1984 October 27

[A. Loizou, J.]

IN THE MATTER OF ABDULLAH RASHID,

and

IN THE MATTER OF AN APPLICATION FOR THE ISSUE OF A WRIT OF HABEAS CORPUS,

(*Civil Application No.* 39/84).

Fugitive offenders—Extradition—Extradition proceedings—Committal to custody pending extradition—Evidence—Standard of proof required—Statements of accomplice—Admissibility—Corroboration—No corroboration required because committing Judge must not make an evaluation of the evidence—Actus reus—Established by evidence of accomplices—Extradition of Fugitive Offenders Law, 1970 (*Law* 97/1970)*—Section* 94 *of the Criminal Procedure Law, Cap.* 155.

Habeas Corpus—Extradition proceedings.

The applicant, a Syrian national, was committed to custody pending his extradition to the Federal Republic of Germany in order to face charges connected with the unlawful import and distribution of cannabis and cannabis resin in that State. Hence an application for an Order of Habeas Corpus under the Extradition of Fugitive Offenders Law, 1970 (Law No. 97 of 1970). The evidence before the trial Court consisted of the uncorroborated statements of the three accomplices of the applicant, namely, Freitag, Reuschler and Langlotz. The statement of Freitag was given on oath before a local judge in Germany, whereas the statements of Reuschler and Langlotz, though not originally given during judicial proceedings, were subsequently adopted by them and incorporated during a judicial interrogation. Before the trial Judge there was a statement of the relevant provisions of Narcotic Drugs Act of the Federal Republic of Germany on which the charges were based; and these provisions refer to cannabis and cannabis

resin which in the particulars of the offence were described as hashish, as they are commonly known.

Counsel for the applicant mainly contended:

(1) That the Court failed to apply the facts before it properly to the proper test.

(2) That there was no admissible evidence before the Court, it all being entirely that of his accomplices, and

(3) That the actus reus of the offence has not been established in the absence of expert evidence as to classification of the alleged narcotic substance.

Held, that the standard of proof required is of evidence that would justify the committal of the respondent to trial if the alleged offences were committed in Cyprus; that considering the circumstances under which the statements of the accomplices were given and later affirmed the trial Judge was right in regarding this evidence as admissible; that no corroboration was required at the stage of the proceedings before the trial Court; that corroboration goes only to the weight of a statement and not to its admissibility and a committing Judge must not make an evaluation of the evidence before him; that, in any case, even if corroboration was needed, and such is required by law only for specific offences, provided the Judge warns himself (as he has also done in the present case), he can safely act on the accomplices evidence and convict; that there was enough evidence, that of the accomplices which was sufficient to establish the actus reus; and that, therefore, the application must be dismissed.

Held, further, that the aggregate effect of the statutory enactments on which the charges were based and the offences in respect of which the accomplices were charged, the confessions of the accomplices to having committed the offences described therein, and the incrimination made by them, of the respondent, complete the picture and justified the trial Judge in concluding that the evidence was sufficient to warrant the trial of the respondent for that offence, had it been committed within the jurisdiction of the Court, and hence the making of the order for his extradition.

Application dismissed.

Cases referred to:

Schtraks v. *Government of Israel* [1962] 3 All E.R. 529 at p. 533;

In re Mutke (1982) 1 C.L.R. 922 at p. 931;

In re Webbe (1983) 1 C.L.R. 978;

In re Hayek (1983) 1 C.L.R. 266;

Armah v. *Government of Ghana* [1966] 3 All E.R. 177;

Dowse v. *Government of Sweden* [1983] 2 All E.R. 123 at p. 128;

Peristianis v. *Police* (1969) 2 C.L.R. 137;

Mantis v. *Police* (1981) 2 C.L.R. 166;

R. v. *Secretary of State for India* [1941] 2 All E.R. 546.

Application.

Application for an order of habeas corpus by Abdullah Rashid following his committal to custody awaiting extradition by a Judge of the District Court of Larnaca.

Chr. Pourgourides, for the applicant.

E. Loizidou (*Mrs.*), for the respondent.

Cur. adv. vult.

A. Loizou J. read the following judgment. The applicant, by the present application for an order of Habeas Corpus, filed under the Extradition of Fugitive Offenders Law, 1970 (Law No. 97 of 1970), hereinafter to be referred to as the Law, challenges a commital order made by the District Court of Larnaca for the purpose of extraditing him to the Federal Republic of Germany to face charges connected with the unlawful import and distribution of cannabis and cannabis resin in that State.

The applicant who is a Syrian national was arrested on the 23rd March, 1984, by virtue of a warrant of arrest issued by the President of the District Court of Larnaca, under section 8(1)(b) of Law 97 of 1970. The relevant written authority under section 7(2) of the Law for the commencement of the extradition proceedings was given by the Minister of Justice on the 17th April, 1984, as a result of a request to that effect by the Government of the Federal Republic of Germany.

As a result of the evidence heard, the District Court Larnaca ordered on the 19th June, 1984, that the applicant be committed to custody pending his extradition to the aforesaid country. Against this order the applicant filed the present application for an order of Habeas Corpus under section 10 of the Law.

The grounds upon which this application rests are that:

(1) The trial Court failed to apply the correct legal principles during the extradition proceedings that is it erred in Law, and

(2) The trial Court failed to evaluate properly the evidence adduced and in particular failed to examine whether there was before it legally admissible evidence establishing the actus reus of the alleged offence and/or it admitted inadmissible evidence.

Counsel for the applicant contended that the trial Judge erred in that he considered wrongly that the evidence before him was sufficient to warrant the applicant's committal for trial, the standard of which evidence ought to have been such as, on the authority of *Schtraks* v. *Government of Israel* [1962] 3 All E.R. 529, at 533, if uncontradicted would have led to a verdict of guilty.

The evidence before the District Court of Larnaca, he contended, was not legally admissible evidence, consisting only of the uncorroborated statements of the accomplices of the applicant. In their statements they allege that he sold them "hashish" in Syria. They do not specify whether it was cannabis or cannabis resin and before the Court no expert evidence was produced by the requesting State specifying that the substance seized by the Police in Germany and which the applicant was allegedly dealing with, fell within a specified category of a prohibited drug. And since specific drugs relate to specific offences, unless the drug in question falls within a specified category there can be no offence since the actus reus of such offence cannot be established. Thus the Court misdirected itself, applied the wrong test and exercised its discretion wrongly.

So in effect the applicant is dealing with three points:

(1) That the Court failed to apply the facts before it properly to the proper test.

(2) That there is no admissible evidence before the Court it all being entirely that of his accomplices, and

(3) That the actus reus of the offence has not been established in the absence of expert evidence as to classification of the alleged narcotic substance.

As regards the first point concerning the standard of proof required for extradition proceedings, it is governed by section 9 (5)(a) of the Law which provides:

"(5) Εφ' όσον η εξουσιοδότησις δια την έναρξιν της διαδικασίας της εκδόσεως ήθελε παρασχεθή το δε επιληφθέν της εκδόσεως Δικαστήριον ήθελεν ικανοποιηθή, δυνάμει των προσαχθέντων προς υποστήριξιν της αιτήσεως εκδόσεως αποδεικτικών στοιχείων, ή των κατ' αυτής προσαχθέντων τοιούτων, ότι το αδίκημα εις ό αφορά η τοιαύτη εξουσιοδότησις είναι αδίκημα δι' ο δύναται κατά νόμον να χωρήση έκδοσις, προς τούτοις δε ικανοποιηθή—

(α) εν μεν τη περιπτώσει προσώπου διωκομένου δια την διάπραξιν του εν λόγω αδικήματος, ότι τα προσαχθέντα ενώπιον αυτού αποδεικτικά στοιχεία είναι επαρκή ώστε να δικαιολογώσι την παραπομπήν αυτού εις δίκην δια το εν λόγω αδίκημα, εφ' όσον τούτο διεπράττετο εντός της δικαιοδοσίας του Δικαστηρίου.

(β) . . . . . .

το Δικαστήριον θέλει διατάξει την προφυλάκισιν αυτού μέχρις ου χωρήση η έκδοσις, εκτός εάν η έκδοσις απαγορεύεται δυνάμει ετέρας τινός προνοίας του παρόντος Νόμου... ".

In English:

"(5) Where an authority to proceed has been issued in respect of the person arrested and the Court of committal is satisfied, after hearing any evidence tendered in support of the request for the extradition of that person or on behalf of that person, that the offence to which the authority relates is an extradition offence and is further satisfied—

(a) where that person is accused of the offence, that the evidence would be sufficient to warrant his trial for that offence if it had been committed within the jurisdiction of the Court;

(b) . . . . . .

the Court shall, unless his committal is prohibited by any other provision of this Law, commit him to custody to await his extradition thereunder;—————"

The trial Judge after going through the various authorities,

Cypriot and English, concluded that the standard of proof required is of evidence that "would justify the committal of the respondent to trial if the alleged offences were committed in Cyprus".

In *Re Manfred Mutke* (1982) 1 C.L.R. 922 at p. 931, Triantafyllides, P., considers that evidence is required that is "sufficient to warrant the respondent's trial for the offences concerned". Also in the case of "*In Re Wehbe* (1983) 1 C.L.R. 978 he refers to "legally admissible evidence justifying the making of a committal order for extradition purposes". Stylianides, J. in *Re Hayek* (1983) 1 C.L.R. 266 refers at p. 270 to evidence "sufficient under the law to commit the applicant to trial for that offence, if it had been committed within the jurisdiction of the Court". He then proceeds further to deal with how much evidence is required to commit and, in the light of section 94 of the Criminal Procedure Law, Cap. 155, which provides that:

> "Where there is a conflict of evidence, the Judge shall consider the evidence to be sufficient to commit the accused for trial if the evidence against him is such as, if uncontradicted, would raise a probable presumption of his guilt".

concludes at p. 294 that in order to justify the committal this evidence must be such that "if uncontradicted would raise a probable presumption of his guilt".

Useful guidance of how strict the test is under s. 94 can be found in A. N. Loizou's and G. M. Pikis' "Criminal Procedure in Cyprus" at pp. 166–7:

> "The Judge is enjoined by this provision to consider only those pieces of evidence which point towards the guilt of the accused and disregard any other evidence contradicting it. The presumption envisaged by section 94 is a factual one to be derived from incriminating evidence, assuming it to be correct and uncontradicted, strong enough to raise a probability of guilt. Probability is a matter of fact and degree; an interplay of logic and common sense should guide the Court in its task. Bearing in mind that the probability envisaged by the law must be a real and not a fanciful one, the guilt of the accused must be probable as a matter of logical inference; the probability must be realistic in the light of ordinary experience of human affairs.

The duty to be discharged by the Judge is an objective one and he must not allow his impression of the witnesses to affect his judgment.

It is interesting to compare the provisions of section 94 and those of section 74(1)(c) providing for the evidential burden that must be discharged by the prosecution before the accused is called upon to make his defence at the trial. In the latter case, before the accused is called upon, there must be prima facie evidence tending to establish the guilt of the accused. In contradistinction to section 94, the Court, in deciding whether there is a prima facie case at the trial, can only take into consideration evidence that is at least provisionally credited by the Court as reliable, whereas a committing Judge, acting under section 94, must in no way make an evaluation of the evidence before him.

The most fundamental distinction between the evidence that must subsist to justify committal under section 94 and that required to establish a prima facie case under section 74, is that in the former case we are merely concerned with probabilities of guilt, whereas in the latter, with presumptions of guilt arising from an evaluation of the evidence for the prosecution, sufficient to call for an answer from the accused".

Useful guidance can also be derived from the English authorities, though I believe they must be read with some caution as regards the interpretation of the test of "probable presumption of guilt" and its strictness vis a vis our Law. The case of *Schtraks* (supra) as well as all the English pre-1967 authorities have been decided in the light of the provisions of the Fugitive Offenders Act, 1881, which, in section 5, in order to commit the fugitive to prison for extradition purposes, provides for evidence which "raises a strong or probable presumption that the fugitive committed the offence mentioned in the warrant".

The current law in England, the Fugitive Offenders Act 1967, section 7 provides (as well as the old Extradition Act 1870, section 10) for evidence "sufficient to warrant his trial". As a result, in England the two tests appear to be different.

Lord Reid in the case of *Armah* v. *Government of Ghana* [1966] 3 All E.R. 177 deals extensively with the distinction between the stricter test which requires "a strong or probable presumption of guilt" as required by the 1881 Act and the lesser test of evidence as would "justify the committal for trial" which was required by the old 1870 Act, and decides that the two tests are definitely not the same.

Having said this about the standard of evidence required, I shall proceed to consider the evidence available before the trial Court at Larnaca. This consists of the uncorroborated statements of the three accomplices of the applicant, namely, Freitag, Reuschler and Langlotz. The statement of Freitas was given on oath before a local judge in Germany, whereas the statements of Reuschler and Langlotz, though not originally given during judicial proceedings were subsequently adopted by them and incorporated during a judicial interrogation. Considering the circumstances under which the statements were given and later affirmed and having in mind the decision of *Dowse* v. *Government of Sweden* [1983] 2 All E.R, 123, at p. 128, I would consider that the trial Judge was right in regarding this evidence as admissible.

As regards the question of corroboration none was required at the stage of the proceedings before the District Court. Corroboration goes only to the weight of a statement and not to its admissibility and as already stated above, a committing Judge must not make an evaluation of the evidence before him. But in any case, even if corroboration was needed, and such is required by law only for specific offences, provided the Judge warns himself (as he has also done in the present case), he can safely act on the accomplices evidence and convict. See *Peristianis* v. *Police* (1969) 2 C.L.R. 137; *Mantis* v. *Police* (1981) 2 C.L.R. 166; *R.* v. *Secretary of State for India* [1941] 2 All E.R. 546.

Finally as regards the contention of the applicant that since there is no expert evidence as to the alleged narcotic substance and consequently no actus reus, I must say that there is enough evidence, that of the accomplices which is sufficient to establish the actus reus.

In the warrant of arrest, exhibit 3, which constitutes part

of the material placed before the trial Judge the following is stated:

"He is charged with having,
since the autumn of 1979 until today,
in Bonn and at other places,
continuously,

for gain and as member of a gang that has been formed for the purpose of continuously committing such criminal offences,

dealt in narcotic drugs of a not unconsiderable quantity without having been in possession of the licence of the BUNDESGESUNDHEITSAMT (Federal Board of Public Health), and, in coincidence with that,

imported narcotic drugs of a not unconsiderable quantity into the Federal Republic of Germany,

which he did by having, as member of a group of drug traffickers, contacted persons in the Federal Republic of Germany and, together with them, imported hashish in quantities from 20 to 380 kilos each time into the Federal Republic of Germany by means of passenger cars or lorries with built-in concealments coming from Syria via Switzerland, Austria, or other countries to the Federal Republic where those quantities of hashish were sold to customers who are partly known, partly unknown. The person charged received certain amounts of the sale proceeds each time on which he depended for his living.

Such act is threatened with punishment according to §§ 1 Paragraph 1, 3, 29, Paragraph 1, Number 1, Paragraph 3, Number 1 and Number 4, 30, Paragraph 1, Number 1 and Number 4 of the BETAUBUNGSMITTELGESETZ (Narcotic Drugs Act).

He is strongly suspected of having committed such offence on account of the statements of EWALD REUSCHLER and RUDIGER FREITAG who are prosecuted separately.

In his case, there exists the cause of arrest specified in section 112, Paragraph 2, No. 2 of the STRAFPROZESSORDNUNG (German Code of Criminal Procedure)—

i.e. the risk of escape—because the person charged is staying at an unknown address".

There follows a statement of the relevant provisions of the Narcotic Drugs Act of the Federal Republic of Germany on which the charges are based. It should be pointed out that "narcotic drugs" within the meaning of the said Act are such substances and preparations as are specified in Annexes I-III and in the list of narcotic drugs included in the Appendix, the one given for the purposes of the present case in the said exhibit is "cannabis" and "cannabis resin".

In the statement of offence contained in exhibit 5, all accomplices were charged as follows:

"that in Bonn, Mannheim and other locations at the time between autumn 1979 until September 1983 continuously and jointly together with other wanted persons and without the permit from the Federal Ministry of Health a) as members of an organization which has been created for the continuous commitment of such acts, have been professionally dealing with drugs, b) partly for singly offences during which at each time, they have been carrying drugs in large quantities particularly at the aforementioned time as members of a group of persons which was put together with the purpose to continuously violate the Drugs Law, have imported a total of 1600 kgs of hashish in the Federal Republic of Germany, whereby accused 1–6 above, the partial assistance of accused 7–8 have imported at least 1085 kgs of hashish in five sequential acts from Syria into Germany and have attempted to do so in two further cases. Furthermore the accused Freitag and Reuschler have smuggled hashish from Austria, Spain and Switzerland into the Federal Republic of Germany in 16 cases each—from which 12 together, that each case a quantity of 18–40 kgs, a total of 500 kgs and that they have distributed jointly the said hashish. The hashish was sold partly to known and partly to unknown purchasers in Germany. The accused Freitag has inter alia offered to the prosecution witness Katzamann (policeman) on 12.9.1983 in Bonn 50 kgs of hashish at the price of DM 275,000".

In page 4, of the statement of one of the accomplices before the Judge on the 28th September, 1983, it is stated:

"On Monday 3.10.1983 in the afternoon I had a detailed discussion. I was cautioned and have understood this. I was told that I am suspected of a contravention of the provisions of the drugs law. It was made clear to me that it is known that I have been involved in the smuggling and trading with large quantities of hashish. I have been also told that I am a member of an organization which has been specially formed for the purpose of dealing with hashish in large quantities. I have been informed about all facts and dates of the investigation of the police. I have understood clearly all the above accusations. It is now clear to me that in my present situation the best thing for me to do is to make a full statement. I am ready and willing to help the police with my statement so that they will eventually be able to arrest accomplices who are still free and also to find hashish which may be still available. I hope that my behaviour from now on will be of use to me during eventual later Court proceedings. Finally, I declare that I make this statement at my own free will and without any coercion. I was allowed during my interrogation to smoke cigarettes.

Finally, I would like to say that during yesterday the 3.10.1983 I had the chance of a short conversation with the expert Mrs. Dassmann-Allef. She did not make any promises to me. From the above reasons I have realised that it can only be to my benefit if I make a full statement. I am at the disposal of the authorities for any additional interrogation, should this be necessary".

It is clear therefore, that the confessions relate to the charges preferred which were explained to the witnesses before making their statements and who had in fact the services of advocates to advice them. These charges, the particulars of which were earlier set out in full in this judgment, were in respect of offences and misdemeanours punishable under " §§ 1, 3 29 Subsect. 1 Nr. 1, Subsect. 3 Nr. 1+4 30 Subsect. 1 Nr 1+4 33 **BtmG** (=Drugs Law) §§ 25 Subs 2 52, 73 Criminal Law". These articles of the German Drugs' Law and Criminal Law refer to cannabis and cannabis resin which obviously in the particulars of offence, was described as hashish, as they are commonly

known. The aggregate effect therefore of the statutory enactments on which the charges were based and the offences in respect of which the accomplices were charged, their confessions to having committed the offences described therein, and the incrimination made by them of the respondent, complete the picture and justified the trial Judge in concluding that the evidence was sufficient to warrant the trial of the respondent for that offence, had it been committed within the jurisdiction of the Court, and hence the making of the order for his extradition.

In the light of all the above this application is dismissed, but in the circumstances there will be, however, no order as to costs.

Application dismissed with no order as to costs.