COMMONWEALTH OF THE BAHAMAS GOVERNMENT

IN THE COURT OF APPEAL

CAIS NO. 92 OF 2007

B E T W E E N

THE GOVERNMENT OF THE UNITED STATES OF AMERICA

THE SUPERINTENDENT OF HER MAJESTY'S PRISON

THE ATTORNEY-GENERAL

Appellants

AND

VICTOR KOZENY

Respondent

Before:	**The Rt. Hon. Dame Sawyer, P.** **The Hon. Mr. Justice Longley, J.A.** **The Hon. Mr. Justice Blackman, J.A.**
Appearances:	**Mr. Alun Jones, Q.C., Messrs Franklyn Williams and Loren Klein for the Appellants** **Mr. Clive Nicholls, Q.C., and Mr. Philip E. Davis for the Respondent**
Dates:	**27 July, 2009, 30 November, 2009, 1 December, 2009 26 January, 2010**

J U D G M E N T

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1. I have read the judgment in draft of the Honourable Mr. Justice of Appeal, Longley and I agree with it and would dismiss the appeal against the grant of habeas corpus and allow the appellants' appeal against the award of costs for the reasons he gives.

2. However, as the question of an award of costs by a Supreme Court Justice in an extradition (criminal) matter is being raised for the first time and we are not in agreement with the decision of the learned judge in the court below, I ought to add some reasons of my own.

3. I start with first principles.

4. At common law, there is no inherent jurisdiction in the Supreme Court to make an award of costs; on the criminal side of Queen's Bench (to which court the jurisdiction of the Supreme Court of The Bahamas is equated) the power or jurisdiction to make awards of costs to and against a litigant arises from statute – see, for example Halsbury's Laws of England 3rd Edition Volume 10 paragraph 1004, page 546 and Chapter 6 of Archbold Criminal Pleadings Evidence and Practice 1998 Edition, paragraph 6-1.

5. Before the introduction of the Prosecution of Offences Act 1985 in England the award of costs in criminal proceedings was governed by statute starting, as far as my researches went, with the Criminal Law Act 1826, the Criminal Justice Act 1907, Costs in Criminal Proceedings Act 1908, the Criminal Justice Act 1948, and the Costs

in Criminal Cases Act 1952. Those statutes were not extended to the Colony of the Bahama Islands and, again as far as my research went, I did no find any statute which enabled a court to make an award of costs in a criminal case apart from section 249 of the Criminal Procedure Code Act which is quite stringent in the size of an award of costs that could be made on an appeal from a magisterial court.

6. In addition to the cases mentioned by Justice Longley, I would add the cases of Kurt Werner Rey and Alain Charron, which were decided after the Supreme Court Rules 1978 came into operation and Charron was decided after the Supreme Court Act, 1996 came into operation on 1 January, 1997. The issue of costs was not raised in either of those cases.

Rt. Hon. Dame Sawyer,
P.

JUDGMENT DELIVERED BY THE HON. JUSTICE LONGLEY, JA

1. These appeals arise out of an extradition matter. The respondent was the subject of an extradition request by the Government of the United States of America. Following the hearing in the Magistrate's court, the learned magistrate dismissed some of the charges that were the subject of the Minister's Authority to Proceed (ATP) made under the Extradition Act (Chapter 96) (the Act), but she committed him to custody to await his extradition to the USA on other charges contained in the ATP. He made an application for habeas corpus to the Supreme Court pursuant to section 11 of the Act. That application, which was heard by Isaacs Sr. J, was successful and the committal order made by the magistrate was set aside. It is against that order that the appellants now appeal, seeking ultimately, the restoration of the order made by the magistrate for the respondent's extradition. Isaac Sr. J also made an order for costs and the appellants contend that there was no jurisdiction to make the order for costs. I shall return to the appeal against the order for costs.

2. I cull from the judgment of Isaacs Sr. J the background which is as **follows: -**

Brief Background

The Respondent is a Czech national who has been living in The Bahamas since 1995 and who has not departed the jurisdiction since 1999. Apparently he was in possession of passports issued to him in a number of other countries including Ireland, where he was granted citizenship as well

as Panama and Brazil. He also holds a pilot's licence. He is described as a "Financier."

3. In the late 1990s the Republic of Azerbaijan was engaged in the process of privatizing certain State assets and at one stage allowed foreigners to participate in its privatization programme through the purchase of vouchers and options. One such asset was the State Oil Company of the Azerbaijan Republic (hereinafter referred to as 'SOCAR'). SOCAR held all of the country's substantial deposits of oil and gas reserves, as well as its facilities for oil exploration production and refining. SOCAR aroused the Applicant's interest and he took steps to acquire it. The Applicant is alleged to have organized his entry into the programme through a British Virgin Islands company called Oily Rock Group Ltd.; and he founded an investment bank in Azerbaijan called the Minaret Group Ltd. A number of individual and institutional investors are alleged to have supplied funds as co-investors to accounts in New York which were then remitted to accounts in Switzerland before being withdrawn in cash and flown to Azerbaijan on the Applicant's private airplane.

4. The respondent is alleged to have paid millions of dollars in bribes to certain officials in the Government of Azerbaijan (hereinafter referred to as "the Azeri officials") over the period during the currency of the conspiracy. Additionally, he entered into an agreement with the Azeri officials to transfer two-thirds of the vouchers and options that Oily Rock had acquired in SOCAR to these Azeri officials; and he agreed to pay them two-thirds of the profits realized from the venture. For their part, the Azeri officials agreed to permit the respondent and the other investors to acquire a controlling interest in SOCAR. It is alleged that the respondent traveled to

New York as a part of the conspiracy and secured substantial investment funds. He transferred these funds to Switzerland and then on to Azerbaijan in cash.

5. By 1999 it had become apparent that the scheme was a failure. One of the investors, AIG, took legal action against, inter alios, the respondent, alleging that he fraudulently induced AIG to enter agreements, that he breached his fiduciary duties and that he diverted millions of dollars of AIG's funds for his benefit.

6. In 2000, the respondent approached the United States Embassy in Nassau, New Providence and informed the United States officials of the conspiracy to bribe the Azeri officials. The Applicant asserts that the conspiracy ended in 1998. For the purposes of these proceedings however, the conspiracy is alleged by the Requesting State to have continued to run from August 1997 to September 1999. The respondent, without the assurance he would not be prosecuted, detailed his involvement and that of a number of other individuals in this conspiracy.

7. The respondent had received advice from, inter alios, his attorneys, that he was not amenable to prosecution under the United States Foreign Corrupt Practices Act (hereafter referred to as "the FCPA). It appears that three of his co-conspirators were arrested and prosecuted in the U.S. between 2003 and 2004 as a result of the information he provided.

8. However, the respondent was arrested on 5 October 2005 pursuant to a provisional warrant of apprehension issued by S & C Magistrate Carolita Bethell having previously been told on or about 14 May 2003 he would not receive immunity from prosecution and an indictment was imminent.

9. That indictment was handed down in October 2005. It contained some 30 counts. Based on that indictment a request was made to the government of The Bahamas for the extradition of the respondent pursuant to the provisions of the treaty between the two states.

10. When the respondent appeared before Magistrate Bethell, she remanded him in custody pending the outcome of the extradition proceedings. Given the Respondent's penchant for collecting passports bail was denied. Nevertheless, some two years later the respondent was admitted to bail. Mr. Nicholls has taken issue with the use of the provisional warrant procedure in circumstances where the respondent had been in constant contact with the United States and Bahamian officials and had communicated in writing his willingness to remain in The Bahamas should a request for his extradition be made by the United States of America. He points to this as one of the indicators of bad faith demonstrated by the American authorities since there could not have been any urgency in these circumstances warranting the request for, and the issuance of, a provisional warrant. He submitted further, that reducing the respondent into custody was a ploy to place him in the untenable position of remand at a notoriously harsh institution to sap his will and cause him to agree to be surrendered rather than spend an inordinate time in HM Prison, Fox Hill. This, he argued, was further evidence of bad faith on the part of the Requesting State.

11. Subsequently, and in accordance with the provisions of the Extradition Act, the Minister issued his ATP in this case. In fact, the Minister issued two ATPs pertaining to the respondent.

12. The Minister issued his first ATP on 2 December 2005 asserting the conduct alleged against the respondent would, had it occurred in The Bahamas, have given rise to various substantive and conspiracy bribery offences under the Prevention of Bribery Act 1976; and of money laundering under the Proceeds of Crime Act 2000.

13. The Minister issued his second ATP on 9 March 2006 asserting the conduct alleged would give rise to offences of corruption under section 462 of the Penal Code and money laundering under the Money Laundering (Proceeds of Crime) Act 1996. The ATP stipulated 39 fresh charges.

14. Mr. Nicholls accused the Requesting State of in essence "moving the goal posts" during the hearing inasmuch as they initially relied on the FCPA to ground the respondent's surrender; then, when it seemed their case was failing, the UN Convention against Transnational Organized Crime (hereinafter referred to as "the CTOC"); and finally, recourse was had to the Inter American Convention Against Corruption (hereinafter referred to as "the IA CC"). On occasions the Requesting State served the respondent with additional material on which they intended to rely: 2 March 2006, 9 March 2006 and 5 — 7 April 2006.

15. There is no dispute between the parties that there was a conspiracy to corrupt the Azeri officials and that such officials were paid money, given gifts and provided shares in certain companies under the control of the respondent without payment; and had certain medical procedures paid for them by the respondent. The respondent in proceedings commenced against him and others in London, England admitted as much. He asserts, however,

that the plaintiffs in the suits were all willing participants in the bribery scheme.

16. The case for the Requesting State was contained in the main in the three affidavits of Mr. Jonathan S. Abernathy an Assistant United States Attorney for the Southern District of New York and the affidavits of witnesses exhibited thereto, e.g., Thomas Farrell, John Pulley, Christine Rastas, Hans Bodmer and Clayton Lewis. Mr. Abernathy deemed himself an expert in the criminal laws and procedures of the United States.

17. Having heard the evidence, the magistrate declined to commit the Respondent on any of the charges contained in the first ATP but did commit him on certain of the charges contained in the second ATP.

18. The gist of the Magistrate's ruling of 29 June 2006 is that the prevention of bribery charges were dismissed because the alleged conduct, had it occurred in The Bahamas, would not have given rise to any offence under the Prevention of Bribery Act 1976, as required by section 5(l)(b)(ii) of the Extradition Act 1994. Also, that the money laundering charges were dismissed because the conduct had it occurred within The Bahamas could not have given rise to an offence whether under the Proceeds of Crime Act 2000 or the Money Laundering (Proceeds of Crime) Act 1996, as required by section 5 (1)(b)(ii) of the Extradition Act 1994.

19. On 28 September 2006 the Magistrate found all four of the Corruption of a Public Official charges in the second ATP (including eleven counts of Conspiracy to Corrupt a Public Official and five counts of Aiding and Abetting Corruption of a Public Officer) made out by the Requesting State

on the basis that the conduct disclosed offences under US law and, had it occurred in The Bahamas, would have given rise to offences under section 462 of the Penal Code. Magistrate Bethell held that "public officer" under section 462 was not restricted to Bahamian public officials. Further, she concluded there were no restrictions within section 5 of the Extradition Act precluding his return. She committed the Respondent on the charges she found made out and remanded him to custody to await his surrender.

20. Notwithstanding the committals made by the learned magistrate, as a result of a ruling by a judge Scheidlin in the USA on 16th July 2007, all counts of the U.S. indictment were held to be time barred, except counts 1, 11 and 21. Originally, the U.S. indictment against the respondent and in respect of which his extradition to the U.S. to stand trial in New York, was sought, charged one count of conspiracy to violate the Foreign Corrupt practices Act (FCPA) and Travel Act (TA); 12 counts of violation of the FCPA, 6 counts of violation of the TA; one count of conspiracy to commit money laundering; and 4 counts of money laundering.

21. Isaac Sr. J. therefore remarked as follows at page 16 of his judgment: "**The conduct alleged in relation to counts 1, 11 and 21 found charges 1, 20 and 28 to 30 in the second ATP. The Requesting State concedes this point. The five surviving charges are: Charge 1- Conspiracy to Corrupt a Public Officer, contrary to sections 89(1) and 462 of the Penal Code (Ch. 84) (between May 1997 and September 1999); 2. Charge 20- Aiding and Abetting Corruption of a Public Officer, contrary to section 462 and 86(1) of the Penal Code (Ch. 84) (between May 1997 and September 1999); 3. Charge 28- Money-Laundering, contrary to section**

9(2) of the Money Laundering (Proceeds of Crime) Act 1996 (between March 1998 and September 1998); 4. Charge 29- Conspiracy to Commit Money Laundering, contrary to section 9(2) of the Money Laundering (Proceeds of Crime) Act 1996 and section 86(1) of the Penal Code (Ch. 84) (between March 1998 and September 1998); Charge 30- Aiding and Abetting Money Laundering, contrary to section 9(2) of the Money Laundering (Proceeds of Crime) Act 1996 and section 86(1) of the Penal Code (Ch 84) (between March 1998 and September 1998). "

22. He noted however, that '**The learned Magistrate did not commit the Applicant on charges 28, 29 and 30**. 'And at page 17, the learned judge concluded: **Thus, the only counts that would remain for the Court's consideration if it considers the other charges statute-barred are charges 1 and 20, namely, Conspiracy to Corrupt a Public Officer and Aiding and Abetting Corruption of a Public Officer.** He went on to so hold at page 18 of the judgment and this is now common ground.

23. Isaacs Sr. J. however held that the offences were not extradition offences and that in any event the requesting state was guilty of bad faith and abuse of process and so he set aside the order of the learned magistrate. The appeal is against that decision.

24. **The substantive appeal**

Ground 1 states as follows: The learned Judge held wrongly: (I.) that in habeas corpus proceedings brought under section II of the Extradition Act 1994 the Appellants might not argue, in defence of the legality of the Respondent's detention, that his committal to prison following committal proceedings under that Act was lawful on the basis that the committal

evidence disclosed extradition offences not found by the magistrate; (2.) it was necessary that the requesting state should challenge the magistrate's refusal to find such offences, if it sought to do so, by the case stated procedure set out in section 11 (5) of that Act; and (3.) accordingly, that offences of money laundering contrary to section 9 (2) of the Money Laundering (Proceeds of Crime) Act 1996 might not provide a justification for the Respondent's detention.

25. Though there are three parts to ground 1, it raises two related issues; whether, on an application for habeas corpus, the requesting state may be permitted to rely upon or proffer new grounds to justify the detention, even though those grounds, being charges allegedly disclosed on the evidence but which were rejected by the magistrate and were dismissed, and whether in order to resurrect charges dismissed by the magistrate on the extradition hearing and to rely upon them to further justify a detention, it is necessary for the requesting state to lodge an appeal against the dismissal of the charges by way of case stated.

26. This ground evidences the appellant's attempt to resurrect or rehabilitate the money laundering offences which were dismissed by the learned magistrate. The magistrate dismissed the money laundering charges on the ground that had the conduct occurred it could not have given rise to any offences under the proceeds of crime act or the Money laundering act.

27. Counsel for the appellant sought to resurrect those charges on the application for habeas corpus and argued that the detention could be justified on that basis. Isaac disagreed holding: **that I agree with Mr. Nicholls**

because I am satisfied that on the habeas corpus application the Court is to consider only those matters outlined in sections 7 and 11 (3); and whether the warrant of committal is good on its face, i.e, it discloses a valid reason for the Applicant's detention. Had the Respondents so wished, they could - and ought to - have proceeded by case stated. In matters of extradition as in any criminal system where loss of liberty to the individual is involved, compliance with the procedures must be strictly observed.

28. Mr. Jones invited this Court to revisit the Magistrate's decision not to commit the Applicant on the charges contained in the second ATP.

29. It seems to me however, that a magistrate is obliged to proceed on the hearing in the same manner as she would if she were conducting a Preliminary inquiry. That means that she has to be satisfied that sufficient evidence has been led to justify committal. In this case not only was she not so satisfied but she specifically found that no such offence was made out on the evidence before her. Those were specific findings made against the appellant. If they wanted to challenge those findings it seems to me that the proper process for doing so was by way of case stated, the procedure provided in the Act. The applicant for habeas corpus is entitled to a reasonable expectation that he would no longer be in jeopardy of facing those charges again without proper notice. To my mind, fairness, which is an overriding consideration, dictated that he be properly warned of the intention to seek to justify the detention on that basis through the appeal process.

30. To my mind, because extradition proceedings are criminal in nature, section 10 (5) not only incorporates by reference the substantive criminal law and procedure, but also those provisions of the constitutional law that offer certain safeguards and protections to ensure fairness to anyone liable to loose his liberty upon penal sanction. One such precept is that a man likely to loose his liberty is entitled to know beforehand the reason why he might loose his liberty so that he can get adequate time and facilities to properly prepare to meet the case. Even though broad powers are given to courts to amend charges and informations, that power is always to be exercised in the interest of justice and without prejudice to the accused. And the later in the proceeding the less likely it is that such a power would be exercised unless it can be done without doing injustice to the accused.

31. Likewise, it seems to me that if the requesting state intends to put its case on a particular footing it is obligated to inform the respondent at the earliest permissible opportunity so that he might be given adequate time for the preparation of his defence. The statute permits it to do that through the case stated process.

32. If the magistrate had dismissed all the charges it cannot be gainsaid, that the requesting state would have been obligated to launch an appeal if it wanted to challenge that decision so as to put the respondent in jeopardy once again. I cannot think of any reason why the situation would be any different simply because the magistrate dismissed some but not all the charges.

33. In any event I agree with Isaacs Sr. J. that on such an application the court is only concerned with the validity of the detention on the basis for

which the warrant was obtained, not on the basis for which it might have been obtained and no authority has been cited which supports that position. Ground 1 therefore fails.

34. I turn now to grounds 2 and 3 of the Notice of appeal, which may conveniently be taken together. **Grounds 2 and 3** state as follows: 2. The learned judge held, wrongly, that the magistrate was in error in holding that the criminal conduct of which the Respondent was accused would have constituted offences of corrupting a public officer, contrary to section 462 of the Penal Code, if they had been committed in The Bahamas, applying the principles of transposition appropriate to the Extradition Act 1994. 3. The learned judge held, wrongly, that that the magistrate was in error in holding that the criminal conduct of which the Respondent was accused would have constituted offences of conspiracy to corrupt a public officer, contrary to sections 89 (1) and 462 of the Penal Code, if they had been committed in The Bahamas, applying the principles of transposition appropriate to the Extradition Act, 1994.

35. Grounds 2 and 3 raise the fundamental question of the proper interpretation of section 462 of the Penal Code. More specifically, whether upon its true construction the offence created by section 462 applies only to Bahamian officials or jurors. This is, in reality, the crux of the appeal because it is pivotal to the remaining corruption charges for neither a substantive charge nor the related charges of conspiracy or abetment can stand if the learned judge's interpretation is correct. It was common ground that the allegation in the U.S. charges under the FCPA was to the effect that the respondent had bribed or corrupted foreign officials, (Azeri officials).

The charges under the FCPA did not, indeed it seems they could not, pertain to local U.S. officials. During the course of the appeal it appeared at times that the appellants were contending that the conspiracy charges might stand alone having regard to the provisions of section 89(2) of the Penal Code. However it seems to me that if section 462 only refers to Bahamian public officers and officials, a substantive charge and the inchoate offences of conspiracy and abetment must also fall. To my mind it follows that if the completed offence falls the inchoate offence based on the same section must also fall.

36. Section 462 provides as follows: **Whoever corrupts or attempts to corrupt any person in respect of any duties as a public officer or juror is guilty of a misdemeanour.**

37. Overruling the learned magistrate, **Isaacs** Sr. J. held as follows: "**I hold the view that when section 462 refers to "public officer" it can only mean a Bahamian public officer and does not include foreign public officers as the section applies only to domestic offences. That section reads: "Corrupting public officer or juror 462. Whoever corrupts or attempts to corrupt any person in respect of any duties as a public officer or juror is guilty of a misdemeanour." Further evidence that a 'public officer' is to be taken as meaning a domestc creature reference is made to Article 108 of the Constitution. Article 108 provides: 'Appointments, etc. of Public Officers. 108. Subject to the provisions of this Constitution power to make appointments to public offices and to remove and to exercise disciplinary control over persons holding or acting in such offices is hereby vested in the Governor-General, acting**

in accordance with the advice of the Public Service Commission.' The Constitution contemplates holders of public offices or 'public officers' to be appointed by the Governor-General or by such body to whom he may delegate this power under Article 110. Hence, the conduct must have occurred entirely in The Bahamas for the purposes of transposition of any substantive offences, viz, the corrupt act or the attempt must have taken place in The Bahamas and the public official must have been a Bahamian public officer or, if the act occurs partly in and partly outside the jurisdiction, the end result of the corrupt act or attempt must constitute an offence if committed in The Bahamas- A person in The Bahamas who bribes a public officer in a foreign country commits no offence in The Bahamas because section 462 does not create an extraterritorial offence."

38. I agree with the decision of Isaacs J on this point which I think is reinforced by the definition of public officers in section 6 of the Penal Code and by reference to the offences set out in Title xxix of the Penal Code. These compel one to the conclusion that public officers in the section 462 and the other offences listed in Title xix mean Bahamian public officers. Section 6 provides as follows: "**In this Code 'public officer' means any person holding any of the following offices, or performing the duties thereof, whether as a deputy or otherwise, namely- (1)any civil office, including the office of Governor-General, the power of appointing a person to which or of removing a person from which is vested in Her Majesty, or in the Governor-General, or in any public commission or board or committee; (2)any office to which a person is nominated or appointed by statute or by public election; (3) any civil office, the power**

of appointing to which or of removing from which is vested in any person or persons holding public office of any kind included in either of subsections (1) or (2) of this section; (4) any office of arbitrator or umpire in any proceeding or matter submitted to arbitration by order or with the sanction of any court; (5)any justice of the peace."

39. And to put the matter beyond doubt, unless the context otherwise requires, 'public office 'is defined in section 3 of the Interpretation and General Clauses Act as **"public office" means, subject to the provisions of the Constitution, any office of emolument under the Crown in right of the Government of The Bahamas, whether such office be permanent or temporary, and "officer" or 'public officer' means any person holding a public office."**

40. The learned magistrate was of the view that the Penal Code did not limit public official to Bahamian public officials. I cannot agree. When regard is had to the definition of 'public office' in the Interpretation and General Clauses Act and to the other statutory provisions that define public office and public officials, and which make provisions for their appointment and removal by either the Governor General or agents or organs of the State, one is compelled to the conclusion that only Bahamian public officials is referenced in the legislation.

41. While I have reservations about the learned judge's decision on the justifiability of a conspiracy to corrupt a Bahamian official abroad, I entertain no doubt and feel constrained to agree with the learned judge's interpretation of the section 462 of the Penal Code as applying only to

Bahamian officials. To my mind that section cannot be employed to support or to ground the US charges under the FCPA.

42. Furthermore, I accept as a matter of pure law that an extradition offence must be an offence under the law of both states. In this case Mr. Jones has submitted that because at least one of the offences of corruption of Azeri official was committed in the United States, it was caught by the FCPA of the USA, and therefore it corresponds to an offence under section 462 of the Penal Code. I am unable to accept that submission, not only because all crime is local, but also because it is clear from the enactment of the FCPA, the United States itself was satisfied that it had to make special statutory provision in its laws in order to penalize the corruption of foreign officials. As of this writing, I am not aware that the Parliament of The Bahamas has enacted any such legislation. To further buttress the point, I refer to the unreported extradition case of the Government of the US v Robert L. Vesco. In December 1973, former Court of Appeal Stipendiary and Circuit Magistrate, Osadebay, who was just beginning his illustrious career as a jurist while serving as a Stipendiary and Circuit Magistrate, dismissed the application for the extradition of Mr. Vesco on the basis that there was no corresponding offence of wire fraud in the law of the Bahamas, the charge on which the US Government had sought Mr. Vesco's extradition. Therefore, I am unable to agree with Mr. Jones that this offence is caught by the treaty between the United States and the Bahamas.

43. Moreover, the international community having only recently adopted specific provisions dealing with the criminalization of corruption of **foreign public officials** such as the United Nations Convention Against

Transnational Organized Crime and the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions underscores the point that the provisions of the Penal Code cannot be used for extra-territorial issues in this kind of case. [**Emphasis added**]

44. Grounds 2 and 3 must therefore fail. This effectively puts an end to the appeal but I would go on to briefly consider the other grounds.

45. **Ground 4 states as follows:** 4. The learned judge was wrong to hold that the First Appellant might not rely on the provisions of the inter-American Convention against Corruption, for the purpose of determining whether the Respondent was accused of extradition offences, because there was no reference to those provisions by the Minister in his Authorities to Proceed.

46. Ground 4 questions the scope of the ATP. Does it define the jurisdiction of the magistrate? Apart from the fact that the learned magistrate did not commit on any offence under the IAAC, the question which arises is whether such offence must be specified in the ATP. It seems to me, having regarded to section 10(5) of the Extradition Act, the ATP circumscribes the jurisdiction of the magistrate, defines her jurisdiction and notifies the accused of the case he has to meet. See **(Regina (Guisto) v Governor of Brixton Prison [2004] 1 A.C. 101.)**. In any event for the reasons given on ground 1, this ground too must fail.

47. **Ground 5 states as follows:** "5 The learned judge held, wrongly, that the magistrate was in error in declining to determine, for the purpose of deciding whether the request disclosed extradition offences, whether the

conduct alleged against the Respondent disclosed a prima facie case that he was guilty of offences contrary to the law of the requesting state."

48. Ground 5 raises the issue of the duty of a magistrate in an' exceptional accusation case'. This recently was the basis of some discussion in the Privy Council in a case argued here in the Bahamas. (see the discussion of the Privy Council in a case from Bermuda decided Nov 4 2009 –Johannes Deuss v AG of Bermuda and COP). The point however, seems moot. Isaacs J was following a longstanding authority of Lord Diplock in Nielsen. What was once considered exceptional is now the norm that can only be reversed by the Privy Council.

49. **Ground 6 states as follows**: "6, The learned judge was wrong to hold that the First Appellant had acted in bad faith and was guilty of an abuse of the process of the court in conducting the extradition proceedings against the Respondent."

50. Ground 6 simply challenges the determination of the learned judge that the requesting state had acted in bad faith by not making certain disclosures, etc. This ground raises the question of whether the discretion vested in the judge was properly exercised. As a matter of principle, appellate courts do not interfere with the exercise of discretion on the basis it might have exercised the discretion differently. To interfere, the court must be satisfied that some error of law occurred or that the judge took into consideration or failed to consider some relevant matter. In this case although I might have exercised my discretion differently, I cannot say the learned judge erred. There was ample material before the court, particularly as it related to the failure of the requesting state to disclose certain pertinent

information of law and fact that gave rise to a suspicion of bad faith and abuse of process.

51. The extradition process, because it involves the deprivation of liberty, requires the exercise of good faith on the part of the requesting state and that must mean that it has a duty to disclose in a timely manner and with its request if the information is known at that time, any information that would not only be adverse to its request but would inform a prudent court in the exercise of its function that might lead to a relevant trail of enquiry. Whether the failure to comply with this obligation in any particular case is bad faith depends on all the circumstances of the case. There certainly was material before the learned judge to reach the conclusion which he did and I see no reason to interfere with that decision. For my own part I would have been particularly concerned about the failure to disclose the application of the principle of lenity which raised the question of whether the respondent was at all amenable to penal sanctions in the requesting state.

52. **The appeal against cost**

I turn now to the appeal against the order for cost. Essentially the appellants contend that the Supreme Court has no jurisdiction to make an order for cost in a criminal cause or matter, or that in any event the discretion was wrongly exercised. The appellant's case is founded upon the decision of the Privy Council in **United States Government vs Bowe [1990] 1A.C.500 (Bowe).**

53. To my mind Bowe is distinguishable. The question in Bowe was whether the proceedings were in a 'criminal cause or matter?' notwith-

standing that they were intitulted in civil proceedings. Once it was determined that the proceedings were in 'a criminal cause or matter'' the statute, by its express terms, took away the jurisdiction of the Court of Appeal to award costs in the matter. (see section 28 of the Court of Appeal Act ch.52).

54. In this case however we are concerned with the jurisdiction of the Supreme Court to award costs in a criminal cause or matter, and statute expressly confers jurisdiction on the Supreme Court to award costs in all proceeding. Section 30 provides as follows: 30. (1) Subject to this or any other Act and to rules of court, the costs of and incidental to all proceedings in the Court, including the administration of estates and trusts, shall be in the discretion of the Court or judge and the Court or judge shall have full power to determine by whom and to what extent the costs are to be paid. (2) Nothing in this section shall alter the practice in any criminal cause or matter or in bankruptcy.

55. The discretion, therefore, appears to be wide enough to cover the grant of costs in criminal cases.

56. However, when sections 30(1) and 30(2) are read together, they appear to be open to the construction that the Supreme Court has jurisdiction to make an award of costs in criminal cases and the discretion is only to be circumscribed by any practice that was in existence at the time of the passage of the Act in 1996. (see **R v Chief metropolitan Magistrate ex parte Osman[1988] 3 All. E.R 173)(Osman).** In other words, since the prevailing practice is not altered by the enactment, the discretion to order costs in criminal causes, in my judgment, must be exercised in accordance

with the prevailing practice in such cases, which practice must have immediately predated the passage of the enactment. So before purporting to exercise the discretion conferred by the section, it is imperative that there must be evidence of the prevailing practice. If there is no evidence either way then there is no proper evidential basis for the court to exercise its discretion.

57. In this case the learned judge purported to exercise discretion to grant cost to the respondents without the benefit of any evidence as to the prevailing practice. This in my judgment was an error because the effect of the order is that there was in existence a practice of awarding cost in criminal cases when there is no evidence to support that conclusion.

58. To support the decision of the learned judge the respondent point to Order 1r2 (3) of the rules of the Supreme Court and its reference to order 57 which incorporates order 54. That is the order that deals with habeas corpus applications. However, it seems to me that while those provisions evidence a **power** to grant costs in such cases they do not evidence the existence of a **practice** of granting costs in such cases.

59. It is however, somewhat perplexing that the parties cited no local cases on such matters to see if a practice could be distilled from the decided cases.

60. I have reviewed the Law reports of the Bahamas volumes 1 and 2 for 1965-70 and the 1989-90 volume which include several cases of habeas corpus which were decided before and after the 1978 Rules of the Supreme Court came into effect, and I have been unable to find one case where costs

were awarded. I refer to the following cases: **R v Superintendent of Her Majesty's Prison, ex parte Crux [1965-70] 2 LRB450, and 476; Crux v Government of Canada [1965-70] 1 LRB 348; R v Superintendent of Her Majesty's Prison, ex parte Grey [1965-70] 2 LRB 29; R v Chief Immigration Officer ex parte Heller [1965-70] 2 LRB 93; R v Stipendiary and Circuit Magistrate ex parte Brown Nos 1 and 2 [1989-90] 1 LRB 273 and 395; R v Superintendent of Her Majesty's Prison, ex parte Bain[1989-90] 1 LRB 156; R v Superintendent of Her Majesty's Prison, ex parte Darville nos 1 and 2 [1989-90] 1 LRB 128 and 163; R v Stipendiary and Circuit Magistrate ex parte Triana [1989-90] 1 LRB107 and 264 (Triana).**

70. In none of those cases was an order for cost made and only in the Triana case which was a case of Prohibition was the issue even raised.

71. In Osman the divisional court relied on two cases to be satisfied of the existence of a practice of awarding cost in criminal cases. In the cases cited in paragraph 9 above the absence of any argument on cost or order for costs suggest that there was no such practice in existence of granting cost in criminal causes, particularly having regard to the fact that litigation in the Bahamas is heavily driven by costs.

72. In any event for the reasons given I would allow the appeal against the order for cost.

73. I have tried to be as brief as possible because having given careful consideration to the submissions of counsel, I must confess that with the

exception of the decision on cost, I agree entirely with the judgment of Isaacs Sr. J.

The Hon. Mr. Justice Longley, JA

I agree.

The Hon. Mr. Justice Blackman, JA