[1980–87 Gib LR 371]

IN THE MATTER OF KLAKOSZ

SUPREME COURT (Davis, C.J.): March 20th, 1986

Extradition and Fugitive Offenders—committal proceedings—documents from requesting country—evidence in committal proceedings to be depositions, statements on oath or affirmations—affirmation means confirmation or declaration of truth of document—unsworn statement may be "affirmed" if made in circumstances of sufficient gravity and solemnity

Extradition and Fugitive Offenders—committal proceedings—documents from requesting country—unsworn statements inadmissible in committal proceedings unless "affirmed"—declaration by maker that they have no wish to add to, delete from or otherwise alter not affirmation

The Government of France sought the extradition of the applicant on charges of fraud, forgery and embezzlement.

The applicant, a French citizen, was arrested in Gibraltar with a view to extradition after being accused of fraud, forgery of commercial documents and embezzlement in France. He was brought before the Stipendiary Magistrate who found that the evidence against him in respect of the charge of embezzlement justified his committal pending the issue of the Governor's warrant for his extradition. The evidence adduced before the Stipendiary Magistrate had included an unsworn statement made by the defendant to two "judicial police officers," a similar unsworn statement made by the president and managing director of the company to the same two "judicial police officers," an unsworn statement made by way of complaint to a police inspector (all of which contained declarations), and three depositions.

The applicant applied for a writ of habeas corpus on the basis that the evidence adduced before the magistrate did not justify his committal. He submitted that (a) unsworn statements were inadmissible in evidence as they were not depositions, statements on oath or affirmations as required by the relevant provisions of the Extradition Acts 1870 and 1873, when read with the 1878 Extradition Treaty; (b) although the two police officers were described as "judicial police officers," there was no evidence as to what this meant, nor did it show that the statements could be considered to be affirmations or depositions; and (c) there had been nothing before the magistrate which distinguished the unsworn statements from those made to the police in an ordinary investigation and the declaration at the end of

each statement did not amount to a sufficient affirmation of the accuracy of the statements so as to make them admissible in evidence.

The respondent submitted that (a) it was a question of fact for the Stipendiary Magistrate, after considering all the circumstances in which the unsworn statements had been made, to determine whether they had been sufficiently adopted so as to bring them within the category of affirmation; and (b) the statements made in the presence of two police officers amounted to affirmations as the signed declaration at the end of each statement sufficiently confirmed the accuracy of their content.

Held, allowing the application:

(1) The applicant would be released as there was no admissible evidence justifying his committal in respect of the charge of embezzlement. The unsworn statements, with the exception of the applicant's own, were inadmissible as they failed to comply with the Extradition Acts when read together with the Treaty which required that, in committal proceedings, statements of evidence be made in the form of "depositions and statements on oath taken in a foreign state . . ." or "affirmations taken in a foreign state." The vital constituent of an affirmation was the solemn declaration of truth and therefore an unsworn statement could, on occasion, amount to an affirmation if made in circumstances of sufficient gravity and formal solemnity for the witness to fully appreciate the importance of telling the truth. The applicant's statement therefore amounted to an affirmation as it had been made in the presence of two police officers and the applicant was present in the magistrates' court to adopt or reject the statement as his own (paras. 29–31; paras. 41–42).

(2) Although it was a question of fact for the magistrate to decide, on consideration of all the circumstances, whether unsworn statements had been sufficiently adopted by their maker, in the present case it appeared that the magistrate had neither directed, nor been asked to direct, his mind to that point. Further, none of the other evidence adduced against the applicant contained anything which sufficiently implicated him. One of the depositions, for example, consisted mainly of hearsay evidence which was inadmissible in committal proceedings and the other depositions were made up of mostly unsubstantiated allegations (para. 28; paras. 32–33; paras. 36–38).

(3) It was also irrelevant that the unsworn statements contained declarations. They were simply ordinary declarations made by the maker of a statement, after he had been given the opportunity to read it, to the effect that he had no wish to add, delete or otherwise alter his statement. There was nothing in them which indicated an awareness of the gravity and importance of the truth being told so as to make each declaration an adoption of the statement. They did not even contain an acknowledgement that what had been stated was true (paras. 27–28).

Cases cited:
(1) *Arton (No. 2)*, *In re*, [1896] 1 Q.B. 509, considered.
(2) *Federal Republic of Germany (Govt.)* v. *Sotiriadis*, [1975] A.C. 1; [1974] 2 W.L.R. 253; [1974] 1 All E.R. 692; [1974] Crim. L.R. 250, considered.
(3) *R.* v. *Brixton Prison Gov.*, *ex p. Lennon*, [1963] Crim L.R. 41, considered.
(4) *R.* v. *Brixton Prison Gov.*, *ex p. Sadri*, [1962] 1 W.L.R. 1304; [1962] 3 All E.R. 747; (1962), 106 Sol. Jo. 836, considered.
(5) *R.* v. *Brixton Prison Gov.*, *ex p. Twena*, Divisional Ct., November 27th, 1980, unreported, considered.
(6) *R.* v. *Pentonville Prison Gov.*, *ex p. Ecke* (1981), 73 Cr. App. R. 223; [1974] Crim. L.R. 102; (1973), 118 Sol. Jo. 168, considered.
(7) *R.* v. *Pentonville Prison Gov.*, *ex p. Kirby*, [1979] 1 W.L.R. 541; [1979] 2 All E.R. 1094, considered.
(8) *R.* v. *Pentonville Prison Gov.*, *ex p. Passingham*, [1983] Q.B. 254; [1982] 3 W.L.R. 981; [1982] 3 All E.R. 1012; [1982] Crim. L.R. 592; (1982), 126 Sol. Jo. 784; on appeal, *sub nom. Dowse* v. *Govt. of Sweden*, [1983] 2 A.C. 464; [1983] 2 W.L.R. 791; [1983] 2 All E.R. 123; [1983] Crim. L.R. 678; (1983), 127 Sol. Jo. 308, considered.
(9) *R.* v. *Pentonville Prison Gov.*, *ex p. Singh*, [1981] 1 W.L.R. 1031; [1981] 3 All E.R. 23; (1981), 73 Cr. App. R. 216; 125 Sol. Jo. 480, followed.

Legislation construed:
Extradition Act 1873 (36 & 37 Vict., c.60), s.4: "Be it declared, that the provisions of the principal Act relating to depositions and statements on oath taken in a foreign state, and copies of such original depositions and statements, do and shall extend to affirmations taken in a foreign state, and copies of such affirmations."

C. Finch for the applicant;
C.A. Gomez for the respondent.

1 **DAVIS C.J.:** This is an application by Michel Klakosz for a writ of habeas corpus in respect of the warrant of committal issued by the Stipendiary Magistrate on December 9th, 1985, committing him to prison to await the warrant of the Governor of Gibraltar for his extradition to France.

2 By Order in Council dated May 16th, 1878, setting out the terms of the treaty come to between the United Kingdom and the Republic of France, the Extradition Acts 1870 and 1873 were applied in the case of France and thereby extended, by virtue of s.17 of the Extradition Act 1870, to Gibraltar. A requisition was made to the Governor of Gibraltar by the Head of the French Consular Office in Gibraltar for the surrender of Michel Klakosz, who was accused in France of embezzlement, forgery of

commercial documents and fraud. Klakosz, who had been arrested in Gibraltar on November 13th, 1985, was brought before the Stipendiary Magistrate.

3 The warrant of arrest of Klakosz, issued by the French Government, stated as follows. On June 26th, 1985, the Public Prosecutor in Mulhouse ordered the Mulhouse Constabulary to carry out an inquest into the movements of the temporary employment agency I.B.I., which is situated in Mulhouse and is dependent on the I.B.I. company situated in Paris.

4 The inquest revealed that Mr. Klakosz, the director of the agency in Mulhouse, had unduly requested the payment of FFr.648 from each of his employment applicants. These sums were paid into the "export" account of the agency and cashed by Mr. Klakosz. They amounted to a total sum of FFr.594.272 which corresponded to 917 cheques for FFr.648. In addition, Mr. Klakosz had drawn up false temporary employment invoices, thereby misappropriating a sum of approximately FFr.2m. to the prejudice of the I.B.I. company.

5 On August 21st, 1985, an investigation was opened into the activities of Mr. Klakosz in the cabinet of Mr. Bertin. Mr. Klakosz made his way to the port of Gibraltar aboard his boat *Le Clapotis*, some time during the month of October. Having considered the evidence adduced and having heard counsel for the French Government and the accused, the Stipendiary Magistrate discharged the accused in respect of the offences of fraud and forgery, but ordered his committal in respect of the offence of embezzlement.

6 The offence of embezzlement no longer exists in Gibraltar, it is now encompassed by the offence of theft contained in the Criminal Offences Ordinance, s.170, and follows the Theft Act 1968 of England. In the list of crimes in Article III of the Treaty, however, item 20 refers to embezzlement or larceny and it is not disputed that the Stipendiary Magistrate was entitled, under the Extradition Act 1870, s.10, to order the committal of the accused on the French charge of embezzlement even though the offence, if committed in Gibraltar, would now amount to theft.

7 The evidence adduced before the Stipendiary Magistrate comprised the following:

(a) An unsworn statement by the applicant, Michel Klakosz, dated July 16th, 1985. This statement is headed "*Preliminary Inquest Procedure*" and purports to have been taken by Patrick Pfluger and Didier Guidici, who are described as "Judicial Police Officers." It would seem that these two police officers had been ordered to carry out an inquiry into the "movements of the temporary employment agency I.B.I." by the Public Prosecutor in Mulhouse on June 26th, 1985;

(b) A similar unsworn statement taken by the same two "Judicial Police Officers," Pfluger and Guidici, on August 12th, 1985 from Bernard Marcel Grayo, the President and Managing Director of the I.B.I. Agency;

(c) A deposition of Augustin Brignoli dated September 2nd, 1985;

(d) An unsworn statement made by way of complaint by Pascal Le Goff on August 22nd, 1985, to a Police Inspector in Brest, to which is attached a form of contract relating to temporary employment in Saudi Arabia between the I.B.I. Agency and Pascal Le Goff. The contract is apparently signed by the applicant and there is another document headed "Medical Costs and Repatriation Insurance," which is also apparently signed by the applicant, the last paragraph of which requests the payment of FFr.648 to the I.B.I. Agency;

(e) A deposition of Nathalie Brey taken over the period from August 22nd to October 1st, 1985;

(f) A deposition of Henry Sacramento, an officer in the Gibraltar Police Force, taken by the Stipendiary Magistrate.

8 It would appear from these statements and depositions that the "embezzlement" in respect of which the Stipendiary Magistrate committed the applicant, was that described in the second paragraph of "the facts" set out above and that the applicant, as director of the I.B.I. Agency in Mulhouse, "had unduly requested the payment of the sum of FFr.648 from each of his employment applicants. These sums were paid into the "export" account of the agency and cashed by Mr. Klakosz, amounting to a total sum of FFr.594,272 which corresponds to 917 cheques of FFr.648."

9 Mr. Finch, for the applicant, submitted that the statements of the applicant, Bernard Grayo and Pascal Le Goff were inadmissible in evidence before the Stipendiary Magistrate as they were not depositions, statements on oath or affirmations as required by s.14 of the Extradition Act 1870 as extended by s.4 of the Extradition Act 1873, read together with the Treaty.

10 He referred me to *R.* v. *Pentonville Prison Gov., ex p. Singh* (9). In that case, the applicant, Harmohan Singh, was accused of committing certain drug offences in Norway, and the Norwegian Government sought his extradition to Norway under the 1870 and 1873 Extradition Acts. The evidence before the magistrate at the extradition proceedings comprised, *inter alia*, evidence on oath before a court in Norway as well as statements by four persons who were accomplices in the alleged offences.

11 The statements of the four accomplices were given before a Norwegian court, not under oath. Some days later, the accomplices were brought back before the court and reminded of a provision in the Norwegian Penal Code which made them liable to punishment if they gave perjured

evidence in court. Three of the accomplices stated that they had been aware of the provision in the Code when giving their evidence. The fourth said that, although he had not been aware of that provision, his evidence would have been the same had he known of it and he repeated that he had told the truth. On being committed by the magistrate in England, the applicant applied for a writ of habeas corpus and submitted, *inter alia*, to the Divisional Court that the unsworn statements by the four accomplices were not admissible evidence in extradition proceedings in England and that the remaining evidence was not sufficient to justify the committal.

12 It was argued that s.14 of the 1870 Act and s.4 of the 1873 Act, when read together with the relevant extradition treaty, required that the evidence of the requesting state, Norway, be taken on oath if it was to be admissible in the courts of the United Kingdom or, alternatively, if evidence could be taken on affirmation that the procedure which took place in Norway was deficient to such a degree as to make the material inadmissible. Article X of the relevant treaty provided that ". . . the authorities of the state applied to shall admit as entirely valid evidence the sworn depositions or statements of witnesses taken in the other state."

13 It was held, on the authority of the *dicta* of Lord Russell, C.J. in *In re Arton (No. 2)* (1), and Lord Widgery, C.J. in *R.* v. *Pentonville Prison Gov., ex p. Ecke* (6) that, having regard to the fact that one of the effects of the treaty was to avoid the necessity of bringing witnesses from overseas, the words "sworn depositions or statements of witnesses" in Article X were to be given a liberal interpretation and included an affirmation.

14 On the question of what amounted to an affirmation, Ackner, L.J. in *R.* v. *Pentonville Prison Gov., ex p. Singh* (9) said ([1981] 1 W.L.R. at 1036):

> ". . . [I]t is agreed that the mere signature to a document or the verbal acknowledgement that its contents are correct cannot amount to an affirmation. Where then is the line to be drawn?
>
> The answer cannot be precise; it must be a matter of fact and degree dependent upon the particular circumstances of the case. I do not consider that the affirmation need take place prior to the making of the statement. What is required, where the statement has been made, is its adoption in circumstances which recognise the gravity and importance of the truth being told on the particular occasion. I would not necessarily accept that the mere acknowledgment, albeit before a judicial authority, that what has been previously said is the truth would amount to an affirmation. But in this case, the acknowledgment before the judicial authority was made after the terms or the substance of section 168 of the Norwegian Penal Code was drawn to the attention of each of the alleged accomplices. The fact that the provisions of this section were not drawn to their attention initially

> when they appeared before the judge does not seem to me, in the circumstances of this case, to make any material difference. They were brought back before the court within a very short time of their initial appearance and their subsequent acknowledgment in the circumstances which I have described of the truth of what they had previously said amounted, in my judgment, to a sufficient acknowledgment."

15 Skinner, J. (*ibid*., at 1037) said:

> "In my judgment the document put forward as an affirmation must contain, or show on its face, a solemn declaration by the witness before a judicial authority that its contents are true The document might consist of a record of what the witness has said or might refer to a record of something said on another occasion and acknowledged or adopted in solemn form before the judicial authority. The vital constituent is the solemn declaration of the truth which might be expressed in a number of different ways. For example, in the present case the reference in the case of each witness to section 168 of the Norwegian Penal Code clearly emphasises the solemnity of what the witness is adopting and accepting in the document."

16 Skinner, J. then set out how the four accomplices had originally made their statements before a judge in court and then two or three days later had been brought back before the same judge and reminded of the provisions of s.168 of the Norwegian Penal Code. He then said (*ibid*., at 1038):

> "In order to decide whether there was an affirmation in any particular case, the documents recording the witnesses' evidence have to be looked at as a whole. Doing so here, I have no hesitation in saying that, in each of these cases, the documents reveal a solemn declaration, reinforced by penal sanctions, that their contents are true and they amount to affirmations within section 4 of the Act of 1873."

17 Mr. Finch also referred me to the case of *R.* v. *Pentonville Prison Gov., ex p. Passingham* and its appeal, *sub nom. Dowse* v. *Government of Sweden* (8). These two cases related to the extradition of two men, Passingham and Dowse, to Sweden, where they were alleged to have committed drug offences. In the extradition proceedings before the magistrate, the Swedish Government produced in evidence a statement made before a Swedish court by an accomplice in the alleged offences. In the statement, the accomplice confirmed previous statements made to the Swedish police which implicated and identified Passingham and Dowse. In accordance with Swedish law, the accomplice's evidence was not given on oath and he was not liable to be punished for perjury if he gave false evidence. He was, however, liable to imprisonment if the statements made to the police were false, and he was reminded of that fact when giving

evidence before the Swedish court. The magistrate found that there was a case to answer and committed Passingham and Dowse to await extradition to Sweden. They applied for a writ of habeas corpus contending that the magistrate had erred in admitting the statement to the police by the accomplice because the record of the proceedings in the Swedish court showed that, although the accomplice had acknowledged its veracity in court, he had not done so on oath or by way of "affirmation" (in accordance with s.14 of the 1870 Act as extended by s.4 of the 1873 Act), since the accomplice's statement in court could not amount to an "affirmation" as it was not supported by the sanction of a penalty for perjury.

18 It was held by the Divisional Court in *R.* v. *Pentonville Prison Gov., ex p. Passingham* (8) that, for a statement to be received in evidence in extradition proceedings under the Extradition Acts, it did not have to be made under the sanction of a penalty for perjury. It was sufficient if it was made in circumstances of sufficient gravity and formal solemnity for the witness to fully appreciate the importance of telling the truth. On the evidence, the accomplice had realized the importance of that when acknowledging, in the Swedish court, the veracity of his statement to the police and that was sufficient to constitute an "affirmation" of his statement for the purpose of the Extradition Acts. Griffiths, L.J. said ([1983] Q.B. at 258):

> "In my view, the object of enabling statements to be received, if made upon oath or affirmation, is to enable the procedure of extradition to operate without the cumbrous necessity of bringing witnesses from abroad to this country if the evidence that they have given in their own country had been made in circumstances of such formal solemnity as to make it likely that the witnesses fully appreciated the gravity of the occasion and the importance that they should give true testimony. If evidence has been given under such conditions in their own country, it can be assumed with reasonable confidence that if brought to this country they would be likely to give similar evidence to our court and it is therefore safe to act on the evidence given in their own country.

19 Later on he added (*ibid.*, at 258–259):

> "If, on the other hand, they are called upon to make a statement under circumstances of grave formality such as will bring home to their minds the importance that their testimony should be the truth, it will as a general rule be safe to rely upon it and, for my part, I think the sanction of the possibility of a prosecution for perjury would add little, if anything, to that safeguard.
>
> The question of the meaning of an affirmation has been considered by this court in two fairly recent decisions. It was considered by a Divisional Court, consisting of Donaldson, L.J. and Hodgson, J., in

R. v. *Governor of Brixton Prison, ex parte Twena* (unreported) . . . In the course of giving his judgment in that case, Donaldson, L.J. said:

> 'It seems to me that that is a document which is evidence of Tsim having affirmed in open court that the contents of the police record of his statement to them were correct, but that it is not an affirmation, because an affirmation in this context must be a document which is in some way acknowledged by the witness as being his solemn declaration. He can acknowledge it in a number of ways. The most obvious way to acknowledge it is to sign it. Next, although it may be less usual, he could have written it in his own handwriting without signing it, but that is not, in my judgment, the limit of the number of ways in which someone may acknowledge a document as his affirmation.
>
> I have come to the conclusion in the light of the further argument since the adjournment that the affirmation here is the statement, or the record of the statement, made by the police officers appearing within inverted commas . . . which was not originally an affirmation at all, but became an affirmation when adopted by Tsim before the examining magistrate.'"

20 Griffiths, L.J. then went on to cite part of the passage quoted above of the judgment of Ackner, L.J. in *R.* v. *Pentonville Prison Gov., ex p. Singh* (9) ending with Ackner, L.J.'s words ([1981] 1 W.L.R. at 1036): "What is required, where the statement has been made, is its adoption in circumstances which recognise the gravity and importance of the truth being told on the particular occasion."

21 Dowse appealed from the decision of the Divisional Court to the House of Lords. In *Dowse* v. *Govt. of Sweden* (8), Lord Diplock said ([1983] 2 A.C. at 470):

> "The primary and natural meaning of an 'affirmation' in ordinary speech is a confirmation or declaration that something is true; and I see no reason for not giving to the word, where it appears in section 14 of the Act and article 13 of the Treaty, its primary and natural meaning.
>
> The reference in sections 14 and 15 of the Act and article 13 of the Treaty to affirmations and statements 'taken' in the state that is requesting extradition, and the requirement in section 15(2) that they should be authenticated by being 'certified under the hand of a judge, magistrate or officer of the foreign state where the same were taken,' indicate that an affirmation to be admissible in evidence, must be one the making of which involved some formality of an official character; and in my view, make it clear that where the formality consists of

the affirmation being made in proceedings before a judge or magistrate who gives a certificate to that effect this is sufficient to make the statement certified by the judge or magistrate as having been made in those proceedings admissible in evidence in extradition proceedings brought under the Extradition Act."

22 Lord Diplock also cited the *dictum* of Ackner, L.J. set out above as cited by Griffiths, L.J. in the Divisional Court and said about it (*ibid.*, at 472): "I would agree, my Lords, that this may be the appropriate criterion to apply to an affirmation taken otherwise than upon oath by a non-judicial officer of a foreign state . . ."

23 Mr. Finch submitted that it was clear from these authorities that, where an unsworn statement has been made, it must, to fall within the category of an affirmation within the meaning of the 1870 Act, s.14, as extended by the 1873 Act, s.4, have been subsequently adopted in circumstances which recognize the gravity and importance of the truth being told on the particular occasion that it was made.

24 Article VIII of the Treaty with France provides, insofar as relevant, as follows:

> "Warrants, depositions, or statements on oath issued or taken in the dominions of either of the two High Contracting Parties, and copies thereof . . . shall be received in evidence in proceedings in the dominions of the other if purporting to be signed or certified by a Judge, Magistrate, or officer of the country where they were issued or taken provided such warrants, depositions, statements, copies . . . are authenticated . . ."

25 As regards the statements of the applicant and Bernard Grayo, Mr. Finch submits that there was no evidence before the Stipendiary Magistrate that these statements were anything other than ordinary police statements taken in the course of a police investigation into suspected offences. Although the officers Pfluger and Guidici describe themselves as "Judicial Police Officers," there was no evidence before the Stipendiary Magistrate as to what this meant or to show in any way that these statements could be considered as depositions or affirmations, it being clear, on the face of the statements themselves, that they were not statements on oath. At the end of each of these statements is a declaration by the maker which reads: "Having read the above declaration, I insist thereon and have nothing to change, add or cancel therein." Beneath this appears the signatures of the maker and the two police officers. Mr. Finch submitted that this closing declaration could not be said to constitute a sufficient adoption of the statement as envisaged by Ackner, L.J. in *R.* v. *Pentonville Prison Gov., ex p. Singh* (9).

26 Mr. Gomez, for the respondent, submitted that it was a question of fact for the Stipendiary Magistrate, on consideration of all the circumstances in which the statement of Bernard Grayo was made, to determine whether there was a sufficient adoption of the statement by Grayo so as to bring it within the category of an affirmation. Mr. Gomez submitted that the declaration at the end of the statement constituted a sufficient adoption of the statement if considered in light of the facts (i) that it was made in the presence of two police officers which must have indicated to Grayo the seriousness of the occasion; (ii) that the statement was headed "*Preliminary Inquest Procedure*"; (iii) that the statement comprised an original statement and an additional statement made over the course of two days; (iv) that Grayo, as the managing director of a French company, must be assumed to be a man of responsibility and clarity of mind; and (v) that, in the course of his statement, Grayo made a serious accusation against the applicant.

27 As regards Mr. Gomez's submission that whether it could be said to amount to an affirmation was a question of fact for the Stipendiary Magistrate to decide, on consideration of all the circumstances surrounding the making of Grayo's statement, it did not appear that the learned Stipendiary Magistrate ever directed or was ever asked to direct his mind to this point. In those circumstances, it is clearly incumbent on me to consider the point, and the conclusion to which I have come, on the authorities cited to me, is that the statements taken by the "Judicial Police Officers" Pfluger and Guidici, do not constitute "affirmations" as required by the Extradition Acts of 1870 and 1873 when read together with the Treaty.

28 In the absence of any evidence to the contrary, these statements appear to be statements made to the police in the course of a police investigation. The declaration at the end of each of the statements is, in my view, simply an ordinary declaration made by the maker of a statement after he has been given an opportunity to read over it to the effect that he has no wish to add to, delete from or otherwise alter his statement. There is nothing in the making of this declaration which indicates an awareness of "the gravity and importance of the truth being told" so as to make the declaration an "adoption" of the statement as envisaged by Ackner, L.J. in *R.* v. *Pentonville Prison Gov., ex p. Singh* (9). The declaration does not even contain an acknowledgment that what was said in the statement was the truth. The declaration is, in my view, merely "a verbal acknowledgment" that the contents of the statement are correct. In his judgment in *R.* v. *Pentonville Prison Gov., ex p. Singh*, Ackner, L.J. said that it was agreed that such an acknowledgment could not amount to an affirmation.

29 While it appears to me that different considerations apply to the statement of the applicant (with which I shall deal later), insofar as

Bernard Grayo's statement is concerned, it appears that, for these statements to constitute "affirmations," the authorities clearly require there to have been a formal adoption of the statement by Grayo before a judge or magistrate in circumstances of sufficient solemnity which indicates that he was adopting the statement as one in which he had told the truth (see in particular the end of the passage from the judgment of Donaldson, L.J. in the unreported case of *R.* v. *Brixton Prison Gov., ex p. Twena* (5) quoted in para. 19 above). There is now, and there was before the Stipendiary Magistrate, no evidence of any such adoption. In my view, this statement cannot therefore be said to be an affirmation and accordingly it should not have been admitted in evidence before the Stipendiary Magistrate.

30 In my view, however, this does not apply in the case of the statement made by the applicant to the officers Pfluger and Guidici because the applicant was present in person in the magistrates' court. In my view, in spite of the wording of the Extradition Acts 1870 and 1873, as read with the Treaty, there is no requirement that the applicant's (the accused's) statement should be a deposition, a statement on oath before a judge or magistrate or an affirmation, because it was open to the applicant in the magistrates' court, either to give evidence himself or merely to adopt the statement made by him to the officers Pfluger and Guidici which was adduced in evidence against him by the requesting country, as the truth. Accordingly, I find that the applicant's statement was properly admitted in evidence before the Stipendiary Magistrate.

31 Insofar as the statement of Pascal Le Goff is concerned, as I have said earlier, this statement amounts to no more than a complaint to the police which is apparently signed by the maker but does not have attached to it either a declaration or acknowledgement that it is correct. There is nothing to show that Le Goff in any way adopted this statement as being a truthful statement before any sort of judicial officer, and for the reasons set out above, I find that this statement, together with the documents handed to the Police Inspector at Brest contemporaneously with the making of the statement, should not have been admitted in evidence before the Stipendiary Magistrate.

32 We are left, therefore, with the depositions of Augustin Brignoli, Mme. Brey and Henry Sacramento. Insofar as Brignoli's deposition is concerned, it contains, in my view, no evidence of embezzlement or theft by the applicant. Much of the closing two paragraphs of Brignoli's deposition appear to be hearsay and (on the authority of *R.* v. *Pentonville Prison Gov., ex p. Kirby* (7)) inadmissible. *R.* v. *Pentonville Prison Gov., ex p. Kirby* was a case concerning extradition to Canada under the Fugitive Offenders Act 1967. In that case it was held that hearsay evidence was inadmissible in committal proceedings carried out under s.7 of that Act. In my judgment, the same applies in the case of committal proceedings carried out under ss. 9 and 10 of the Extradition Act 1870, as read

with Article VII of the Treaty. But in any case, the evidence of Brignoli amounts to no more than a statement to the effect that the applicant has disappeared in suspicious circumstances and that the I.B.I. agency had, according to him, suffered a loss of FFr.3.3m.

33 Turning then to Mme. Brey's evidence. Madame Brey was the secretary of the I.B.I. Agency at Mulhouse where the applicant, as from December 1984, was employed. It seems clear from Mme. Brey's evidence that the applicant both had the opportunity and was in a position to steal from the agency. Madame Brey, in the course of her lengthy deposition, makes numerous allegations and suggestions of theft and fraud by the applicant. It appears from her evidence that there exists a large quantity of exhibits, many of which she referred to in the course of making her deposition. None of these, however, were produced in evidence before the Stipendiary Magistrate. The result is that, while Mme. Brey's deposition raises a great deal of suspicion against the applicant, it is supported by no actual evidence to show either embezzlement or theft by the applicant.

34 Mr. Finch referred me to the case of *R.* v. *Brixton Prison Gov., ex p. Lennon* (3). In that case, the applicant, Lennon, was arrested in England on charges of false pretences and forgery in France. He was alleged to have forged travellers' cheques from an imaginary American bank and presented them as genuine in French shops. In each case, the depositions of the shopkeepers described the transaction and then stated that a bank official had later told them the cheques were bad. It was held that there was no evidence that the cheques were forgeries because they were drawn on an imaginary bank. The cheques should have been identified by the bank official who took them and he should have stated why they could not be accepted. The requisitioning country had failed to put its tackle in order and the court regarded the matter, which related to the liberty of the subject, strictly. Accordingly, the writ was issued and the applicant was discharged.

35 Similarly, in *R.* v. *Brixton Prison Gov., ex p. Sadri* (4), the applicant for habeas corpus was committed under the Fugitive Offenders Act 1881, pending extradition to Aden, on charges of falsification of accounts in a cash book, theft, and conspiracy to commit a criminal breach of trust. He was later discharged by the Divisional Court because, although there were affidavits made by two partners and an accountant from the same firm in which the applicant had worked, in which they discussed their examination of the cash book and the results of that examination, neither the cash book nor any authenticated copies of it, nor the extracts from it referred to, were produced in evidence before the committing magistrate. It was held that, in the absence of the cash book or authenticated copies of it or extracts from it, there was no admissible evidence before the magistrate to justify the applicant's committal under the 1881 Act. In my view, exactly

the same must apply in this case insofar as Mme. Brey's evidence is concerned.

36 Insofar as Henry Sacramento's deposition is concerned, this contains an exculpatory statement by the applicant to the effect that he was engaged by his employer, Grayo, to smuggle large quantities of French currency into Switzerland and that, on warning Grayo of a trap laid for him by the Swiss Police, he was given FFr.1m. by Grayo and advised to leave the country.

37 In the final paragraph of his deposition, Sacramento says:

> "Sergeant Barea asked me to ask the defendant whether it was normal to take money from the people he employed. He said 'Yes, it is normal,' and went on to explain that this money was for medical insurance on employment. That money was taken to Switzerland as well."

38 There is nothing in the statement made by the applicant to Police Officer Sacramento and Sgt. Barea, as read with the applicant's statement to Police Officers Pfluger and Guidici in France on July 16th, 1985 which amounts, in my view, to evidence incriminating him in any way in the offence of embezzlement (or theft) which he is alleged to have committed.

39 Lord Diplock, in *Federal Republic of Germany (Govt.)* v. *Sotiriadis* (2) said ([1975] A.C. at 29):

> "Habeas corpus does not provide a remedy by way of appeal from judicial decisions made within jurisdiction. So, as a general rule, upon an application for a writ of habeas corpus to secure the release of a prisoner detained pursuant to an order made by a judicial authority as a result of a judicial hearing, the only question for the High Court, and for this House on appeal from the High Court, is whether or not the judicial authority had jurisdiction to make the order for his detention.
>
> Where, however, the detention is pursuant to an order of committal made by a magistrate under section 10 of the Extradition Act 1870 the powers of the court before whom the prisoner is brought on habeas corpus are more extensive in two respects.
>
> The first of them is not germane to the instant case . . ."

40 Nor is it in the present case. Lord Diplock continued (*ibid.*, at 30):

> "The second respect in which the court exercises a wider power in habeas corpus applications brought in extradition cases is not the subject of any express provision in the Act, but is the result of long-established practice which was approved by this House in *Reg.* v. *Governor of Brixton Prison, Ex parte Schtraks* . . . and in *Reg.* v.

> *Governor of Brixton Prison, Ex parte Armah* . . . a case under the Fugitive Offenders Act 1881. Under this practice, the court will entertain the question whether there was any evidence before the magistrate to justify the committal and, if it finds that there was none, will order the prisoner to be discharged. Strictly speaking, to commit a person for trial for an offence when there is no evidence that he committed it, is not to act in excess of jurisdiction but to err in law, since it must involve a misunderstanding of the legal nature of the offence. Nevertheless, in extradition cases, the courts have assimilated such an error of law to acting in excess of jurisdiction. Accordingly, your Lordships would be entitled to allow this appeal if you were satisfied that there was *no* evidence before the magistrate that the respondent had committed either of the offences with which he was charged. But, if there was some evidence, you would not be entitled to substitute your own appreciation of its weight or cogency for that of the magistrate upon whom jurisdiction to determine whether the evidence is sufficient to justify committal is conferred by section 10 of the Act."

41 In this application, I have come to the conclusion that there was no evidence before the learned Stipendiary Magistrate that the applicant had committed the offence of embezzlement with which he was charged. Accordingly, I find that he must be discharged and I so order.

42 I make this order in exercise of the powers conferred on this court by O.54, r.4(1) of the Rules of the Supreme Court (which apply in Gibraltar by virtue of r.8(1) of the Supreme Court Rules). It constitutes a sufficient warrant to the Superintendent of the Gibraltar Prison for the release of the applicant.

Application granted.