(1) The executive authority of Saint Christopher and Nevis is vested in Her Majesty.

(2) Subject to the provisions of this Constitution, the executive authority of Saint Christopher and Nevis may be exercised on behalf of Her Majesty by the Governor-General either directly or through officers subordinate to him.

(3) Nothing in this section shall prevent the legislature from conferring functions on persons or authorities other than the Governor-General.”

Section 52:

“(1) There shall be a Prime Minister of Saint Christopher and Nevis who shall be appointed by the Governor-General.
...

(3) There shall be, in addition to the office of Prime Minister, an office of Deputy Prime Minister and such other offices of Minister of the Government as may be established by Parliament, or, subject to the provisions of any law enacted by Parliament, by the Governor-General, acting in accordance with the advice of the Prime Minister.

(4) Appointments to the office of Minister, other than the office of Prime Minister, shall be made by the Governor-General, acting in accordance with the advice of the Prime Minister, from among the members of the National Assembly.”

Section 54:

“The Governor-General, acting in accordance with the advice of the Prime Minister, may, by directions in writing, assign to the Prime Minister, or any other Minister responsibility for any business of the Government, including the administration of any department of the Government.”

Section 56:

“(1) In the exercise of his functions the Governor-General shall act in accordance with the advice of the Cabinet or a Minister acting under the general authority of the Cabinet except in cases where he is required by this Constitution to act in accordance with the advice of, or the recommendation of, any person or authority other than the Cabinet.”

23. By an instrument dated 6 July 1995 pursuant to section 54 the Governor-General assigned to the Prime Minister, Mr Denzil Llewellyn Douglas, responsibility for the business of the Ministry

of Foreign Affairs which was specified in the instrument as follows:

“ MINISTRY OF FOREIGN AFFAIRS

SUBJECTS

DEPARTMENTS

Foreign Affairs and Defence

Ministry of Foreign Affairs

Conferences and Protocol

Passport Office

Conventions and Agreements

Nationality

”

24. The submission advanced on behalf of the appellants was that prior to 19 September 1983 the executive authority of St Christopher and Nevis was exercised on behalf of Her Majesty by the Governor and that the power to issue the requisition to the magistrate under sections 7 and 17 of the 1870 Act had to be exercised by him and that, as from 19 September 1983 under section 51(2) of the Constitution the executive authority was to be exercised on behalf of her Majesty by the Governor-General, it therefore followed that the requisition to the magistrate under section 7 must be issued by him and not by the Minister of Foreign Affairs.

25. The submission advanced on behalf of the respondent was that under the 1983 Constitution St Christopher and Nevis became an independent sovereign state and that the functions of government and the exercise of executive authority, including executive decisions in relation to requests for extradition, were to be carried out by a government minister and not by the Governor-General. Accordingly the necessary adaptation and modification of section 17 of the 1870 Act were that a requisition by the United States of America for the surrender of a fugitive criminal was to be made to the Minister of Foreign Affairs and that the requisition to the magistrate was also to be issued by the Minister of Foreign Affairs.

26. Their Lordships are of opinion that the submission advanced on behalf of the respondent is correct. Before St Christopher and Nevis became an independent state the executive authority of that territory was vested in Her Majesty and was exercised on her behalf by the Governor. It was therefore appropriate that in matters relating to extradition the functions carried out in the United Kingdom by a Secretary of State under section 7 of the 1870 Act should be carried out in St Christopher and Nevis by the Governor. But after St Christopher and Nevis had become an independent

sovereign State and after 6 July 1995 when the Governor General assigned to Mr Denzil Llewellyn Douglas the responsibility for foreign affairs, it became constitutionally proper that the function under section 7 should be carried out by the Minister to whom responsibility for foreign affairs had been assigned. Under the assignment the subjects assigned to Mr Denzil Llewellyn Douglas included “Conventions and Agreements”. The Treaty concluded between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America for the reciprocal extradition of offenders and set out in Schedule 1 to the United States of America (Extradition) Order 1976 is an “Agreement” within the meaning of that term in the assignment by the Governor General and the Treaty commences with the words:

“The Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America;

Desiring to make provision for the reciprocal extradition of offenders;

Have agreed as follows ... ”

27. In the opinion of their Lordships the Minister of Foreign Affairs is a more appropriate person to exercise the function under section 7 of the 1870 Act than the Governor-General. If the function of issuing a requisition to a magistrate under section 7 of the 1870 Act is vested in the Governor-General, section 56(1) of the Constitution would require him to act in accordance with the advice of the Cabinet or a minister acting under the general authority of the Cabinet, and it would be a strange result if the 1983 Constitution Order granting independence to St Christopher and Nevis resulted in the decision whether to issue a requisition to a magistrate under section 7 being taken by the Governor-General on the advice of the Cabinet rather than by the decision being taken, as it is in England, by a government minister.

28. Section 7 of the 1870 Act clearly contemplates that the Secretary of State in England who receives the request for extradition will issue the requisition to the magistrate. The appellants accept that the request for extradition of the appellants was properly made to the Minister of Foreign Affairs (see *Government of the United States of America v Bowe* [1990] 1 AC 500, 527A), and in the absence of an express statutory provision pointing to a different conclusion it would appear more logical that, the request from the United States of America having been made to

the Minister of Foreign Affairs, the requisition to the magistrate should also be issued by that minister.

29. The appellants relied on the decision of the Board in *Government of the United States of America v Bowe* that in the Bahamas (under the relevant legislation) the requisition under section 7 of the 1870 must be issued by the Governor-General notwithstanding that the request for extradition from the United States Government had to be made to the Minister or Ministry of Foreign Affairs of the Bahamas. But that decision does not assist the appellants because in the Bahamas there was an express statutory provision which was described as follows by Lord Lowry in delivering the judgment of the Board at p 520F-H:

“Section 4(3) of The Bahamas Independence Order 1973 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 9 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.’”

And at p 527A Lord Lowry stated:

“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 of the Act of 1870 must be made by the Governor-General.”

30. The appellants also relied on the judgment of Razack J in the High Court of Justice of Trinidad and Tobago in *In re Lolita Saroop* (HCA 3040 of 1993) where he held in relation to legislation in Trinidad and Tobago similar to the legislation in St Christopher and Nevis that a requisition to the magistrate under section 7 of the 1870 Act must be issued by the President and that a requisition signed by a minister is a nullity. In his judgment at p 20 Razack J stated:

“I have looked at the Trinidad and Tobago Gazettes of December 27 1991 and 29 April 1992 Vol. 31 No. 111 - appointment and assignment of Responsibilities to Ministers - and in neither of those, and so far as I am aware, is there any specific assignment to any Minister of Government of the responsibility for Extradition. The Minister of Foreign Affairs is given the responsibility of ‘External Relations’.

The President in my view has a statutory function under Section 7 of the Act and that function cannot be held to have been assigned to the Minister of Foreign Affairs under the general responsibility of Foreign Relations. An assignment of the responsibility for extradition matters must be specific in my view to relieve the President of his responsibility under that section.”

However their Lordships consider that *In re Saroop* does not assist the appellants and that the case is distinguishable from the present one because here the assignment of the Governor-General expressly stated that “Conventions and Agreements” were one of the subjects for which responsibility was assigned to Mr Denzil Llewellyn Douglas and, as they have stated, their Lordships are of opinion that extradition matters are included within the term “Agreements”.

31. Therefore their Lordships consider that in order to bring the 1870 Act into conformity with the Constitution pursuant to paragraph 2(1) of Schedule 2 to the St Christopher and Nevis Constitution Order 1983 it is necessary to adapt the Act by substituting “St Christopher and Nevis” for “British possession” and “the Minister of Foreign Affairs” for “the governor” in section 17 of that Act. Accordingly their Lordships hold that the requisitions issued by the Minister of Foreign Affairs in this case were valid and lawful.

II. The ruling of the High Court that the magistrate erred in law in not committing the appellants

32. In his first judgment delivered on 17 April 1998 Smith J set out at some length and carefully considered the evidence adduced before the magistrate on behalf of the respondent. An important part of the evidence against the appellant Heath was tapes of a recorded telephone conversation between Heath in St Christopher and a man named Bernagie Webbe in Rochester, New York, and there were transcripts of this conversation. Smith J described the

first conversation and what occurred after that conversation at pages 87 and 88 of the record as follows:

“Three minutes later, at 11 past midnight on the same day Webbe still in Rochester telephoned respondent Heath in St Kitts and asked him if everything was safe. Heath told Webbe that everything was safe, that something was on the ride and that everything was set. Heath also told Webbe that he remembered they had talked about Mr White which was shown to be the coded name for cocaine and that it was strictly that. Heath said that it was already checked personally by him.

Not very long after the conversation between Webbe and respondent Heath, indeed at 13 minutes past midnight on the same day Webbe again contacted McBean and told him he could leave anytime as it was at his disposal but a definite for the morrow. If he wanted to he could go down and wait. McBean said he will wait. On the following day McBean and another person went to New York and after having been traced and followed by police officers was intercepted and found to be carrying a quantity of cocaine in a truck. McBean and the other person, his cousin, were taken into custody as well as the cocaine.

A few days after McBean was arrested with the cocaine, in fact on the 26 June, 1992, Heath called up to Webbe’s place in Rochester trying to locate Webbe. He left his telephone number with the person who answered the telephone for Webbe. At 7:53 pm on the said 26 June, 1992 Heath again called Webbe and after identifying himself by his nickname asked Webbe what had happened. Webbe told him that there was bad news as everything had gone down. When Heath asked Webbe if they got him Webbe confirmed that they did have the boy and that he had his cousin with him.

Bernagie Webbe and his wife were subsequently charged with the criminal offence of conspiring with others to distribute cocaine and they pleaded guilty to that charge. The telephone through which Webbe was contacted by respondent Heath is listed in the name of Webbe’s wife.”

The judge then stated:

“It was clear from what was before this court and the Senior Magistrate that the case advanced before the Senior Magistrate by the applicant against the respondent Heath was

that Heath combined and arranged with Bernagie Webbe to get up to Webbe in New York a quantity of cocaine. The McBeans collected this cocaine for Webbe on another part of the arrangement with Webbe but they were caught by the police while transporting it through New York. The majority of this evidence would have been gleaned from the transcripts which also showed that everything that was on the tapes was not clearly heard by the person or persons who produced the transcripts.”

Later at p 106 he stated:

“It could have been easily seen from the affidavits and the admissible parts of the transcripts which were before the Senior Magistrate that there was some agreement between Heath and Webbe for Heath to get cocaine to Webbe and that cocaine did get to McBean who was in contact with Webbe in relation to its collection. Respondent Heath did not give any evidence himself or call any witness to show that the extradition attempt was for an offence of a political character and not an extradition crime or that the witnesses testifying on behalf of the applicant were not competent to give the evidence they did.”

The judge described the evidence against the appellants Matthew and Miller at pp 88 and 89 as follows:

“Also from the documents that were before this court and the Senior Magistrate the evidence adduced before the Senior Magistrate was to the effect that respondent Glenroy Matthew, Wesley Jeffers, Clifford Henry and Tyrone John met and discussed taking shipments of cocaine into Miami from St Kitts using Amerijet flights. The details of how the cocaine was to be loaded on to the Amerijet flights in St Kitts and collected in Miami were sorted out and agreed. A quantity of cocaine was actually imported into Miami on at least one occasion in 1994. Glenroy Matthew was clearly a party to the whole arrangement.

It was clear from what was in the affidavits (particularly the affidavits of Wesley Jeffers and Tyrone John) before this court and the Senior Magistrate that the case advanced by the applicant against the respondent Matthew was that Matthew, Clifford Henry, Wesley Jeffers and Tyrone John combined to take and did take quantities of cocaine from St Kitts to Miami. Counsel for the respondent Matthew contended before me that the evidence tended to show that what was done by Matthew related to a period earlier in 1994 than the

period in 1994 covered in the particulars of the charges laid against Matthew. Even if this was so that factor was not of sufficient moment to indicate that there was not evidence to support the charges against Matthew.

Then there was a transcript of a tape made of conversations between respondent Matthew, Clifford Henry, Vincent Morris and respondent Miller in which the four discussed the shipping arrangements used or to be used with the transporting of stuff on Amerijet flights in which Wesley Jeffers and Tyrone John were involved. Respondent Miller appears to attribute to himself the underwriting or bankrolling of the arrangements. There was also evidence of Vincent Morris and Clifford Henry having access to a quantity of cocaine. It is a very fair assumption that respondent Miller combined or agreed with respondent Matthew and others to transport cocaine from St Kitts to Miami.”

Later in his judgment at p 117 the judge stated with reference to the appellants Miller and Matthew:

“Not only therefore did the Senior Magistrate not consider the evidence in the transcript but there is no indication that he considered the evidence in the affidavit of Wesley Jeffers and Tyrone John. There was ample evidence in those affidavits of an arrangement or agreement between the respondent Matthew and the deponents to supply and or import cocaine into the United States of America by loading it aboard Amerijet aeroplanes in St Kitts and off-loading it in Miami. Counsel for the respondent Matthew did indicate that the affidavits did show that there may have been an arrangements to import and or supply cocaine during the early months of 1994.

The evidence in the transcript is to the effect that the two respondents engaged in conversations with others as to how they may transport the cocaine handled by the deponents of the affidavits mentioned earlier, Jeffers and John. The Senior Magistrate did not consider this evidence however as he did not have a guide to walk him through it. The said transcript was in English.”

33. As already set out Smith J concluded that the evidence was such that the magistrate should have committed the appellants to

prison pursuant to section 10 of the 1870 Act and that the orders of the magistrate discharging the appellants should be set aside.

34. Before the Board Mr Fitzgerald QC, for the appellants, did not advance any substantial argument that if all the matters referred to by Smith J in his first judgment had been properly in evidence before the magistrate the judge would have been in error in holding that the magistrate should have committed the three appellants to prison pursuant to section 10. But Mr Fitzgerald submitted that the transcripts (and particularly the transcripts relating to the telephone conversations of the appellant Heath) upon which Smith J in part based his decision were not properly in evidence before the magistrate.

35. In order to rule on this submission it is necessary to consider what took place at the hearing before the magistrate. There was evidence before the magistrate that the two telephone conversations between the appellant Heath and Bernagie Webbe to which Smith J referred in his first judgment took place and of the contents of those conversations. This evidence consisted (*inter alia*) of the affidavit evidence of a police officer, John Brennan, of the Rochester Police Department in Rochester, New York, and of the oral evidence of Inspector Austin Lescott of the Royal St Christopher and Nevis Police Force. Police Officer Brennan stated at paragraph 4 of his affidavit:

“Beginning in November 1991, I participated in an investigation into the narcotics trafficking activities of one Bernagie Webbe. On June 19, 1992 United States District Judge Michael A. Telesca, Western Judicial District of New York, authorized the interception of telephonic communications occurring over the residential telephone bearing the number (716) 235-7185, subscribed to by Lorna Tracey, 712 South Plymouth Avenue, Rochester, New York, the wife of Bernagie Webbe. On June 26, 1992, United States District Judge Michael A. Telesca authorized the interception of telephonic communications occurring over the mobile cellular telephone bearing the number (716) 739-9841, also subscribed to by Lorna Tracey. I was an active participant in the monitoring, interception and recording of several telephone conversations pursuant to the two wiretap orders of United States District Judge Telesca between June 19 and July 5, 1992.”

In his affidavit Police Officer Brennan then set out in detail the contents of the telephone conversations between the appellant

Heath and Bernagie Webbe referred to in his judgment by Smith J. In paragraph 23 of his affidavit Police Officer Brennan stated that he participated in the creation of the transcripts of the recorded telephone conversations and that he was of opinion that the transcripts were true and accurate. The transcripts were annexed as Exhibits A, B, C, J and K to his affidavit.

36. The note of the oral evidence given in chief before the magistrate (at p 76 of the record) by Inspector Austin Lescott is as follows:

“I have been involved in the investigation of this matter. I gave an affidavit. I swore on June 5, 1996. I am stationed at the SSU and Head of the Drug Squad from since 1993 and a police officer for over 22 years. Prior to being Head, I worked at the SSU for 10 years. I know Noel Heath for over 10 years. He is also called Zambo. I spoke to him during the period of 10 years. I spoke to him several times during the course of duty and other times. I can recognise his voice. I know Gary Tuggle and Mr Brennan, and Matthew Barnes. On Monday August 25, 1995 I went to Rochester, New York. I met with John Brennan and Matthew Barnes. I spoke to them and they showed me a number of tapes and transcripts of those tapes. I studied the tapes and transcripts and I recognised the voice of Noel Heath also known as Zambo. I compared tapes with transcripts and they correspond. Zambo’s voice was on the said tapes. (Witness is shown tapes - No objection by Dr Ramsahoye QC). These are the tapes I received. There are 10 tapes. I recognise the voice of Zambo. (Witness is shown affidavit of Matthew Barnes which is attached to the transcript). The transcript is here. (Dr Ramsahoye ‘I wish before the tapes are admitted to cross-examine the deponent about the origin of the tapes. Whether they were obtained clandestinely and without the knowledge and consent of the defendant)’.”

37. It is therefore apparent that the tapes of the recorded telephone conversations between the appellant Heath and Bernagie Webbe were present in court at the hearing and were identified by Inspector Lescott. There was also evidence that the transcripts present in court were an actual record of what was said in those telephone conversations. It is also clear from the note of the evidence that the only ground on which Dr Ramsahoye, for the appellants, challenged the admissibility of the tapes was that they had been obtained clandestinely and without the knowledge and consent of the appellant Heath and Inspector Lescott was cross-examined by Dr Ramsahoye as follows (p 78 of the record):

“I do not know if Heath’s consent was given to taping these conversations. I did not say a judge in America made an order that a resident should have his telephone tapped. I saw an order from a judge giving authority to Drug Enforcement Officers to monitor a telephone number of a resident. I do not know for sure if the tapes arose out of the monitoring of that particular order to which the judge referred. I do not personally know how the tapes came about. The tapes were given to me by someone to examine.”

38. However, in his written decision of 28 October 1996 (pp 39 and 40 of the record) the magistrate stated:

“I should also point out, and make clear at this stage, that those ten audio tapes which were produced in court on August 19, 1996 by Special Agent Mr Gary Tuggle for identification purposes, and which were later identified in court on said August 19, 1996 by Mr Austin Lescott; two audio tapes (13 and 14 handed over by Mr Trevor Wells) which are included in the affidavit of August 13, 1996 of Mr Larry Frye; two audio tapes which are included in the affidavit of June 5, 1996 of Mr Robert Catterton; and the video tape included in the affidavit of May 20, 1996 of Mr Dean Morris could not be admitted in evidence pursuant to sections 14 and 15 of the Extradition Act. Further, no proper foundation was laid or even attempted for these ten audio tapes to be admitted in evidence in accordance with the practice and procedure for the admission of real evidence ...

And so, I did not listen to any of the audio tapes, neither did I view the video tape. To do so, would have been most improper and could have constituted a grave error or irregularity on my part.”

39. Mr Fitzgerald submitted that Smith J was not entitled to take into account the transcripts of the conversations between the appellant Heath and Bernagie Webbe because the tapes were not properly in evidence before the magistrate. Mr Fitzgerald cited the judgment of the Court of Appeal in *R v Rampling* [1987] Crim LR 823 that a transcript is not evidence of a telephone conversation - the evidence of a telephone conversation is contained in the tape which records the conversation and the making and use of a transcript is an administrative matter for the convenience of the court. Therefore Mr Fitzgerald submitted that as the tapes were not properly in evidence before the magistrate there was no evidence of the telephone conversations in which the appellant Heath took part.

40. Their Lordships reject that submission. It is clear that the evidence of Police Officer John Brennan and Inspector Lescott and of other witnesses constituted a proper basis for the tapes being adduced in evidence, and as they were properly adduced in evidence it was permissible for the transcripts to be considered. As their Lordships have observed, it is apparent that the only objection taken to the admissibility of the tapes before the magistrate was that the recording had taken place unlawfully, and that on that ground the tapes should not be admitted in evidence. Their Lordships consider that there was no validity in that objection because there was evidence in the affidavit of Police Officer John Brennan that the United States District Judge had authorised the interception of the telephone communications in Rochester, New York, and there is no suggestion that the interception of the other telephone communications relied on by the respondent against the other appellants was unauthorised. Furthermore the fact that evidence has been obtained illegally does not, in itself, make it inadmissible (see *Kuruma v The Queen* [1955] AC 197) although the court may exclude it in the exercise of its discretion.

41. Therefore, their Lordships reject the submission that the High Court was in error in ruling that on the evidence before the magistrate he should have committed the appellants to prison pursuant to section 10 of the 1870 Act.

III. Section 14 of the Constitution

42. The appellants sought to rely on section 14 of the Constitution which provides:

“(1) A person shall not be deprived of his freedom of movement, that is to say, the right to move freely throughout Saint Christopher and Nevis, the right to reside in any part of Saint Christopher and Nevis, the right to enter Saint Christopher and Nevis, the right to leave Saint Christopher and Nevis and immunity from expulsion from Saint Christopher and Nevis ...

(3) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of subsection (1) to the extent that the law in question makes provision ...

(g) for the removal of a person from Saint Christopher and Nevis to be tried or punished in some other country for a criminal offence under the law of that other country or to under go

imprisonment in some other country in execution of the sentence of a court in respect of a criminal offence under a law of which he has been convicted; ...”

The appellants submitted that extradition was only permitted by section 14(3)(g) to the extent that “the law in question makes provision”. They argued that “the law in question” must be a written law and that after the magistrate, pursuant to section 10 of the 1870 Act, had ordered the discharge of the appellants, the “law”, namely the 1870 Act, did not permit a challenge to that decision, the only challenge permitted by the 1870 Act to a decision of the magistrate under section 10 being the right of the prisoner to apply for habeas corpus recognised by section 11 of the Act which provides:

“If the police magistrate commits a fugitive criminal to prison, he shall inform such criminal that he will not be surrendered until after the expiration of fifteen days, and that he has a right to apply for a writ of Habeas corpus.”

Therefore they argued that the challenge to the decision of the magistrate by an application for certiorari and the subsequent decision of the High Court was not permitted by section 14.

43. Their Lordships reject this submission. The law is clear that the High Court has power on an application for judicial review to quash the decision of a magistrate to discharge a fugitive under section 10 of the 1870 Act (see *In re Nielsen* [1984] AC 606), and their Lordships are satisfied that the provisions of section 14 of the Constitution do not in any way restrict this power. The reference to section 14(3) to “any law” relates to a law which makes provision for the matters referred to in subparagraphs (a) and (h) of section 14(3) and does not relate to the law under which the High Court exercises its supervisory jurisdiction over magistrates’ courts.

IV. Abuse of process

44. The appellants further submitted that there had been such delay in the case that it would constitute oppression and an abuse of process for the case to continue. They submitted that it was implicit in section 5 of the Constitution which protects the right to personal liberty that proceedings affecting the liberty of the person should be brought within a reasonable time. In advancing these submissions Mr Fitzgerald pointed to the time which had elapsed between the order of the magistrate on 28 October 1996

discharging the appellants and the second judgment of the High Court dated 19 January 2000.

45. Their Lordships consider that the delay that has occurred in this case is most regrettable, but a very substantial part of the delay is attributable to the unfortunate difference of opinion between the magistrate and Smith J which gave rise to additional and protracted proceedings and which is not attributable to the respondent. Mr Fitzgerald criticised the respondent for taking almost six months after the decision of the magistrate on 26 January 1999 before filing a notice of motion to set aside that decision of the magistrate on 23 July 1999, but the notice of motion was filed within the period of six months permitted by the High Court Rules and the time taken by the respondent cannot be regarded as an abuse of process. It is also clear that the appellants contributed very materially to the overall period of delay because, instead of accepting that in his judgment delivered on 17 April 1998 Smith J had quashed the decision of the magistrate given on 28 October 1996 to discharge the appellants and recognising that the formal order of the High Court should have been amended to give effect to the judgment, their counsel Dr Ramsahoye submitted to the magistrate at the further hearing before him that, as recorded by the magistrate in his decision dated 26 January 1999 (see the record p 128):

“... the Order of the High Court dated the 17th day of April, 1998 which was perfected and entered on the 17th day of July, 1998 and received at this court on the 23rd day of July 1998, did not quash the Orders made by the Magistrate for District ‘A’ on the 28th day of October, 1996 whereby the Requested Persons were all discharged, and the Requested Persons continue to be so discharged.”

46. Their Lordships also take into account the fact that the appellants have not been in custody since the decision of the magistrate on 28 October 1996. Therefore their Lordships reject the submission that the proceedings should be stayed for delay constituting abuse of process.

47. Therefore, for the reasons which they have given, their Lordships will humbly advise Her Majesty that the appeal of the appellants against the two judgments of the High Court delivered on 17 April 1998 and 19 January 2000 ought to be dismissed and the case remitted to the High Court. Their Lordships understand that Dr Haynes Blackman has retired from his position as a magistrate, and it will therefore be for the High Court to decide

what the next step in the proceedings should be, but it is clearly desirable that the High Court and the parties should act with the utmost expedition.