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IN THE SUPREME COURT OF BELIZE, A.D. 1999

ACTION NO. 425

ADOLPH D. LUCAS SR
Attorney-at-Law
Notary Public

IN THE MATTER OF RHETT FULLER, a prisoner
awaiting an extradition hearing

AND

IN THE MATTER of section 68 of the
Indictable Procedure Act

BEFORE the Hon. Chief Justice Abdulai Conteh.

Mr. Kirk Anderson for the Applicant.

Mr. Edwin Flowers S.C., Acting Solicitor General for
the Respondent.

DECISION

This matter arises out of a Petition for bail pursuant to section 68 of the Indictable Procedure Act.

At the conclusion of the hearing of this application on 16 June 2000 and having considered the submissions of counsel who appeared for both the Applicant and the Respondent, the latter was represented by the Solicitor-General, who indicated to the court that, on instructions, he was not opposing the application, I consequently made the following orders:

- i) That the Applicant be admitted to bail in the sum of \$50,000 with two sureties in like sum;
- ii) That the Applicant is to report to the police in Belize City every Monday and Friday at 10 a.m. until the proceedings relating to him in this matter are concluded;
- iii) That the Applicant is to surrender to the police all travel documents in his possession;
- iv) That the Applicant shall reside and continue to reside at No. 62 Cleghorn Street, Belize City until the proceedings relating to him in this matter are concluded;
- v) That this Order is to be notified to and posted at every border post throughout Belize.

I then intimated that I would give my reasons later. I now propose to do so.

The Petitioner Rhett Fuller by his petition dated 19 October 1999, petitioned this Court pursuant to section 68 of the Indictable Procedure Act, Chapter 93 of the Laws of Belize, to be admitted to bail until court actions

relating to his case are concluded before the Courts in Belize.

Although the application then before the Court was dated 19 October 1999, it was evident on the face of the Petition itself that the Applicant had been entangled in the machinery of the legal process since about 21st October 1998. On the morning of that day, the Applicant states that he was arrested and brought before the Chief Magistrate who denied him bail pending a hearing of the Applicant's proposed extradition then scheduled to come up before the Belize City Magistrate Court No. 1 on 13 November 1998.

In November 1998, the Applicant states in his Petition, the Chief Magistrate made an Order that he the Applicant could lawfully be extradited to the State of Florida in the United States of America there to stand trial for murder in relation to the alleged murder of one Larry Miller.

Presumably since then, the Applicant had been in custody, for as he further states in his Petition, shortly after making the Order by the Chief Magistrate, his Attorneys applied to this Court for a writ of Habeas corpus to issue in order to secure his release from custody.

The Habeas Corpus application was heard by Justice John Rivero who most unfortunately, in my view, and very lamentably, died before rendering any judgment on the application. The Applicant therefore surmised in his Petition that in the circumstances it was likely that all the issues relating to his Habeas Corpus application would have to be heard all over again by another judge of this court - or at the very least another such judge would have to render judgment in relation to his application for the said writ of Habeas Corpus.

It was perhaps this unfortunate and indeterminate state of affairs and the concatenation of events as I will show shortly, that have prompted the current application for bail by the Applicant.

A certain vicissitude seems to have dogged the Applicant's progress, at least of his applications, before the Courts. In the case of his Habeas Corpus application, the icy hand of death untimely snatched Justice Rivero away. In the case of the other string in his bow for his shot to secure his release, perhaps albeit, temporarily from custody, he launched this Petition. But this time around, there was a statutory impedimenta in the way towards a resolution of his application in the shape of section 5 of the Extradition Act - Chapter 88 of the Laws of Belize. This provides as follows:

"The powers vested in any judge by Her Majesty's High Court of Justice in England relative to the discharge of any fugitive criminal when not conveyed out of the United Kingdom within two months after his committal under the Extradition Acts are hereby vested in and may in this (country i.e. Belize) be exercised only by the Chief Justice".

This provision, in effect, prevented an earlier determination of the Applicant's Petition. For Mr. Justice Wilfred Elrington - quondam puisne judge of this Court, notwithstanding that the matter had been set before him and argued, notified the parties, presumably the Applicant's Attorneys and the Solicitor-General for the Respondents, on 6th December 1999 that he was precluded from dealing with the matter in accordance with the above quoted section 5 of the Extradition Act.

This was how the matter came before me; and having heard counsel for the Applicant and the Solicitor-General, and after careful consideration I made the Orders I did on 16 June 2000.

Let me however set the whole application in perspective against the relevant legal provisions. By section 5 of Chapter 88 of the Laws of Belize this application came within my docket as Chief Justice. This same section talks about the powers relative to the discharge of any fugitive when not conveyed out of the U.K. (for which now, of course, mutatis

mutandis, should read Belize) within two months after his committal under the Extradition Acts. For the purposes of this application, I set out the provisions of section 12 of the Extradition Act 1870:.

"12. Discharge of persons apprehended if not conveyed out of (United Kingdom/Belize) within two months.- If the fugitive criminal who has been committed to prison is not surrendered and conveyed out of the (United Kingdom/Belize) within two months after such committal, or, if a writ of Habeas corpus is issued, after the decision of the court upon the return to the writ, it shall be lawful for any judge of one of Her Majesty's Superior Courts at (Westminster/Belize), upon application made to him by or on behalf of the criminal, and upon proof that reasonable notice of the intention to make such application has been given to a Secretary of State, to order the criminal to be discharged out of custody, unless sufficient cause is shown to the contrary".

Although not stated in his Petition or in any supporting Affidavit thereto, counsel for the Applicant in urging the petition on the Court informed me that there had been a previous application by the Applicant for bail in Action

No. 429 of 1998 before Meerabux J., but this was refused. Counsel then urged the Court to consider that notwithstanding that refusal, there was a material difference in the circumstances of the present application, namely, so much time had elapsed but nothing has progressed since then and the Applicant has in the meanwhile been in custody for well over a year and a half.

Indeed, the Solicitor-General in informing the Court that his instructions were not to oppose the application confirmed that the Applicant had been in custody for quite some time pending extradition proceedings. This, he said, also bothered the Attorney-General, therefore as a result of the long drawn-out nature of the proceedings, he was not oppose to bail being granted to the Applicant.

Without attempting to even consider attributing or apportioning blame for the delay, that is, if anyone is blameable, it is the duty of this Court however to consider the Applicant's petition in all the circumstances of this case and judicially exercise the discretion vested in me in the matter by law.

I am mindful of the fact that the Applicant was taken into custody sometime in 1998 in an endeavour to have him extradited to Florida, United States of

America to stand trial in that country on an alleged murder charge which the Applicant states in his Petition had been preferred against him since 1990. This fact necessarily impinges on the relationship between this country and the United States. Although extradition is, par excellence, a matter for the foreign relations of a country and it is, in inter-States' relationship, governed by treaty; it is however, through the provisions of a State's municipal (domestic or national) laws that the treaty itself is implemented - usually in an Extradition Act.

In Belize today, notwithstanding the passage of time since independence, there is yet to be legislated for the country an autochthonous Extradition Act. Thus, even though there is on the Statute Book an Extradition Act in Chapter 88 of the Laws of Belize, it contains only a cryptic rendition of United Kingdom Extradition Acts 1870 to 1932 including the Counterfeit Currency (Convention) Act, 1935, as denoting the Extradition Acts for Belize. In my opinion, and given the increasing importance of the subject in the fight against transnational crime, it is about time Belize had a modern and comprehensive statute.

A modern and comprehensive Extradition Act will, I am certain, ensure that Belize will have in place effective extradition provisions and procedures which

will assure national, regional and global interests in the on-going fight to make the world a safer place are capable of achievement. This will greatly facilitate the rendition for trial of accused or criminals in the place where the offence was or alleged to have been committed. It should always be remembered that extradition is the delivery by one government to another of fugitive criminals; that is, persons accused or convicted of crimes committed and justiciable in one country who have fled to or are found in another country.

At all times material to this application it was the Extradition Treaty of June 8, 1972 concluded in London between the United States of America and the United Kingdom that was relevant. This treaty is contained in United Kingdom Treaty Series No. 16 (1977) and was by an Exchange of Notes dated 21st October 1976 and annexed thereto, made applicable to Belize and was made operational here by the United States of America (Extradition) Order 1976 contained in Statutory Instrument 1976 No. 2144.

However, ex abundante I inquired of learned counsel for the parties during the hearing of this application as to the applicability of the Extradition Treaty Between the Government of Belize and the Government of the United States of America recently concluded on 30th March 2000 between the two

countries. It was common ground between the parties that this instrument was not as yet operational and that it was the 1972 treaty between U.S.A. and the United Kingdom that was the extant and applicable instrument.

It is worth however to note that this instrument contains no provision for refusing or granting bail to persons who are subject to its process.

Also, the Extradition Act in Chapter 88 and its cryptic incorporation of the United Kingdom Extradition Acts 1870 to 1932 including the Counterfeit Currency (Convention) Act, 1935, does not deal expressly with the question of bail; although it must be stated here, contrary to a general misconception, a committal magistrate before whom a prisoner is brought for the purposes of extradition, has it seems, the power to admit the prisoner to bail, his jurisdiction depending in each case upon the terms of the treaty with the foreign requesting State - See Notes on section 9 of Extradition Act, 1870, in *Halsbury's Statutes of England, 2nd Edition Vol. 9* at page 881.

This may well explain why the Applicant has sought recourse to section 68 of the Indictable Procedure Act - Chapter 93 of the Laws of Belize. This provides as follows:

"The Court or judge may at any time, on the petition of an accused person, order him, whether he has been committed for trial or not, to be admitted to bail, and the recognisance of bail may, if the order so directs, be taken before any magistrate or justice of the peace".

The question of granting bail in circumstances involving extradition proceedings or analogous proceedings has long confronted the Courts. It first arose in Reg. v Spilsbury (19 Cox. C.C. 160; 79 L.T. Rep. 211 and (1898) 2 Q.B. 615). This was a case under the Fugitive Offenders Act 1881 and not strictly a case of extradition. Twenty-four years later in Rex v. Phillips (1922, 27 Cox. C.C. 332) the issue arose this time in full bloom, as it were, under the Extradition Act 1870.

In both cases however, the Courts found in favour of the power of the Court to grant bail. In Spilsbury (supra) Lord Russell, CJ described the power of the Court to grant bail as "... a power of ~~(the)~~ salutary nature which has so venerable a history, and which has been so long exercised by the Court, it is impossible to suppose that the Legislature, if intending to interfere with it, would not have made that intention clear and distinct on the face of the Act".

In Phillips (supra), Lord Hewart C.J. was able to dispel the notion supposed to have been contended for by the Attorney-General in that case that in no case under the Extradition Acts is the question of bail to

be considered. He stated however that "... where a case is under the Extraditions Act there is, in addition to the normal consideration which apply to a question of bail, an added ingredient due to the fact that a treaty has been made with a foreign country".

Although bail was in fact refused in these two cases, they have featured regularly in discussing the availability of bail in extradition proceedings.

To my mind, these two cases although recognising that bail may be available in extradition proceedings, established the principle that in exercising the discretion to admit to bail, the Court should be extremely cautious due to the fact that extradition proceedings involve treaty relationship with foreign countries. In the words of Wright J. in Spilsbury (supra) "*under the Extradition Acts the jurisdiction depends in all cases on treaties with foreign countries*".

Locally here in Belize we have the decision of this Court in Re Gordon Young 1 Bz LR 220, where a predecessor of mine (Sir Clifford Innis C.J.) stated at page 223:

"... although the discretion to grant bail in such cases (Extradition) exists, no case has been cited in which it has been exercised in favour of the applicant".

In this particular case, it may be recalled the Applicant, who was committed to prison in extradition proceedings for fraudulent conversion before the magistrate for Belize judicial district, to await his surrender to the authorities to Mexico, applied for bail. The application was refused by this Court.

This leads me to pose this question: Ought the Court invariably in extradition proceedings to refuse bail? An examination of the authorities does not seem to disclose any clear cut answer one way or the other apart from recognising the discretion of the Court in the matter. But as Sir Clifford Innis C.J. said in *Re Gordon Young* (supra) "... no case has been cited in which it has been exercised in favour of the applicant".

In my view, it seems to be the position that it is safe to say that at the very least, the Court should in extradition proceedings be extremely cautious even chary in granting bail.

In Belize however, there is no general statute on bail, such as the Bail Act 1976 of the United Kingdom. There are however, some statutory provisions relating to the matter. For example, section 4 of the Juvenile Offenders Act - Chapter 94 of the Laws of Belize, provides for bail of children and young persons who are arrested. More specifically sections 62 to 70 of the Indictable Procedure

Act - Chapter 93 of the Laws of Belize provide for the issue of bail generally, but section 10 of the Criminal Justice Act 1992 - No. 26 of 1992 expressly in Part IV puts limitation on the right to bail in certain cases before the Magistrates Courts. It is worth noting however that by Act No. 6 of 1994, the Criminal Justice Act 1994, in Part III, an express statutory discretion was granted to Magistrates as to the grant of bail, but then only for special reasons to be recorded in writing.

In the circumstances, I am ineluctably drawn to the conclusion that every bail application is in fact sui generis, and must be looked at and examined in the light of its own facts and circumstances. Absent directive statutory provisions, one can only seek guidance from the authorities on bail and try to apply by analogy any deducible principles. Apart from the irreducible minimum that bail is intended to ensure that the person granted it must present himself whether to take his trial or for the purposes of extradition for his committal for extradition, no one factor can be said to be authoritatively determinative of the myriad issues and factors a Court must necessarily bear in mind in deciding to exercise its discretion on the issue of bail.

However, in extradition cases, because of foreign policy considerations and the operation of the maxim

pacta sunt servanda, agreements must be observed, the Court must be chary in admitting a person who is the subject of extradition proceedings to bail. For extradition is, in the nature of things, quintessentially between States and often regulated by treaty and everything possible should be done to adhere to a treaty's provisions and obligations.

It is however without question that the issue of ✓ bail is fundamental not only for the liberty of the individual but also, in the round, for the proper administration of justice. The grant of bail affirms the presumption of innocence that should underpin any fair criminal justice system. But at the same time, an abuse or misuse of the institution of bail has inevitably, serious and deleterious consequences for justice and its due administration. If persons out on bail could, as it were, go on the lam and thereby not be available to stand their trial, or in the case of extradition proceedings, put themselves beyond reach for rendition to the requesting state, this will not only stultify the administration of justice but also harm international cooperation between states in the fight against crime.

These considerations no doubt influence the courts in considering applications such as the instant one.

However, the institution of bail itself is a vital part of the due administration of justice. In this regard, I would like to reiterate and adopt the factors so succinctly but eloquently stated by the late G.B. Singh J., of this court in 1992 in Action No. 229 of 1992, In The Matter of Carlos Caveza, Gabriel Zuniga, Antonio Munoz and Juan Carlos Samona, Prisoners awaiting trial AND In the Matter of section 68 of the Indictable Procedure Act (unreported).

The factors Singh J. stated that the courts should consider in bail applications are as follows:

- a) that bail is not a privilege but a right and should not be refused unless for compelling reasons,
- b) an accused person is innocent until he is proven guilty,
- c) the remand in custody of an accused person who is eventually acquitted may result in such accused person having been unjustly deprived of his liberty,
- d) an accused person is not to be punished before conviction by the wilful withholding of bail and

e) the granting or withholding of bail lies within the discretion of the judge or magistrate providing however that such discretion must be exercised judiciously and not capriciously or according to the whims and fancies, likes or dislikes of the person presiding.

There is also, in my view, an important ✓ consideration that a Court in Belize in considering an application for bail should or ought always to have in mind. This stems from the provisions of the national Constitution. There is, in my view, in the national Constitution of Belize, a presumption in favour of the personal liberty of the citizen. This presumption is hedged around by various safeguards to ensure that no one should lose his or her liberty except in a clear case as enjoined by the law. Section 5 subsection (1) of the Constitution states:

"A person shall not be deprived of his personal liberty save as may be authorized by law in any of the following cases..."

It then proceeds to itemize the ten instances (a) through (j) when the law can sanction the loss of personal liberty of an individual.

And subsection (2) goes on to stipulate the entitlement of any person who is detained or

arrested. That is to say, he or she shall, on detention or arrest, be entitled to be informed promptly, and not later than forty-eight hours, in a language he understands, of the reasons for his arrest or detention; of the entitlement to communicate without delay and in private with a legal practitioner of his choice or in the case of a minor, with his parents or guardian and to have adequate opportunity to give instructions to the legal practitioner of his choice; of the entitlement to be informed immediately upon arrest of his right to communicate and in private with a legal practitioner of his choice or if a minor with his parents or guardians of his entitlement to the remedy by way of habeas corpus for determining the validity of his detention.

Subsection (3) provides that any detained or arrested person who is not released, shall be brought before a court without undue delay and in any case not later than seventy-two hours after arrest or detention.

Of significance for the purposes of bail applications, in my view, is subsection (5) which stipulates the entitlement to bail on reasonable conditions of any person who is arrested or detained upon reasonable suspicion of having committed or being about to commit a criminal offence under any

law and is not tried within a reasonable time. But this subsection contains an important proviso or saving clause: bail on reasonable conditions for a person arrested or detained and who is not tried within a reasonable time, shall not prejudice any further proceedings that may be brought against that person. That is to say, this constitutional entitlement to bail does not of itself preclude or prejudice any further proceedings that may be taken later against the person that may be granted bail.

This Court cannot be unmindful of these important constitutional considerations in the particular circumstances of this application.

The applicant was taken into custody and brought before the Chief Magistrate on the morning of 21st October 1998 and the process for his extradition far from concluding, has been beset by one vicissitude after another. As a consequence he has been in detention for nearly twenty months. I am not surprised that the learned Solicitor-General in the circumstances could not, properly, oppose this application to grant bail to the applicant. This grant, in fulfilment of the constitutional entitlement of the Applicant, is not in any event prejudicial to any further proceedings that the authorities may be minded to bring against him later.

For now, let the Applicant Rhett Allen Fuller go,
on the terms and conditions I had outlined earlier.


A. O. CONTEH
Chief Justice

Dated: 28th June, 2000.

