

IN THE SUPREME COURT OF BELIZE, A.D. 2019

Claim No. 852 of 2019

**In the Matter of the Extradition Request of Andrew Avelline Bennett
And
In the Matter of a Case Stated for Determination by the Supreme Court
And
In the Matter of Section 20(3) of the Constitution of Belize, Cap 4, R.E. 2011**

BETWEEN ANDREW AVELLINE BENNETT CLAIMANT

AND GOVERNMENT OF THE UNITED DEFENDANTS
STATES OF AMERICA

ATTORNEY GENERAL OF BELIZE

Before: The Hon Westmin R.A. James (Ag)

Date: 25th July 2021

Appearances: Mr Anthony Sylvestre and Ms Illiana Swift for the Claimant
Mrs Samantha Matute-Tucker for the Defendants

JUDGMENT

Background

1. On or around the 20th day of December, 2017, the United States of America made a request for the extradition of the Claimant, an Attorney at Law, pursuant to Article 6 of the Extradition Treaty between the Government of the United States of America and the Government of Belize (the "Treaty"), which was duly executed on the 30th day of March, 2000, and which is duly incorporated into the Extradition Act, Chapter 112 of the Laws of Belize.

2. The extradition proceedings commenced on the 18th January, 2018, where the Claimant appeared before the Honourable Court and was arraigned. After the arraignment he applied for bail, and which the Court granted.
3. At the arraignment on the 18th January, 2018, the Claimant sought disclosure of the extradition documents and indicated that they wished to make a preliminary objection to the Extradition Bundle tendered into evidence by the Foreign Service Officer of the Ministry of Foreign Affairs, and marked for identification as not satisfying Article 7(a) of the Extradition Treaty Schedule to the Extradition Act.
4. On the 12th December 2018, the 28th December 2018 and 4th January 2019, oral arguments were presented and heard on the issue of whether the Bundle satisfied the requirements of Article 7(a). It was then discovered that the certificate was missing from the Magistrate's file.
5. The matter was further adjourned to the 16th May 2019, and the 30th May 2019 and on the latter date it was ruled that the Respondent would have been allowed to take the steps to have the document of certification which was prepared by the principal consular officer of Belize resident in the United States, which was only absent from the Bundle submitted to the Court, tendered.
6. Thereafter, the Claimant indicated that he wished to have the questions referred to the Supreme Court for determination. The Chief Magistrate granted the application for a case to be stated to the Supreme Court of Belize.
7. Consequently, on the 18th December, 2019 the Claimant filed a Fixed Date Claim by way of a case stated for the following relief:
 - (i) A Declaration that the extradition proceedings are in violation of the Claimant's constitutional rights protected under the Constitution;
 - (ii) A Declaration that the procedure adopted in the extradition proceedings by order of the Chief Magistrate on 30th May, 2019 infringes the Claimant's constitutional right protected under the Constitution;
 - (iii) A Declaration that the extradition proceedings are an abuse of process;

- (iv) A stay of the extradition proceedings before the learned Chief Magistrate; and
- (v) Such further or other reliefs as may be just.

8. The Chief Magistrate stated the following questions:

1. Whether the Extradition proceedings are in violation of the Applicant's fundamental rights protected by the Constitution. It is the Applicant's submissions that the Extradition Request made by the USA is replete with evidence which was:
 - (i) Illegally obtained
 - (ii) Obtained in breach of his right not to be subjected to arbitrary search?
 - (iii) Was a violation of his right to not be subjected to arbitrary search?
2. Whether the procedure to be adopted as ordered by the Chief Magistrate on the 30th day of May, 2019, infringes the Applicant's section 6 Constitutional Right as it is not provided for in the Indictable Procedures Act?
3. Are the Extradition proceedings an abuse of process?

Jurisdiction

9. Section 20(3) of the Constitution provides that

"If in any proceedings in any court (other than the Court of Appeal or the Supreme Court or a Court-Martial) any question arises as to the contravention of any fundamental rights and freedoms provided for in section 3 to 19 inclusive of this Constitution, the person presiding in that court may, and shall if any part of the proceedings so request, refer the question to the Supreme Court unseen, in his opinion, the raising of the question is merely frivolous or vexatious."

10. I would now consider the questions submitted to this Court for determination.

- (i) *Whether the Extradition proceedings violate the Claimant's fundamental rights protected by the Constitution, as the evidence was illegally obtained, and in breach of the applicant's right to privacy and arbitrary search.*
11. The Claimant submits that the evidence in support of the extradition request was illegally obtained since the WhatsApp communications "*were recorded without his consent and not pursuant to any court order*", in breach of the Interception of Communications Act, Chapter 229:01.
12. The Defendants argued that the evidence was not obtained illegally because there was consent by one of the parties to the conversation, and as such, there was no breach of the Claimant's rights to privacy or constituted arbitrary search as enshrined in the Constitution. The Defendants rely on Section 3(3)(b) of the Interception of Communications Act, which provides that a person does not commit an offence under it, if that person has written or otherwise documented authorisation consenting to the interception from the person to whom or from whom the communication is transmitted.
13. The Defendants submitted in the alternative that if the Court finds that the WhatsApp communications were unlawfully obtained, there is still the sworn Affidavit of SA Joseph Pelz detailing their interactions and or conversations with the Claimant, to support the extradition request. As such, the Defendants submit, the relief being sought by the Claimant ought not to be granted by the Court.
14. The issue in relation to this aspect of the case stated was canvassed by the Court of Appeal in *Leach and Knowles v Attorney General Civ Appeal 20 of 2017* to which I am bound. In that case, the Court of Appeal held that the procedure of Case Stated utilized by the Claimant was the proper procedure not premature and subject to the proviso on abuse of process.
15. The Court of Appeal also held that the Court should assess the evidence in relation to the constitutional issues raised as there must be a balance between the fundamental rights of the person and the principles of comity and reciprocity. The Court of Appeal held that a trial judge should evaluate whether the process in the

Magistrate's Court was being abused, in relation to the alleged violation of the party's fundamental rights afforded by the Constitution. Moreover, the Court stated that it is required to assess the evidence in support of the requests made by the United States for the extradition of the Claimant to determine whether there was an abuse of the process of the Magistrate's Court in Belize.

16. The Court of Appeal ultimately held that the interceptions of communications between the appellants and the undercover agent was in breach of the Interception of Communications Act of Belize and violated their constitutional rights against arbitrary search and seizure and their right to privacy. They later held it was an abuse of the Magistrate's Court process and the extradition proceedings was stayed.
17. The evidence of the United States in the case at bar include though not exclusively evidence obtained by the United States, through WhatsApp communications between the Claimant and an undercover agent in Belize. The Claimant in the present proceedings relies on the Canadian case of *R v Durante* emanating from the Supreme Court of Canada, where there was a similar provision in the interception of communications legislation there for participant surveillance. That Court held that the Constitutional right to be secured against unreasonable search and seizure does impose an obligation on police to seek prior judicial authorization, before engaging in participant surveillance the Court highlighted the function of such authorization in balancing the competing interests. The Court also warned against the serious risks faced when the obligation to seek authorization is dispensed with and the decision to intercept is left to the absolute discretion of state agents.
18. The Claimant also relied on the the European Court of Human Rights jurisprudence in *A v France* and *M.M. v Netherlands*. Both of these cases which dealt with recordings carried out by a consenting participant in the conversation similarly found that the involvement of state officials in assisting the participant in recording the conversation was such that the interference would be imputable to the State and required judicial authorization.

19. The Defendants were unable to provide any authority to the contrary. There is no dispute that what was done in this case was an interception of the communication with the Claimant and that there was no application made under section 5 of the Interception of Communication Act for an interception direction under section 6.
20. I agree with the Claimant that the WhatsApp messages obtained by the undercover agent with the undercover agent's permission was in breach of the Interception of Communications Act and prior judicial authorization was necessary. I think if one does not read the provision on participant surveillance when it involves a state actor in this way, it would allow the State to get around the intention of the Act to obtain judicial authorization by simply putting an officer as the other party to the communication. I therefore hold that the undercover agent in this case was a state actor and it was necessary for prior judicial authorization under the laws of Belize for the interception of communication between himself and the Claimant. Relying on the guidance from *Leach and Knowles (supra)* I therefore hold that the WhatsApp communication used was in breach of the Claimant's constitutional rights guaranteed by sections 9 and 14 of the Constitution and cannot be relied on by the Magistrate.

Abuse of process

21. The evaluation does not stop with a declaration that illegally obtained evidence breaching the constitutional rights of the Claimant, the Court has to decide whether it amounted to an abuse of process of the Magistrate's Court.
22. In *Leach and Knowles (supra)* The Court of Appeal held that the evidence obtained by the United States in that case was not sufficient under the laws of Belize to commit the appellants because of the failure to obtain judicial authorization in accordance with the Interception of Communications Act. In that case the evidence was mainly emails and telephone conversations and other communications that was obtained in violation of the Interception of Communications Act. It was on that basis that the Court of Appeal held that there was an abuse of process of the Magistrate's Court extradition proceedings and therefore, the extradition proceedings ought to be stayed.

23. The remedy of a permanent stay is an 'exceptional remedy' which immunizes an accused from prosecution and frustrates the pursuit of accountability. In *R v Ferguson; ex parte A-G* [2008] QCA 227 the Queensland Court of Appeal stated at 19: "*The exceptional jurisdiction permanently to stay proceedings is truly residual in character in the sense that it falls to be exercised only in those cases where the other legal safeguards of the right of the accused to a fair trial are not apt to secure that right.*" In *R v Johannsen & Chambers* (1996) 87 A Crim R 126 Fitzgerald J stated at 135:

"... there is a strong predisposition towards permitting prosecutions to proceed, with procedural and other rulings and directions moulded to achieve a fair trial which produces a result free of the taint of risk of miscarriage of justice ... A stay should not be granted if the prosecution can proceed, uninfluenced by improper purpose, without unfairness to the accused, with a legitimate prospect of success and, in the event of conviction, no significant risk that, because of delay or other fault on the part of the prosecution, an innocent person will have been convicted."

24. Therefore, it is not every infringement of the right that will cause the entire proceedings to be stayed. It depends on the circumstances as to hold otherwise would mean that any infraction no matter how slight would render any extradition proceedings stayed. This also follows from the fact that much of the machinery and substance of the law is aimed at achieving the same ends as the abuse of process doctrine, namely a fair trial which maintains public confidence in the courts.

25. In *Leach and Knowles (supra)* at paragraph [75] Madam Justice Minnet Hafiz Bertram JA said the United States was required to present a prima facie case, which had to be based on evidence that was admissible under the Laws of Belize. She cited Article 6 of the Treaty which provides that a request for extradition of a person who is sought for prosecution shall also be supported by such evidence as would be found sufficient, according to the law of the Requested State (Belize) to justify the committal for trial of the person sought if the offense of which the person has been accused had been committed in the Requested State (Belize). This is supported by Article 10(1) of the Treaty provides that "*Extradition shall be granted*

only if the evidence is found sufficient according to the law of the Requesting State either to justify the committal for trial of the person sought if the offence which the person accused had been committed in the territory of the Requested State or to prove that the person is the identical person convicted by the courts of the Requesting State.” The Learned Justice of Appeal held that to allow the extradition under circumstances where the evidence was mostly evidence obtained in absence of judicial authorization would be affront to the rule of law and as such an abuse of process of Magistrate’s Court extradition proceedings. I do not take the Court of Appeal ruling to be that once there is a breach of a person’s constitutional rights it means that the matter must be stayed.

26. Therefore, I have to assess whether separate and apart from the evidence which was obtained in contravention of the Claimant’s constitutional rights and not admissible evidence upon which the Magistrate can rely is there enough evidence to justify committal for trial of the person sought. If the evidence that had been obtained in breach of fundamental rights could be confined and excluded then the case might be allowed to continue.

27. I agree with the Defendants the WhatsApp messages are not the only evidence contained in the Affidavit of Special Agent Joseph Pelz. There is evidence of personal meetings with the Claimant and in person discussions with the Claimant and agreements made by the Claimant with SA Pelz in person. There was also the passing of cash from SA Pelz to the Claimant. There is also evidence of observations of the Claimant that all were not alleged to have breached any law in Belize and not argued to be inadmissible evidence before the Magistrate. There is therefore in my opinion still ample evidence contained in the sworn Affidavit of SA Joseph Pelz detailing his interactions and conversations with the Claimant including passing of money, that may allow a Magistrate to find that there is such evidence as would be found sufficient according to the law of Belize to support the extradition.

28. I therefore would not grant a stay as the prosecution can proceed, without unfairness to the accused, once the evidence that was taken in contravention of the Claimant’s constitutional rights is excluded from the Chief Magistrate’s

contemplation. I therefore hold that there is no abuse of process and so would not stay the proceedings on this basis.

Breach of Right to Protection of the Law

29. The Claimant also seeks in this claim a declaration that the procedure adopted in the extradition proceedings by order of the Chief Magistrate on the 30th May, 2019 infringes the Claimant's constitutional right protected under the Constitution, specifically, his right under section 6 to protection of the law.
30. Section 6(1) of the Constitution provides that “[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law.”
31. The decisions of the Caribbean Court of Justice in *Attorney General of Barbados v Joseph and Boyce* [2006] 69 WIR 104, *Juanita Lucas & Anor v Chief Education Officer & Anor* [2015] CCJ 6 (AJ) and *The Maya Leader's Alliance v Attorney General of Belize* [2015] CCJ 15 all addressed this right. In *Maya Leader's Alliance* the CCJ stated:

*“The law is evidently in a state of evolution but we make the following observations. The right to protection of the law is a multi-dimensional, broad and pervasive constitutional precept grounded in fundamental notions of justice and the rule of law. The right to protection of the law prohibits acts by the Government which arbitrarily or unfairly deprive individuals of their basic constitutional rights to life, liberty or property. It encompasses the right of every citizen of access to the courts and other judicial bodies established by law to prosecute and demand effective relief to remedy any breaches of their constitutional rights. However the concept goes beyond such questions of access and includes the right of the citizen to be afforded ‘adequate safeguards against irrationality, unreasonableness, fundamental unfairness or arbitrary exercise of power’ [*Attorney General v Joseph and Boyce* at para 20]. The right to protection of the law may, in appropriate cases, require the relevant organs of the state to take positive action in order to secure and ensure the enjoyment of basic constitutional rights. In appropriate cases, the action or failure of the state may result in a breach of the right to protection of the law. Where the citizen has been denied rights of access and the procedural fairness demanded by natural justice, or where the citizen's rights have otherwise been frustrated because of government action or omission, there may be ample grounds for finding a breach of the protection of the law for which damages may be an appropriate remedy”*

32. The Claimant has argued the right to protection of the law is the right of a person to have rights granted to him by way of a law or a legal process, not to be interfered with. He argued that once the evidence has been tendered at a preliminary inquiry hearing and submissions have commenced, the examining magistrate is not statutorily empowered to embark on the procedure the learned Chief Magistrate did in the extradition proceedings below.

33. In *Rhett Fuller v AG* the Privy Council endorsed Mottley P description of the manner in which the Act had to be adapted in order to apply in Belize:

“This Act provides for a scheme of extradition of a person whose presence is required in a foreign country to stand trial in respect of a criminal offence for which he is charged. Once the request is made and the warrant is issued, the person is brought before the magistrate. The magistrate is required to hear the case ‘in the same manner, and have the same jurisdiction and powers, as near as may be, as if the prisoner were brought before him charged with an indictable offence’ committed in Belize (section 9). Evidence must be produced which would, according to the Law of Belize, justify the committal of the person for trial of an indictable offence. If there is no such evidence, the magistrate is required to discharge the prisoner. The powers under the Extradition Act are to be exercised in Belize by the Chief Magistrate. In committing the person, the Chief Magistrate is required to inform him that he will not be surrendered until after the expiration of fifteen days. In addition, the Chief Magistrate must inform the prisoner that he has the right to apply to the Supreme Court for a writ of habeas corpus. The Act does not give the appellant any right of appeal. It requires the Chief Magistrate to inform him of his right to apply for habeas corpus. The Act does not create the right to apply for habeas corpus. The Act merely recognizes that the right exist. Such right, in my view would have existed as part of the common law of England and as such became part of the common law of Belize. It is noted that the right to apply for habeas corpus is enshrined in the Constitution of Belize.”

34. Section 9 of the *Extradition Act* provides:

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

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

35. The Affidavit of Lavinia Cuello indicated that on 18th day of January 2018 when the Extradition proceedings were to commence, the Claimant requested disclosure of the extradition documents and indicated his intention to file preliminary objections on whether the extradition bundle satisfied Article 7(a) of the Treaty. The affiant goes on to say that orders were made for disclosure of the document; time given for filing of the Claimant's objections; time given to the Defendants to respond and a date on which to return for hearing.
36. Ms Cuello then deposes that the extradition bundle was not authenticated but was only tendered for identification purposes by the Foreign Service Officer attached to the Ministry of Foreign Affairs, Belize. When the Claimant commenced his oral arguments in relation to the preliminary point, it came to the Chief Magistrate's attention that the Certificate of the Belize Ambassador to US which is required to be attached to the extradition bundle was absent from the extradition bundle that the Court had. As such, time was given to the Defendants to address the absence of the Certificate. Upon return before the Chief Magistrate, the Defendant was given permission to have the Certificate tendered as part of the extradition bundle. The matter was adjourned until the 4th June 2018 when the Claimant indicated that he wished to have the questions referred to the Supreme Court for determination.
37. The facts as described by the Magistrate was that document of certification prepared by the principal consular officer of Belize resident in the United States, was only absent from the bundle submitted to the Court. There was no indication that the certificate was not in existence or that the Claimant was not in possession of same it seems that it was just missing from the Magistrate's bundle through some sort of inadvertence.
38. The Claimant has argued that the Magistrate has no such power under the Indictable Offences Act. They further argued that section 34 of the IPA does not allow the Magistrate to embark on the procedure the learned Chief Magistrate did.
39. The Defendant has argued that Chief Magistrate in exercising her powers in extradition proceedings must do so as near as may be in the exercise of her powers under the *Indictable Procedure Act*, Chapter 96 of the Laws of Belize, but she must have "*regard to the specific provisions of the Extradition Treaty and the Extradition Act*". They argued that under the Article 6 of the Treaty provides for

extradition procedures and required documents. Article 6(3) states: “6 (3) A request for extradition of a person who is sought for prosecution shall also be supported by: (c) such evidence as would be found sufficient, according to the law of the Requested State, to justify the committal for trial of the person sought if the offense of which the person has been accused had been committed in the Requested State.”

40. I disagree with the Claimant. I believe there is provision in the IPA that allows further evidence to be taken. There is a provision in Belize like other jurisdictions in the Caribbean other than Jamaica where the prosecution even after the committal proceedings can refer the case back to the magistrate, directing him to reopen the inquiry to take further evidence. This is a special power given when the prosecution considers that all the available evidence has not been led by the prosecution.
41. It was held in *R v Gomes* (1962) 5 WIR 7 that the availability of this procedure ensured that the prosecution does not suffer where a prosecutor by careless omission fails to lead certain available evidence. On the directions of the DPP, the magistrate may reopen the enquiry and take evidence of a witness either who did not give evidence, although his statement is on the prosecution file, or who gave incomplete evidence. This procedure is effectively a continuation of the preliminary enquiry after which the accused person must again be committed to stand trial.
42. If extradition proceedings are similar to committal proceedings, then the prosecution should have a similar ability to lead further evidence if the evidence is incomplete especially through some inadvertence or error and that evidence was available.
43. As I understand it, in the case at bar, it was simply a case where the document through some inadvertence was not on the file of the Magistrate. There was no contention that the Claimant was not provided with the document nor that the document was not existent or even that the document was never on the Magistrate’s file. The Claimant’s preliminary objection had nothing to do with the document being missing from the Court’s file and the Court was simply completing its file.
44. Further there is no evidence as yet before the Chief Magistrate to consider in determining whether to commit the Claimant to be extradited, and section 35 is not applicable in this way. I therefore dismiss this aspect of the Claimant’s Claim.

45. The Order of the Court is as follows:

1. The WhatsApp communication were obtained in violation of section 9 and 14 of the Constitution, and therefore cannot be considered by the Chief Magistrate in the Extradition Proceedings;
2. The procedure adopted in the Extradition Proceedings by order of the Chief Magistrate on 30th day of May, 2019 is not an abuse of proceed contrary to section 6 of the Constitution; and
3. The Extradition Proceedings are not an abuse of process, and the Extradition Proceedings are to continue before the Chief Magistrate.

46. Having regard to the fact that the Claimant prevailed on some of his case and not all, I would order no order as to costs.

/s/Westmin James
Westmin R.A. James
Justice of the Supreme Court (Ag)