Lavulo v Fifita & Kingdom of Tonga (No.2)

Supreme Court, Nuku'alofa
Hampton CJ

2 February 1996

Extradition - bail - power in Supreme Court
Bail - extradition - Supreme Court
Habeas corpus - extradition - procedure
Practice and procedure - habeas corpus - extradition

The facts are set out in the judgment immediately above. The plaintiff applied for bail in the Supreme Court awaiting deportation.

Held:

1. There was authority that the only appropriate means of reviewing extradition was by way of habeas corpus notwithstanding the grant of bail.
2. The Supreme Court retained its inherent power to grant bail and the legislature, in the Extradition Act, had not excluded, curtailed or circumscribed that power whether expressly or by implication.
3. But that such a power should be exercised sparingly and with extreme care and caution.
4. Bail would be granted.

Case considered: R v Spilsbury [1898] 2 QB 615

Statute considered: Extradition Act

Counsel for plaintiff : Ms Tonga
Counsel for defendants : Mrs Taumoepeau

Judgment

This in effect, is an addendum to my Judgment in this matter (C.958/95) of 18 December 1995.

In that Judgment (at paras. 65 to 67) I touched on matters of bail in terms of the lack of ability of the Magistrates' Courts to grant bail after a committal to custody to await the return to the country seeking extradition. I also commented in that Judgment (at paras. 57 to 64) on the method of reviewing such extradition proceedings before this Court and expressed the view that the only vehicle was by an application for habeas corpus.

My views on both aspects, and especially the latter, are re inforced by a Judgment which I have now found and considered in the course of researching whether this Court has an inherent jurisdiction to grant bail, notwithstanding the committal to custody to await return.

In R v. Spilsbury [1898] 2 Q.B, 615 the then Lord Chief Justice, Lord Russell had before him (and Wright J. and Kennedy J.) a rather similar situation as to that before me. There an order had been made by a magistrate, committing to prison the accused person, awaiting his return to Tangier, Morocco.

Lord Russell discussed at p.621 in passing and by way of comment on argument, the question as to how an accused person could apply for habeas corpus if, as Lord Russell found there was jurisdiction to do, and to which I will return - he was allowed bail by the Court of Queen's Bench.

He said this:-

> "...supposing a defendant, being committed by the magistrate, is admitted to bail by this Court, how is he to apply for a habeas corpus, seeing that he is already at large? I think there is really nothing in the point. He could apply for a habeas corpus before he was released on bail; but the language of s.5 of the (Fugitive Offenders) Act (1881) is conclusive. That section provides that "where the magistrate commits the fugitive to prison he shall inform the fugitive that he will not be surrendered until after the expiration of fifteen days, and that he has a right to apply for a writ of habeas corpus...". These concluding words shew that, if the fugitive is committed to prison, he may apply for a writ of habeas corpus, ... on grounds which go to the validity of the order for his return, and he would have the same right to apply if he was released on bail".

S.10 of our Extradition Act (cap.22) is in very similar terms to the s.5 spoken of by Lord Russell. As I say that decision reinforces my views expressed in the earlier Judgment. Habeas Corpus is and was the only appropriate application.

As to bail the Court reached the conclusion in Spilsbury that that Court of Queen's Bench retained its historical inherent power to admit to bail in such cases and that the Legislature in the enactments in question there, had not curtailed or circumscribed that well-known power - if the Legislature intended to curtail or circumscribe that power it would have to carry that out by express enactment - and it had not done so. It was not enough to say, as the Crown did there, that the defendant had to show that there was a power to admit to bail, given in the Fugitive Offenders Act 1881, itself. The Act did not give such a power but the Court held that it had, independent of statute, by the common law, jurisdiction to admit to bail and the statute (whether expressly or by necessary implication) did not deprive the Court of that power.

I have examined carefully our Extradition Act. It does not, by express words, exclude or circumscribe the power of this Court, in its inherent jurisdiction, to admit a person to bail. Nor does it by implication. A magistrate may grant bail on remand pending the persons committal to custody for return. Upon return to the country seeking extradition a court having jurisdiction there may admit the person to bail. It would be, as Lord Russell said, a curious, a strange result "if there were no jurisdiction to admit him to bail during the period between the making of the order for his return and his return" (p.621).

I have concluded therefore that, following a Magistrate making an order of committal to custody to await return, this Court does have an inherent power to grant bail; but that such a power should be exercised sparingly and with extreme care and caution, given the type of cases which will be the subject of Extradition Act proceedings.

It has been submitted on behalf of the Crown that that power to grant bail should extend only up until the time when the Prime Minister issues a warrant ordering the return of the person, pursuant to s.11 of the Extradition Act. (Such an Order has been made in this case by the Prime Minister on 1st February 1996). The argument is that the extradition has by then reached an entirely executive level and that this Court cannot intervene or alternatively, should not intervene.

I am not convinced that that is so. It is, just another matter which must be taken into account when considering the application for bail. It indicates that the actual physical return of the person is imminent and that may affect the Court's view of the bail application.

Here the facts are these:-

2 November 1995	-	in the Magistrate Court committal order made and bail granted.
7 December 1995	-	Plaintiff gives birth to her second child.
18 December 1995	-	judgment of this Court dismissing Plaintiff proceedings.
1 February 1996	-	Prime Minister issues warrant ordering her return to the U.S.A.
1 February 1996	-	Warrant executed.
2 February 1996	-	Bail application made to this Court; based primarily on the fact that the second child is still being breast fed by the Plaintiff.

It has not been confirmed that the actual return of the Plaintiff to the U.S.A.is immediately imminent. I am influenced by that.

I gave oral reasons on Friday evening, as to why I believed the factual circumstances were exceptional, sufficiently so as to allow the grant of bail (on strict terms and conditions) in my view. I do not propose to repeat those here, but they do primarily relate to the circumstances of mother and child. Bail was allowed.

Nor do I intend repeating the terms and conditions of bail. They are set forth in the Orders and the Bail bonds executed.