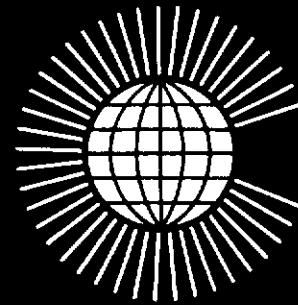


Commonwealth Legal Assistance News



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MULTILATERAL DEVELOPMENTS

G-8 Summit Pledges to Combat Transnational Crime

In April 1996 the Senior Experts Group on Transnational Organized Crime established by the P8 finalised 40 recommendations aimed at ensuring effective international co-operation in the global effort to combat crime. The recommendations identify areas in which improvements could be made to increase the effectiveness of bilateral and multilateral anti-crime efforts and cover, inter alia, the subjects of mutual assistance, extradition, witness protection, abuse of modern technology, illicit traffic in drugs and firearms, terrorism, smuggling, proceeds of crime, money laundering and corruption.

The recommendations were considered during the June 1997 Denver Summit of the G-8 countries and were substantially implemented.

Law Officers of Small Commonwealth Jurisdictions

The sixth meeting of Law Officers of Small Commonwealth Jurisdictions was held in Barbados in July/August. Chaired by the Hon. David Simmons QC, the meeting dealt with a number of important issues.

The meeting's communiqué records that the simplification of extradition procedures was recognised as a priority. The Secretariat was requested to produce, for consideration by Senior Officials of Law Ministries and subsequently by Law Ministers, draft model proposals on this subject and to include in such draft, provisions for the introduction of regional warrants designed to streamline the extradition procedure.

The meeting, while recognising the significance and utility of effective laws enabling the confiscation and forfeiture of the proceeds of crime, acknowledged the various difficulties faced by their prosecutors and courts in the implementation of laws on these subjects.

The important subject of options available for cost recovery in both extradition and mutual assistance cases were again considered.

We always need copies of cases, legislation and articles relating to transnational crime and international co-operation. Please send them to us for publication.

Crime and Technology

A subject considered by the meeting of small jurisdictions meeting was computer and computer related crime which was recognised by Ministers and Attorneys-General as demanding an international response particularly where use of the Internet was involved. The inevitability of the development of a multilateral response to this issue (which was also the subject of one of the P8 40 recommendations referred to above) highlighted the need for Commonwealth countries to be in a position to influence the form of the outcome of that project and to ensure both the satisfactory resolution of jurisdictional issues and civil liberty concerns and the development of international co-operation mechanisms which meet their individual and collective needs.

The meeting asked the Secretariat to undertake, as a matter of priority, the dissemination of copies of national laws and material which would assist in the formulation of a definition of the terms "computer crime" and "computer related crime". Cybercash and its uses in money laundering and for the purposes of gambling through the Internet were subjects of particular interest to Ministers and Attorneys-General. Of major interest was the development of adequate licensing arrangements to control gambling on the Internet which would both protect national interests and facilitate the generation of income for small jurisdictions.

In addressing this issue Ministers and Attorneys-General highlighted the potential for adverse criticism of small jurisdictions which fail to take, in a timely manner, the steps necessary to ensure that their facilities were not used by money launderers and other criminals. The Secretariat, in co-operation with a group of advisers drawn, inter alia, from volunteers from Anguilla, The Bahamas, Barbados, Bermuda, Jersey, Namibia, and St Kitts & Nevis was asked to study the nature and implications of computer crime and to report to Law Ministers. The Secretariat was also asked to examine the development of regulatory frameworks, a model law and effective co-operative mechanisms. Acknowledging the urgent nature of this issue, Ministers and Attorneys-General asked that Commonwealth Heads of Government be apprised of the need for pan Commonwealth attention to the subject.

The ad hoc group of advisers established by the Barbados meeting would welcome the participation of other Commonwealth officials. If you are interested in participating in the development of proposals for consideration by Law Ministers please contact us as soon as possible.

LEGISLATION

Zimbabwe - Civil Matters (Mutual Assistance) Act 1995 [Chapter 8:02]

This legislation, which came into force on 1 April 1996, repeals and replaces the Reciprocal Enforcement of Judgments Act and the Witnesses Compulsory Attendance Act with appropriate savings for things done thereunder.

The new legislation provides the declaration of foreign countries or territories to be "designated countries" for the purposes of the Act and permits the Minister to declare that the Act will apply in relation to an "international tribunal". It deals with the admissibility of evidence in Zimbabwe of documents from a "designated country" and covers the reciprocal enforcement of judgments, other than judgments for the payment of taxes, fines or penalties) as between Zimbabwe and designated countries. Evidence may be obtained, under the Act for use in civil cases in designated countries and foreign process may be served. Compliance with subpoenas for the attendance of witnesses will be compulsory only in cases where the Minister of Justice, Legal and Parliamentary Affairs has so provided in his order designating the foreign country.

United Kingdom - Criminal Justice and Public Order Act 1994 - (Commencement No. 11 and Transitional Provision) Order 1997, SI 1997 882 (C.31)

This Order was made under the Criminal Justice and Public Order Act 1994, s.172, and it brings into force on April 1, 1997 the Criminal Justice and Public Order Act 1994, ss. 158(2), 158(5), 158(6), 158(7), 158(8) and 159(5). These make amendments to the procedures to be followed at committal hearings under the Extradition Act 1989 and before a magistrates court under the Backing of Warrants (Republic of Ireland) Act 1965. The amendments to s. 9 of the 1989 Act and to Sch. 1 paras. 6 and 7 to that Act will only apply when the extradition request or, as the case may be, requisition, is received by the Secretary of State after April 1, 1997.

CASE NOTES

Extra-territoriality - mutual legal assistance - co-operation between police - evidence obtained in according to requested country law - whether failure of foreign police to comply with Charter amounting to a breach of Charter rights rendering evidence so obtained inadmissible in Canada - Canadian Charter of Rights and Freedoms 1982, (the "Charter") s. 24(2)

The appellant was arrested in the U.S. pursuant to an arrest warrant issued by a U.S. District Court following an official Canadian request for his extradition in connection with the murder of a man found stabbed to death in British Columbia. The Canadian police asked the U.S. police to interview the accused, record statements and advise him of his rights under U.S. law. The police officers complied with the appropriate U.S. legal requirements and gave a Miranda warning. The appellant made a statement denying the murder and contradicting the evidence of witnesses and challenged the admissibility of the U.S. statement on the ground that, in violation of the requirement under s. 10(b) of the Charter, the police officers had failed to advise him of his right to counsel at the time of arrest. (US law requires police to advise an accused of his or her right to counsel when confined in a custodial setting and prior to questioning: Canadian law provides that everyone has the right on arrest or detention to retain and instruct counsel without delay and to be informed of that right.)

The Court of Appeal affirmed his conviction of second degree murder, ruling that the statement taken in the U.S. was admissible. The appellant appealed to the Supreme Court contending that the failure of the U.S. police to comply with s. 10(b) of the Charter had rendered the statement subsequently obtained susceptible to exclusion under s. 24(2) thereof at his trial in Canada. The appellant also asserted that any evidence tendered in Canada should be treated as if the Charter applied to it.

Held, dismissing the appeal:

1. It was an accepted rule of law that a state was only competent to enforce its laws within its own territory and the practice of co-operation between police of different countries did not make the law of one country applicable in the other country. Bilateral mutual legal assistance treaties negotiated under the authority of the Mutual Legal Assistance in Criminal Matters Act RSC, 1985, c.30 (4th Supp) provided that the actions requested of the assisting state should be undertaken in accordance with its own laws, not those of the requesting state. The Charter could not govern the conduct of foreign police co-operating with Canadian police on an informal basis and the personal decision of a foreign officer to assist the Canadian police could not dilute the exclusivity of the foreign state's sovereignty within its territory, where only its law governed the process of enforcement. The gathering of evidence by these officers was subject to the rules of that country and none other and their conduct could not amount to a breach of the Charter.

2. A person abroad is not without remedy for abuse in the course of foreign evidence gathering. The Charter guarantees a fair trial and provides that the accused's liberty cannot be limited except in accordance with the principles of fundamental justice. To admit evidence gathered in an abusive fashion may well violate the principles of fundamental justice.

3. Section 24(2) was not an independent source of Charter rights, it only provided a remedy for their breach. It was not unfair to treat evidence gathered abroad differently from evidence gathered on Canadian soil. The Canadian police were to encourage high standards of investigation by foreign police to avoid the possibility of evidence being excluded or a stay being entered, but any attempt to bind foreign police by Canadian law would be impossible to regulate.

4. Because there had been no breach of the Charter, the question whether the evidence should have been admitted was governed solely by s.24(2). The trial judge properly dealt with the issue of admissibility by making it clear that it was for the jury to decide what inference, if any, should be drawn in the context of all the evidence.

Terry v R (Attorney General of Canada intervening), [1996] 3 Law Reports of the Commonwealth 16

Extradition - application for habeas corpus - alleged terrorists - likelihood of prejudice in requesting state - Extradition Act 1989 (UK)

The extradition of the applicants, two Algerian Muslims, was requested by the French Government. The applicants were accused of offences following heavy terrorist attacks in Paris and elsewhere, and were implicated in the offences by a third man, who had been arrested.

One of the applicants held joint Algerian and French nationality, while the other held Algerian nationality. Each applicant sought a writ of habeas corpus, claiming that if he was returned to France he may face prejudice at his trial by reason of his race, religion, or political opinions, or in the case of the Algerian national, by reason of his nationality, within the meaning of s. 6(1)(d) of the Extradition Act 1989 (UK), (the "1989 Act").

Section 6(1)(d) of the 1989 Act provides that a person must not be surrendered or committed or kept in custody for the purposes of return, if it appears to an appropriate authority that he might, if returned, be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality or political opinions.

The applicants cited material which they claimed showed that there had been widespread racism in France against Algerian Muslims generally and towards them in particular, which had been encouraged by the press. They also referred to a statement by the French Minister of Justice, who had said that the Algerian applicant had played an essential, though not exclusive, role in the bombing campaign that had hit France. The applicants also complained about the fact that there were inadequate safeguards (both procedural and substantive) to preclude the risk of prejudice at the trial in the particular situation that had arisen.

Held, dismissing the applications:

Even if it could be shown that a media campaign which followed a serious outbreak of bombing did create a risk of prejudice, it was hard to imagine that a risk could be present for any of the reasons stated in the 1989 Act. Any potential for unfairness could not be said to arise from the state criteria as distinct from other possible factors. Generally, no risk of any lack of fairness at the trial of either applicant could be found. The status, abilities, and experience of the judges of the special court would ensure a fair trial and there was no real risk that they would be influenced by inflammatory press reports or the reported remarks of the Minister.

Re Ramda; Re Boutarfa, (UK Court of Appeal) *The Times*, 27 June 1997

State succession - Extradition Treaty between U.K. and U.S.A. applying to British colonies, including Trinidad and Tobago - whether Treaty still effective between Trinidad and Tobago and U.S.A.: Extradition - evidence of sole foreign witnesses to offence and that of co-conspirators being given by way of depositions in extradition proceedings - whether fugitive having constitutional right under due process of law to cross-examine foreign witnesses: Operation of the *autrefois acquit* rule in extradition cases - dual criminality - abuse of process

The extradition of the appellant, who had been indicted, inter alia, on a charge of conspiracy unlawfully to possess, import into the U.S.A. and distribute there quantities of controlled substances in contravention of U.S. laws, was requested by the U.S. from Trinidad and Tobago, in 1993. The extradition request was made pursuant to a 1931 extradition treaty made between the U.K. and U.S.A.

Background

The appellant was first arrested in reliance on a warrant issued by the Chief Magistrate pursuant to an order issued by the Minister of Foreign Affairs. She made a successful application for the issue of a writ of habeas corpus on the ground that the order issued by the Minister for Foreign Affairs was a nullity. The application was granted because the order, to be a valid one, required the seal of the President of the Republic of Trinidad and Tobago which it did not bear. The appellant was later arrested pursuant to a warrant issued on the order of the President. A challenge to that arrest was unsuccessful. The court held in the second case that the appellant had not been "in peril" in the earlier proceedings as a "technical defect causing those proceedings to be a nullity prevents the application of the rule [*autrefois acquit*]"

Facts

The procedure which applied to the determination of the extradition request is set out in the Extradition Act 1870 (Imp.) The United States of America (Extradition) Order in Council 1935 gave effect to the arrangement on surrender of fugitive criminals embodied in the UK/USA Extradition Treaty of 1931 which applied to Great Britain and its colonies.

Trinidad and Tobago attained independence in 1962 and there were two aspects of the attainment of that status relevant to this case: (i) unless all laws made prior to the attainment of independence were saved by express provision in the Constitution, those laws would cease to be effective after attainment of independence; (ii) with respect to existing treaties - treaties of the predecessor sovereign may be continued by "express agreement" or by "conduct".

By virtue of ss.4 and 5 of the Constitution of Trinidad and Tobago provision was made to save and continue to apply "existing law" and accordingly the Extradition Act 1870 continued to apply in the former colony. On the day Trinidad and Tobago became independent there had been an exchange of letters between the British High Commissioner and the then Prime Minister of Trinidad and Tobago under which the government of Trinidad and Tobago agreed to assume the U.K.'s duties arising from valid international instruments.

Documentary evidence, authenticated in accordance with the 1870 Extradition Act (Imp.), was presented in support of the application, including depositions from two witnesses to the alleged offence and the appellant was committed to custody pending extradition to the U.S.

Grounds of Appeal

The appellant appealed, contending that although the 1870 Act continued to apply to Trinidad and Tobago after it attained independence as a result of the "existing law" provisions in the Constitution, the 1931 treaty did not continue to operate thereunder between the U.S.A. and Trinidad and Tobago after independence in the absence of an arrangement between them with respect to extradition.

The appellant also contended that the evidence of the two foreign witnesses was wrongly admitted by way of deposition since their evidence was the only evidence capable of proving the crime and the appellant had a constitutional right under due process of law to cross-examine them; and further, that the evidence of the two co-conspirators should have been given orally in court because of the charge of conspiracy.

Held:

1. The 1931 treaty was saved by the "existing law" provisions of the Constitution and in any event the conduct of Trinidad and Tobago and the U.S.A. indicated a clear intention to view the treaty as a continuing force.

2. On the issue whether depositions could be received in evidence rather than requiring the presence in court of the witnesses, the nature of the inquiry before the magistrate and the rules under which he is to act are prescribed in the 1870 Act. So long as the magistrate conducts the case before him in accordance with the prescribed procedure there can be no complaint. The question of guilt or innocence of the appellant was not an issue before the magistrate and since the 1870 Act specifically provides for evidence to be received by way of depositions and for the inquiry to be heard in the same manner "as near as may be" as a preliminary inquiry, no question of a breach of due process arose when that right under the Act was exercised by admitting evidence by way of depositions.

3. The evidence of the two alleged co-conspirators was admissible by way of depositions sworn out of court and they were not required to come to court to give evidence orally, regardless of the fact that the charge was one of conspiracy. The appellant did not have the right to cross-examine a witness in those circumstances and they were not required to come to court to give evidence orally.

4. There was no abuse of process when the appellant was re-arrested following rectification of a defect in proceedings leading to the appellant's first arrest. There are instances when a person may be rearrested following release on an order for habeas corpus. One such instance is where the accused is discharged because of a defect in proceedings leading to arrest. She was not put in "double jeopardy".

5. There is nothing in precedent, comity or good sense which prevented the common law from regarding as justiciable inchoate crimes committed abroad which were intended to result in the commission of criminal offences within a jurisdiction since an overt act was not necessary to found the jurisdiction. To wait until some overt act was performed in pursuance of the conspiracy would defeat the preventive purpose of the crime of conspiracy. It follows that as long as the crime for which she had been indicted in the USA was an indictable offence in Trinidad and Tobago and an extradition crime that was the end of the matter. At common law a conspiracy entered into abroad to commit an offence in Trinidad and Tobago would be indictable in Trinidad and Tobago.

Saroop v Maharaj (Trinidad and Tobago- Court of Appeal, 1995), [1996] 3 Law Reports of the Commonwealth 1

Extradition - restriction on return - arrangement to protect - Hong Kong Government requesting return of fugitive - trial to take place after transfer of sovereignty to People's Republic of China - whether oppressive to order return - whether Secretary of State taking relevant matters into consideration - Extradition Act 1989 ss. 6(4) and 12(1) (UK)

The background to this case is to be found in Issues 8 and 19 of CLAN. The case now before the House of Lords concerned an appeal by the Home Secretary against a decision by the Queen's Bench Divisional Court to quash a warrant ordering the return of Ewan Quayle Launder to Hong Kong to face trial there on charges of corruption.

The applicant's objections were of a fundamental nature and related to the future of Hong Kong.

He maintained that despite the arrangements which have been made to secure continuity for the rule of law after the transfer, he would be faced with the real risk that the safeguards will not be effective and that he will receive an unfair trial and if convicted, inhumane punishment.

The question whether it was unjust or oppressive to order the respondent's return to Hong Kong depended on whether the People's Republic of China could be trusted to implement its treaty obligations to respect his fundamental human rights, allow him a fair trial and leave it to the courts, if he was convicted, to determine the appropriate punishment. The decision whether or not to grant the warrant of extradition had been entrusted to the Secretary of State by Parliament.

The case for the applicant, which was supported by a large amount of expert evidence, was that the People's Republic of China had already shown through its conduct in recent years within China that it was incapable of giving effect to the rule of law on which the Basic Law had to depend. The other view, which was taken by the Secretary of State, was that the People's Republic of China had good reason to make every effort in Hong Kong to preserve the existing criminal justice system. A breakdown of the rule of law in such a case would almost certainly have a damaging effect on confidence throughout the business community on which Hong Kong depended for its success and prosperity.

Held, allowing the appeal:

1. It was not in the interests of justice to decline to hear all the issues in the appeal, and that the jurisdiction to determine the appeal was not confined to the point of law certified.
2. The Home Secretary had not acted with procedural impropriety, illegality or irrationality in deciding to issue a warrant of extradition to Hong Kong under s. 12(1) of the Extradition Act 1989 having concluded that the People's Republic of China could be relied upon to abide by the Sino-British Joint Declaration on the Question of Hong Kong and implement the Basic Law for the Hong Kong Special Administrative Region after July 1, 1997.
3. The evidence showed that the Secretary of State had taken his own decision after considering all the representations which had been made to him. He has not simply regarded himself as bound by the Cabinet's judgment that China would comply with its treaty obligations and given no further consideration to the respondent's argument.
4. A reasonable Secretary of State could, on the material available to him, have concluded that the concerns which were indicated by China's actions in other places and circumstances were not such as to give rise to a serious risk of injustice or oppression in the respondent's case.

Regina v Secretary of State for the Home Department, Ex parte Launder [1997] 1 Weekly Law Reports 839 (House of Lords)

Habeas corpus - German authorities no longer seeking accused's return - immunity from extradition by lapse of time - return unjust and oppressive

An application was made by N for habeas corpus following committal under the Extradition Act 1989, s. 9, for return to face punishment pending a decision by the Secretary of State for the Home Department to return N to Germany. The European Convention on Extradition 1957, Art. 10, provides for immunity from prosecution or punishment as a result of a lapse of time. Under German law, a 10 year limitation period in respect of immunity from punishment in respect of N's previous convictions for drug trafficking and theft applied. However, in committing N, the stipendiary magistrate had found that the definition of an "extradition crime" was not subject to matters of limitation under s. 9 of the Extradition Act 1989, even though the German authorities were no longer involved in pursuing matters against N.

Held, allowing the application:

Regardless of the correctness of the magistrate's decision in respect of the limitation issue, it would be unfair and oppressive under s. 11(3)(b) of the 1989 Act for N to be returned, considering the passage of time since the alleged offences and the decision of the German authorities.

Neumann, Re (U.K.) (Unreported) January 14, 1997, Queens Bench Division, (CO 2732/96)

Extradition - committal proceedings - evidence - computer printouts forming substance of case against fugitive - whether admissible in extradition proceedings - whether extradition proceedings criminal proceedings - Police and Criminal Evidence Act 1989 ("PACE") (c.33), s. 9(2), Sch. 1, para. 6(1)

The applicant was alleged to have gained access to a bank's U.S. computer by means of his own computer in Russia. The charges translated into the offences of theft, forgery, false accounting and unauthorised modification of computer material under English law. He had been committed to prison pending directions from the Home Secretary relating to his extradition to the U.S.A.

(For further background to this case, please refer to CLAN Issue No 12, in which it was reported that the applicant challenged his committal on the grounds, inter alia, that the computer printout records were hearsay and could not be admitted under s. 69 of PACE since that section did not apply to extradition proceedings which were not criminal proceedings within s. 72 of that Act. The Divisional Court of the Queen's Bench Division dismissed the application holding that extradition proceedings were criminal proceedings for the purposes of PACE and that the evidence of computer printouts had been rightly admitted in evidence.)

The applicant appealed to the House of Lords, contending that the computer printouts were hearsay and inadmissible in extradition proceedings because such proceedings were not criminal proceedings and therefore s.69(1) of PACE permitting the admissibility in criminal proceedings of statements produced by computers did not apply, alternatively, that if extradition proceedings were criminal proceedings the magistrate should have exercised his discretion under s.78(1) of PACE to refuse to allow the computer evidence and the evidence of the accomplice on which the prosecution proposed to rely to be admitted because the admission of the evidence had an adverse effect on the fairness of the proceedings.

Held, dismissing the appeal:

1. For the purposes of PACE, extradition proceedings were criminal proceedings since s. 9(2) of and para 6(1) of Sch 1 to the Extradition Act 1989 required that extradition proceedings should be conducted "as nearly as may be" as if they were committal proceedings before magistrates; since such committal proceedings were criminal proceedings it followed that the normal rules of criminal evidence and procedure applied to extradition proceedings.

2. The computer printouts were tendered to prove transfers of funds and were records of such transfers created by the interaction between those who requested them and the computer, the evidential status of which was similar to that of a photocopy of a forged cheque and they could not be seen as hearsay.

3. Although extradition proceedings were criminal proceedings so that s. 78 of PACE, as originally enacted applied to them, the question was whether the admission of the evidence would have such an adverse effect on the extradition proceedings that it ought to be excluded, and not whether the admission of the evidence at the trial would have an adverse effect on the fairness of the trial. The magistrate should ordinarily assume that the powers available to the trial judge would ensure that the proceedings at the trial were fair.

R v Governor of Brixton Prison, ex parte Levin, [1997] 3 WLR 117, 3 All ER 289 (House of Lords)