

IN THE COURT OF APPEAL OF BELIZE, A D 2023  
CIVIL APPEAL NO 21 OF 2021

**ANDREW AVELLINE BENNETT**

Appellant

v

**GOVERNMENT OF THE UNITED STATES OF AMERICA  
ATTORNEY GENERAL OF BELIZE**

1<sup>st</sup> Respondent  
2<sup>nd</sup> Respondent

---

BEFORE:

The Hon Madam Justice Hafiz-Bertram	-	President
The Hon Madam Justice Minott-Phillips	-	Justice of Appeal
The Hon Mr Justice Foster	-	Justice of Appeal

A Sylvestre & I N Swift for the appellant.  
S Matute, Assistant Solicitor General, for the respondents.

---

Date of Hearing: 12 June 2023  
Date of promulgation: 18 August 2023

**JUDGMENT**

**MINOTT-PHILLIPS, JA**

[1] The issue before this court is whether the High Court Judge, the Hon. Mr Justice James, was correct in determining that extradition proceedings that had commenced against the Appellant, Mr Bennett, before the Chief Magistrate were not an abuse of the process of the court and should continue.

[2] That issue comes before us by way of an appeal filed pursuant to section 20 (4) of the Constitution by Mr Bennett who was aggrieved by that determination of James, J.

**[3]** I reproduce the factual background set out by James, J as it is clear and succinct.

**[4]** On or around the 20<sup>th</sup> day of December 2017, the USA made a request for the extradition of Mr Bennett, an Attorney-at-Law, pursuant to Article 6 of the Extradition Treaty between the Government of the USA and the Government of Belize (“the Treaty”), which was duly incorporated into the Extradition Act, Cap 112, of the Laws of Belize.

**[5]** The extradition proceedings commenced on 18 January 2018 when the Claimant appeared before the court and was arraigned. After the arraignment he applied for, and was granted, bail.

**[6]** At the arraignment on 18 January 2018, Mr Bennett sought disclosure of the extradition documents and indicated that he wished to make a preliminary objection to the extradition bundle tendered into evidence by the Foreign Service Office of the Ministry of Foreign Affairs (and marked of identification) as not satisfying Article 7(a) of the Extradition Treaty.

**[7]** On 12 & 28 December 2018, and 4 January 2019, oral arguments were presented and heard on the issue of whether the bundle satisfied the requirements of Article 7(a). It was then discovered that the certificate was missing from the Magistrate’s file.

**[8]** The matter was adjourned to 16 and 30 May 2019 and, on the latter date, it was ruled that that the Govt of the USA and the AG of Belize would be allowed to take steps to have tendered the document of certification (prepared by the principal consular officer of Belize resident in the USA) which was only absent from the bundle submitted to the court.

**[9]** Thereafter Mr Bennett indicated he wished to have questions referred to the Supreme Court for determination. The Chief Magistrate granted his application for a case to be stated to the Supreme Court of Belize.

**[10]** Consequently, on 18 December 2019 Mr Bennett filed a Fixed Date Claim Form by way of case stated for the following relief:

- a. A declaration that the extradition proceedings are in violation of his constitutional rights protected under the Constitution;
- b. A declaration that the procedure adopted in the extradition proceedings by order of the Chief Magistrate on 30 May 2019 infringes his constitutional right protected under the constitution;
- c. A declaration that the extradition proceedings are an abuse of process;
- d. A stay of the extradition proceedings before the Chief Magistrate; and
- e. Such further or other reliefs as may be just.

**[11]** The Chief Magistrate stated the following questions for determination by the Supreme Court (James, J):

1. Whether the extradition proceedings are in violation of Mr Bennett's fundamental rights protected by the Constitution. It is Mr Bennett's submission that the extradition request made by the USA is replete with evidence which was:
  - a. Illegally obtained?;
  - b. Obtained in breach of his right not to be subjected to arbitrary search?;
  - c. Was a violation of his right to not be subjected to arbitrary search?.
2. Whether the procedure to be adopted as ordered by the Chief Magistrate on 30 May 2019 infringes Mr Bennett's section 6 Constitutional right as it is not provided for in the Indictable Procedures Act?
3. Are the extradition proceedings an abuse of process?

**[12]** The order made by James, J determining those questions had three paragraphs:

- a. The first paragraph declared that WhatsApp communication that formed part of the evidence in support of the extradition request by the Government of the United States of America (USA) was obtained in violation of sections

9 and 14 of the Constitution, and therefore could not be considered by the Chief Magistrate in the extradition proceedings. It answered the first question asked by the Chief Magistrate.

- b. The second paragraph declared that the procedure adopted in the extradition proceedings by order of the Chief Magistrate on 30 May 2019 was not an abuse of process contrary to section 6 of the Constitution. It answered the second question asked by the Chief Magistrate.
- c. The third paragraph declared that the extradition proceedings were not an abuse of process, and ordered that they continue before the Chief Magistrate. It answered the third question asked by the Chief Magistrate.

**[13]** At the outset of the hearing counsel for Mr Bennett sought, and was granted, permission from us to abandon grounds 1 and 2 of his appeal. For clarity, those abandoned grounds of appeal are set out below.

**[14]** Abandoned ground 1 was that James, J erred in holding that the procedure adopted in the extradition proceedings by order of the Chief Magistrate on 30 May 2019 does not violate section 6 of the Constitution.

**[15]** Abandoned ground 2 was that James, J erred in holding *that “there is no evidence as yet before the Chief Magistrate to consider in determining whether to commit [Mr Bennett] to be extradited”* in that the examining Magistrate in stating the case to the Supreme Court, held in her *“brief facts”* that *“the extradition bundle [was] tendered into evidence by the Foreign Service Officer of the Ministry of Foreign Affairs”*.

**[16]** Ground 3 of Mr Bennett’s appeal (being the only remaining live ground after the abandonment of grounds 1 and 2) was that James, J erred in holding that the *“extradition proceedings are not an abuse of the process”* and that there is other evidence in the affidavit of SA Joseph Peltz to establish a *prima facie* case, in that:

- a. He failed to consider and have regard to the fact that the 1<sup>st</sup> Respondent (Govt. of USA), on its own evidence, in the affidavit of SA Peltz, expressed that the “*electronic communications establish[ed] probable cause*”; and
- b. The “*other evidence*”, contained in the affidavit of SA Joseph Peltz, does not establish a *prima facie* case in relation to the seven counts on the indictment.

[17] As the submissions made to us on both sides related solely to ground 3 of the appeal, this decision is confined to that ground.

[18] In advancing the argument that James, J. erred in determining that the proceedings were not an abuse of process, counsel for Mr Bennett submitted that this case fell within the class of case that is an abuse of the process of the court by virtue of “*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*”<sup>1</sup> This argument derived from the conclusion of James, J that the WhatsApp communication evidence was obtained in violation of sections 9 (protection from arbitrary search or entry) and 14 (protection of right of privacy) of the Constitution and, therefore, could not be considered by the Chief Magistrate in the extradition proceedings. Counsel for Mr Bennett appeared to regard the affidavit evidence of Special Agent (SA) Peltz that the “*electronic communications establish probable cause*” as inferring that nothing else did, or could do so, as the submission was that the “*other evidence*” contained in SA Peltz’s affidavit does not establish a *prima facie* case in relation to the 7 counts on the indictment. Mr Bennett’s position was, therefore, that the extradition proceeding could not be sustained following the exclusion of the WhatsApp communication evidence, and that the attempt to use the WhatsApp communication was an affront to the rule of law such as to constitute the proceedings an abuse of the process of the court. As I understood the argument advanced on behalf of Mr Bennett, that attempt (coupled with his assertion that the residual evidence was incapable of establishing a *prima facie* case on the 7 counts in the indictment) tainted the

---

<sup>1</sup> **Rhett Allen Fuller v The Attorney General of Belize** [2011] UKPC 2 , at numbered paragraph 5. The Board’s reasons were delivered by Lord Phillips.

whole process such that James, J erred in refusing to permanently stay the extradition proceedings as an abuse of process. Counsel for Mr Bennett placed much reliance on the decision of this court in ***Leach and Knowles v Attorney General for Belize***<sup>2</sup>. ***Leach and Knowles*** is a case in which this court declared that the evidence against the appellants was obtained in violation of their fundamental rights guaranteed by sections 9 and 14 of the Belize Constitution and in violation of the Interception of Communications Act. Accordingly we stayed the extradition proceedings having declared them to be an abuse of process<sup>3</sup>.

[19] In ***Leach and Knowles*** the material to be adduced in evidence in support of the extradition request was obtained by the USA mainly through telephone intercepts and emails in circumstances where no application was made under the Interception of Communications Act for an interception direction. No judicial authorization pursuant to the Interception of Communications Act having been obtained, the Court of Appeal found that the communications were illegally obtained.

[20] James, J. did not consider all aspects of the case before him to be on all fours with ***Leach and Knowles***. He pointed out that, in the case before him, unlike in ***Leach and Knowles***, there was, after the exclusion of the illegally obtained evidence, material remaining that may be capable of supporting the extradition request being considered by the Chief Magistrate. He made it clear that he did not interpret the Court of Appeal decision in ***Leach and Knowles*** to be that once there is a breach of a person's constitutional rights it means the matter must be stayed<sup>4</sup>. He went on to say<sup>5</sup>,

*“Therefore, I have to assess whether separate and apart from the evidence which was obtained in contravention of the Claimant’s constitutional rights....is there enough evidence to justify committal for trial of the person sought. If the evidence that had been obtained in breach of fundamental*

---

<sup>2</sup> Civil Appeal 20 of 2017 – An unreported decision of the Belize Court of Appeal delivered on 17 December 2020.

<sup>3</sup> The conclusion of the Court of Appeal in ***Leach and Knowles v AG*** is at numbered paragraph 78 of its written reasons.

<sup>4</sup> *Ibid.* at para 25.

<sup>5</sup> *Ibid.* at paras 26-28.

*rights could be confined and excluded then the case might be allowed to continue.*

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

*I therefore would not grant a stay as the prosecution can proceed, without unfairness to the accused, once the evidence that was taken in contravention of the Claimant's constitutional rights is excluded from the Chief Magistrate's contemplation. I therefore hold that there is no abuse of process and so would not stay the proceedings on this basis."*

**[21]** In the case at Bar, separate and apart from the WhatsApp communication that the judge below found was unlawfully obtained in violation of Belizean law and Mr Bennett's constitutional rights which, consequently, could not be relied on to support the extradition request, there was other material supporting the request which included evidence of:

- a. A meeting between Mr Bennett, SA Pelz and one Ernest Raymond on 21 August 2014;

- b. Mr Bennett allegedly requiring a fee to start a process for a money laundering scheme;
- c. The alleged submission by Mr Bennett to Mr Pelz of wire instructions for payment of the fee;
- d. Mr Bennett's alleged receipt of the fee;
- e. A meeting between Mr Bennett and SA Pelz on 24 March 2015 allegedly to discuss matters incidental to the money laundering scheme;
- f. The transportation by SA Pelz of US\$250,000 to Belize on 20 May 2015 represented to be drug money needing to be laundered and the alleged presentation of the funds to Mr Bennett in a black back pack;
- g. The observation and surveillance of Mr Bennett's movements;
- h. Mr Bennett (having allegedly requested and received from SA Pelz SWIFT codes to enable him to do so) allegedly wiring the laundered funds in the cumulative amount of US\$200,000 on and after 1 June 2015;
- i. An alleged retention by Mr Bennett of US\$50,000 purportedly as a 20% commission for laundering the funds.

**[22]** It was the submission of the respondents that the continuation of the extradition proceedings would not be an abuse of process and that the remaining material following the exclusion of the WhatsApp communication was direct evidence capable of establishing probable cause (particularly when considered in the context of the presumption of the evidence's reliability derived from the treaty). It was the further submission made on behalf of the Respondents that the trial judge acted properly in examining the totality of the evidence before him to determine whether the proceedings should continue following his exclusion of the WhatsApp communication.

[23] In refusing to permanently stay the extradition proceedings, James, J said the following:

*“The remedy of a permanent stay is an ‘exceptional remedy’ which immunizes an accused from prosecution and frustrates the pursuit of accountability. In **R v Ferguson; ex parte A-G** [2008] QCA 227 the Queensland Court of Appeal stated at 19: **“The exceptional jurisdiction permanently to stay proceedings is truly residual in character in the sense that it falls to be exercised only in those cases where the other legal safeguards of the right of the accused to a fair trial are not apt to secure that right.”***

...

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

[24] I agree with the determination of James, J that, on the facts of this case, *“the prosecution can proceed, without unfairness to the accused, once the evidence that was taken in contravention of [Mr Bennett’s] constitutional rights is excluded from the Chief Magistrate’s contemplation.”*

[25] In the matter he was considering, it fell to James, J. to determine whether the attempted use by the USA of the illegally obtained WhatsApp communication material was, by itself, a basis to permanently stay the extradition proceedings as a sufficiently serious misuse of the process of the court.

[26] In this case counsel Sylvestre for Mr Bennett is not criticizing the approach taken by James, J. so much as the decision he arrived at following the approach he took. I say that because the submission made was that, *“James, J. having accepted there was a breach of a fundamental right, had to look at whether it was possible that there could still be a fair hearing?”* It is clear from his written reasons (already quoted above) that James, J. did conduct such an examination; and that, having done so, his answer to that question was, “yes”. He exercised his judicial discretion to determine that the facts before him fell on the side of the line that did not justify a permanent stay of the proceedings. I detect no error in him so concluding.

[27] In the case of ***Vincent Ashman v Commissioner of Correctional Services, the Director of Public Prosecutions and the Attorney General***<sup>6</sup>, Sykes, J, made the following trenchant observation<sup>7</sup>,

*“The expression abuse of process defies a single comprehensive definition. It is often easier to describe rather than define what is an abuse of process. Despite this difficulty, it is important to give some indication of what is in view when one speaks of abuse of process. From the cases, it seems that an abuse of process arises where the system of justice administered by properly constituted courts are being wrongly used to such an extent that it becomes a misuse, in that the processes are being used for some purpose for which it was not designed which if unchecked has, or may lead to oppression, unfairness and injustice to a party to the litigation. To grant a stay or the equivalent of a stay, the conduct must be such that it cannot be remedied by any other means but a stay.”*

Sykes, J also said the following in relation to the abuse of process doctrine<sup>8</sup>,

---

<sup>6</sup> [2012] JMSC Full 2. An unreported decision of the Full Court of Jamaica (G. Smith, J, B Sykes, J and C Edwards, J) delivered on 28 May 2021.

<sup>7</sup> At numbered paragraph 61.

<sup>8</sup> At numbered paragraph 69.

*“The only time the judge can intervene is if the process of the courts is being used for a thoroughly improper purpose such as harassing another party. There may be evidence that there is no genuine desire to pursue the case to conclusion. The case may be brought to demonstrate raw power as distinct from using the court to determine a legitimate dispute between the parties. If the court intervenes in these circumstances, the intervention is not based on the merits of the case or the judge’s subjective view on whether the matter should have been brought but rather on the way in which the litigation is being pursued. Of course, there will be circumstances where the content of the case is important such as instances of res judicata, issue estoppels, autrefois acquit or convict and so on. But instances like these apart, the intervention is based on serious misuse of the court process.”*

**[28]** It is to be noted that in extradition proceedings the Chief Magistrate is engaged in a determination of whether the requesting state has met the evidential threshold warranting the issuing of the extradition order and not in not deciding whether the counts in the indictment are established.

**[29]** Section 9 of the Extradition Act makes applicable the Extradition Treaty between the Government of Belize and the Government of the United States of America signed on the 30 March 2000, a copy of which is in Schedule 1 of the Act.

**[30]** Article 1 of the Treaty sets out the obligation to extradite as follows: The Contracting States agree to extradite to each other, pursuant to the provisions of this Treaty, persons sought for prosecution or convicted of an extraditable offense by the authorities in the Requesting State.

**[31]** Section 3 of Article 6 of that Extradition Treaty additionally states. A request for extradition of a person who is sought for prosecution shall also be supported by:

- a. a copy of the warrant or order of arrest, if any, issued by a judge or other competent authority of the Requesting State;
- b. a document setting forth the charges; and
- c. such evidence as would be found sufficient, according to the law of the Requested State, to justify the committal for trial of the person sought if the offense of which the person has been accused had been committed in the Requested State.

[32] 'Money laundering' appears as item 23 in the schedule listing offences that is annexed to the Treaty with the United States of America set out at Schedule 1 of the Extradition Act.

[33] In the view of James, J. upon the evidence taken in contravention of Mr Bennett's constitutional rights being excluded from contemplation, it remains possible for the prosecution to proceed (without unfairness to Mr Bennett) to have the Chief Magistrate determine whether it satisfies the requirements of section 3 of Article 6 of the Extradition Treaty. That is clearly what informed his refusal of the permanent stay requested, and there is authority that supports his decision.

[34] In the case of *R v Maxwell*<sup>9</sup>, a decision of the United Kingdom Supreme Court, Lord Dyson, writing on behalf of the court, stated:

*"It is well established that the court has the power to stay proceedings in two categories of case, namely (i) where it will be impossible to give the accused a fair trial, and (ii) where it offends the court's sense of justice and propriety to be asked to try the accused in the particular circumstances of the case. In the first category of case, if the court concludes that an accused cannot receive a fair trial, it will stay the proceedings without more. No question of the balancing of competing interests arises. In the second category of case, the court is concerned to protect the integrity of the*

---

<sup>9</sup> [2011] 1 WLR 1837 at 1841, letters F-H

*criminal justice system. Here a stay will be granted where the court concludes that in all the circumstances a trial will ‘offend the court’s sense of justice and propriety’ (per Lord Lowry in **R v Horseferry Road Magistrates’ Court, Ex p Bennett** [1994] 1 AC 42, 74G) or will ‘undermine public confidence in the criminal justice system and bring it into disrepute’ (per Lord Steyn in **R v Latif** [1996] 1 WLR 104, 112F).”*

[35] The decision of James, J. that the proceedings before the Chief Magistrate are not an abuse of process and are to continue, illustrates his view that the continuation will not offend the court’s sense of justice and propriety, nor will it undermine public confidence in the justice system and bring it into disrepute.

[36] The questions stated by the Chief Magistrate for determination by James, J in this case have been previously set out in paragraph 11 above. It seems to me that the issue of whether the extradition proceedings are an abuse of the process of the court fell to be determined by James, J within the context of whether there was a violation of his constitutional rights under sections 6, 9 & 14 of the Constitution. James, J’s jurisdiction to answer the questions referred to him by the Chief Magistrate came from section 20(3) of the Constitution which says,

*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 inclusive 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. [my emphasis]*

Sections 3-19 of the Constitution are those sections protecting fundamental rights and freedoms.

**[37]** James, J was careful not to make a determination of the adequacy of the evidence (other than the WhatsApp communications) to support the extradition as that is one of the very issues for the Chief Magistrate in the continuation of the proceedings. The questions for the court below did not require James, J to make a pronouncement on the evolution of the offence of money laundering in Belize or the sufficiency of the evidence in that regard. And he steered well clear of making any such pronouncement and kept within his limited jurisdiction set out in section 20(3).

**[38]** I reject the submission made to us on behalf of Mr Bennett that James, J. came to the view that there was evidence that would establish a *prima facie* case against him and that he, accordingly, usurped the function of the examining magistrate. James, J did not say that the remaining evidence “*would establish a prima facie case*” against the appellant. What he said was that the remaining non-WhatsApp communication material “*may allow a Magistrate to find that there is such evidence as would be found sufficient according to the law of Belize to support the extradition*”. He left the issue of evidential sufficiency for a *prima facie* case as a conclusion falling to be made by the Chief Magistrate upon the resumption of the proceedings before that court.

**[39]** For the reasons expressed I would dismiss this appeal and affirm that part of the order of James, J that is the subject of this appeal.

**[40]** I would also make a provisional order for the costs of the appeal, which provisional order is to be made final after 7 days. That provisional order awards the costs of the appeal to the Respondents to be taxed if not agreed. It may be varied and will be finalized upon consideration of any submissions seeking an alternative costs order that are filed and served within the 7-day period we’ve stipulated.

**HAFIZ BERTRAM, P.**

**[41]** I have read the draft judgment of my learned sister, Minott-Phillips JA and I agree with the order proposed by her and the reasons for doing so.

---

HAFIZ-BERTRAM, P.

**FOSTER, JA**

**[42]** I agree with the reasons expressed by my sister, Minott-Phillips, JA and with the orders made.

---

FOSTER, JA