IN THE SUPREME COURT OF BELIZE, A. D. 2014

CLAIM NO. 586 OF 2013

IN THE MATTER of GARY GORDON SEAWELL, a prisoner at Hattieville Prison

And

IN THE MATTER of an Application for a Writ of Habeas Corpus Ad Subjiciendum

And

IN THE MATTER of Section 30 of the Supreme Court of Judicature Act, Chapter 91 of the Laws of Belize, Revised Edition 2000

BETWEEN:	**(GARY GORDON SEAWELL**	**APPLICANT**
	(AND	
	(SUPERINTENDENT OF	**RESPONDENTS**
	(HATTIEVILLE PRISON	
	(ATTORNEY GENERAL	

BEFORE THE HONORABLE MADAM JUSTICE MICHELLE ARANA

Mr. Arthur Saldivar for the Applicant
Ms. Iliana Swift and Ms. Leonia Duncan for the Respondents

D E C I S I O N

1. This is an application by Gary Gordon Seawell for a Writ of H*abeas Corpus ad Subjiciendum* directing the Superintendent of Prison Taheera

Ahmad to show cause why Mr. Seawell should not be released immediately.

The Facts

2. The Applicant, in his affidavit dated November 4th, 2013 states the facts surrounding this *habeas corpus* application. He states that he is presently detained at Hattieville Correctional Facility pursuant to an order made on the 22nd day of October, 2013 by Her Honour Ann Marie Smith, Chief Magistrate, at the conclusion of extradition proceedings instituted by the United States of America (the Requesting State) in Belize (the Requested State). He further claims that according to documents supplied to the Chief Magistrate by the Requesting State, it is alleged that he, Gary Seawell, along with Mark Anthony Seawell and Duane J. Seawell between 1994 and through August 1997 organized a group of individuals to sell marijuana in Texas and Ohio and to import kilogram quantities of cocaine from Belize through Mexico for distribution in the Columbus, Ohio Area. It is further alleged that Gary Seawell along with Mark Anthony Seawell and Duane J. Seawell caused over one million dollars to be sent via wire transfers to Houston, Texas; Lakeland, Florida; and Belize City, Belize.

On the 2nd February, 1998 a Grand Jury in and for the Southern District of Ohio, Eastern Division in the United States of America issued an indictment charging him with 40 counts of violations of the United States Code, namely:

a) One (1) count of conspiracy to import into the United States five hundred grams of cocaine in violation of 21 U.S.C., section 963;

b) One (1) count of conspiracy to distribute and possess with intent to distribute marijuana, a Schedule 1 controlled substance and over 500 grams of cocaine, a Schedule 2 controlled substance, in violation of 21 U.S.C., section 846;

c) One (1) count of conspiracy to commit money laundering , in violation of 18 U.S.C., section 1956(h);

d) Eight (8) counts of laundering monetary instruments to promote the unlawful activity of cocaine and marijuana distribution, in violation of 18 U.S.C., section 1956(a)(1)(i) and 18 U.S.C., section2;

e) Six (6) counts of laundering of monetary instruments to conceal or disguise the nature, locations, source and ownership of the proceeds derived from the sale of cocaine and marijuana, in violation of 18 U.S.C. section 1956 (a)(1)(B)(i) and 18 U.S.C., section2;

f) Sixteen (16) counts of unlawful importation into the United States of over 500 grams of cocaine, a Schedule 2 controlled substance, in violation of 21 U.S.C., section 952(a), section 960(b)(2)(B) (ii) and 18 U.S.C., section 2;

g) One (1) count of unlawful attempt to import into the United States over five (5) kilograms of cocaine, a Schedule 2 controlled substance, in violation of 21 U.S.C., section 952(a), section 960(a) (1), section 960(b)(1)(B)(ii), section 963 and 18 U.S.C., section 2;

h) Three (3) counts of unlawful attempt to import into the United States over five(5)kilograms of cocaine, a Schedule 2 controlled substance, in violation of

21 U.S.C., section 952(a), section 960(a)(1), section 960(b)(1)(B)(ii), 963 and 18 U.S.C., section 2;

i) One (1) count of unlawful attempt to possess with intent to distribute over 500 grams of cocaine, a Schedule 2 controlled substance, in violation of 21 U.S.C., section 841(a)(1), section 841(b)(1)(B)(ii), section 846 and 18 U.S.C., section 2; and

j) One (1) count of operating a continuing criminal enterprise and forfeiture of assets derived from the operation of the enterprise, in violation of 21 U.S.C., section 848.

The grounds of the application as stated in Mr. Seawell's Notice of Application dated 4th November, 2013 are as follows:

I) The Applicant is currently detained at the Hattieville Correctional Facility pursuant to an order made on the 22nd day of October, 2013 by Her Honour Ann Marie Smith, Chief Magistrate, at the conclusion of extradition proceedings instituted by the United States of America.

II) The evidence that Chief Magistrate Smith relied on to order the Applicant's detention and extradition to the United States is legally insufficient in that it failed to establish a *prima facie* case for the following reasons *inter alia:*

(a) The evidence provided by the Requesting State was not certified and authenticated as required by the provisions of the Extradition Act, Cap 112;

(b) Portions of the evidence provided by the Requesting State were inadmissible as it was hearsay evidence and false evidence; and

(c) There was no or not sufficient evidence of identification.

III) It would be unjust and/or oppressive to extradite the Applicant as it would be impossible for him to obtain a fair trial in the Requesting State for the following reasons, *inter alia*:

(a) Based on the evidence presented at the extradition hearing, the offences were alleged to have occurred between 1994 through August 1997, approximately nine years after, the extradition request was made on 6th November2006.No explanation was offered to the Court by the Requesting State to account for this extraordinary delay in institution the extradition proceedings;

(b) If extradited to the United States to face the charges in connection with the extradition request, the Applicant would be greatly prejudiced by the inordinate period of time which had passed between the date of the alleged offences and the present as he does not have a clear recollection of events that took place between 1994 through August 1997, and he would in any event find it difficult to clearly recollect his exact whereabouts, acts and omissions around that time;

(c) It is unlikely that the Applicant will be able to locate witnesses who would be prepared to testify on his behalf and give evidence to exculpate him. Any witness that is found may not accurately nor reliably recollect events that occurred between 1994 through August 1997 or about the Applicant's whereabouts at that time;

(d) The offences for which the Applicant has been charged are complex and will require the assistance of a legal practitioner. However, the Applicant is without means to pay a legal practitioner for a trial in the United States. The Applicant therefore apprehends that his constitutional right to a fair trial, which includes the right to a legal

practitioner of his choice, at his expense, will be infringed in these circumstances.

IV) The lack of sufficient evidence and the apprehended breaches of the Applicant's constitutional right in a trial in the United States on multiple complex charges make the extradition oppressive, unjust and an abuse of process and the continued detention of the Applicant unlawful.

3. This application for a Writ of Habeas Corpus is supported by an affidavit of Gary Seawell sworn to on November 4th, 2013 at Hattieville Prison.

4. On behalf of Mr. Seawell, Learned Counsel Mr. Saldivar argues before this court that the evidence relied on by Chief Magistrate Smith is insufficient to legally justify his detention and to legally establish a *prima facie* case in that:

(a) The evidence provided by the Requesting State was not certified and authenticated as required by the provisions of the Extradition Act, Chapter 112;

(b) Portions of the evidence provided by the Requesting State were inadmissible as it was hearsay evidence and false evidence; and

(c) There was no or not sufficient evidence of identification.

Issues

5. **1) Were the documents properly authenticated (in form) for the purposes of the Extradition Act Cap 112 of the Laws of Belize and if not, what effect did that lack of authentication have on the proceedings before the Chief Magistrate?**

2) Did the content of the documents amount (in substance) to hearsay and were they wrongly considered by the Chief Magistrate leading her to render a decision that was not sound in law?

3) What effect does the delay in bringing extradition proceedings have on the right of the Applicant to a fair trial?

Lack of authentication of documents as required by Extradition Act Chapter 112 of the renders documents inadmissible

Mr. Saldivar argues that none of the documents/purported affidavits in the committal bundle provided by the United States contains the oath to which they are required to swear. He cites section 36(1) of the Indictable Procedure Act Chapter 96 of the Laws of Belize as the basis on which the admissibility of evidence should be decided by a magistrate acting as an examining magistrate for the purpose of determining the sufficiency of evidence for committal of an accused:

36 (1) "For the purpose of section 35 a written statement complies with this section if -

(a) The conditions falling within subsection (2) are met; and

(b) Such of the conditions falling within subsection (3) as apply are met,

(2) The conditions falling within this subsection are that -

(a) the statement purports to be signed by the person who made it;

(b) the statement contains a declaration by that person to the effect that it is true to the best of his knowledge and belief and that he made the statement knowing that, if it were tendered in evidence, he would be liable to prosecution if he willfully stated in it anything which he knew to be false or did not believe to be true."

Mr. Saldivar contends that in order for any of the documents provided by the United States in its committal bundle to satisfy the requirements of Section 14 and 15 of the Extradition Act (UK), the oath articulated in Section 36(1) subsection 2(b) of the Indictable Procedure Act of Belize must have been included. Failing this, those documents cannot be considered legal documents in Belize and cannot be considered depositions or statements on oath in extradition proceedings.

He goes further and argues that the rules governing affidavits in the United States further establishes that what was presented to Her Honour the Chief Magistrate would not satisfy the requirements of the Federal Rules of Civil Procedure in the United States. He cites the United

States case of ***Orsi v Kirkwood*** 999 F. 2d 86 (1993) which held that under Federal Rules of Civil Procedure 56(c), a party who submits evidence for or against a summary judgment motion must do so in the proper authenticated form. Even at a preliminary stage of trial, courts should not permit admission of documents that do not strictly comply with procedural rules. It was decided in that case that it is imperative that a party's sworn submission be sufficient in execution and substance, as well as consistent with prior assertions, to ensure the integrity of the process. Mr. Saldivar also relies on the US case of ***Nissho-Iwai American Corporation v. R. Sukarno Kline*** 845 F. 2d 1300 (1988) where the United States Court of Appeals, Fifth Circuit addressed the issue of whether a party's signed statement given in the presence of a notary constituted summary judgment evidence. The acknowledgement at the end of the purported affidavit considered by the court in that matter read as follows:

> *"BEFORE ME, the undersigned authority, on this day personally appeared Mrs. Sukarno Kline, known to me to be the person whose name is subscribed to the foregoing affidavit, and acknowledged to me that she executed the same for the purposes and consideration therein…"*

The Court held that this acknowledgement was insufficient to convert an unsworn statement into a valid affidavit and was thus properly disregarded as competent summary judgment evidence.

Mr. Saldivar states that sections 14 and 15 of the Extradition Act of the United Kingdom provides what is considered authentication for the purposes of the Act:

> Section 14: *"Depositions or statements on oath, taken in a foreign state, and copies of such original depositions or statements, and foreign certificates of or judicial documents stating the fact of conviction, may, if duly authenticated , be received in evidence in proceedings under this Act."*
>
> Section 15: *"Foreign warrants and depositions or statements on oath, and copies thereof, and certificates of or judicial documents stating the fact of a conviction, shall be deemed duly authenticated for the purposes of this Act if authenticated in manner provided for the time being by law or authenticated as follows:-*
>
> *1) If the warrant purports to be signed by a judge, magistrate, or officer of the foreign state where the same was issued;*
>
> *2) If the depositions or statements or the copies thereof purport to be certified under the hand of a judge, magistrate, or officer of the foreign state where the same were taken to be the original depositions or statements, or to be true copies thereof, as the case may require; and*
>
> *3) If the certificate of or judicial document stating the fact of conviction purports to be certified by a judge, magistrate, or officer of the foreign state where the conviction took place; and if in every case the warrants, depositions, statements, copies, certificates, and judicial documents (as the case may be) are authenticated by the oath of some witness or by being sealed with the official seal of the Minister of Justice,*

> *or some other Minister of State; and all courts of justice, justices, and magistrates shall take judicial notice of such official seal, and shall admit the documents so authenticated by it to be received in evidence without further proof."*

Mr. Saldivar states that the documents submitted to the Chief Magistrate do not meet the criteria set out in these provisions. He argues that therefore they are not depositions on oath according to the law in Belize, in the United States or in the United Kingdom and those documents are therefore nullities. To summarize his arguments on this point, Learned Counsel is claiming that the Chief Magistrate could not make a valid order for extradition of Mr. Seawell since the documents on which she based her decision were not properly authenticated.

Respondent's Submission on Ground One: Lack of Authentication of Documents

Ms. Iliana Swift, Crown Counsel responded to Mr. Saldivar's submissions on this ground by stating that this is an application for a writ of *habeas corpus,* not an appeal of the Chief Magistrate's decision to extradite. She submits respectfully that the Court therefore has a limited jurisdiction in relation to this matter. She cites Lord Reid in the House of Lords decision of ***Schtracks v. Government of Israel and Others*** 1964 AC 556, where

Lord Reid pointed out the Jurisdiction of the Court in a *habeas corpus* proceeding as follows:

> *"The next point involves the question what is the proper function and jurisdiction of this House in an appeal of this kind. I understand that others of your Lordships intend to deal more fully with this question and I shall only state my views in outline. There is no appeal in the ordinary sense from the decision of a magistrate to commit. Such review as is competent can only take place in one or other of two ways. The accused can apply for a writ of habeas corpus, and whether he does so or not, the Secretary of State can decide not to grant the request for extradition, if in the exercise of his discretion he thinks that it is proper to take that course.*
> *This House has no wider powers than the powers of a court. I do not find it necessary in this case to define precisely what those powers are. The court, and on appeal, this House, can and must consider whether on the material before the magistrate a reasonable magistrate would have been entitled to commit the accused, but neither a court nor this House can retry the case so as to substitute its discretion for that of the Magistrate."*

On the specific issue as to the authentication of documents, Ms. Swift argues that the affidavit of Robyn Jones Hahnert, Assistant United States Attorney on behalf of the Requesting State, exhibits the affidavits that the prosecution intends to rely on at the hearing of the matter in the United States and at paragraph 82 he states:

> *"Each of the affidavits attached as exhibits to this affidavit were sworn to before a notary public for the state of Ohio, who is legally authorized to administer an oath for this purpose. Exhibit 6 is a true and correct copy of the State of Ohio statute pertaining to the penalty for making a false statement."*

Ms. Swift submits that it is not for this court in Belize to decide what is the proper procedure to be followed in taking affidavits in the United States. She agrees that while the Extradition Act (UK) 1870 states that depositions before a Magistrate must be on oath, she submits that whether or not an oath is provided only goes to the weight of the evidence. In support of this contention, Ms. Swift cites ***Dowse v. Government of Sweden*** [1983] 2 All E R 123 where the House of Lords held that in a request for extradition in England, evidence provided by a co-accused who was already convicted where the laws of Sweden prohibited convicted/accused persons from providing evidence on oath, the House of Lords decided that that restriction pertained to the laws of Sweden and even if an oath was not provided, the absence of an oath would go only to the weight of evidence and not to admissibility.

Ms. Swift argues that these formalities should not concern the court here in Belize. It is for the Applicant, if he is extradited, to make these objections at the actual trial in the United States. She further submits that in Civil Appeal No.11 of 2002 ***Rhett Fuller v. The Attorney General of Belize***, the Court of Appeal held that hearsay is admissible in extradition proceedings. In the Fuller case, after analyzing ***R v.***

Zossenheim (1903) 20 TLR 12 and ***R v. Governor of Pentonville Prisoner ex parte Voets*** [1986] 1 All ER 630, President of the Court of Appeal Mottley stated as follows:

> *"These cases show that the Chief Magistrate must determine whether the evidence contained in the depositions is such that would according to the Laws of Belize, justify the appellant's committal for trial. As Lloyd LJ indicated in Voets case 'it appears to be well established that hearsay evidence is inadmissible to establish a prima facie case under the Extradition Act'. However, the Chief Magistrate was required to determine whether the depositions taken in the United States should be received into evidence under and in accordance with the provisions of Section 14 of the 1870 Act. In so doing, the Chief Magistrate was not required to determine whether the depositions otherwise complied with the requirements of the Laws of Belize in so far as the taking of depositions was concerned."*

6. **<u>Ruling on Issue One</u>**

In elucidating this issue and placing it in its proper context, I believe it would be very helpful to refer to a passage from a judgment of McLachlin J in ***Kindler v Canada (Minister of Justice)*** [1991] 2 SCR 779 as cited by Mottley P. in Civil Appeal No. 11 of 2002 ***Rhett Fuller v The Attorney General*** as follows:

> *"…While the extradition process is an important part of our system of criminal justice, it would be wrong to equate it to the criminal trial process. It differs from the criminal process in purpose and procedure. Extradition procedure, unlike criminal procedure, is founded on the concepts of reciprocity, comity and respect for differences in other jurisdictions. This unique foundation means that the law of extradition must accommodate many factors foreign to our internal criminal law. While our conceptions of what constitutes a fair criminal law are important to the process of*

> *extradition, they are necessarily tempered by other considerations. Most importantly, our extradition process, while premised on our conceptions of what is fundamentally just, must accommodate differences between our system of criminal justice and the systems in place in reciprocating states. The simple fact is that if we were to insist on strict conformity with our own system, there would be virtually no state in the world with which we could reciprocate. Canada, unable to obtain extradition of persons who commit crimes here and flee elsewhere, would be the loser. For this reason, we require a limited but not absolute degree of similarity between our laws and those of the reciprocating state. We will not extradite for acts which are not offences in this country.* ***We sign treaties only with states which can assure us that their systems of criminal justice are fair and offer sufficient procedural protections to accused persons****. We permit our Minister to demand assurances relating to penalties where the Minister considers such a demand appropriate. But beyond these basic conditions precedent of reciprocity, much diversity is of necessity tolerated*." (emphasis mine)

I agree with the submission made by Ms. Swift on this issue in these proceedings. As the above passage clearly shows, the court hearing an application for extradition is not concerned with the intricacies of the local laws of the Requested state. So the question whether or not the Indictable Procedure Act Chapter 96 of the Laws of Belize requires that documents be sworn in a certain manner is not relevant in extradition proceedings. The more attractive portion of Mr. Saldivar's argument appears to be that the Extradition UK Act 1870 requires in sections 14 and 15 that the documents presented to the Magistrate must be depositions or statements on oath. However, on this particular point, I

agree with Ms. Swift that in proceedings before the Chief Magistrate the absence of an oath goes to weight rather than admissibility. I also agree that it is not for the Chief Magistrate in extradition proceedings to concern herself with whether the documents submitted to her would be admissible in the United States. That is a point which should be raised by the Applicant at the United States trial when the matter reaches court there.

It appears to me that the issue here is one of form versus substance. The case law cited by Ms. Swift seems to be showing that the duty of the Chief Magistrate is to examine the documents presented by the Requesting State, and if she is satisfied that the activities of the accused described therein amount **in substance** to criminal offences under the laws of Belize, then that is sufficient for that accused person to be extradited. In the passage from McLachlin J cited above, while Her Ladyship was discussing considerations pertaining to extradition in the Canadian context, it appears to me that her comments are just as relevant to Belize, and this is no doubt why Mottley JA cited this passage in the Rhett Fuller decision. So, as initially tempting as it may be to become mired down and enmeshed in Mr. Saldivar's argument that the

documents were not properly authenticated under the procedural requirements of Belize's law, and therefore inadmissible, I find that the documents were properly admitted. When I peruse the contents of the witness statements examined by the Chief Magistrate, I find that the activities described by the witnesses are offences recognized under Belize substantive criminal law. They are also offences under the Extradition Act Chapter 112. I therefore find that the Chief Magistrate was correct to act upon them and issue the extradition order. Applying the reasoning of McLachlin J in ***Kindler v Canada (Minister of Justice)*** [1991] 2 SCR 779 to the case at bar, the treaty signed between Belize and the United States is premised on the understanding that the system of justice in both countries is fair and offers sufficient procedural safeguards to protect accused persons such as Mr. Seawell. In fact the very authorities submitted by Mr. Saldivar on Mr. Seawell's behalf serve to prove that courts in the United States are vigilant in ensuring the rights of persons are not prejudiced by admission of documents that are not properly authenticated. The Applicant is free to make his objections to the documents at his trial in the United States. I also need to point out that extradition proceedings (as correctly stated by Ms. Swift in her

submissions) involving the United States and Belize are governed specifically by section 9 of the Extradition Act Chapter 112 of the Laws of Belize as follows:

> *9. "The extradition proceedings of fugitive criminals between Belize and the United States of America shall be directed in accordance with the Extradition Treaty between the Government of Belize and the Government of the United States of America signed on the 30th day of March 2000, a copy of which is set out in the Schedule hereto*."

Under the terms of this treaty, Article 7 sets out the provision which determines the admissibility of documents in extradition proceedings between Belize and the United States:

> *"The documents which accompany an extradition request **shall** be received and admitted as evidence in extradition proceedings if -*
>
> *(a) In the case of a request from the United States, they are authenticated by an officer of the United States Department of State and are certified by the principal diplomatic or consular officer of Belize resident in the United States;*
>
> *(b) In the case of a request from Belize, they are certified by the principal diplomatic or consular officer of the United States resident in Belize, as provided by the extradition laws of the United States; or*
>
> *(c) They are certified or authenticated in any other manner accepted by the law of the Requested State."*

Having perused the bundle of documents submitted by the United States to the Chief Magistrate in Belize in these extradition proceedings, I find that the United States as the Requesting State complied with

Article 7(a) of the treaty in that the documents accompanying the request were certified by the Secretary of State in the United States Condoleeza Rice and by Belize's Ambassador to the United States, Ambassador Lisa Shoman. For all these reasons, I therefore rule that this ground fails.

7. **Portions of the evidence provided by the Requesting State were inadmissible as it was (in substance) hearsay evidence and false evidence**

Mr. Saldivar submits that the requirements of the Extradition Treaty between the United States of America and Belize section 6(3)(c) were not complied with by the Requesting State, i.e., the United States . In his written submissions, he argues that the Chief Magistrate never addressed her mind to the fact that the documents relied upon by the United States were *"The inadmissible hearsay of co-conspirators many of whom remained named on the indictment and who in the documents themselves, declared that they were induced by persons in authority with promises of leniency for cooperation and none of whom either acknowledged or declared to accept any duty of truthfulness."* He further submits that *"The omission of the legal requirement for such*

statements or evidence to be made pursuant to an expressed appreciation of the maker of his duty to tell the truth casts grave doubt upon the veracity and impugns the integrity of the process. The failure of the Chief Magistrate to countenance the peril of hearsay evidence of this type impugns her decision and the preservation of the order contained in her ruling would lead to the unconstitutional deprivation of the Applicant's right to a fair trial."

Respondent's Submission on Argument that Evidence of Co Conspirators is Hearsay and Inadmissible

In answer to this ground, Ms. Swift cites Civil Appeal No. 11 of 2002 ***Rhett Fuller v. The Attorney General of Belize***, where the Court of Appeal in paragraph 103 of their judgment quoted Lord Alverston Chief Justice in ***R v. Zossenheim*** (1903) 20 T.L.R. 121 as follows:

> *"Foreign depositions ought to be most strictly scrutinized. The magistrate ought to say what the **substance** of them was, **as establishing the facts of the case,** but to say that if the magistrate should then inquire whether certain formalities according to English law has been taken, was in His Lordship's opinion, contrary to section11 of the Extradition Act 1870…Though the Magistrate ought to scrutinize the depositions and see that they afforded substantial evidence of facts going to prove an offence, his Lordship knew of no authority that, because they may be criticized subsequently and cross -examined to subsequently, **or because possible they had not been taken according to English rules of evidence,** they ought not to be acted upon…"* (emphasis mine)

The Court of Appeal in *Rhett Fuller* went on to cite Lloyd LJ **in *R v. Governor of Pentonville Prisoner ex parte Voets*** **[**1986] 1 ALL E R 630 as follows at page 632:

> *"The first submission raises an important point which I do not find altogether easy. By section 10 of the Act of 1870 and article VII of the Anglo-French Treaty of 14 August 1876, the subject of an Order in Council of 16 May 1878, the evidence to be produced was such evidence as would, according to the law of England, justify the applicant's committal for trial. The law of England in section 10 of the Act means not only English substantive law but also English rules of evidence. Thus it appears to be well-established that hearsay evidence is inadmissible to establish a prima facie case under the Extradition Acts. The only exception is that provided by section 14 of the Act itself, under which depositions take in a foreign state may be received in evidence, even though otherwise inadmissible in English law, and even thought the formalities required by English law in the taking of depositions are not complied with."*

The Court of Appeal in *Rhett Fuller* went on to find the Chief Magistrate was required to determine whether the depositions taken in the United States should be received into evidence under and in accordance with the provisions of Section 14 of the 1870 Act. In so doing the Chief Magistrate was not required to determine whether the depositions otherwise complied with the requirements of the Laws of Belize in so far as the taking of depositions was concerned. The Court of Appeal also found that the Chief Justice was correct in holding that the depositions

properly fell within the statutory exception to section 14 of the 1870 Act, and that there was sufficient evidence to commit the appellant.

8. **Ruling on Ground 2**

I have perused the documents submitted on behalf of the United States in these proceedings and contrary to the assertions of Mr. Saldivar, the facts set out in these statements appear to be first-hand accounts from witnesses who allegedly worked directly with the Applicant in his operations. Some of these witnesses, for example, one Tod Nelson Young gives a detailed account of travelling from motel to motel accompanying the Applicant in Columbus, Ohio listening to conversations where the Applicant and his brothers discussed selling drugs, staying at apartments in which the Applicant stored cash and narcotics, accompanying the Applicant to collect payment for cocaine from his customers and observing the Applicant weighing the cocaine.

Mr. Saldivar did not illustrate either in the Court below or in this Court which portions of the evidence submitted to the Chief Magistrate amounted to hearsay and false evidence, and it appears to me from my perusal of the statements that the Chief Magistrate had sufficient evidence before her on which to make the extradition order. I also wish

to state that the Applicant can reiterate this hearsay objection at his trial in the United States. I therefore find that this ground also fails.

9. **The Question of Delay**

The Applicant also argues that an inordinate amount of time has passed between the date when the offences were allegedly committed and the present date. Mr. Saldivar submits on behalf of Mr. Seawell that if the Applicant were to be extradited to the United States at this time he would be greatly prejudiced by the inordinate amount of time which has passed between the date of the alleged offences and the present. Mr. Seawell says in his affidavit that he does not have a clear recollection of events that occurred between 1994 through 1997 as he cannot recall his exact whereabouts, acts and omissions around that time. He also claims that it is unlikely that he will be able to locate witnesses who would be prepared to testify on his behalf as they may not be able to accurately or reliably recollect events that occurred between 1994 and 1997. Mr. Saldivar in his oral arguments in this court submitted that the present case is distinguishable from the Rhett Fuller case in that there was a delay of 12 years before the extradition proceedings started and that during that period of time Mr. Seawell was

living in Belize quite unaware that he was wanted in the United States for anything. In the Fuller case, there was ongoing contact between Fuller and the United States authorities for several years immediately before extradition proceedings began. In addition, the Privy Council held that some of the delay was caused by Fuller's own actions such as fleeing from the United States and lack of diligence in pursuing his appeals. In the present case, Mr. Saldivar submits that no such blame can be cast on Mr. Seawell as Mr. Seawell had no role to play in the excessive delay by the United States in pursuing extradition proceedings against him. He therefore asks this Court to discharge the extradition order on the basis that the undue and excessive delay will greatly prejudice his client's ability to get a fair trial and constitutes an abuse of process.

10. **<u>The Respondent's Response to Applicant's Claim of Undue Delay will result in Unfair Trial</u>**

In answer to this ground, Ms. Swift relies on the Privy Council's decision in ***Rhett Fuller v The Attorney General of Belize*** [2011] UKPC 23 where Lord Phillips in delivering the judgment of the Board cited the House of Lord's decision in ***Kakis v. Government of The Republic of Cyprus*** [1978]

WLR 779. Lord Diplock (in the latter case) discussed delay caused in whole or in part by the actions of the accused in extradition proceedings, and in such cases His Lordship stated that *"delay in the commencement or conduct of extradition proceedings which is brought about by the accused himself by fleeing the country, concealing his whereabouts or evading arrest cannot , in my view, be relied upon as a ground for holding it to be either unjust or oppressive to return him*…"

Lord Diplock then went on to discuss delay (as in the case at bar) which has not been caused by the accused and what the Court should consider in such a case:

> *"As respects delay which is not brought about by the acts of the accused himself, however, the question of where responsibility lies for the delay is not generally relevant. What matters is not so much the cause of the delay as its effect; or, rather the effects of those events which would not have happened before the trial of the accused if it had taken place with ordinary promptitude. So where the application for discharge under section 8(3) is based upon the passage of time under paragraph (b) and not on absence of good faith under paragraph (c), the court is not normally concerned with what would be an invidious task of considering whether mere inaction of the requisitioning government or its prosecuting authorities which resulted in delay was blameworthy or otherwise. Your Lordships have no occasion to do so in the instant case."*

The Board found that the delay in Fullers case was in large part due to his own actions.

Ms. Swift went on to quote the Belize Court of Appeal in Civil Appeal No. 45 of 2011, *Rhett Fuller v. The Attorney General of Belize* where the court considered the issue of delay in extradition proceedings. Mendes JA stated as follows at paragraphs 49 to 51:

> *"But, as noted above, **Knowles** and **Gomes** have made clear that the correct approach is to determine whether there is evidence that a fair trial in the requesting state has become impossible because of the delay. Indeed, this was the test which the appellant advocated in his written submissions to the Minister. The Minister pointed out correctly that extradition proceeds on the basis that the person whose extradition is sought will receive a fair trial in the requesting state and that there will exist procedures to determine whether a fair trial can be held despite long delay. It is for the trial judge in the requesting state to determine such questions, not the courts of the requested state and not the Minister. He will only act if there was evidence presented to him that a fair trial has in fact become impossible, that there are in fact no mechanisms in place in the requesting state which will accommodate or evaluate the effect of delay on the fairness of the trial. There was no such evidence put before the Minister and in the absence of such evidence he was quite right to say that he was not in a position to evaluate the appellant's contention that he could no longer get a fair trial in the United States. In so stating, he did not abdicate his statutory duty. Rather, he recognised the limitations which he faced in making any such determination. It is pertinent that the Privy Council had expressed similar sentiments and had obviously influenced the Minister on this question. Lord Phillips said (at para 75):*
>
> > *"Mr. Fitzgerald has put at the forefront of his case on abuse of process the delay that has occurred in this case. He has submitted that this would render impossible a fair trial in the United States. The Board is in no position to evaluate this submission, nor was the Supreme Court in Belize. It was not, however, a matter for investigation by that court. Extradition proceeds on the basis that the person whose extradition is sought will receive a fair trial in the requesting State. If it is plain that a fair trial will not be possible, it will obviously be unjust and oppressive to return the person, but that is not this case. If it is alleged that the delay that has occurred, or any other matter, has rendered a*

fair trial in Dade County impossible, the appropriate remedy is to apply to the court there for relief."

[50] It is in this light, I think, that the Minister's findings must be viewed. What the appellant was required to present to the Minister was ***evidence*** *that the difficulties which he claimed to be experiencing as a result of delay would not be considered by the trial judge in the United States. If there was a mechanism in place in the requesting state to evaluate his concerns, there would be no cause for complaint.* ***If the trial judge in the United States was persuaded that a fair trial was no longer possible, it is to be presumed that the charges would be dismissed. If, on the other hand, the trial judge determined that the prejudice the appellant claimed to have suffered would not affect the fairness of the trial, there would be no cause for complaint.*** *The point is that it was not for the Minister to make such determinations. His concern was only with any evidence which would demonstrate that a fair trial was impossible, which could include some evidence of how a case like this would be dealt with in the United States. No such evidence was presented to the Minister and accordingly he cannot be faulted for finding that there was no evidence of any manifest negative consequence or that the trial would be negatively impacted. (emphasis mine)*

[51] In any event, it seems to me that the evidence that the appellant did present left much to be desired. He claimed not to have a clear recollection of the events that took place in 1990 and that he had difficulty in clearly recollecting 'his exact whereabouts, acts and omissions around that time.' He does not claim, in other words, to have no recollection at all and a consequence inability to mount a defence. Similarly, he claims that it is unlikely that he would be able to locate a witness who would be prepared to testify on his behalf and to give exculpatory evidence. He says further that any witness he might find may not be able to accurately or reliably recollect events that occurred in 1990 or his whereabouts at that time. ***What he does not say is that there is some particular witness who is either no longer available to him or who has said that they cannot remember the relevant events.*** *In other words, there may in fact have been no such witness ever in existence.* ***The appellant appears to rely on bald speculation. In order to mount a case that a fair trial is impossible, it was incumbent on the appellant to demonstrate, for example, that evidence***

which once existed was no longer available because of the delay, or that he simply had no recollection of the events surrounding the offence*."* *(emphasis mine)*

11. **<u>Ruling on Issue of Undue Delay</u>**

It is beyond dispute that there has been significant delay by the United States in bringing these extradition proceedings against the Applicant. The alleged criminal activities occurred in 1994 to 1997 and the request for extradition was heard by the Chief Magistrate in 2013. It is also clear, that unlike in the Fuller case, no blame for causing this delay is ascribed to the Applicant. But as the Court of Appeal in *Rhett Fuller* has articulated quite clearly, the simple fact of delay is not enough warrant a court discharging an order for extradition. There is a duty on the Applicant to bring evidence to prove to this court that the court in the United States will not take into account the length of the delay and the effects of that delay on the availability of evidence into consideration. There has been no evidence provided by the Applicant to this court that certain evidence which once existed no longer exists due to the delay. To paraphrase Mendes JA in *Rhett Fuller* cited above, a mere assertion or a "bald speculation" that a fair trial is now impossible due to delay is not enough. For these reasons, this ground does not succeed.

12. The ground concerning evidence of identification was not pursued by the Applicant before this court. That ground is therefore treated as abandoned.

13. I find that the detention of the Applicant is lawful and the order for extradition issued by the Chief Magistrate is valid.

14. Application dismissed. Costs awarded to the Respondent to be agreed or assessed.

Dated this Thursday, 3rd day of July, 2014

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Michelle Arana
Supreme Court Justice