

10 **Geesteranus v R**

Supreme Court, Nuku'alofa
Ward C.J.

21, 24 August, 1992

Bail - extradition - application of Bail Act - principles.

Extradition Act proceedings - Bail Act has application

20 *Extradition Act - procedure under section 8*

Habeas Corpus - not applicable to a refusal of bail on a valid warrant

Words - "forthwith" equates to immediately.

The applicant was arrested on a provisional warrant under the Extradition Act. A magistrate refused to even consider bail. Habeas corpus proceedings were commenced.

HELD:

Remitting the matter to the Magistrates Court for the bail application to be considered:-

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1. Habeas corpus proceedings were not the appropriate means to challenge the refusal of bail, but the proceedings were treated as an application for judicial review (as if leave had been granted).
 2. Section 9 of the Extradition Act allows for bail to be applied for, the provisions of the Bail Act apply and a Magistrate must consider an application if one is made.
 3. Under section 8 of the Extradition Act the magistrate has a duty to give notice to the Prime Minister "forthwith" and that means "immediately" in this context.

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Statutes considered : Bail Act
Extradition Act, s.84 & s.9

Counsel for applicant : Mr Macdonald
Counsel for Crown : Mrs Taumoepeau

Judgment

These proceedings commenced in the Supreme Court as an application for a writ of habeas corpus. John Maas - Geesteranus the person on whose behalf the application was made was arrested on 20th August on a provisional warrant issued by a magistrate under section 8 of the Extradition Act following a request from the U.S. Government for his extradition to face charges of drug offences.

On 21st August, ex parte application was made to the Supreme Court and a writ was issued returnable on 24th August.

710 Perusal of the papers suggests this application was originally made under section 10 but that would have been premature as no committal to custody has yet occurred. However, the main ground of the application was a suggested failure of the magistrate to exercise his power to consider bail and so the writ was issued on that basis. The return shows clearly that the detention is under a valid warrant and therefore lawful and the writ is cancelled.

120 As has been stated the ground urged in the application was to challenge the refusal of the magistrate to consider bail based on his interpretation of section 9 and, in particular, section 9(3). In these circumstances, habeas corpus was not the appropriate remedy and the application would have been better directed towards certiorari or mandamus. As the point involves the liberty of an individual, it should be resolved and Crown Counsel has agreed to let the matter proceed as an application for judicial review as if leave had been granted on the grounds raised in the original application.

There is no dispute that the arrested man was brought before the magistrate in custody pursuant to a provisional warrant on 21st August. When a bail application was made, counsel for the government took the view that the magistrate had no discretion to grant bail under section 9(3). The magistrate agreed, declined to consider bail and remanded the person in custody.

The first three subsections of section 9 read:

- 130 "9 (1) A person arrested in pursuance of a warrant under section 8 of this Act shall (unless previously discharged under subsection (3) of that section) be brought as soon as practicable before a court (in this Act referred to as the court of committal) consisting of a magistrate.
- (2) For the purposes of proceedings under this section a court of committal consisting of a magistrate shall have the like jurisdiction and powers, as nearly as may be, including power to remand in custody or on bail, as a magistrate's court holding a preliminary inquiry.
- 140 (3) Where the person arrested is in custody by virtue of a provisional warrant and no authority to proceed has been received in respect of him, the court of committal may fix a reasonable period (of which the court shall give notice to the Prime Minister) after which he will be discharged from custody unless such an authority has been received."

Briefly stated, Crown Counsel's argument is that the wording of section 9(3) only envisages custody where the arrest is under a provisional warrant and so there is no power to consider bail.

150 The applicant's case is that the whole section is to be read as one and section 9(2) gives the magistrate power to consider bail for the purpose of proceeding under this section.

What does section 9 provide?

Whenever a person is arrested on a warrant issued under section 8, he must be brought as soon as practicable before a magistrate's court. That court is thereafter referred to in the Act as the court of committal.

The court in this case was the court of committal and it has, under section 9(2), all the power of a magistrate's court holding a preliminary inquiry to remand in custody or on bail. Section 9(3) does not restrict those powers. If such a restriction had been intended, it would have been expressly stated. What section 9(3) does is to provide an
160 extra safeguard for a person who is only arrested on a provisional warrant and is retained in custody. When the court of committal has a person before it who has been arrested on a provisional warrant, it means there is no authority to proceed and section 9(3) ensures he is not kept in custody indefinitely awaiting that authority.

The Magistrate, if he remands in custody, must decide a reasonable period for his detention pending that authority and, if it is not given by the end of that period, he must release the person. The subsection refers only to custody because it is a safeguard against excessive custody. If the person is on bail, it is not needed and does not apply. It takes it altogether too far to suggest that, because it does not mention bail, it prohibits bail.

The power to consider bail, is clearly given under section 9(2) and is now also
170 covered by the Bail Act 1990. That Act has no special provisions for extradition cases and so the basic position is that the person is entitled to bail unless the court is satisfied of the matters in section 4. The court must consider all the relevant matters including the seriousness of the allegations, the strength of the evidence and the likelihood of the person failing to submit to custody.

Despite the lack of special provisions in the Bail Act for extradition cases, they do, by their very nature, present special circumstances especially when the person is not a resident of this country. Such a person has no ties here. Extradition charges are likely to
180 be serious and he may have a strong incentive to try to leave the country. These days, seizure of a passport is often not an adequate safeguard for a person who may have more than one or possess similar documents such as seaman's papers. If he does leave the country there is no way he can be brought back here. There are many authorities that say it is only in the most unusual circumstances that it would be appropriate to release a man on bail in an extradition case.

By the provisions of the Bail Act, if the magistrate refuses bail, the person has a right to come to the Supreme Court. This alone makes it more appropriate to consider mandamus than certiorari for the latter, if this court should refuse bail, would deprive him of a possible review of that decision. The case will, therefore, be remitted to the court of
190 committal with a direction that the magistrate hear and consider the question of bail.

During argument, a matter came to light that causes me some concern and about which comment may be appropriate.

Under section 8(3), where a provisional warrant is issued by a magistrate, he has a duty forthwith to give notice to the Prime Minister and transmit the evidence on which the warrant was issued. It appears, in this case, that still had not been done four days after the warrant was issued. No provisional warrant should be issued without the magistrate making such a report. It should be done immediately. That is what the word "forthwith" means and, if it was not done in this case, it was a serious omission by the magistrate.

200 If the Magistrate has not done so by now, he must send a report to the Prime Minister

under section 8(3). He must then consider bail. If he refuses it, he must, on the basis of all the information before him and bearing in mind a man's liberty is involved, decide a reasonable time during which the remand in custody should continue pending authority to proceed. Notice of that decision should immediately be sent to the Prime Minister.

I am told by counsel that the magistrate previously fixed a period of eight days as reasonable but notice was not sent to the Prime Minister for a few days. It is clearly essential that notice is sent immediately because the period runs from the date of the refusal of bail not from the date the Prime Minister receives the notice. At the end of that period, if the Prime Minister has not given authority to proceed, the person must be discharged from custody.

I therefore direct that the case be remitted to the court of committal, that the magistrate be provided with a copy of this judgment and he hear and consider the application for bail at 10:00 am on Friday 28th August. If he refuses bail, the reasonable period of time will then run from the date of that decision.