IN THE COURT OF APPEAL OF BELIZE AD 2020

CIVIL APPEAL NO 20 OF 2017

KELVIN LEACH Appellant

v

ATTORNEY GENERAL Respondent

AND

CIVIL APPEAL NO 21 OF 2017

ROHN KNOWLES Appellant

v

ATTORNEY GENERAL Respondent

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BEFORE

The Hon Sir Manuel Sosa	President
The Hon Madam Justice Minnet Hafiz Bertram	Justice of Appeal
The Hon Mr Justice Lennox Campbell	Justice of Appeal

E Courtenay SC with I Swift and L Mendez for the appellants.
S Matute Tucker, Deputy Solicitor General, with A Finnegan, Crown Counsel, for the respondent.

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14 and 15 March 2019 and 17 December 2020

SIR MANUEL SOSA P

[1] On 15 March 2019, I was concordant with the other members of the panel that these appeals should be allowed and the orders set out at para **[78]**, below made. I have had the advantage of reading the reasons for judgment of my learned Sister, Hafiz Bertram JA, and concur fully in them.

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SIR MANUEL SOSA P

HAFIZ BERTRAM JA

Introduction

[2] These were consolidated appeals heard and allowed by the Court on 14 March 2019, when reasons for decision were promised. The issues raised in the appeal were legality and constitutionality of extradition proceedings before the Chief Magistrate of Belize. Kelvin Leach and Rohn Knowles ("the appellants") were the subject of extradition requests by the Government of the United States of America ("United States") as it was alleged that they committed offences of securities fraud and conspiracy to launder money. During the proceedings before the Chief Magistrate, the Attorney General sought to adduce evidence obtained by the United States by interception of the appellants' telephone conversations, emails and other communications. The appellants sought leave of the Chief Magistrate, which was granted, to state a case to the Supreme Court in relation to the breach of their rights under the **Belize Constitution Act, Chapter 4** ("Constitution"), as the evidence was obtained without valid judicial authorization pursuant to the **Interception of Communications Act, Chapter 229:01** ("Interception of Communications Act"), Revised Edition 2011 of the Laws of Belize. Arana J heard the case and ruled that it was premature and misconceived. The appeal to this Court considered those issues and also the constitutional issues raised by the appellants which were not considered by the court below.

Brief Background

[3] The United States requested the provisional arrest of Rohn Knowles and Kelvin Leach ("the appellants"), on the 12 September 2014, pursuant to Article 9 of the Extradition Treaty between the United States and the Government of Belize. On 15 September 2014, the Minister of Foreign Affairs issued an Order to the Chief Magistrate for Warrants of Apprehension of the appellants who were fugitives of the United States. The warrants were signed and executed as authorized by the then Chief Magistrate.

[4] The appellants filed petitions for bail and were granted bail on 29 September 2014 on the conditions that the appellants were not permitted to leave the jurisdiction of Belize, surrender all travel documents to the court and report to the police station every Monday and Friday.

[5] The United States submitted the official extradition request on 13 November 2014. At the commencement of extradition proceedings before the Chief Magistrate, the documents submitted by the United States were not authenticated because of the constitutional objection raised by the appellants. They argued before the Chief Magistrate that their extradition was sought based on evidence that was obtained in violation of their fundamental rights not to be subjected to arbitrary search and seizure and their right to privacy. The appellants obtained leave from the Chief Magistrate to state a case to the Supreme Court and as a result of that objection, the documents were tendered for identification purposes only.

[6] The appellants stated their case to the Supreme Court by Claims No. 50 and 51 of 2016. The two claims were consolidated and heard by Arana J. They challenged the constitutionality and legality of the extradition proceedings by the United States. The cases were stated pursuant to sections 20(3), 9, and 14 of the **Belize Constitution.**

Relief sought in the Supreme Court

[7] The following reliefs were sought in the Supreme Court:

1. A declaration that extradition proceedings were unlawful and in violation of the appellants fundamental rights not to be subject to arbitrary search and seizure guaranteed by section 9 of the Belize Constitution;

2. A declaration that extradition proceedings were unlawful and in violation of the appellants' fundamental right to privacy guaranteed by section 14 of the Belize Constitution;

3. A declaration that the extradition proceedings were an abuse of process;

4. An order that the extradition proceedings be stayed;

5. Damages for breach of the appellants' constitutional rights;

6. Such further or other relief and costs.

[8] On the 30 June 2017, the trial judge refused the relief sought and awarded costs to the Attorney General, to be agreed or assessed.

[9] The appellants appealed the decision of the trial judge which was heard by this Court on 14 March 2019. The decision was reserved to a date to be announced. On 15 March 2019, the Court orally announced its judgment, whereby both appeals were allowed. The reasons for doing so follow.

The Appeal

Grounds

[10] There were five grounds of appeal, namely:

(1) The trial judge erred in law in finding that the application was premature and thus should not have been brought to the Supreme Court prior to extradition proceedings in the Magistrate's Court;

(2) The trial judge erred in law in finding that evidence brought before the extradition judge in Belize is not to be assessed;

(3) The trial judge erred in law in failing to determine whether the extradition proceedings amount to an abuse of process;

(4) The trial judge erred in law in refusing the relief sought; and

(5) The trial judge erred in law in ordering costs against the appellants.

Relief sought

[11] There were seven reliefs sought by the appellants, namely:

(1) An order setting aside the order of the Supreme Court dated 30 June 2017;
(2) A Declaration that the evidence against the appellants were obtained in violation of the appellant's fundamental rights guaranteed by sections 9 and 14 of the *Belize Constitution;*
(3) A Declaration that the evidence against the appellants were illegally obtained in violation of the *Interception of Communications Act*;
(4) A Declaration that the extradition proceedings were an abuse of process;
(5) An Order that the extradition proceedings be stayed;
(6) Damages; and
(7) Costs of the appeal and in the court below.

Decision of the trial judge

[12] The trial judge accepted the submissions of the Attorney General and found that the case stated was premature and should have waited until the completion of the extradition proceedings before pursuing any constitutional challenges. At paragraph 8 (pages 18-19) of the judgment the judge addressed prematurity:

> " …… I find that this application is premature and I see no reason for not allowing the extradition proceedings to continue to take its course. …. there is no reason for the Applicant not to have waited for the Magistrate to make a decision and then appeal all the way up to the Caribbean Court of Justice if necessary. That course of action would not in any way deprive the Applicants of the opportunity

to have the courts adjudicate upon any alleged violation of their constitutional rights; on the contrary, it reinforces the principle that the Applicants should exhaust all their remedies available before seeking constitutional relief. This practice of disrupting the flow of extradition proceedings with these unnecessary applications was frowned upon in Government of the ***United States of America v. Bowe*** **(1989) 37 WIR 9** where the Privy Council held that generally speaking on an application for extradition 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 where it is clear that the extradition proceedings must fail should this practice be varied. …… bringing this matter by way of a case stated is an unwarranted attempt to bring an application for constitutional relief before the Court before the extradition proceedings in the Magistrate Court are completed. This application is clearly premature as there is no evidence before the Magistrate since the documents were not even tendered when the Applicants launched this case stated in the Supreme Court, interrupting the extradition proceedings before the Magistrate and bringing the case to a halt."

[13] The trial judge also accepted the submissions for the Attorney General that the application was misconceived. She stated that the arguments launched for the appellants attacking the reliability and admissibility of the evidence are matters which are governed by the principles of comity and reciprocity in extradition proceedings and should be left for the determination of the trial judge in the United States. The reasons for making this finding are stated at page 21 of the judgment where the judge said:

> **"**Extradition matters are *sui generis* and there is a presumption that the evidence is reliable and that the Claimants will get a fair trial in the United States. While it is true that in this case there was no compliance with our local legislation on the recording of electronic communications, the *Interception of Communications Act Chapter 229 of the Laws of Belize*, the evidence sought to be relied upon as the basis for this request was gathered pursuant to a warrant issued by a United States judge. Questions of admissibility and reliability of evidence are not issues for an extradition judge in Belize whose duty it is to determine whether there is a *prima facie* case to be tried within the parameters of the extradition treaty between Belize and the United States. I feel compelled to cite McLachlin J in **Kindler v Canada (Minister of Justice)** *[1991] 2SCR 779* as referred to by Mottley P in Civil Appeal No. 11 of 2002 **Rhett Fuller v. The Attorney General of Belize** as follows:

"….. While the extradition process is an important part of our system of criminal justice, it would be wrong to equate it to the criminal trial process. It differs from the criminal process in purpose and procedure. Extradition procedure, unlike criminal procedure, is founded on the concepts of reciprocity, comity and respect for differences in other jurisdictions.

This unique foundation means that the law of extradition must accommodate many factors foreign to our internal criminal law. While our conceptions of what constitutes a fair criminal law are important to the process of extradition, they are necessarily tempered by other considerations.

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

[14] It was for those reasons that the learned trial judge found little merit in the submissions for the appellants in the case stated application and therefore referred the matter back to the Chief Magistrate for the committal proceedings to continue before her.

Whether the case stated was premature

[15] Learned senior counsel, Mr. Courtenay for the appellants submitted that the trial judge's observation that the appellants have a right to appeal the decision of the Chief Magistrate was an error since the *Extradition Act 1870 ("the Extradition Act")* does not provide for an appeal from the committal Magistrate's decision to extradite. Counsel referred the Court to section 11 of the Extradition Act which provides that the accused has only a right to apply for *habeas corpus.* Counsel submitted that the remedy is however, limited as it allows an accused to challenge the lawfulness of the detention which is not the same as a challenge to the lawfulness of extradition proceedings. Counsel relied on the case of Fuller (which was also relied upon by the trial judge).

[16] Mr. Courtenay further submitted that the case for the appellants fell within the exception which the trial judge identified. ("*Only where it is clear that the extradition proceedings must fail should this practice be varied*"). He contended that the case for the appellant was that the extradition proceedings must fail for being an abuse of process. Further, the proceedings ought to be stayed if the Court finds that there was abuse of process.

[17] Senior counsel further submitted that the trial judge failed to appreciate that constitutional matters, including the constitutionality of evidence fell within the purview of the Supreme Court. (section 20(3) of the Belize Constitution). As such, the Chief Magistrate acted within jurisdiction and a proper basis in law in referring the constitutional matter to the Supreme Court. The Magistrate's Court, counsel submitted, shall then dispose of the matter in accordance with the decision of the Supreme Court. (Section 20(5) of the Belize Constitution).

[18] Learned counsel, Mrs Tucker for the Attorney General submitted that the trial judge was correct in her finding that the case stated application was premature. She contended that on an application for extradition 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. She relied on the case of **Bowe** which was also relied upon in the court below to persuade the trial judge to refuse relief sought by the appellants.

[19] Counsel further relied on **Scantlebury and others v Attorney General of Barbados and another** (2009) 76 WIR 86, in which the court found that any challenge to extradition proceedings must be made after the proceedings before the Chief Magistrate have concluded. She relied on paras 64-65 where the court unanimously held that an adequate remedy was available.

Discussion

[20] The appellants contended that there had been a breach of their constitutional rights during the hearing of the extradition proceedings before the Chief Magistrate. On this basis, an application was made for leave to state a case to the Supreme Court. It is trite that the Magistrate's Court has no jurisdiction to hear constitutional matters and it is the Supreme Court that has the original jurisdiction to do so. (See section 20 of the Constitution). Ms Finnegan in her first affidavit sworn on 30 March 2016, deposed as to what transpired before the Chief Magistrate causing the extradition matter to be referred to the Supreme Court. She deposed that the documents in relation to the extradition proceedings were not authenticated as required because the appellants raised constitutional objections. As a result, the extradition bundles were only tendered for identification purposes and an application was made by the appellants for a case to be stated to the Supreme Court to have the constitutional issues determined. At paragraph 12 of the affidavit, Ms Finnegan deposed that the case was stated to the Supreme Court on 13 March 2015, after it was determined by the Chief Magistrate that the issues were of serious constitutional import.

[21] The appellants in their fixed date claim by way of a case stated for constitutional relief raised a breach of sections 9 and 14 of the Belize Constitution. Section 9 provides for the protection from arbitrary search of person or property except where it is

done under the authority of any law. Section 14 provides for the protection of right to privacy except as otherwise provided by law.

[22] The Chief Magistrate was obviously not of the view that the Constitutional issues raised by the appellants were frivolous or vexatious and granted leave to refer the question to the Supreme Court for determination. (section 20(3) of the Constitution).

The point on right of appeal from a committal order

[23] The learned trial judge in her judgment stated that the appellants should have waited for the Magistrate to make a decision on the determination of the extradition proceedings and then "*appeal all the way up to the Caribbean Court of Justice, if necessary. That course of action would not in any way deprive the Applicants of the opportunity to have the courts adjudicate upon any alleged violation of their constitutional rights; on the contrary, it reinforces the principle that the Applicants should exhaust all their remedies available before seeking constitutional relief."* The question, as raised by Mr. Courtenay, is whether there would have been a right of appeal from a committal order by the Chief Magistrate. I was in agreement with the arguments put forward for the appellants that there was no such right of appeal. The Extradition Act does not give prisoners who are committed any right of appeal. The Chief Magistrate is required to inform the criminal, if he is committed, that he has a right to apply to the Supreme Court for *habeas corpus*, pursuant to section 11 of the Extradition Act which provides that:

> "11 If the .. magistrate commits a fugitive criminal to prison, he shall inform such criminal that he will not be surrendered until after the expiration of fifteen days, and that he has a right to apply for a writ of **Habeas corpus."**

[24] Accordingly, it is shown that the appellants had no right of appeal even if the extradition proceedings had concluded and they were committed by the Chief Magistrate.

Prematurity point

[25] The remedy of *habeas corpus* allows an accused to challenge the lawfulness of his detention after committal. As mentioned above, the appellants were not committed and as such there could not have been a challenge to the lawfulness of detention by way of *habeas corpus* to the Supreme Court as provided by section 11 of the Extradition Act. Further, the application by the appellants before the Chief Magistrate raised violation of their fundamental rights and she had no jurisdiction to determine such application. A question that arose on this appeal was the procedure that should have been followed since the appellants raised the issue during the committal proceedings before the Magistrate and the trial judge was of the view that the application before the Supreme Court was premature.

[26] In the case of **Fuller,** the Board asked the question as to the **correct procedure** where a person wishes to challenge extradition on the ground that it will violate a fundamental right but, did not find it necessary to determine that issue because of other issues raised by the appellant in that case. The Board had this to say on the point and explained the difference between **lawfulness of extradition** proceedings and **lawfulness of detention** at paras 49 and 50:

> 49. …Section 20 of the (Belize) Constitution provides for the application to the Supreme Court where a person alleges that a fundamental right has been or is likely to be violated. Section 20(3) makes provision for any other court to refer to the Supreme Court any question that arises of the contravention of a fundamental right. **What is the correct procedure where a person wishes to resist extradition on the ground that it will violate a fundamental right**? **Can he raise the point at the committal proceedings before the Chief Magistrate? If so, should the Chief Magistrate refer the point to the Supreme Court.** Alternatively, can and should the point be raised for the first time on a habeas corpus application to the Supreme Court? Or should the person resisting extradition raise the point by a separate constitutional motion under section 20?

50. **It is not necessary to resolve these procedural issues on this appeal, for Mr. Fitzgerald has complicated the picture by his reliance on section 20 the Constitution.** The appellant raised his abuse of process challenge in the course of habeas corpus proceedings before the Supreme Court. Habeas corpus is the remedy provided by section 5(2)(d) where the fundamental right to liberty has been infringed by detention. But in reality it is not the detention that the appellant challenges but the extradition process itself. *The **lawfulness of the detention** is not the same as the **lawfulness of the extradition**, albeit that the two are inter-connected. A person can be lawfully detained pending the determination of whether his extradition is lawful,* but not if *or when it is determined that the extradition is not lawful*."

[27] The Board concluded that where the allegation are that the proceedings is an abuse as it violates a constitutional right, the Supreme Court pursuant to section 20 and 95 of the Belize Constitution has the sole jurisdiction to determine that issue. The procedure to be followed was not discussed.

[28] In the instant matter, the **lawfulness of the extradition** (since there was no detention) was raised at the committal proceedings before the Chief Magistrate and she referred the matter to the Supreme Court pursuant to section 20 of the Constitution. Section 20(3) makes provision for any other court to refer to the Supreme Court any question that arises on the contravention of a fundamental right. The "*any other court*", in my respectful view, does include the Magistrate's Court. Since the Magistrate has no jurisdiction to determine constitutional matters the case was properly referred to the Supreme Court. This judgment however, should not be considered as one that opens a floodgate for applications to be made to the Chief Magistrate during committal proceedings. It depends on the circumstances of each case as the habeas *corpus* remedy is available after committal, as was done in **Fuller, where** the major complaint was delay. In the instant matter, the evidence obtained by the United States to request extradition was obtained in breach of Belize domestic laws as found by the learned trial judge. There was no reason under such circumstances, in my opinion, to wait for committal and then challenge the committal by way of *habeas corpus* or constitutional motion. In my opinion,

the learned trial judge should have determined the constitutional issues raised by the appellant.

[29] The case of **Scantlebury** relied upon by the respondent can be distinguished from the instant matter. It was an application for Judicial Review of the Chief Magistrate's decision on several grounds including the refusal for the appellant to cross examine witnesses and the admission of evidence provided by an anonymous witness. The application was made pursuant to section 24 of the Barbados Constitution which empowers the High Court to review decisions where there is an allegation of violation of one's constitutional rights.

[30] Section 24 of the Barbados Constitution contains a proviso stating that the High Court shall not exercise its powers if it is satisfied that adequate means of redress are available under any other law. Section 24 provides:

> "*Provided that the High Court shall not exercise its powers under this subsection if it is satisfied that adequate means of redress are or have been available to the person concerned under any other law*."

[31] Section 20 of the Barbados Extradition Act provided for a right of appeal and it was the opinion of the court that this was an effective alternative remedy. The court found that any challenge to extradition proceedings must be made after the conclusion of the proceedings before the Chief Magistrate. The court unanimously held that an adequate alternative remedy was available. At paras 64 – 65, the court said:

> "[64] In our judgment, the appellants could have and should have appealed in accordance with s 20 of the Act after conclusion of the committal proceedings. All that was necessary was that after the application to cross-examine the deponents on their affidavits was refused, the appellants should have awaited the Chief Magistrate's decision in respect of committal.
>
> [65] Instead, they chose the route of judicial review under the Constitution and under the Administrative Justice Act. In our judgment, s 20 of the Act provided an adequate and efficacious alternative remedy. In *Thakur Persad Jaroo v AG* [2002] UKPC 5, (2002) 59 WIR 519 the Judicial Committee of the Privy Council said that if another procedure is

> available, resort to a procedure such as is provided in s 24 of the Constitution will be inappropriate. Resort to it will be an abuse of process. We agree with Reifer J's dismissal of the applications for judicial review. First, the appellants ought to have allowed the committal proceedings to be completed before seeking to challenge them. Secondly, an adequate remedy was available to the appellants under s 20 of the Act."

[32] In the present case, Section 20 of the Belize Constitution, the redress clause, does not contain a proviso similar to section 24 of the Barbados Constitution. Further, the Extradition Act of Belize does not contain a provision for a right of appeal. Section 20(3) and (5) of the Belize Constitution makes no provision for an alternative remedy for breach of fundamental rights. Also there is no right of appeal from committal proceedings as discussed above. Therefore, the case of **Scantlebury** is inapplicable to the instant matter.

[33] The other authority relied upon by the respondent in this Court and the court below was **Bowe.** The trial judge in the court below, also relied on **Bowe** and opined that the appellants should have exhausted all their remedies available before seeking constitutional relief. The learned judge relied on the finding of the Privy Council and said that the practice of disrupting the flow of extradition proceedings was frowned upon because "*generally speaking on an application for extradition 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 where it is clear that the extradition proceedings must fail should this practice be varied*****.**" (emphasis added).

[34] In my view, the case of **Bowe** is also distinguishable from the instant matter. In that case a prerogative remedy was sought and in the present case, declarations were sought for breach of the appellants' fundamental rights which are constitutional issues. Further, as recognized by the trial judge in the instant matter, the court in **Bowe** said that the practice of presenting the entire case can be varied if it is clear that extradition proceedings must fail. Accordingly, since the trial judge in the instant matter found that the evidence presented by the United States was obtained in breach of Belize legislation, in particular, the **Interception of Communications Act**, she should have considered,

in my respectful view, whether the extradition proceedings would have failed for that reason.

[35] It was for those reasons that I was of the opinion, that the cases stated by the appellants challenging the breach of their fundamental rights, were not premature.

Was the case misconceived?

[36] The trial judge also found that the applications by the appellants were misconceived. She opined that the arguments launched for the appellants attacking the reliability and admissibility of the evidence are matters which are governed by the principles of comity and reciprocity in extradition proceedings and should be left for the determination of the trial judge in the United States.

[37] The appellants argued that the judge misdirected herself in relegating the nature of extradition proceedings as mere conduits for the principles of reciprocity and comity. Mr. Courtenay in oral and written submissions contended that in order to grant an extradition request, the court must determine whether the evidence adduced would be sufficient to commit the accused person to trial in the requested state (Belize) and it is not a matter only for the receiving state (United States).

[38] The respondents submitted that the trial judge was correct in finding that the evidence before the extradition judge in Belize is not to be assessed by the judge and that the consideration of the evidence is a matter for trial.

Discussion

[39] The learned trial judge was correct to say that extradition matters are *sui generis* and that there is a presumption that the evidence is reliable and that the appellants will get a fair trial in the United States. Extradition is based on mutual agreements between states and as such the courts will generally assume that a requesting state in such proceedings was acting in good faith. But, it is my view, that the principle does not end at that point. The presumption in favour of extradition is **not an absolute one**, since there

may be circumstances which prevent automatic decisions to extradite, such as **abuse of process**. In the present case, the appellants raised the ground of abuse of process and therefore, the court ought to have assessed the evidence and determined whether it would be sufficient to commit the appellant in this jurisdiction (Belize). The trial judge said that "*the evidence sought to be relied upon as the basis for this request was gathered pursuant to a warrant issued by a United States judge."* This is not a basis for refusing to assess the evidence before the court where there is a claim of abuse of process. The court was obligated to make further enquiries and in this case, the learned trial judge was aware that there was no compliance with the **Interception of Communications Act.** It was my view, that the presumption that the United States would fulfil its treaty obligations could be rebutted, where there was evidence that extradition would not be compatible with the appellant's fundamental rights under the Belize Constitution.

[40] The learned trial judge said that "*Questions of admissibility and reliability of evidence are not issues for an extradition judge in Belize whose duty it is to determine whether there is a prima facie case to be tried within the parameters of the extradition treaty between Belize and the United States*." The judge relied on the case of **Kindler (**which was relied upon by this Court in **Rhett Fuller**), in which McLachlin J explained the difference between the criminal process and the extradition process. It is accepted that extradition procedure, unlike criminal procedure, are governed by the principles of comity and reciprocity. However, McLachlin J also recognized that extradition can attract scrutiny on account of an "*objectionable procedure or punishment in the requesting country."* At page 35 of the judgment under the heading of *"Which sections of the Charter apply?,* McLachlin J after discussing that the court must avoid extraterritorial application of the guarantees in the Canadian Charter of Rights and Freedom, under the guise of ruling extradition procedures unconstitutional, said the following:

> "This is not to say that extradition will never attract scrutiny on account of an objectionable procedure or punishment in the requesting country. While section 12 of the Charter may not apply since the acts occurred outside of Canada, our law of Extradition and the minister's act pursuant to that law do fall under the Charter and the general guarantees found in s 7. They

must meet the requirements of s 7 of the Charter that no one be deprived of his or her life, liberty or security of person except in accordance with the fundamental principles of justice….. Just as the extradition process involves considerations which go beyond our internal criminal law, so must an assessment of its fundamental fairness take account of those factors."

[41] Kindler was convicted in the Unites States of first degree murder and the jury recommended the imposition of the death penalty. He escaped from prison to Canada before he was sentenced. Subsequently he was arrested and after an extradition hearing was committed for surrender to the United States. Kindler brought an application to review the Minister's decision on the ground that the death penalty violates the Charter. The application was dismissed in the Federal Court and an appeal was also dismissed in the Federal Court of Appeal. An appeal was thereafter made to the Supreme Court.

[42] The Supreme Court considered two constitutional issues, that is, whether section 25 of the Extradition Act violates section 7 or section 12 of the Charter, and if so, whether such violation is justified under section 1. McLachlin J found that on the facts of the case, where "*the reasons for extradition are compelling and the procedural guarantees in the reciprocating state high, I am satisfied that the Minister's decision did not infringe the Charter."*

[43] In the present case, the court below should have assessed the evidence in relation to the constitutional issues raised by the appellants as was done in the case of **Kindler.** There must be a balance between the fundamental rights of the appellants and the principles of comity and reciprocity. Accordingly, I was of the opinion that the applications made were not misconceived and that the learned trial judge erred in not assessing the evidence obtained by the United States for the extradition of the appellants.

Conclusion on prematurity and misconceived grounds

[44] The case stated to the Supreme Court was neither premature nor misconceived. The trial judge had jurisdiction to determine whether the process in the Magistrate's court was being abused, in relation to the alleged violation of the appellants' fundamental rights provided for under the Belize Constitution. Accordingly, the learned trial judge erred in not considering whether the process of the Magistrate's court was being abused.

Jurisdiction of Court of Appeal to determine abuse of process

[45] Mr. Courtenay submitted that if this Court found that the appellants were entitled to mount an abuse of process challenge, then it should step further than determining the error by the learned trial judge and determine whether the extradition proceedings were an abuse of process. The Court was of the view that it had jurisdiction to determine the abuse of process point under section 19(1) (a) of the **Court of Appeal Act** and section 20(3) of the **Belize Constitution.** Section 19 of the Court of Appeal Act provides for the power of the Court. In particular section 19(1) (a) provides:

> "19. (1) On the hearing of an appeal under this Part, the Court shall have power to,
>
> > (a) confirm, vary, amend or set aside the order or make any such order as the Supreme Court or the judge thereof from whose order the appeal is brought might have made, or to **make any order which ought to have been made,** and make such further or other order as the case may require;"

[46] It is clear that section 19(1) (a) gives this Court the power to make any order which ought to have been made by the learned trial judge. The court below ought to have considered the question raised by the appellants of the breach of their fundamental rights. (section 20(3) of the Belize Constitution).

[47] Further, this Court had before it written and oral submissions on the constitutional issues raised which adequately addressed the points. The authority of **Fuller** was relied upon by both sides and that case was most helpful in addressing the abuse of process issue for violation of fundamental rights.

Whether extradition requests by the United States was an abuse of process

[48] On 13 November 2014, the United States made the request for the extradition of the appellants to face charges for conspiracy to commit securities fraud, in violation of Title 18, United States Code, section 371 and conspiracy to launder money, in violation of Title 18, United States Code, Section 1956 (h).

[49] The request in relation to both appellants, as shown by the transcript of the proceedings, comprised (a) the applications for the extradition and affidavits in support of the applications; (b) the indictments; (c) the warrants for their arrest; (d) the relevant provisions of the Unites States Code and (v) the affidavits of Thomas McGuire.

[50] The affidavits of Thomas McGuire exhibited the evidence obtained by the United States against both appellants. It is not necessary to list all the exhibits as the focus of this judgment is to determine whether in obtaining the evidence there was a violation of the fundamental rights of the appellants as enshrined in the Belize Constitution. The evidence included emails and recording of telephone conversations obtained through search warrants granted by United States District Court authorizing the interception of telephone conversations from Belize to the Bahamas.

[51] Mr. Courtenay submitted that the United States in requesting the extradition of the appellants, sought to rely on evidence obtained contrary to the Interception **of Communications Act**. Further, that the interception *of* communications in the absence of valid judicial authorization in Belize as provided under that Act, was a flagrant violation of their Constitutional right to privacy provided by section 14 of the **Belize Constitution** and their right not to be subjected to arbitrary search and seizure as provided by **section 9** of the **Belize Constitution**. Senior counsel relied on several authorities in written and oral submissions, including: **Rhett Fuller**; **Regina v Horseferry Road Magistrates'**

Court, Ex parte Bennett; **R v Duarte** [1990] 1 S.C.R. 30; **Malone v United Kingdom** [1984] ECHR 10;

Discussion

(i) Unlawful interception

[52] This Court was required to assess the evidence in support of the requests made by the United States for the extradition of the appellants to determine whether there was an abuse of the process of the Magistrate's Court in Belize. The requests were based on evidence obtained by the United States, mainly through telephone intercepts and emails. The recordings of communications with regards to Knowles are as shown by the affidavit of Thomas McGuire (See Exhibits E, F, H, I, K, L, P). The recordings of communications with regards to Leach are as shown by the affidavit of Thomas McGuire (See Exhibits C, E, K, F, H, I, M, N and O). Mr. McGuire deposed that the recordings were made as participant surveillance with an undercover agent and a party in Belize.

[53] The relevant provisions of the **Interception of Communications Act** for the purposes of this case are sections 2, 3, 5, 6. Section 2 is the interpretation section. Part II of the Act makes provisions for interception of communications. Intercept under section 2 includes the following:

> "intercept" includes,
>
> > (a) aural or other acquisition of the contents of a communication through the use of any means, including an interception device, so as to make some or all of the contents of a communication available to a person other than the sender or recipient or intended recipient of that communication;
> >
> > (b) monitoring a communication by means of a monitoring device;
> >
> > (c) viewing, examining, or inspecting the contents of a communication;

(d) diverting of any communication from its intended destination to any other destination; and

(e) cloning of telecommunication equipment by con-figuring or otherwise modifying telecommunication identifying information associated with or contained in a telecommunications instrument so that such instrument may be used to obtain telecommunications service without authorization.

[54] Section 3 provides for the prohibition of interception. Section 3(1) provides:

3. (1) Except as provided in this section, any person who with intent intercepts communication in the course of its transmission by means of a public postal service or a communication network without authorisation, commits an offence and, on conviction on indictment, is liable to,

(a) a fine of not less than twenty five thousand dollars and not exceeding fifty thousand dollars or to a term of imprisonment not exceeding three years in the first instance;

(b) a fine of not less than fifty thousand dollars and not exceeding one hundred thousand dollars or to a term of imprisonment not exceeding five years in the second instance; and

(c) a fine of one hundred thousand dollars and a term of imprisonment not exceeding five years in the subsequent instances.

[55] Section 5 makes provisions for interception applications to be made by an authorized officer to a Judge in Chambers. Section 5 provides:

5. (1) An authorised officer who wishes to obtain an interception direction pursuant to the provisions of this Act shall request the Director of Public Prosecutions to make an application ex parte to a Judge in chambers on his behalf.

(2) An application referred to in subsection (1) of this section shall be in the prescribed form and shall be accompanied by an affidavit deposing the following,

(a) the name of the authorised officer on behalf of whom the application is made;
(b) the facts or allegations giving rise to the application;
(c) sufficient information for a Judge to issue an interception direction;
(d) the ground referred to in **section 6 (1)** of this Act on which the application is made;
(e) full particulars of all the facts and the circumstances alleged by the authorised officer on whose behalf the application is made ….

[56] Section 6(1) provides for the issuance of interception direction. In particular, section 6 (1) (a) (v) and (vi) is relevant to this case. It provides:

"6. (1) An interception direction shall be issued if a Judge is satisfied, on the facts alleged in the application pursuant to section 5 of this Act, that there are reasonable grounds to believe that,

(a) obtaining the information sought under the interception direction is necessary in the interests of,

……..

(v) preventing, detecting, investigating, or prosecuting any offence specified in the Schedule, where there are reasonable grounds to believe that such an offence has been, is being or may be committed; or
(vi) **giving effect to the provisions of any mutual legal assistance agreement** in circumstances appearing to the Judge to be equivalent to those in which he would

issue an interception direction by virtue of subparagraph (v); and …"

[57] It is not in dispute that what was done was an interception of the appellants' communications. It was also common ground between the parties that there was no application made under section 5 of the **Interception of Communications Act** for an interception direction under section 6. The trial judge below also found that there was no compliance with this Act. In my view, the United States could have made an application under the **Interception of Communications Act for** the issuance of an interception direction (See section 6 (1) (vi)). This would have been supported under the Mutual **Legal Assistance and International Co-operation Act, 2014**, (See sections 3, 4 -9) and the **Mutual Legal Assistance in Criminal Matters (Belize/USA) Act**, Chapter 103:01, Revised Edition 2011. Accordingly, since there was no judicial authorization pursuant to the **Interception of Communications Act**, the interceptions of the appellants' communications were illegally obtained.

(ii) Constitutional issues raised by the appellants

[58] The appellants' contention were that there was a violation of their fundamental rights under the Belize Constitution in relation to the intercepted communication. They relied on sections 9 and 14 of the Constitution which fall under Part II, under the heading of "*Protection of Fundamental Rights and Freedoms*". Section 9 provides for protection from arbitrary search and entry and section 14 provides for protection of right to privacy. Section 9 provides:

> "9. (1) Except with his own consent, a person shall not be subjected to the search of his person or his property or the entry by others on his premises.
>
> (2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes reasonable provision-

(a) that is required in the interests of defence, public safety, public order, public morality, public health, town and country planning, the development and utilisation of mineral resources or the development or utilisation of any property for a purpose beneficial to the community;

(b) that is required for the purpose of protecting the rights or freedoms of other persons;

(c) that authorises an officer or agent of the Government, a local government authority or a body corporate established by law for public purposes to enter on the premises of any person in order to inspect those premises or anything thereon for the purpose of any tax, rate or due or in order to carry out work connected with any property that is lawfully on those premises and that belongs to the Government or to that authority or body corporate, as the case may be; or

(d) that authorises, for the purpose of enforcing the judgment or order of the court in any civil proceedings, the search of any person or property by order of a court or entry upon any premises by such order."

[59] Section 14 provides for protection of the right of privacy as follows:

"14. (1) A person shall not be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. The private and family life, the home and the personal correspondence of every person shall be respected.

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision of the kind specified in subsection (2) of section 9 of this Constitution."

Enforcement of protective provisions

[60] Section 20 of the Belize Constitution provides for enforcement of the protective provisions and this includes, sections 9 and 14 raised by the appellants. Hence the appellants were correct in applying to the Supreme Court for redress. Section 20 provides:

> "20. (1) If any person alleges that any of the provisions of sections 3 to 19 inclusive of this Constitution has been, is being or is likely to be contravened in relation to him … that person ... may apply to the Supreme Court for redress.
>
> (2) The Supreme Court have original jurisdiction,
>
> (a) to hear and determine any application made by any person in pursuance of subsection (1) of this section and
>
> (b) to determine any question arising in the case of any person which is referred to it in pursuance of subsection (3) of this section,
>
> and make such declarations and orders, … as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of sections 3 to 19 inclusive of this Constitution.
>
> (3) 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 of the provisions of sections 3 to 19 of this Constitution, the person presiding in that court may, and shall, if any party to the proceedings so requests, refer the question to the Supreme Court unless, in his opinion, the raising of this question is merely **frivolous or vexatious**.
>
> (4) Any person aggrieved by any determination of the Supreme Court under this section may appeal there from to the Court of Appeal.

Violation of sections 9 and 14 of the Belize Constitution

[61] Section 9 of the Constitution provides that a person shall not be subjected to the search of his person or his property, or entry on his premises, except with his own consent. Section 14 of the Constitution provides that a person shall not be subjected to arbitrary or unlawful interference with his privacy. However, these rights are not absolute as shown by section 9(2) and section 14(2) of the Constitution. These provisions provide for such search or entry to be done and for interference with privacy in appropriate circumstances.

[62] In the present case, the United States obtained the evidence in support of the extradition requests by telephone conversations and videos recorded by an undercover agent pursuant to US legislation which supports "*participant surveillance*," as shown by 18 U.S.C. 2518. Also, the evidence consists of telephone conversations and emails obtained through "*search warrants"* granted by the United States District Court authorizing the interception of telephone conversations made from Belize to the Bahamas. (See the transcript at pages 544 to 558). Both of these methods utilized by the United States failed to adhere to the domestic laws of Belize, that is, the provisions under the **Interception of Communications Act** of Belize.

[63] In the case of **Malone**, relied upon by Mr. Courtenay, the European Court of Human Rights discussed the question whether provisions for such surveillance and interception should contain adequate guarantees against abuse. In that case Malone was charged with offences relating to the handling of stolen goods. During the trial it emerged that his telephone conversations had been monitored by the police. Although he was acquitted of the charges he brought civil proceedings to have the monitoring declared unlawful and contended that there was an interference with his private life which was a violation of Article 8 of the European Convention on Human Rights. The court found that there was a violation of Article 8 since the law of England and Wales had failed to indicate with sufficient clarity the scope and manner of the exercise of the relevant discretion conferred on public authorities. There was no provision for the minimum degree of legal protection to which a citizen was entitled to under the rule of law. The

Court held that the law should be sufficiently clear to give a citizen an adequate indication as to the circumstances in which public authorities would be entitled to resort to secret and potentially dangerous interference with the right to respect for his private life.

[64] Mr. Courtenay further relied on the case of **Duarte** from the Supreme Court of Canada. The case concerned section 8 of the Canadian Charter of Rights and Freedoms, which states, "*Everyone has the right to be secure against unreasonable search or seizure".* In that case, there was no judicial authorization. The Court held that surreptitious electronic surveillance of an individual by a state agency constituted an unreasonable search or seizure under section 8 of the Charter. Further, that it made no difference that one party to a private conversation had agreed to the surveillance.

[65] In the present case, the interceptions were done by participant surveillance in accordance with the US laws which made no difference since there was no judicial authorization under the **Interception of Communications Act** of Belize.

[66] Further, in relation to the warrant granted by the United States District Court this also violated the appellants' rights against arbitrary search and seizure since they were residing in Belize at the time and subjected to the laws of Belize. The United States acted unilaterally when it intercepted the communications of the appellant although it had the option of proceeding under the **Mutual Legal Assistance and International Cooperation Act** and the **Mutual Legal Assistance in Criminal Matters (Belize/USA) Act.** Belize, a democratic society, has adequate laws in place, which clearly indicate how such interceptions should be done as shown by the **Interception of Communications Act.**

[67] Accordingly, it was my opinion that the interceptions of the appellants' telephone conversations and emails violated their constitutional rights against arbitrary search and seizure and right to privacy.

Abuse of process for breach of constitutional rights

[68] Since the evidence obtained by the United States to request the extradition of the appellants was illegally obtained thereby breaching the constitutional rights of the appellants, the Court had to determine whether this amounted to an abuse of the process of the Magistrate's court. The case of Fuller relied on by both parties and the trial judge, discussed abuse of process. The Board in **Fuller**, at paragraph 5 of the judgment, observed that "abuse of process" can describe "(i) making use of the process of the court in a manner which is improper, such as adducing false evidence or indulging in inordinate delay, or (ii) using the process of the court in circumstances where it is improper to do so, as for instance where a defendant has been brought before the court in circumstances which are an affront to the rule of law, or (iii) using the process of the court for an improper motive , such as to extradite the defendant for a political motive."

[69] Breach of fundamental rights was not a direct issue discussed in the case of **Fuller**. Nevertheless, at paragraph 58 of the judgment, the Board considered the position in Belize in relation to fundamental rights and extradition laws and the circumstances under which the Supreme Court can grant a habeas corpus application. The Board said:

> "**[58]** The question arises in a country such as Belize, where fundamental human rights are entrenched in the Constitution but where extradition is governed by the 1870 Act, in what circumstances the Supreme Court can, or should, accede to a habeas corpus application on the ground that extradition would be so unjust or oppressive as to be unlawful, with the consequence that detention of the person whose extradition is sought cannot be justified. It is not necessary in this case to attempt to give any general answer to this question, but the Board considers that the circumstances might extend further than those that can naturally be described as amounting to an abuse of process. Where, however, there has been an abuse of process in the narrow sense of the kind that the Board has described in [5], above, the Supreme Court can properly grant the application for habeas corpus on the ground that it is contrary to justice that the court's process should be used in such circumstances."

[70] In the instant matter, the abuse of process complained of by the appellants is the breach of their fundamental rights, that is, right to privacy and right not to be arbitrarily searched. In my view, the allegation of abuse of process in this case falls under the second category shown at paragraph 5 of the **Fuller** judgment. ("*using the process of the court in circumstances where it is improper to do so, as for instance where a defendant has been brought before the court in circumstances which are an affront to the rule of law*").

[71] The breach of fundamental constitutional rights is a serious issue and it has been proven that the evidence gathered by the United States to seek extradition of the appellants was illegally obtained in violation of the provisions of The ***Interception of Communications Act.*** As such, the evidence obtained were in violation of the appellants' fundamental rights guaranteed by sections 9 and 14 of the Belize Constitution. Further, abuse of process goes to the legality of the extradition proceedings. In the case of **Knowles v Government of the United States of America [2006] UKPC 38,** which was considered in **Fuller**, the Board accepted that abuse of process was a matter that could properly be raised before the Supreme Court.

[72] In Fuller**,** the major issue discussed by the Board was the extent of the jurisdiction of the Supreme Court of Belize on an application for habeas corpus in an extradition matter. The issue addressed was whether the Supreme Court of Belize had jurisdiction to entertain an abuse of process challenge. The appellant relied mainly on the delay of 7 years to have his appeal heard by the Court of Appeal which he contended rendered the application for extradition an abuse of process. The Board accepted the submissions for the appellant in relation to the law on the jurisdiction of the Supreme Court of Belize to entertain abuse of process challenge. The appeal was nevertheless, dismissed because the Board was of the opinion that the appellant could have made representations to the Registry to prepare his record to appeal to the Court of Appeal.

[73] In the case of **Bennett**, relied upon by Mr. Courtenay, the defendant who was alleged to have committed criminal offences in England was traced in South Africa by the English police and forcibly returned to England to stand trial in the Magistrate's court.

The defendant sought an adjournment to enable him to challenge the court's jurisdiction since he alleged that he was kidnapped from South Africa as a result of collusion between the South African police and the British police. The application for the adjournment was refused and he was committed to stand trial.

[74] The defendant sought judicial review of the Magistrate's court decision which was also refused. He thereafter appealed and it was held, allowing the appeal that "where a defendant in a criminal matter has been brought back to the United Kingdom in disregard of available extradition process and in breach of international law and the laws of the state where the defendant has been found, the courts in the United Kingdom should take cognizance of those circumstances and refuse to try the defendant; and that, accordingly, the High Court, in the exercise of its supervisory jurisdiction, had power to inquire into the circumstances by which a person had been brought within the jurisdiction and, if satisfied that there had been a disregard of extradition procedures, it might stay the prosecution as an abuse of process and order the release of the defendant." The matter was remitted to the High Court to consider whether there was an abuse of extradition procedures.

[75] In the present case, the abuse of process complained of was that the evidence obtained by the United States to seek extradition violated the constitutional rights of the appellant. 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. The law governing extradition in Belize is the Extradition Act, Chapter 112 of the laws of Belize ("the Extradition Act"). Section 9 of the Extradition Act provides for extradition of fugitive criminals between Belize and the United States of America (USA). It states:

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

[76] 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, (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). (emphasis added)

[77] The evidence obtained by the United States 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 my view, to allow extradition under such circumstances, would be an affront to the rule of law. Accordingly, I was of the opinion, that there was an abuse of the process of the Magistrate's court extradition proceedings and therefore, the extradition proceedings ought to be stayed.

Conclusion

[78] It was for all those reasons, that I agreed on 15 March 2019, to allow both appeals and for the following order to be made:

> "(1) The Order of the judge below in Claim No. 50 of 2016 and Claim No. 51 of 2016 are set aside.
>
> (2) It is declared that the evidence against the appellants was obtained in violation of the appellant's fundamental rights guaranteed by sections 9 and 14 of the *Belize Constitution;*
>
> (3) It is declared that the evidence against the appellants was obtained in violation of the *Interception of Communications Act*;

(4) It is declared that the extradition proceedings were an abuse of process.

(5) It is ordered that the extradition proceedings be stayed.

(6) The Appellants to have costs in this Court and the court below to be provisional in the first instance.

(7) Mr. Leach and Mr. Knowles are released from bail.

(8) The appellants are discharged."

Details of provisional cost order

[79] The appellants were granted costs in this Court and the court below as shown in the Order above. The costs order is provisional, to be made final after seven days. In the event either party should apply for a contrary order within the period of seven days from the delivery of this judgment, the matter of costs shall be determined on written submissions to be filed and exchanged by the parties in ten days from the date of the application.

_____
HAFIZ BERTRAM JA

CAMPBELL JA

[80] I have had the pleasure of reading the judgment of my learned sister Justice Bertram-Hafiz and agree with her reasoning and disposition of the matter.

_____
CAMPBELL JA