THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV 2013-04131

IN THE MATTER OF THE EXTRADITION ACT, 1985 AS AMENDED

IN THE MATTER OF THE APPLICATION OF AMERNATH JAGMOHAN FOR A WRIT OF HABEAS CORPUS AD SUBJICIENDUM

BETWEEN

AMERNATH JAGMOHAN

Applicant

AND

THE COMMISSIONER OF PRISONS
THE ATTORNEY GENERAL

Respondents

Before The Hon. Madam Justice C. Gobin
Appearances:
Mr. D West instructed by Ms. Reyes for the Claimant
Mrs. P. Elder S.C. leading Mr. W. Sturge and
Ms. Haynes instructed by Ms. S. Maharaj for the Respondents

JUDGMENT

1. This is an application for habeas corpus. The factual background as set out in the claimant's skeleton submission is agreed and I shall simply recite it with some of my own observations.

BACKGROUND

2. On January 29, 2013 Amarnath Jagmohan ("the Applicant") was arrested at a hotel in Trinidad pursuant to a provisional warrant issued under Section 10(1) (b) of the

Extradition (Commonwealth and Foreign Territories) Act, 1985 as amended ("Extradition Act"). The Applicant appeared before Her Worship, Chief Magistrate Marcia Ayers-Caesar sitting in the Eight Port of Spain Magistrates' Court on January 30, 2013 and was remanded into custody until February 26, 2013.

3. On January 30, 2013 the Chief Magistrate failed to fix a date by which the Attorney General should issue an Authority to Proceed in respect of the Applicant.

4. The Applicant filed habeas corpus proceedings CV2013-01336 and by Order dated April 11, 2013 His Lordship Justice Rahim ordered that the Applicant be brought before the Chief Magistrate before 4:00 p.m. on that same day failing which the Applicant's continued detention would be unlawful.

5. The Applicant was brought before the Chief Magistrate as per the Order of Rahim J and on that day the Authority to Proceed was read to the Applicant.

6. On May 14, 2013 the Appellant again appeared before the Chief Magistrate. On that day Counsel for the Requesting State opened their case. Evidence was led from Permanent Secretary, Ms. Marlene Juman and the arresting officer PC Herman Narace, on behalf of the Requesting State. The Record of Case was tendered into evidence.

7. Following the close of the case the Requesting State, Counsel for the Applicant made a submission of no case to answer. He stated inter alia that the Record of Case

did not conform to section 19A (5) of the Extradition Act. The gravamen of the submission was that the Record of Case was incorrectly certified. It was certified by one K. Shammugam, Minister for Law of the Republic of Singapore, who did not qualify as a judicial or prosecuting authority as required by provisions of the amended Act of 2004.

8. On June 4, 2013 instead of responding to the no case submission of Counsel for the Applicant, Counsel for the Requesting State sought leave to re-open their case. The Chief Magistrate granted leave to Counsel for the Requesting State on June 20, 2013.

9. On October 8, 2013 the Permanent Secretary tendered into evidence a Supplemental Record of Case dated July 25, 2013, which was certified instead by Mr. TAN Ken Hwee, who on the face of the certificate was designated the prosecuting authority.

10. The Applicant was committed to await the warrant of the Attorney General on October 8, 2013. Counsel for the Requesting State relied on both the record of case and supplemental record of case for committal. In the absence of written reasons for her decision it is impossible to say upon which of the records she acted, or if she did so on both.

11. On October 18, 2013 the Applicant filed this application for a writ of habeas corpus pursuant to Section 13 of the Extradition Act.

12. It is not in dispute that supplemental evidence was received by the magistrate after she had heard the submission of Counsel for the claimant. Counsel raised the lack of proper certification of the record of case and the effect on the admissibility of the record. In what appears to be an attempt to meet the submission and to cure what may be described as an obvious defect, Counsel for the requesting State submitted the supplemental record and affidavit by way of further evidence.

13. The further evidence included a fresh certificate of the TAN Ken Hwee dated the 25th July 2013. The relevant part of the certificate read:

> **"*In relation to that request, I, TAN Ken Hwee, a Senior State Counsel and the Deputy Chief Prosecutor of the Economic Crimes and Governance Division of the Attorney General's Chambers, a prosecuting authority of the Republic of Singapore, certify that the evidence summarised or contained in the Record of Case dated 19th March 2013 and in the Supplemental Record of Case dated 25th July 2013 is in a form that would be admissible at the trial and was gathered according to the laws of the Republic of Singapore and is sufficient under the laws of the Republic of Singapore to justify prosecution and is available to be produced at the trial".*** (emphasis mine)

14. Mr. TAN Ken Hwee filed an affidavit in which inter alia he explained:

> ***"In addition to being a Senior State Counsel and the Deputy Chief Prosecutor of the Economic Crimes and Governance Division of the Attorney General's Chambers, I am also appointed as a Deputy Public prosecutor. Subject to the direction and control of the Attorney General, who is also the Public Prosecutor, I am responsible for the prosecution of Armanath Jagmohan for the offences referred to in paragraph 6 of my affidavit dated 15th march 2013".***

THE GROUNDS FOR JUDICIAL REVIEW

15. In these proceedings the claimant has challenged the committal on three grounds which as I understand them are:

(1) The decision of the Attorney General to issue the Authority to Proceed is irrational and illegal.

(2) The record of the case was inadmissible by reason of the defect in certification,

(a) Mr. TAN Ken Hwee has not established he is a prosecuting authority within the Act.

(b) In any case Mr. TAN Ken Hwee in purportedly certifying the record has lumped together S.19 (a), 5(a) (i) and (ii) in so doing has rendered the certificate unreliable and inadmissible.

(3) The record of the case is inadmissible because of each of the documents contained in it do not bear the signature of the certifier as required by S.19 A 5 (c).

THE FIRST GROUND – LEGALITY OF THE ISSUANCE OF THE AUTHORITY TO PROCEED

16. The first point is simply that the record of case which would have been before the Attorney General at the time when he issued the ATP was on the face of it inadmissible. In those circumstances the order for the return of the claimant could not lawfully have been made in accordance with the provisions of the Act. Since the issuance of the ATP was unlawful, the proceedings were fundamentally flawed and the committal order was therefore null and void.

17. The issue of certification is in this context fundamental. The absence of certification in accordance with the Act renders the record of the case inadmissible. It

follows that a Magistrate cannot lawfully make an order for the return of a person on the basis of an inadmissible record of the case. On a plain reading Section 9 (7) prohibits the issuance of an ATP by the Attorney General in certain circumstances. It provides:

> **"The Attorney General may not issue an authority to proceed or may withdraw one already issued if it appears to him that an order for the return of the person concerned could not lawfully be made, or would not in fact be made, in accordance with the provisions of this Act.**

18. The question then is whether the Statute allows the issuance the Authority to Proceed in these circumstances, where on the face of it the record does not meet the statutory requirements. Senior Counsel for the respondent answers in the negative. Mrs. Elder contends that certification only becomes relevant and material at the hearing before the Magistrate. She submits that the Attorney General is performing a purely administrative/executive function when he receives the request for return. The issue of certification therefore is irrelevant to the Attorney General's deliberations and to the issuance of the Authority to Proceed.

19. I accept the submissions of Mr. West for the claimant on this point. While the Authority to Proceed is a pre-condition to the adjudication by the courts and the process is two-staged in a sense, in my opinion Section 9 (7) imposes a statutory prohibition on the issuance of the ATP unless the Attorney General applies his mind to compliance with the statute, and before he invokes the judicial process. This, by implication, imposes a duty on the part of the Attorney General primarily, it would seem to me, to consider the matter of the admissibility of evidence on the face of the record of the case.

20. A Magistrate cannot lawfully order the return of the requested person on the basis of an inadmissible record of case. The Act imposes the duty on the Attorney General to protect the judicial process as well as the right of the person whose release is sought in precisely these circumstances where the issuance of an ATP raises the risk of illegality in the contemplated proceedings.

21. In the circumstances I hold that the issuance of the ATP was null and void and of no effect and the committal was unlawful.

22. While my ruling on this ground effectively determines the matter, I shall proceed to deal with the claimant's remaining submissions though academic in the light of my finding above, are important.

THE SECOND GROUND
CERTIFICATION BY PROSECUTING AUTHORITY

23. I turn to the submission that Mr. TAN Ken Hwee is not a prosecuting authority. Before I deal with the submission in respect of his qualification, since the issue of his qualification arose in the context of "supplemental evidence",to do so I must indicate that in my opinion, the extradition hearing having begun and the Magistrate having considered evidence which was (it seems) accepted as inadmissible in the form in which it was tendered, it was not open to the Magistrate to simply admit a "supplemental affidavit" along with a supplemental record of the case. The only appropriate course was for the Attorney General to withdraw the Authority to proceed. The Magistrate in

my view had no jurisdiction to receive the supplemental record of the case after the hearing had begun.

24. To return to the designation of Mr. TAN Ken Hwee, the certificate on the face of it, describes him as "a prosecuting authority". Counsel for the claimant has invited me to go behind the certificate and to embark upon an exercise which requires a detailed examination of the structure and jurisdiction of various arms of the Attorney General's office in Singapore.

25. I decline to do so and adopt the approach of Bereaux J as he then was in the case of **CV2006-2959 -Ferguson & Galbaransingh v The Attorney General** when he said:

> ***"In my judgment it is sufficient for the purposes of S.19 A (3) that the certificate state on the face of the record that "I am a prosecuting authority……" Once the document recites that the official is a prosecuting authority, on its face it is admissible."***

26. A finding that Mr. TAN Ken Hwee is a prosecuting authority the certificate does not end the matter. It leads into the further submission that the certificate is not in a form that meets the requirements of S.19A (5) (a) (i) and (ii) of the statute. This defect it is submitted affects admissibility as well as reliability.

27. Simply put, the submission is that the certificate requires the certifier to indicate either Section 19 A 5(a) (i) or Section 19 A 5(a) (ii) applies and that a failure to select one or the other affects the validity of the certificate.

28. Section 19 A (5) provides:

> **(5) A record of the case or supplementary evidence shall not be admitted unless –**
>
> **(a) In the case of a person who is accused of an extraditable offence, a judicial or prosecuting authority of the declared Commonwealth or foreign territory certifies that the evidence summarised or contained in the record of the case or in the supplementary evidence is in a form that would be admissible at the trial; and**
>
> **(i) was gathered according to the law of that territory; or**
> **(ii) is sufficient under the law of that territory to justify prosecution ; or**

29. In his certificate, Mr. TAN Ken Hwee rolled up both subsections. He certified -

> **"*that the evidence summarised or contained in the Record of Case dated 19th March 2013 and in the Supplemental Record of Case dated 25th July 2013 is in a form that would be admissible at the trial and was gathered according to the laws of the Republic of Singapore and is sufficient under the laws of the Republic of Singapore to justify prosecution and is available to be produced at the trial".*** (emphasis mine)

30. I accept Mr. West's submission that S 19A (5) (a) (i) and (ii) are disjunctive and that the certifier must indicate either one or the other, to the satisfaction of the returning State. In this case the certifier simply recited both subsections, lumping them together.

It is easy to see how this affects the reliability of the certificate especially where the certifier is an attorney and prosecutor. In our system such a functionary is not involved in the gathering of evidence. In the absence of some explanation that the position is otherwise in his country, it would be difficult to accept such a certificate, on the face of it.

31. By way of explanation of the difference in the two requirements, Mr. West cited from the text, A Practical Guide to Canadian Extradition, (p.270/271) which explains the difference in the two sections and the circumstances under which the certifier would use one or the other. It says that one form is more appropriate to common law countries and the other to civil law countries. The text provides useful guidance on the reason for the requirement for certifying either one or the other:

> ***The requirements set out in point 2 are alternatives. The two options address differences in legal concepts and procedures between common law and civil law countries. The option of certifying that the evidence referred to in the record of the case is sufficient to justify prosecution is a familiar concept to most common law countries as it is a standard which is required to be met at preliminary hearings. It would be a useful requirement for countries such as the United States, England, Australia, New Zealand, and South Africa. By contrast, the inquisitorial systems of civil law countries, which engage in an ongoing investigative process, would more easily be able to comply with the second option of certifying that the evidence referred to in the record of the case was gathered according to their law***.

32. The importance of certification has already been underscored in the case of **United Kingdom v Tarantino [2003] BCSC 1134 at paragraph 38 citing U.S.A. v McVey [1992] 3 S.C.R. 475 at par.58**. It bears repeating that

> **"Certification is of critical importance. It has been held to be the fibre with which the safety net of assurances as to available evidence is woven. With that safety net and the trust statutorily placed in it, foreign states are afforded extraordinary credence in their locally untested assertions based on certification. This places a high level of responsibility on, and power in, the certifying authority…"**

33. The failure of Mr. TAN Ken Hwee, the certifier to identify whether the evidence contained in the record of the case was in a form that was admissible at trial and whether pursuant to S. 19 A (5) it was gathered according to the law of Singapore, or alternatively whether pursuant to S.19 A 5 (ii) it is sufficient under the law of that country to justify prosecution affects both the admissibility of the record as well as the credibility of the certifier.

34. The distinct sub-sections are not a mere form of words to be included in the certificate in purported compliance with the aim of attracting a rubber stamp of the requested State. Concomittant with the high degree of credence which is afforded to foreign States on the basis of certification, is a corresponding obligation on their part for the exercise of a degree of diligence in complying with the requirement of certification in accordance with the local law. In this instance in my opinion, the requesting State has unfortunately fallen short.

THE THIRD POINT - REQUIREMENT FOR SIGNATURE OF CERTIFIER ON EACH DOCUMENT IN THE RECORD

35. The final point taken by the claimant is that the record of the case upon which the magistrate relied was inadmissible in that it did not conform with S. 19A 5 (c) which

requires each document to bear the signature of the certifying official. On the face of it, the absence of the signature on each document of the record of case is obvious and this is so both in relation to the original as well as the supplemental record.

36. It is necessary to recite the entire section once more to appreciate this point in context. Counsel for the claimant relies on the plain meaning of the provision in the context of S. 19 (5) which sets out the conditions which must be satisfied before the record of the case can be admitted. It states:

> A record of the case or supplementary evidence shall not be admitted unless –
>
> **(a) in the case of a person who is accused of an extraditable offence, a judicial or prosecuting authority of the declared Commonwealth or foreign territory certifies that the evidence summarised or contained in the record of the case or in the supplementary evidence is in a form that would be admissible at the trial; and**
>
> **(i) was gathered according to the law of that territory; or**
>
> **(ii) is sufficient under the law of that territory to justify prosecution;**
>
> **Or**
>
> **(b) in the case of a person who is alleged to be unlawfully at large after conviction of an extraditable offence, a judicial, prosecuting or penal authority of the declared Commonwealth or foreign territory certifies that the documents in the record of the case or in the supplementary evidence are accurate; and**
>
> **(c) each document contained in the record of the case or in the supplementary evidence bears the signature of the certifying official.**

37. Counsel for the respondent has argued that the absence of the words "together in each case" as appears in S. 9 (2) of the Act supports her contention that the requirement for the certifier's signature on each document applies only to the records of cases of persons unlawfully at large. No argument has been advanced as to why a provision, the aim of which must be to assure greater reliability and authenticity of the record, ought not to apply equally to requests for the return of persons wanted to face trial, and to persons unlawfully at large. I reject this argument. On the plainest reading it seems to me that S.19 (5) governs sub-section (a), (b) and (c). In the circumstances and on this ground as well the record of the case was inadmissible.

38. There shall be judgment for the claimant. The Court declares the detention of the claimant to be unlawful. The Court orders the release of the claimant.

39. ADDENDUM: On 22nd January 2014 the matter was adjourned to hear parties on the claimant's entitlement to immediate release or bail in the circumstances of the respondent's Notice to the Court of its intention to appeal.

40. On the adjourned dated 29th January 2014, Senior Counsel for the respondent drew my attention to what counsel said was an error which appeared at paragraph 37 above. I agreed to revisit the submissions and having done so I accept that contrary to what I stated then, Mrs. Elder did indeed present an argument on why the provision ought not to apply equally to requests for the return of persons wanted to face trial, and to persons unlawfully at large.

41. Having regard to my ruling on the first two substantive points in the case, I did not consider that my looking back at the submissions would have made a difference to my original decision and I returned to them out of deference to Senior Counsel and with apologies that Senior Counsel was not given the credit that was due for her industry by my overlooking the point.

42. As I understand it, Senior Counsel's argument was that when the provision for certification in S. (5) (c) is read as a requirement only in a situation where a person who is unlawfully at large it results in a greater degree of stringency which is more appropriate to the circumstances of a 'post conviction' fugitive. And this is so because such a person would have no further opportunity to challenge or test evidence adduced by the prosecution, and would be returning only to serve a sentence.

43. Senior Counsel further submitted that this argument is supported by the fact that S.19 (5) (a) (pre-conviction) requires certification of "the evidence which S.19 (5) (b) (post conviction) requires certification of "the documents" in the record of the case. It demonstrates once more an intention to treat the two differently on the question certification.

44. I reject this argument. S.19 expressly states that the definition of "documents" applies to S. 19 A and S. 19 B in its entirety. In relation to S. 19 (5) (a) I find that "the evidence" in "the record of case" would have included or in most cases been made of

documents which would require certification. Further the reference to documents in S.19 (5) (b) is sufficiently broad. It does not identify for example, individual documents which one would have expected in a post conviction case to be more critical to the record such as a certificate of conviction or a certified copy of the notes of evidence. In the circumstances I am not persuaded by counsel's argument. I find no significance in the specific reference to "document" in S.19 (5) (b).

45. On the more general proposition that a greater degree of stringency applies in the post conviction cases because of the absence of any further opportunity to challenge or test evidence, no authority has been cited in support. Given that that intention of the amendment to the Act of 1986 was to simplify the process before the Magistrate by affording greater credence to the certification of the record of the case for admissibility as opposed to any consideration of the merits or demerits of a charge or conviction, I must reject the submission.

Dated this 23rd day of January 2014

CAROL GOBIN

JUDGE