R. v. PRISON SUPERINTENDENT, ex parte NEWALL

COURT OF APPEAL (Fieldsend, P., Huggins and Davis, JJ.A.): October 1st, 1993

Extradition and Fugitive Offenders—detention pending extradition—habeas corpus—habeas corpus application not to be heard before committal unless clear absence of jurisdiction on face of documents, e.g. authority to proceed defective or accused shows autrefois acquit/convict or immunity from prosecution

Extradition and Fugitive Offenders—detention pending extradition—arrest of offender—abuse of process by improper arrest not a matter for committing Gibraltar Magistrate on habeas corpus application

The States of Jersey sought the extradition of the appellant to Jersey on a charge of murder.

The appellant was intercepted in international waters by a ship of the Royal Navy. Once on board, he was arrested on a warrant by the Jersey police and when the ship docked in Gibraltar the next day he was arrested by Gibraltar police on a provisional warrant from the Stipendiary Magistrate. He argued before the Magistrate that both warrants were invalid and that his arrest at sea had been illegal. The Magistrate rejected these contentions. The Governor then issued an authority to proceed with the appellant's extradition to Jersey.

The appellant obtained leave to apply for habeas corpus in respect of his detention in custody. He intended to argue that the Fugitive Offenders (Gibraltar) Order did not apply to him, since he had been forcibly brought to Gibraltar and had already been in the custody of the state seeking his extradition when brought here. However, the States of Jersey raised a preliminary point, arguing that the appellant's complaints regarding the manner of his arrest were matters of abuse of process to be dealt with by the requesting state following extradition, and that by s.8 of the Schedule to the Order, the Supreme Court had no jurisdiction to hear an application for habeas corpus before the conclusion of committal proceedings.

The Supreme Court (Kneller, C.J.) was satisfied that the application for habeas corpus was premature, and adjourned it to a future date following the committal proceedings which were already in train.

On appeal, the appellant submitted that the court had erred in treating the timing of his application as a preliminary point, since (a) he had been deprived of the opportunity to challenge the Magistrate's jurisdiction and to raise the abuse of the process of the court by the requesting state; and

(b) habeas corpus was a peremptory remedy, designed for the protection of liberty, and should not be postponed.

The States of Jersey submitted in reply that only if a clear lack of jurisdiction was shown on the face of the papers, so that committal proceedings were bound to fail, could an application for habeas corpus be heard before the committal of the offender.

Held, dismissing the appeal:

The Supreme Court would hear an application for habeas corpus before committal only if it was plainly apparent that the committal proceedings were bound to fail for lack of jurisdiction. Such a situation would arise, for example, where there was a defect in the authority to proceed, or where the applicant could show *autrefois acquit* or *autrefois convict* or immunity from prosecution. It was not sufficient that the applicant had an arguable case as to lack of jurisdiction. The appellant's counsel had had the opportunity to raise the issue and the record showed that he had done so, albeit perhaps not as extensively as he would have wished. The court had properly concluded that *prima facie* there was jurisdiction and could simply have dismissed the application for habeas corpus. It had acted in the appellant's favour by adjourning the application instead. The issue of the alleged abuse of process by the requesting state was not a matter for the Magistrate or the Supreme Court. The appeal would be dismissed (page 147, lines 5–12; page 148, lines 6–41; page 149, line 43 – page 150, line 16; page 151, line 41 – page 152, line 18; page 154, lines 3–8; page 156, line 14 – page 157, line 14).

Cases cited:

(1) *Home Secy.* v. *O'Brien*, [1923] A.C. 603; (1923), 92 L.J.K.B. 830, considered.

(2) *Khera* v. *Home Secy.*, [1984] A.C. 74; *sub nom. Khawaja* v. *Home Secy.*, [1983] 1 All E.R. 765, considered.

(3) *R.* v. *Brixton Prison (Governor), ex p. Shuter*, [1960] 2 Q.B. 89; *sub nom. Re Shuter*, [1959] 2 All E.R. 782.

(4) *R.* v. *Horseferry Rd. Magistrates' Ct., ex p. Bennett*, [1994] 1 A.C. 42; *sub nom. Bennett* v. *Horseferry Rd. Magistrates' Ct.*, [1993] 3 All E.R. 138, distinguished.

(5) *R.* v. *Pentonville Prison (Governor), ex p. Sinclair*, [1991] 2 A.C. 64; *sub nom. Sinclair* v. *D.P.P.*, [1991] 2 All E.R. 366, applied.

(6) *Terraz, Ex p.* (1878), 4 Ex. D. 63; *sub nom. Re Terraz & Extradition Acts 1870 & 1873*, 39 L.T. 502.

(7) *US* v. *Gaynor*, [1905] A.C. 128; (1905), 9 C.C.C. 205, applied.

(8) *US Govt.* v. *Bowe*, [1990] 1 A.C. 500; [1989] 3 All E.R. 315, applied.

Legislation construed:

Fugitive Offenders (Gibraltar) Order 1967 (S.I. 1967/1909), Schedule, s.5(3):

"On receipt of such a request the Governor may issue an authority to proceed unless it appears to him that an order for the return of the person concerned could not lawfully be made, or would not in fact be made, in accordance with the provisions of this Act."

s.6(1): "A warrant for the arrest of a person accused of a relevant offence … may be issued—

…

(*b*) without … an authority [to proceed], by the Stipendiary Magistrate in Gibraltar, upon information that the said person is or is believed to be in or on his way to Gibraltar …"

s.8(1): "Where a person is committed to custody under section 7 of this Act, the court shall inform him in ordinary language of his right to make an application for habeas corpus, and shall forthwith give notice of the committal to the Governor."

C. Finch for the appellant;
G.D.L. de Silva, Q.C. for the States of Jersey;
The Prison Superintendent did not appear and was not represented.

FIELDSEND, P.: On August 5th, 1992 the appellant was formally arrested by an officer of the Jersey police on a charge of murder. The arrest occurred on a Royal Navy ship in international waters, some 200 miles from Gibraltar immediately after the appellant had been seized by officers of the Royal Gibraltar Police, but without any warrant or formal arrest. On the same day the Stipendiary Magistrate issued a provisional warrant for the apprehension of the appellant under s.6(1)(*b*) of the Fugitive Offenders Act 1967 (as extended to Gibraltar by the Fugitive Offenders (Gibraltar) Order 1967).

On August 6th, 1992 the appellant was arrested on this provisional warrant when the ship berthed in Gibraltar, by an officer of the Gibraltar police. He was taken before the Magistrate and complained of the manner of his arrest. Before the Magistrate on August 27th, the appellant contended through his counsel that both the Jersey and the Gibraltar warrants were invalid and that his arrest at sea was illegal. These contentions the Magistrate rejected on September 3rd, 1992 and on September 11th the Governor issued an authority to proceed under s.5(3) of the Fugitive Offenders Act with a view to effecting the extradition of the appellant to Jersey.

The appellant obtained leave to bring habeas corpus proceedings against the Superintendent of the Prison for what he alleged was his unlawful detention. These proceedings he instituted by a notice of July 19th, 1993, seeking his release "upon the grounds set out in the affidavit of Roderick Innes Nelson Newall." This affidavit sets out the facts and circumstances of his seizure and arrest which, for the purpose

of these proceedings, can be accepted as correct, and concludes as follows:

> "I accordingly submit that my arrest and forced removal to the jurisdiction of Gibraltar were unlawful and I request leave to issue a writ of habeas corpus directing the Superintendent of the Prison to show cause why I should not be released immediately."

It was made abundantly clear from the appellant's further affidavit that this challenge to his arrest and detention in Gibraltar was based upon the circumstances of his arrest; the contention being that if the Magistrate had known that he was being brought to Gibraltar under compulsion he might not have issued the provisional warrant, and that it was improper for the States of Jersey to attempt to invoke Gibraltar's jurisdiction in this way, as the Fugitive Offenders (Gibraltar) Order could not have been meant to apply to a person brought to Gibraltar against his will. The affidavit makes it clear that the application had "only been made as a result of a recent decision of the House of Lords in *R.* v *Horseferry Rd. Magistrates' Ct., ex p. Bennett* (4), and a remand prisoner may seek such remedies as he is entitled to in order to alleviate his continued imprisonment."

On August 20th, the application came before the court when Mr. de Silva, Q.C., for the States of Jersey, took the point that the application was premature. He contended that the appellant's remedy lay in s.8 of the Act, which provides for a person committed to custody under s.7 to await return to the requesting state to be informed of his right to apply for habeas corpus and gives the Supreme Court power to discharge the person from custody. The case proceeded on this ground alone and, in the event, the Supreme Court adjourned the application to dates to be fixed by the Registrar after the appellant's committal by the Stipendiary Magistrate.

The appellant now appeals. In effect, his sole ground of appeal is that as that was a preliminary point, he was prevented from or had no opportunity of advancing Mr. Finch's arguments on the issue of whether or not the Magistrate had jurisdiction. When pressed before us, Mr. Finch said that he could, for example, have argued that the appellant was not a "fugitive" because he was in the custody of the Jersey police in Gibraltar, and that it was illegal, or at least improper, for the Jersey police to have forcibly brought him to Gibraltar only to invoke the Gibraltar jurisdiction to secure his extradition.

In a forceful argument, Mr. Finch contended that habeas corpus, being a remedy designed to protect the liberty of the subject, was a peremptory remedy the granting of which should never be delayed (see *Khera* v. *Home Secy.* (2) ([1984] A.C. at 111) and *Home Secy.* v. *O'Brien* (1) ([1923] A.C. at 609)) and that it should never be refused until after an applicant had been given a full opportunity to put his case to the court.

He submitted that he had been deprived of the opportunity to argue fully the appellant's case on the issue of jurisdiction by the raising of the

preliminary point, and that by putting back the application until the conclusion of the proceedings before the Magistrate, the learned Chief Justice had offended against the principle of peremptoriness.

Had this been so it might have been—even in extradition proceedings —a serious matter, and it is necessary to see whether it is the case. I should say that although the appellant's affidavit alleged abuse of the process of the court, thus apparently bringing into play the principles enunciated in *Ex p. Bennett* (5), it was not seriously contended that there was any substance in this. *R.* v. *Governor of Pentonville Prison, ex p. Sinclair* (4) is clear authority that abuse of process is not a matter for the committing magistrate, despite the passing reservation in *Ex p. Bennett* ([1994] 1 A.C. at 62–63).

The true starting point of the enquiry is to examine the basis of Mr. de Silva's preliminary point in the court below that the application was premature. Mr. de Silva's contention before the Supreme Court was that a long line of authorities established that a superior court would not interfere with extradition proceedings before they were completed, save perhaps in the most exceptional of cases. The most authoritative decisions are *US* v. *Gaynor* (7) and *US Govt.* v. *Bowe* (8). In the former, the Earl of Halsbury, L.C. said ([1905] A.C. at 137–138):

> "Their Lordships do not mean to suggest that the writ of habeas corpus is not applicable when there is a preliminary proceeding. Each case must depend upon its own merits. But where a prisoner is brought before a competent tribunal, and is charged with an extradition offence and remanded for the express purpose of affording the prosecution the opportunity of bringing forward the evidence by which that accusation is to be supported; if, in such a case, upon a writ of habeas corpus, a learned judge treats the remand warrant as a nullity, and proceeds to adjudicate upon the case as though the whole evidence were before him, it would paralyze the administration of justice and render it impossible for the proceedings in extradition to be effective.
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> The proceedings are very simple: information and arrest; then—either at once or on remand—the judge investigates the case, and either discharges or makes up his mind to commit for extradition, and, if he does the latter, he has to inform the accused person that he will not be surrendered for fifteen days, in order to afford him an opportunity of bringing the legality of his surrender before a Court of justice."

And in the latter, Lord Lowry said ([1990] 1 A.C. at 526):

> "The way in which the proceedings before the magistrate were interrupted in order that the fugitive might apply to the Supreme Court for orders of certiorari and prohibition has meant that their Lordships' decision in the extradition appeal does not achieve finality, since the evidence against him remains to be heard and considered. Their Lordships here take the opportunity of saying that, generally

speaking, the entire case, including all the evidence which the parties wish to adduce, should be presented to the magistrate before either side applies for a prerogative remedy. Only when it is clear that the extradition proceedings must fail (as where the order to proceed is issued by the wrong person) should this practice be varied."

Textbooks have suggested three possible cases in which interference by a superior court may be warranted before committal: (a) where the authorization to proceed was not signed by the proper person; (b) where the accused could show *autrefois acquit* or *autrefois convict*; and (c) where the accused was a person exempt from prosecution, *e.g* a foreign head of state. But in every case it is said that the exemption from extradition would have to be overwhelmingly apparent.

In this case it was contended by Mr. de Silva from the outset that the law and practice relating to extradition proceedings precluded an application of the present nature before the conclusion of the committal because there was no clear case established of lack of jurisdiction. The issue that arose on the preliminary point was whether there was shown to be a clear absence of jurisdiction. If this was not shown, then the matter could be raised and considered only after committal.

The issue, therefore, that Mr. Finch was called upon to deal with was whether, on the face of the papers, there was shown to be a clear absence of jurisdiction. It may be that, because of the late stage at which he knew of the preliminary point, he did not clearly appreciate this, but after Mr. de Silva's argument he could not have been in any doubt. He was certainly not denied an opportunity to deal with the issue. Indeed, so far as one can see from the record of the argument, he dealt with the matter of jurisdiction in more than one place and at no stage did he indicate that he was not dealing with jurisdiction because it was not relevant at that stage.

The issue was not whether there was an arguable case on the Magistrate's lack of jurisdiction but whether, on the papers, the extradition proceedings had to fail: see *US Govt.* v. *Bowe* ([1990] 1 A.C. at 526). To this extent, and to this extent only, was the question of jurisdiction before the court below and Mr. Finch had every opportunity to argue the matter and did indeed address the issue. On this aspect of the appeal, I am quite satisfied that there is no substance in Mr. Finch's contention that he was precluded from arguing any relevant matter.

On the other ground that a habeas corpus application should not be postponed again I am satisfied that the point is without substance. On the merits of the application the court would have been justified in dismissing it outright. The fact that it adjourned the question for argument after committal is only to the advantage of the appellant

For these reasons I considered that the appeal had to be dismissed.

HUGGINS, J.A.: The appellant obtained leave to apply for a writ of habeas corpus. On the hearing of the application the respondent invited

the Chief Justice to decide as a preliminary point whether the "application was premature." The Chief Justice decided that the application was premature but did not dismiss it. Instead he accepted the invitation of counsel to adjourn the application until committal proceedings for extradition of the appellant had been completed. The appellant appealed against that order.

When Mr. de Silva asked that the preliminary point be tried Mr. Finch agreed, but when called upon to reply he said that he had been given notice of the "objection" only that morning and that his would be an "unprepared response." With respect, the preliminary point was not an "objection" in the sense in which that word is normally understood. It was one of the material issues which would have had to be decided if the hearing of the application had proceeded in the ordinary way. The application was set down for hearing on that morning. Accordingly, it came ill from the mouth of counsel that he was not prepared to deal with the point.

It is unfortunate that the precise terms of the preliminary point were not more fully formulated and submitted in writing to the Chief Justice, so that its terms could be formally recorded by him. It has to be borne in mind that the writ of habeas corpus was sought under the general powers of the court and was not what I will call a "statutory writ," available under powers conferred by s.8 of the Fugitive Offenders Act 1967, as extended to Gibraltar. An application for a statutory writ might be made only after committal proceedings had been decided unfavourably to the applicant. If made before that, it would be premature. To say of an application that it was premature implied that it was one which, if brought at a later time, ought to be considered and, if well founded, granted. Thus an application for a statutory writ if made before the committal proceedings were complete was premature, because it ought not to be entertained.

An application under the general powers necessarily alleged that the applicant was unlawfully detained and, provided that it did so, could never be premature. It could only be unfounded. The present application could therefore have been "premature" only in the sense that if it had been an application under s.8 for a statutory writ, it would have been premature. But it was not made under s.8.

The only matter which caused me any anxiety in the case was whether Mr. Finch was misled by the manner in which the preliminary point had been framed. I have read and re-read sympathetically the arguments on both sides as recorded by the Chief Justice, for if Mr. Finch was misled and as a result omitted to seek to deal with any point advanced against him, justice required that we should allow the appeal.

The arguments of Mr. de Silva and Mr. Triay in the court below sought to persuade the Chief Justice that habeas corpus did not lie to remedy an abuse of process not constituting an outright illegality and that on the

evidence adduced in support of the application, there was no ground for an allegation of illegality which could oust the jurisdiction of the Magistrate to hear the committal proceedings.

If those arguments were valid, the result was not that the application was premature but that it was unfounded, and I was satisfied that that was what the Chief Justice had held. In the ordinary case one supposes that he would have dismissed the application. However, this was an unusual case in that the application had been made when the hearing of the committal proceedings was almost complete and a decision thereon was to be expected very soon. I believed that it was on that basis that the Chief Justice adjourned the application in order to avoid further costs. In so doing, he did not expressly say that he was not adjourning the application in its existing form but with intent that it should be deemed to be an application for a statutory writ under s.8. However, that was clearly what he had in mind and I thought we ought to deal with the appeal accordingly.

Grounds 2 and 3 in the memorandum of appeal read as follows:

> "2. The learned Chief Justice erred in law in holding that the Stipendiary Magistrate had jurisdiction to entertain the said committal proceedings without giving the appellant a fair and reasonable opportunity to be heard on the merits as to whether jurisdiction exists to do so or otherwise, contrary to natural justice.
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> 3. The learned Chief Justice erred in law in holding that the Supreme Court had no jurisdiction to entertain a challenge to the continuation of the aforesaid committal proceedings although it is alleged that the police and the prosecuting authorities, *inter alia*, of the requesting state were abusing the process of the magistrates' court of Gibraltar."

In relation to Ground 2 it is necessary to consider more fully the arguments which were advanced and to enquire what were the merits which Mr. Finch said he was not given a reasonable opportunity to urge.

The contention of the requesting state was that provided that the appellant had been found physically within the territory of Gibraltar (as he was) and had been arrested under a provisional warrant purporting to have been issued with the Governor's consent under the Fugitive Offenders Act 1967 (as he had), nothing could oust the jurisdiction of the Magistrate to proceed towards committal unless (i) he alleged that he was not the person named in the warrant; (ii) he claimed sovereign immunity; or (iii) he challenged the due execution by the Governor of the consent to the issue of the provisional warrant.

Mr. de Silva went so far as to contend that not even an order of prohibition could be made to stay those proceedings, but as it was common ground that no application for such an order had been made, that point did not need to be considered. No doubt the Chief Justice could of his own motion have offered the alternative remedy, but he was not

obliged to do so and there was here good reason for not so extending the ambit of the argument.

I mention prohibition because it was admitted that what triggered the application for habeas corpus was the decision in *R.* v. *Horseferry Rd. Magistrates' Ct., ex p. Bennett* (4). There were two features of that case which distinguished it from the present and which, in my view, made it of no real assistance to us: (a) the application was not for a writ of habeas corpus but for judicial review; and (b) the proceedings it was sought to control were committal proceedings preliminary to a criminal trial and not an extradition committal.

The first of these features was material because, as we have seen, habeas corpus lies only where an alleged unlawful detention stems from an alleged lack of jurisdiction in the court, whereas judicial review may be granted in the discretion of the court to remedy an injustice not constituting an absence of jurisdiction. The second feature was material because the Supreme Court might have greater latitude in controlling the ordinary domestic proceedings in the inferior courts than it has in supervising extradition proceedings.

In the event, the only relevance which Mr. Finch gave to *Bennett* was when he submitted that if the court would uphold the rule of law where the ordinary jurisdiction existed, *a fortiori* it would do so in extradition proceedings under which the accused person might be detained for many months before the circumstances of his being brought within the jurisdiction could otherwise be judicially investigated. Even assuming that that was correct, our concern was to see whether such investigation would or would not involve the jurisdiction of the magistrates' court.

The main complaints of the appellant were that he was tricked into leaving his British-registered yacht and to board one of Her Majesty's ships on the high seas; that he was there violently assaulted and restrained by members of the Gibraltar police force; that he was (while under such restraint) formally arrested by the Jersey police under a warrant the validity of which he challenged; that he was wrongfully brought into Gibraltar whilst thus unlawfully detained; and that he was there arrested by the Gibraltar police under a provisional warrant, the validity of which he also challenged. Therefore, he said, the Stipendiary Magistrate had no jurisdiction. These were the matters which he sought to argue upon the application for habeas corpus but which, Mr. Finch contended, were not all relevant to the preliminary point and upon the effects of which, it followed, he did not have an opportunity to argue.

If that contention had been right, he would have had to succeed, but in my view it was not right. Whatever may have been the strict interpretation of the preliminary point, there was no doubt that what was in fact argued on behalf of the States of Jersey was that none of the events prior to the arrest of the appellant in Gibraltar could affect the jurisdiction of the Magistrate to hear the committal proceedings, nor could they affect

the validity of the original warrant; therefore the application for habeas corpus was ill founded.

That those were the contentions made to the Chief Justice was clear from his notes and from his judgment. No submission was made that any of them was irrelevant to the preliminary point. The jurisdiction of the court was the only matter which it was suggested to us Mr. Finch had not fully argued. The existence of that jurisdiction formed the main plank in the argument against the appellant and Mr. Finch sought to rebut it. He was recorded as saying "issue one of jurisdiction and due process." If he did not use all the tools which he now said were available, that did not seem to me to give him a ground of complaint against the Chief Justice.

The issue of the Magistrate's jurisdiction was clearly before the Chief Justice and the impracticability of challenging that jurisdiction by application for habeas corpus is pithily indicated by the Lord Chancellor in *US* v. *Gaynor* (7) ([1905] A.C. at 136): "… [T]he writ if issued could have no other return than that the cause of detention was a lawful remand by a [Magistrate] having jurisdiction over the subject-matter of the inquiry."

For these reasons I was for dismissing the appeal.

DAVIS, J.A.: On July 15th, 1993 the appellant was given leave to apply for a writ of habeas corpus by the learned Acting Chief Justice in the absence of the Chief Justice. The notice of motion dated July 19th stated that the application would be made on the grounds set out in the appellant's affidavit of July 15th, 1993 and that the affidavit would be used at the hearing. The application came on for hearing before the learned Chief Justice himself on August 20th, 1993. On that date the Chief Justice ordered that the application be adjourned to a date to be fixed by the Registrar in the event of the appellant being committed for extradition. He gave his reasons for his decision on September 1st, 1993.

The appellant has appealed against the decision of the learned Chief Justice. The appeal came before this court on September 28th, and was dismissed on September 29th, reasons for our decision to be given later.

The facts leading to the appellant's application for habeas corpus were as follows:

On July 17th, 1992 the Lieutenant Bailiff of Jersey issued a warrant for the arrest of the appellant for murder.

On August 5th, 1992 the appellant was arrested on board the Royal Navy frigate *HMS Argonaut* in international waters by an officer of the States of Jersey Police. The ship then sailed for Gibraltar where, on the information of Det. Sgt. Yome of the Royal Gibraltar Police Force, the Stipendiary Magistrate issued a provisional warrant of arrest under s.6(1)(*b*) of the Fugitive Offenders Act 1967, as extended to Gibraltar by the Fugitive Offenders (Gibraltar) Order 1967 (the relevant parts of the Act being set out in the Schedule to that Order).

On August 6th, 1992, on *HMS Argonaut*'s berthing at Gibraltar, the appellant was arrested on board by an Inspector of the Royal Gibraltar Police Force and was taken before the Stipendiary Magistrate, who remanded him in custody. He has been in custody in Gibraltar ever since.

In his affidavit in support of his application for habeas corpus, the appellant submits that his arrest and forced removal to the jurisdiction of Gibraltar was unlawful and that his detention thereafter has been unlawful.

On August 6th, on his first appearance before the Stipendiary Magistrate, he complained about his arrest and that he had been forced to come to Gibraltar against his will. On August 27th, Mr. Finch, appearing for the appellant before the Stipendiary Magistrate, submitted that both the Jersey warrant of arrest and the provisional warrant of arrest were invalid and that the appellant's arrest was illegal. On September 3rd, 1992 the Stipendiary Magistrate rejected this submission.

On September 11th, 1992 the Governor of Gibraltar, at the request of the Government of the United Kingdom, issued an order under s.5 of the Act authorizing the Stipendiary Magistrate to start proceedings for the extradition of the appellant.

On August 20th, 1993 the proceedings the subject of this appeal took place. On appearance before the Chief Justice, Mr. de Silva, Q.C., for the States of Jersey, and Mr. Triay, Q.C., for the Superintendent of the Prison in Gibraltar, raised preliminary points with the agreement of Mr. Finch for the applicant (the present appellant). These were:

1. The matters raised by the applicant in relation to his arrest on *HMS Argonaut* were matters of abuse of process to be determined by the country of trial—the requesting state—and it was not competent for the Supreme Court in Gibraltar to inquire into these matters.

2. A writ of habeas corpus lay to challenge the jurisdiction of the Stipendiary Magistrate to remand the applicant in custody, and it was only in cases in which the applicant could show from the papers before the court that the committal proceedings under s.7 of the Act were bound to fail for lack of jurisdiction (*e.g.* because the authority to proceed to be issued under s.5(1) of the Act by the Governor is issued by someone other than the Governor, or where diplomatic or sovereign immunity is claimed) that an application for a writ of habeas corpus should be entertained by the Supreme Court before the committal proceedings under s.7 of the Act had been completed.

It was submitted that there was nothing on the face of the record to show that the appellant was illegally detained or that the Stipendiary Magistrate lacked jurisdiction to remand the appellant in custody while he proceeded with the committal proceedings as prescribed in the Act, that the application for a writ of habeas corpus was premature, that the committal proceedings should be completed and that the appellant should

then proceed, if he wished, to apply for habeas corpus as provided for in s.8 of the Act.

Although reference is made in the appellant's second affidavit to *R.* v. *Horseferry Rd. Magistrates' Ct., ex p. Bennett* (4), it does not appear to have been seriously contended in the court below that the Supreme Court or the Stipendiary Magistrate was competent to adjudicate on the matter of the abuse of process alleged by the appellant in so far as his arrest on *HMS Argonaut* was concerned. It seems clear from the proceedings before the learned Chief Justice that the principal issue before the court was whether the appellant could show that the Stipendiary Magistrate so clearly lacked jurisdiction that the committal proceedings were bound to fail.

The learned Chief Justice, having heard the submissions of Mr. de Silva, Q.C., Mr. Triay, Q.C. and Mr. Finch, made the order the subject of this appeal. The appellant's grounds of appeal are as follows:

> "1. The learned Chief Justice erred in law and/or wrongly exercised his discretion (if such a discretion exists) to adjourn the application by the appellant for a writ of habeas corpus until after the completion of committal proceedings begun herein under the Fugitive Offenders (Gibraltar) Order, 1967, notwithstanding that the appellant was challenging the jurisdiction of the magistrates' court to hear and determine such committal proceedings.
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> 2. The learned Chief Justice erred in law in holding that the Stipendiary Magistrate had jurisdiction to entertain the said committal proceedings without giving the appellant a fair and reasonable opportunity to be heard on the merits of whether jurisdiction existed to do so or otherwise, contrary to natural justice.
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> 3. The learned Chief Justice erred in law in holding that the Supreme Court had no jurisdiction to entertain a challenge to the continuation of the aforesaid committal proceedings, although it was alleged that the police and the prosecuting authorities, *inter alia*, of the requesting state were abusing the process of the magistrates' court of Gibraltar."

Mr. Finch, for the appellant, submitted that once the appellant had been granted leave to apply for habeas corpus he was entitled to be heard in support of his application; that as a result of the preliminary point taken by the respondents, he was not able properly to put forward to the Supreme Court his submissions as to the lack of jurisdiction of the Stipendiary Magistrate to proceed with committal proceedings against the appellant under the Fugitive Offenders Act 1967; and that in so fundamental a matter as an application for habeas corpus—which required immediate consideration by the court as it related to the liberty of the subject—the learned Chief Justice had been wrong to adjourn the matter. He referred to *Home Secy.* v. *O'Brien* (1) ([1923] A.C. at 609, *per* Lord Birkenhead) and *Khera* v. *Home Secy.* (2) ([1984] A.C. at 108–110, *per* Lord Scarman).

Mr. Finch agreed that the basis of the appellant's application for habeas corpus had been as set out in the appellant's affidavit of July 15th, 1993. Mr. Finch told this court that he had intended to argue that the Fugitive Offenders (Gibraltar) Order should never have been applied in the appellant's case. Having been arrested on one of Her Majesty's ships by the Jersey police for an alleged offence in Jersey, the appellant should have been taken to Jersey. When he was brought to Gibraltar the appellant was not a fugitive offender; he was in the custody of the state (the United Kingdom and Jersey) which was looking for him. It was outside the contemplation of the Fugitive Offenders Act that that state should then hand the appellant over to the police in Gibraltar and that the States of Jersey should then request the appellant's extradition to Jersey as a fugitive.

Mr. Finch indicated that it was on this basis that he had intended to argue that it was not competent for the States of Jersey to apply for the appellant's extradition and that, accordingly, the Stipendiary Magistrate had no jurisdiction to issue a provisional warrant under s.6 of the Act or to order the appellant's detention in custody thereafter for the purpose of committal proceedings under the Act. It would then have been for the Crown to prove that the Stipendiary Magistrate had jurisdiction and that the appellant's detention was lawful. However, because the proceedings in the Supreme Court had been restricted to consideration of the Crown's preliminary point, he had been unable to develop this argument and the Chief Justice had not been able to consider it. Had he done so, Mr. Finch suggested, it was possible that he would have found in the appellant's favour and ordered the appellant's release.

Mr. Finch submitted that the appellant's application had not been dealt with fairly by the Chief Justice by his allowing the preliminary point to be considered without considering fully the appellant's application.

Mr. de Silva, for the States of Jersey (the state requesting the appellant's extradition), said that he had been concerned that the appellant's application, if heard before the committal proceedings had been completed, could unduly delay those proceedings. There was, he submitted, a considerable body of authority to show that an application for habeas corpus should not be heard in the course of extradition proceedings until the committal proceedings had been completed. Only if it was clear that the committal proceedings were bound to fail should this practice be varied—see *US Govt.* v. *Bowe* (8) ([1990] 1 A.C. at 526, *per* Lord Lowry). Such failure would occur, for instance, Mr. de Silva submitted, where someone other than the Governor of Gibraltar had issued the authority to proceed under s.5(1) of the Act, or where the person arrested could claim sovereign or diplomatic immunity from arrest, or, exceptionally, where the person arrested was able successfully to claim *autrefois acquit* or *convict* in spite of the Magistrate's having already ruled against him under s.4(2) of the Act.

The appellant's affidavit in support of his application for habeas corpus showed nothing approaching a situation from which it could be said the committal proceedings were bound to fail. All they showed was an alleged abuse of process occurring on a British ship in international waters, which was a matter to be dealt with by the country where the trial was to take place (*i.e.* Jersey) and was nothing to do with the courts of Gibraltar: see *R.* v. *Horseferry Rd. Magistrates' Ct., ex p. Bennett* (4).

Mr. de Silva submitted that once the appellant arrived in Gibraltar and was "found" in Gibraltar, as provided for in s.1 of the Act, that section applied and the extradition process came into operation. In support of his submission, Mr. de Silva referred us to the following cases: *R.* v. *Governor of Brixton Prison, ex p. Shuter* (3); *US* v. *Gaynor* (7); *US Govt.* v. *Bowe* (8); and *Ex p. Terraz* (6) (39 L.T. at 509, *per* Huddleston, B.).

It is evident that the main issue before the learned Chief Justice was that, unless it was abundantly clear from the appellant's affidavit that the committal proceedings must fail for lack of jurisdiction, the application for habeas corpus should be heard only after the committal proceedings had been completed. What Mr. Finch was submitting was that he had an arguable case on the question of the Stipendiary Magistrate's jurisdiction, which might or might not have succeeded had he been given the opportunity to argue it. But it seems clear from the authorities cited by Mr. de Silva that it is not sufficient to have an arguable case. It must be patently clear from the affidavit that the committal proceedings must fail. If this is clear from the affidavit then the application will be heard; but if it is not clear, but simply arguable, then the application will only be considered after the committal proceedings have been completed under s.8 of the Act.

It is quite clear from the record of proceedings before the learned Chief Justice that Mr. Finch had the opportunity to deal with this point, which was raised by Mr. Triay as well as—and more fully—by Mr. de Silva, and it would seem that he did indeed address it in his submission generally on the question of jurisdiction. It is, in any event, quite clear from the record that Mr. Finch addressed the Chief Justice on the question of the lack of jurisdiction of the Stipendiary Magistrate in the circumstances described in the appellant's affidavit, even if, as he maintains, he was not able to do so as fully as he would have wished because he was dealing with the preliminary point.

I am satisfied on the authorities referred to above, cited to us by Mr. de Silva, that the learned Chief Justice was right in holding that the Stipendiary Magistrate should complete the committal proceedings for the appellant's extradition before any application for habeas corpus by the appellant be heard. Accordingly I find no merit in Ground 1 of the appellant's memorandum of appeal.

As regards Ground 2, Mr. Finch concedes that he addressed the Chief Justice on the question of the jurisdiction of the Stipendiary Magistrate.

His contention that he was not able to put before the court as fully as he would have wished his argument that the lack of jurisdiction in the Stipendiary Magistrate resulted from the circumstances described in the appellant's affidavit in support of his application for habeas corpus was, in my view, in the light of the authorities cited by Mr. de Silva, immaterial.

As regards Ground 3, I am unable to find in the learned Chief Justice's reasons for his decision that he held that the Supreme Court had no jurisdiction to entertain a challenge to the continuation of committal proceedings by the Stipendiary Magistrate in the process of extradition under the Act. What he did hold was that the practice of applying for habeas corpus after committal should be maintained. This conclusion is supported by the authorities cited to him and to us by Mr. de Silva, and in my view was correct.

For the reasons set out above, I considered that there was no merit in this appeal and that it should be dismissed.

Appeal dismissed.
