Lavulo v Fifita & Kingdom of Tonga

Supreme Court, Nuku'alofa
Hampton CJ
C.958/95

13 & 18 December 1995

Extradition - procedure - evidence - proof
Evidence - extradition - proof
Practice and procedure - extradition - judicial review - habeas corpus
Habeas corpus - judicial review - extradition
Ban - extradition order

The plaintiff was ordered to be extradited back to Hawaii to be sentenced on a charge of conspiring to distribute cocaine. She was granted bail pending her actual extradition. She applied for judicial review claiming the proceedings in the Magistrates' Court were in breach of the Extradition Act and in particular there was a failure to follow proper procedures; a failure to call any evidence; and a failure to identify her as the person sought. It was claimed that there was, therefore, no proper basis for her committal to custody for her return to Hawaii.

Held:

1. The Extradition Act is a full code
2. The preliminary procedures were followed and there was ample evidence for the Chief Police Magistrate to issue a warrant.
3. The procedures contained in Part III of the Magistrates Courts Act (as to preliminary inquiries) are applicable "as nearly as may be" to extradition proceedings.
4. The documents put before the Magistrates' Court were duly authenticated. The procedure followed before the Chief Police Magistrate did follow "as nearly as may be" the form of a preliminary inquiry hearing.
5. There was a hearing held (in terms of s.9 of the Extradition Act). "Hearing" in the overall context of the legislation, bears a meaning akin to receiving.
6. In any event s.9(4) does not compel a Court to hear evidence. The subsection is permissory only. The court may hear evidence, whether from prosecution or defence.
7. The Court of committal cannot commit unless satisfied that (i) the offence alleged is a relevant one and (ii) the evidence would be sufficient to warrant the person's trial if the offence alleged was committed in Tonga.
8. It is for the prosecution to satisfy the Court as to both of those, if it can. It can

do so (in this type of extradition procedure) by calling evidence viva voce or by producing evidence under s.13 or by a combination of both. Here the prosecution chose to proceed under s.13 - the Chief Police Magistrate (and the Supreme Court) were satisfied by that.

9. As to identification, before the Chief Police Magistrate the plaintiff identified herself, to the satisfaction of the Magistrate, as being the person to whom the extradition documents related; and no issue as to identity was raised.

10. Leave to apply for judicial review was refused (but after full consideration of the merits). In any event the proceedings were miscast and must fail on procedural aspects.

11. The Act envisages one means only for review of an extradition order (an order for committal to custody to await return) i.e. by way of habeas corpus and the proper proceedings here were habeas corpus ones. Habeas corpus, despite the admission to bail (subsequent to the committal) for humanitarian reasons, was the appropriate and only allowed vehicle, for review, the plaintiff having been committed to custody.

12. (Obiter) The Magistrate had no jurisdiction or power to grant bail after an order of committal (and as to bail in the Supreme Court see the judgment next following).

Statutes considered	:	Extradition Act Magistrates Courts Act s.34
Regulations considered	:	Supreme Court Rules O.26
Counsel for Plaintiff	:	Mr Edwards
Counsel for Defendants	:	Mr Taumoepeau

Judgment

On 17 October 1995 the First Defendant, the Chief Police Magistrate, issued a Warrant for the arrest of "Filita Freda Lavulo, also known as Freda Vete", to "bring her before me to answer a request from the Government of the United States of America for her extradition to stand trial for the offence of:

1. Conspiracy to distribute and to possess with intent to distribute in excess of 50 grams of cocaine;
2. Possession with intent to distribute in excess of 500 grams of cocaine;

alleged to have been committed on or about October or November 1993 and continuing to and including January 14, 1994, at the District of Hawaii and elsewhere in respect of which on (sic) warrant for her arrest was issued by the U.S. District Court Judge Mr. Alan C. Kay on the 21st July 1995."

That warrant was issued pursuant to s.8(1)(a) of the Extradition Act (Cap.22) following receipt in Tonga of the United States of America's request to extradite and, on which, the Prime Minister of the Kingdom issued an authority to proceed (pursuant to s.7 of the Act) on the 16 October 1995.

No challenge has been taken in relation to any of these preliminary steps (nor from what I have seen of the papers could one have been taken successfully - and I add that, with the consent of all parties, on the 13 December 1995 I directed that the entire Chief Police Magistrates' file be made available to me, and that was done the same day). So there is acceptance e.g. that, in terms of the Extradition Act, the United States of America is a "designated country" (s.4) and the offences for which extradition is sought are "relevant offences" (s.5).

The challenge made by Mr. Edwards is as to the steps and procedures followed in front of the Chief Police Magistrate, after the warrant was executed, and as to the justifiability and/or lawfulness of the Order for extradition eventually made by the Chief Police Magistrate on 2 November 1995.

The Plaintiff was arrested, pursuant to the Warrant, on the 17 October and came before the Chief Police Magistrate that same day. She was remanded to the 18 October; on the 18 October remanded, on bail, to the 19 October; on the 19 October remanded on continued bail until the 26 October; on 26 October the extradition application was heard, both the Solicitor General and Mr. Edwards appearing, when decision on the application was reserved until 2 November; on 2 November the Chief Police Magistrate gave his decision in which he found that (in summary):-

(a) the USA was a designated country
(b) the offences charged were relevant offences
(c) the evidence put before him would be sufficient to warrant the Plaintiff's trial for those offences had they been committed within the jurisdiction of his Court
(d) the evidence put before him would be sufficient to warrant the Plaintiff's trial for those offences according to U.S. laws.
(e) the US authorities in Hawaii has established prima facie evidence to implicate the Plaintiff
(f) therefore the Plaintifff, in Hawaii, on 9 February 1994 had signed a plea agreement and had then pleaded guilty to an extraditable offence (the first charge in the warrant, referred to in para. 1 above).

As a result of those findings the Chief Police Magistrate, on 2 November 1995, made

an order as follows: "I therefore commit the defendant to custody to await her return to Hawaii for sentencing hearing" and went on to add, as he was bound to do in terms of s.10(1) of the Act (but showing the care with which he seems to have approached his obligations, at law), that "the Defendant to apply for Habeas Corpus if she considers my decision unlawful to keep her in custody to await her return to Hawaii for sentencing hearing".

Following the making of that Order, and because of the advanced state of pregnancy of the Plaintiff (she has since given birth, I was told from the Bar) the Plaintiff was allowed bail, on strict terms. I will have some comment on that issue later in this Judgment both as to the effect of that bail decision on the form of these proceedings and as to whether there is power to grant bail once an Order committing a person to custody to await return is made.

On 16 November 1995 the Plaintiff filed an application in this Court seeking leave to apply for judicial review of the Chief Police Magistrate's decision of 2 November 1995 with supporting documents including a short affidavit by the Plaintiff and a Writ and Statement of Claim. The Chief Police Magistrate was named as the First Defendant in these proceedings.

The substantive proceedings sought "an Order of Certiorari quashing the orders of Committal and all other orders made by the learned Chief Police Magistrate on the 2nd day of November 1995 and ..... an order declaring that the purported proceedings on the 26th day of October 1995 and the 2nd day of November were null and void"

As pleaded the complaints made were that, in breach of s.9(4) of the Act "at the committal hearing there was no evidence called or tendered upon which an Order for committal could be made; the learned Chief Police Magistrate however solely relied on the authority to proceed issued by the Prime Minister and the request for the return of the plaintiff which he had used when issuing the warrant for the plaintiff's arrest" .... and .... "failed and/or erred in dealing with this .... case as to hearing such evidence as is required to be produced at the hearing whereby an order can be made .... as to the committal of the Plaintiff".

As argued on behalf of the Plaintiff the complaints are 3 fold:-

i. A failure by the Chief Police Magistrate to ensure proper procedures were followed in his Court, both by the Crown and by himself.

ii. A failure by the Crown to call evidence in support of the application for extradition, in breach of s.9(4), and therefore there was no basis on which a committal order properly could be made.

iii. A failure by the Crown to call evidence identifying the person before the Chief Police Magistrate, i.e. the Plaintiff, as the person named in the various documents from Hawaii, U.S.A., and lodged in support of the extradition application; and therefore, again, a proper basis for committal was lacking.

I need, therefore, in relation to complaints (i) and (ii) above to look, first, at the Extradition Act, and the scheme contained within it; and secondly, as I go through that scheme, to look at the procedures followed here and what was placed before the Chief Police Magistrate.

The Act, I am satisfied, is a full code (and is meant to be a full code) as to matters of extradition both from Tonga, and to Tonga. It's long title spells those purposes out quite clearly; and so do the actual provisions in the Act.

I deal here only with the provisions as to extradition from Tonga, which are relevant to these proceedings.

S.3 provides that, "subject to the provisions of this Act, a person found in Tonga who is accused of a relevant offence in any other country being a country designated .... may be arrested and returned to that country as provided by this Act".

I leave out the portion of s.3 which deals with the ability to extradite a person alleged to have been "unlawfully at large after conviction". As I understand it that basis for application for extradition was not relied on here for, although it was claimed that the Plaintiff had pleaded guilty in Court in Hawaii to the first count alleged against her, yet there was no proof that a conviction had been entered against her on that count - the only records as to that aspect are in U.S. District Court minutes, under seal of that Court, recording the plea of guilty in this way: "Guilty plea entered to Count 1 of the Indictment. Court accepts guilty plea and enters judgment of guilty ... sentencing scheduled for Monday May 16 1994." There was no certificate of conviction or the like; and the minutes referred to are silent on the formal entry of a conviction or otherwise. Consequently hereafter in this Judgment I leave out any reference, from the Act, to that alternative basis of seeking extradition i.e. by proof that the person was unlawfully at large after conviction (refer eg. to s.9(4)(ii)).

To return to the scheme of the Act, Ss.4 and 5 define "designated countries" and "relevant offences" respectively (as I have previously said, neither are matters in contention here).

I will not refer to s.6 at this juncture, but will refer to it later at 2 other relevant points.

S.7 deals with a request from a designated country, to the Prime Minister, for extradition, and, the documentation which must accompany such a request. No challenge is made as to that. Nor could it be made, from what I have seen. I should add that this case is not a case to which the "streamlined procedures" (my words) contained in the proviso to s.7(2) and in s.7(2A) and s.7(2B) apply (as the necessary Order in Council, making the U.S.A. a designed country does not contain and provide for such procedure to be operative). There are indications in the transcript of proceedings before the Chief Police Magistrate that there may have been some misunderstanding by the Chief Police Magistrate as to the applicability of the proviso to s.7(2); but in view of the form and extent of the case for extradition presented and, most importantly, the Chief Police Magistrate's express findings that possible misunderstanding is of no significance - and Mr. Edwards has not argued otherwise (or at all) on this aspect. When I refer to the express findings I mean those in para.5 above as (b) and (c).

S.7 goes on to provide that on receipt of a request the Prime Minister may issue an "authority to proceed"; and that must be done if the request to extradite is to go further. An appropriate authority to proceed was issued here (on 16 October - para 2 above) and there is no challenge as to that.

Under s.6, before such an authority is issued, and indeed later in the procedures and whether in the Magistrates' Court under s.9, or in the Supreme Court under s.10, or back in front of the Prime Minister under s.11, the person before whom the relevant procedures are placed must satisfy himself that certain general restrictions against the extradition and return of the person do not apply, including in s.6(3) ensuring in effect that the person to be extradited, once extradited, will be dealt with only on the matters for which the person has been extradited. S.6(4) allows for the Prime Minister to certify as to those matters

(and those matters thereby to be "conclusive evidence"). The necessary certificate, dated 16 October 1995, was in front of the Chief Police Magistrate. Again there is (and can be) no challenge to that aspect.

S.8 then deals with warrants for arrest. There are 2 forms of such warrants, but the provisional warrant need not be dealt with here. This case does not concern such a type. The Chief Police Magistrate (as here), having received an authority to proceed, may issue "a warrant for the arrest of a person accused of a relevant offence". The form of warrant here is as set out in para.1 of this Judgment and there is no challenge to that warrant, whether as to issue, form, or execution. Again, in my view, nor could there be.

Perhaps I should state that (under s.8(2)) such a warrant may be issued "upon such evidence as would, in the opinion of the Magistrate, authorise the issue of a warrant for the arrest of a person accused of committing a corresponding offence ..... within the jurisdiction of the Magistrate". Here, it seems that the whole of the documentation from the U.S. accompanying the request to extradite, went to the Chief Police Magistrate (with the exception of the Court Minutes referred to in para. 16 above). I will review that documentation later, but suffice to say that there was ample evidence to justify the issue of a warrant.

That warrant was issued and executed on 17 October and, in accordance with the next step in the procedure (s.9(1)), the Plaintiff was brought "as soon as practicable" (here the same day) before the "Court of Committal". Again, no complaint.

Before then going on to consider s.9(4), as amended in 1993 (16/93) which is the crux of the case governing as it does the making of a committal Order, I pause to look at 2 other provisions that touch on procedures at such a hearing before the Court of Committal (i.e. the Chief Police Magistrate here).

S.9(2) says that for the purposes of proceedings under s.9 the Court "shall have the like jurisdiction and powers, as nearly as may be ..... as a magistrate's court holding a preliminary inquiry". That refers to the Magistrates' Courts Act (Cap.11) and particularly to the provisions of part III. Part III is comprehensive, containing some 15 sections, and I do not intend to review those provisions here. The most significant for the present purposes is s.34, which sets out the procedures to be followed at a preliminary inquiry, remembering that in so far as extradition is concerned such should be applied "as nearly as may be" and subject also to the provisions contained in s.13 of the Extradition Act (which I will discuss shortly, as to other ways and means of adducing evidence).

The general thrust of s.34 is for the following to take place in this order:-

> the charge to be stated; the prosecution evidence to be heard, on oath, with a right to cross-examine (by or on behalf of the accused); the right of an accused to make a sworn or unsworn statement or say nothing at all; the right of an accused to call evidence to be explained and, if requested, that evidence heard on oath; if no sufficient case made out to put accused on trial, a discharge; or if sufficient (s.38) a committal for trial.

S.13 of the Extradition Act, if relied upon (as here in this case, by the prosecution), does affect and amend "as nearly as may be" that Magistrates' Courts procedure. For that section allows, in the form of extradition proceedings under review here (but not in the "streamlined procedures" under the proviso to s.7(2) and mentioned herein in para. 19), the admissibility as evidence of certain documents if such documents are "duly authenticated". For the purposes of this case s.13(1)(a) and (b) are the really relevant

provisions. S.13(1)(a) deals with evidence on oath and says that "a document, duly authenticated, which purports to set out evidence given on oath in the designated country shall be admissible as evidence of the matters stated therein". S.13(1)(b) goes on to deal with exhibits, in effect, and says that "a document duly authenticated, which purports to have been received in evidence" (or be a copy) "in any proceeding in such country shall be admissible in evidence".

Before I go back to s.9(4) and the actual hearing (and procedures) complained of here I wish to deal with other preliminary issues which may arise. First having examined the documents (affidavits and exhibits) lodged before the Chief Police Magistrate I find all of them to be "duly authenticated" (with the exception of the Hawaii Court minutes, see para. 16) but they add nothing further at all to the information in the properly authenticated documents, in any event and I do not need to decide on the effect of s.94(e) of the Evidence Act (Cap. 15). By "duly authenticated" I mean as that term is defined in detail in s.9(2). The Chief Police Magistrate found due authentication; I do not understand Mr. Edwards to argue otherwise. Secondly I find that the 3 Affidavits submitted by the prosecution, from the assistant U.S. Attorney for the District of Hawaii (with 8 exhibits), from the Honolulu Police Department Narcotics/Vice Division Police Officer (with 2 exhibits), and from the Drug Enforcement Administration Forensic Chemist are all duly and properly given on oath, in the U.S.A.

Now back to s.9(4) which provides, inter alia (and using only the portions relevant to this case), that "where an authority to proceed has been issued .... and the Court of Committal is satisfied, after hearing any evidence tendered in support of the request .... or on behalf of that person, that the offence is a relevant offence and is further satisfied .... where the person is accused of the offence, that the evidence would be sufficient to warrant that person's trial for that offence if it had been committed within the jurisdiction of the court, the Court shall, unless his committal is prohibited by any other provision of this Act, commit him to custody to await his return thereunder; but if the Court is not so satisfied, or if the committal ..... is so prohibited, the Court shall discharge him from custody".

Again I wish to clear out of the way matters not in contention, but which I have looked at and are in order, in my view. First: the Chief Police Magistrate did make findings (see para.5 of this Judgment) which covered all (and more) of the matters he had to be satisfied with, in terms of s.9(4), before he could make an Order of committal (see items (b) and (c) in para.5 above, in particular). Secondly: the terms of the Order of committal made were in accordance with s.9(4). Thirdly: there can be no challenge to the findings as to "designated country" or "relevant offence". Fourthly: there was no prohibition in any other provision of the Act, preventing committal.

Which leaves the complaints as to (a) general procedures followed; (b) failure to hear any prosecution evidence; (c) lack of any identification evidence; leading to the claim of unlawful and/or unjustifiable committal to custody.

As to (a) and (b) the procedures followed before the Chief Police Magistrate were, put generally these as I understand it:- (a) the Solicitor General re-filing with the Court, and before it commenced the actual extradition hearing, the originals of the duty authenticated papers earlier used to obtain the warrant for the Plaintiff's arrest (the Chief Police Magistrate having retained a copy on his file), (incidentally Mr. Edwards seemed to complain about using the same papers. I see nothing wrong with that, and no difficulties

provided they are sufficient and properly authenticated. (b) copies of all such papers being given to the Plaintiff, or her counsel, - and Mr. Edwards acknowledged to me that those were available to him at the time of the hearings (particularly on the 26 October and the 2nd November). Indeed, I now have an affidavit saying that a full set was with his office on 18 October. I have seen that set. It is a full set of the properly and duly authenticated documents earlier referred to. (c) the prosecution announcing in Court that it intended to rely on those papers to make out its application for a committal order (in effect, although not expressly saying so, relying on s.13); (d) submissions from both the Solicitor General and Mr. Edwards being made on those papers and the procedures being followed (but Mr. Edwards, experienced counsel as he is, not making any request or suggestion at all that he wished to call evidence from or on behalf of the Plaintiff).

Given the provisions of s.13 as discussed in this Judgment, and given the effect that such a method of producing evidence must have on the normal procedures which would be followed if the Chief Police Magistrate were "holding a preliminary inquiry" (s.9(2), I can see no basis for real complaint in what was done here. With the necessary amendment to procedures in allowing evidence in the "duly authenticated" form (e.g. the obvious curtailment of cross examination), the hearing before the Chief Police Magistrate did follow "as nearly as may be" the form of a preliminary inquiry hearing (refer para.27 above).

It would have been better, in my view, particularly in a criminal matter affecting the liberty of the subject, and being conducted in public (as it should be; must be, I should say), if the Solicitor General had not filed (or re-filed) those duly authenticated papers until the extradition hearing itself commenced (in the public Court). Appropriately, it seems to me, he could well have announced the prosecution's reliance on the documents, referred to the effect of s.13, and handed up to the Chief Police Magistrate, through his clerk, the duly authenticated documents relied on, either reading them or summarising the contents of each of them as he went.

But having mentioned that I say that that would be my preferred way of seeing such proceedings conducted. It is no more than that - an expression of preference. In particular it does not, in any way, affect the lawfulness or justifiability of what occurred. Furthermore I must restate - the Plaintiff and her lawyer had copies of all the documents. It was not as if they were kept in the dark; were not given the materials to answer or challenge, if desired; were not prevented from answering the evidence made admisible by law and so admitted; were not prohibited from raising before the Chief Police Magistrate any of the matters mentioned in s.6 of the Act, ("General restrictions on return"), particularly in 6(1)(a)(b) and (c); were not prevented from calling evidence.

I conclude therefore that there is no merit in this procedural complaint. Nor do I see any merit in the associated complaint of a failure to hear evidence tendered in support of the request for the return. This is, indeed, a technical argument, based solely on the use of the words "after hearing any evidence" in s.9(4), and in particular the word "hearing". Mr. Edwards as I understand him in effect says: but no evidence was "heard" by the Chief Police Magistrate so how can be make an order committing? First if indeed this is a mandatory phrase as Mr. Edwards claims, and I will deal with that soon, that is to give "hearing" an extremely narrow and very restrictive meaning, and would fly in the face of s.13 and, in a case such as the present, render 13 absolutely nugatory and meaningless. "Hearing" in my view, and in the overall context of this legislation, bears a wider meaning

more akin to "receiving" - and after all hearing is just that - a form of receiving. S.13 must have some affect.

Secondly, and in any event, s.9(4) does not compel a Court of committal to hear evidence. In my view it is permissory only - and that is made clear by the reference in the same phrase to "after hearing any evidence .... on behalf of that person" (ie. the accused). The accused person (the Plaintiff here) cannot be compelled to give evidence. All the section does is to make it clear that the magistrate, acting as the court of committal, may hear evidence, whether from prosecution or defence. The important thing is that the court of committal cannot commit unless satisfied that (i) the offence alleged is a relevant one and (ii) the evidence would be sufficient to warrant the person's trial if the offence alleged was committed in Tonga. It is for the prosecution to satisfy the Court as to those, if it can. It can do so (in this type of extradition procedure), at its election, by calling evidence viva voce or by producing evidence under s.13, or by a combination of both. But I stress that that is the prosecution's election. If they choose to proceed in a certain way and do not satisfy the court then that is their misfortune. I add that s..9(4)(iii) which relates to the s.7(2) proviso "streamlined" procedure supports my view. That expressly allows a form of proof by documentary record only, yet the words "after hearing any evidence" still apply to those "streamlined" proceedings. That serves to emphasise the permissory only nature of this phrase in question here.

Here they chose to proceed in a way they were allowed to i.e. under s.13. The Chief Police Magistrate was satisfied.

I have looked at those duly authenticated materials. I have put them alongside the Chief Police Magistrate's findings. I can see no reason at all to doubt or challenge, let alone set aside, in any way, those findings on the evidence before the Chief Police Magistrate. Again perhaps it should be noted that Mr. Edwards does not challenge this aspect. In my view, there was a real sufficiency of evidence to justify the findings.

Which leaves them the question of identification of the Plaintiff - for in the discussion of the evidence, as set out in the paras. immediately above, I have left out of consideration this separate aspect.

Mr Edwards says that amongst the duly authenticated papers there was no material making a proper and sufficient linkage between the person referred to in the Affidavits and exhibits, and the person arrested on the warrant and appearing before the Chief Police Magistrate. As to that the Solicitor General at the first hearing before me accepted that, although he adopted a somewhat different stance today.

Mr. Edwards then says that the prosecution, to overcome that difficulty or gap, should have called evidence from, say, the Honolulu police officer (who had sworn I of the Affidavits - the arresting officer) to prove that the person she arrested back in January 1994 was the same person as before the Chief Police Magistrate's court of committal.

The Solicitor General in argument originally agreed that something further on identification was required and says that, subject to what I will say shortly as to an admission by the Plaintiff as to identity, and as to a photograph, then the prosecution would have had to call evidence on that issue. He told this Court that, in the court of committal, he had a witness available as to that (I do not know, properly, any details of that projected witness or evidence) but that given a discussion he had in Court with the Chief Police Magistrate he chose not to call that witness.

The proof of identification need not come only from the person to whom Mr

Edwards referred i.e. the Hawaiian arresting officer. One could speculate as to the evidence coming in various ways and just as two examples - (a) in the form of an admission by the Plaintiff, saying that she was the person who had fled Hawaii and was named in the proceedings there, and made to a police officer in Tonga when the warrant issued here was executed; or (b) in the form of similar admissions to friends or relatives in Tonga i.e. that she had absconded on bail from Hawaii whilst awaiting sentence on cocaine charges.

Here the Chief Police Magistrate said this, in the course of his formal notice of committal (which was part of his file and which, as I understand it, is the notice to the Prime Minister of the committal, so that the Prime Minister can then take the necessary administrative steps under s.11, including the issue of a warrant for the return of the person):-

"14 On the onset of the sitting of court of committal I asked for her name and she identified herself as Filita Freda Lavulo a.k.a. Freda Vete."

The Solicitor General indicated, in argument, that he had addressed the Chief Police Magistrate on the matter of identification at an early stage and that the Chief Police Magistrate had "directed" that he had established from the Plaintiff that she was the person to whom the extradition documents related and that, therefore, there was no dispute as to the identity of the Plaintiff.

The transcript (which seems to be a full and complete one) of the various appearances of the Plaintiff before the Chief Police Magistrate shows this exchange on her first appearance (on 17 October):

"Court: Ko koe Filita Freda Lavulo a.k.a. Freda Vete 'oku ha 'i he lekooti hopo?

Deft: 'Io."

Translated into English the exchange is (and this translation seems to be accepted by both Counsel here):-

"Court: Are you Filita Freda Lavulo a.k.a. Freda Vete as shown in the record of this case?

Deft: Yes."

Subsequently there appears to have been no challenge, or at least any real challenge, made by Mr. Edwards on behalf of the Plaintiff as to this issue of identity. (I, of course, recognise that it was not for the Plaintiff to prove or disprove anything). Nothing was said as to that issue, at all, on either the 18 or 19 October.

The question of identification was briefly mentioned at the later hearing on the 26 October in this way (translated):- (the Chief Police Magistrate first having gone through the history and the documents in painstaking detail):-

Court: "The accused was arrested and brought before me. I then asked her if that was her name which appears in the record and she told me yes."

Later the Solicitor General said this "You mentioned that the accused said that she was the person wanted. Presumably that is sufficient. The identity of the accused is not disputed". The challenge having been squarely laid, one would have thought that, if in fact identity was in dispute, then Mr. Edwards would have immediately risen to it and squarely stated that to be so, despite the earlier admission made in the face of the Court. But his submissions related to the doumentary procedure adopted and its perceived (by him) shortcomings. The Solicitor General then replied, not touching on the matter of identity - responding only to the issues Mr. Edwards had raised. Mr. Edwards was then

allowed another say and it is then that he said that there should be evidence called to show whether this is the same person (in Court) as in the U.S. papers, or not (because that, he said, is what happens in New Zealand). Significantly he does not deal at all with the admission by his client or what the Chief Police Magistrate had said as to that.

In addition, and reinforcing my view that there was indeed, before the Chief Police Magistrate, probable cause established to believe that the Plaintiff was the person named in the U.S. papers, there was amongst the exhibits to the arresting police officer's duly authenticated affidavit, a photograph of a person who the arresting officer "positively" identified as "being Filita Freda Lavulo also known as Freda Vete", and that photograph appeared to be a photograph of the Plaintiff.

Those matters led then to the finding by the Chief Police Magistrate that the Plaintiff was in fact the person referred to in the duly authenticated documents from Hawaii. Given the clear and quite unequivocal acceptance of that by the Plaintiff herself, before the Chief Police Magistrate, I cannot see how any other finding could be (or should have been) reached. Again I find no merit to Mr. Edwards' complaint.

Which disposes of the matter, on the bases it was agreed. But I want to cover a number of other matters for completeness (and with some of them perhaps for future guidance).

As I have had this matter before me I have chosen to look at all procedural and other aspects to make sure there are no deficiencies, other than those claimed and dealt with. And here I should say that, in traversing all the matters above and in commenting on the following, I have treated the Plaintiff's application as in effect being one for habeas corpus.

For completeness therefore I find no impediment to the Plaintiff's extradition, in these circumstances, when measured against:-

(a) the criteria in s.6(1)(a)(b) or (c); or

(b) the criteria in s.10(3)(b) or (c).

And I find nothing unlawful or unjustifiable in what was done here.

Accordingly I refuse to grant leave to the Plaintiff to apply for judicial review. I add that both Counsel were invited, and accepted the invitation, to argue the merits of the matter rather than argue matters in 2 parts i.e. as to leave and as to merits. But, in refusing leave, I do so, as can be seen above, after full consideration of the merits.

I come now to the reasons why leave was not granted, ex parte, at the commencement of these proceedings (for certiorari). At the very outset, when first placed in front of me, by minute of 17 November 1995, I expressed uncertainty as to the Plaintiff's mode of proceeding stating that "a committal, if made, must be a committal to custody to await return. There are then rights to apply for habeas corpus. What right/power is there to grant bail? Query does s.9(2) apply?" I asked that the Defendants be put on notice.

My reservations as to the form of proceedings before me continue. I have indicated those reservations to Mr. Edwards several times. He has chosen not to take habeas corpus proceedings and in effect run them in tandem with the judicial review proceedings, as alternatives. So be it. It is his (or his client's) choice.

Having determined the matter on the merits, and I add, that result being the same whether the proceedings be judicial review or habeas corpus, I go on to add that (and this aspect was argued before me) the proceedings are miscast and must fail on the procedural aspects in any event.

Mr. Edwards says that he had no option but to take judicial review proceedings as habeas corpus proceedings are inappropriate, his client being on bail.

The Act in my view clearly envisages one means, and one means only, of review of an order for committal "to custody to await his return" i.e. by application for habeas corpus. I point to:

(a) the definition in s.2 of "application for habeas corpus"

(b) the whole of s.10 (and the right to appeal from any habeas corpus proceedings to the Court of Appeal)

(c) the effect of habeas corpus proceedings on subsequent administrative steps eg. in s.11 and s.12.

(d) the inclusion of reference to habeas corpus proceedings in s.13 dealing with alternative modes of evidence.

And habeas corpus is the "classical" means of fully reviewing all issues likely to arise in extradition cases. As our Supreme Court Rules O.26 r.1 puts it "This order applies to an application for an order for the release of any person from unlawful or unjustifiable restraint or detention (in this order referred to as "a writ of habeas corpus")".

That encapsulates exactly Mr. Edwards' complaints here. He says the order made, on 2 November, by the Chief Police Magistrate committing his client "to custody to await her return to Honolulu Hawaii for sentencing hearing" was "null and void" and should be "quashed" as in breach of the law.

Habeas corpus, despite the admission to bail, subsequent to the committal, for humanitarian reasons, in my view was the appropriate and only allowed vehicle under the Act, for review. The Plaintiff was committed to custody; sooner or later, if extradition was to be complete, she had to to return to that custody (which Mr Edwards says was unlawful) for the ordered and compulsory return to Hawaii.

I have very real reservations about the ability of the Chief Police Magistrate to grant bail after the order of committal. I have reached a concluded view on this issue but note that (i) it is not necessary in this case now, as it has fallen; and (ii) that issue has not been fully argued before me.

Bail was spurportedly allowed under s.9(2) (for the very best and most understandable of reasons - and there is no criticism meant of anyone, and certainly not of the Chief Police Magistrate, over this). S.9(2) says inter alia, that a magistrate has like power "to remand in custody or on bail" as if holding a preliminary inquiry. That certainly gives a power to remand (and I stress that word) in custody or on bail, but remands can only relate in this context (and "as nearly as may be") to the postponement or deferment of proceedings up until the making of the order of committal to custody for return. From then on the Magistrate is functus officio. He has no further jurisdiction. The order is made - it must be an order committing to custody, as a matter of law. The matter is then out of his hands. Reinforcement for my view is to be found in s.14(1) and the distinction there made between remanded to custody and committed to custody. S.9(2) relates only to remands on bail and not to committals on bail.

And the scheme of the Act, in the steps that follow, make it clear that the person must be in custody. I look at:-

(i) the words used in s.10(1) "committed to custody", requiring then the explanation of habeas corpus.

(ii) the same words in s.10(2), prescribing a minimum "waiting period" to allow

habeas corpus proceedings to be started (although I note that, even if the 15 days waiting period has expired without such proceedings being started, if the person is still in the Kingdom awaiting his return to actually take place, he would still be able to make an application for habeas corpus, and then the prohibition against his return until completion of those proceedings would apply - 15 days is only a minimum period).

(iii) S.10(3), and the reasons spelt out as to why a person can be "discharged from custody" by this Court.

(iv) S.6(3), and the reasons for not committing or keeping a person "in custody for the purposes of such return".

(v) S.11(1) - a person has to be "committed to await his return and not discharged by order of the Supreme Court" before the Prime Minister may issue a warrant ordering the return.

(vi) S.12(1) - if a person is still in custody in Tonga awaiting his return after certain time limits have expired then he may apply to this Court for a discharge. (As an aside, if Mr Edwards is right with his argument that his client although on bail, was not in custody, then of course the client would have no rights to e.g. apply to be discharged under s.12. That, with respect, would be an absurd result).

(vii) S.14(12) dealing with where persons in custody should be held and drawing the distinction made between remanded to custody and committed to custody

I therefore conclude that::-

(a) for procedural reasons the Plaintiff must fail - her proceedings are miscast, and
if a review was wanted it should have been by an application for habeas corpus. Leave to apply for judicial review is refused.

(b) I doubt the validity of her present bail.

(c) in any event, and notiwithstanding her procedural difficulties the order committing her to custody to await her return to Hawaii for sentencing hearing was both justifiable and lawful.

These proceedings will be dismissed. I direct that the file of the Chief Police Magistrate should be returned to his office. I will wish to hear from Counsel as to costs in these circumstances. There are some general issues, here, which are important and have, hopefully, been illuminated. The grant of bail, in my view, wrongly, has not aided the passage of these proceedings but that should not be visited on the Plaintiff.

Having heard counsel I reserve all issues of costs. Leave to be heard further, on 5 vs notice, granted.