The Court of Appeal for Bermuda

CIVIL APPEALS No. 20 of 2006 and 15 of 2007

Between:

JOHN DEUSS

Appellant

-v

THE ATTORNEY GENERAL et al

Respondent

Before: **Hon. Justice Zacca, President**
Hon. Justice Evans, JA
Hon. Justice Stuart-Smith, JA

Date of Hearing: **17th & 18th March 2008**
Date of Judgment: **25th April 2008**

Evans, JA

Judgment

1. These are consolidated appeals against two judgments of Wade-Miller J. dated 8 December 2006 and 20 July 2007, by which she upheld the validity of a provisional Warrant for the arrest and extradition to the Netherlands of the Appellant, John Deuss. The Warrant was issued by the Magistrate on 29 September 2006.

2. The issues raised are (1) whether the Magistrate had jurisdiction to issue the Warrant, and if so, (2) whether it was nevertheless invalid for failing to specify an "extradition crime"

meaning a crime or alleged crime in respect of which extradition from Bermuda to the Netherlands may lawfully be ordered.

3. The request for extradition was made by the Government of the Netherlands. It is recorded in the Warrant as follows –

> *"WHEREAS it has been shown to the undersigned, one of Her Majesty's Magistrates that [Mr. Deuss] is accused of the Extradition Crimes of Handling Stolen Property, Deliberate/Habitual Laundering, and being in Charge of Criminal Organisation within the jurisdiction of the Kingdom of the Netherlands."*

4. The Warrant continued –

> *"AND WHEREAS Information has been presented to me which would, in my opinion, authorise the issue of a warrant for the arrest of a person accused of committing a corresponding offence within the jurisdiction of Bermuda."*

5. Both Miss Clare Montgomery QC for the Appellant and Ms. Paula Tyndale, Senior Crown Counsel appearing for the DPP, in their admirable submissions, reviewed the history of extradition legislation in the United Kingdom and in Bermuda as the background to the two specific issues. We shall adopt the same approach in this Judgment.

6. Extradition – namely, the power to order the arrest of a person within the jurisdiction, at the request of another nation, on the ground that he is accused of or has been convicted of a crime within that other jurisdiction – is entirely the creature of statute. For present purposes, the story begins with the Extradition Act 1870 enacted by the United Kingdom Parliament. This adopted what may be called the classic scheme, which depended on the existence of bilateral treaty obligations between the United Kingdom and the foreign state in question, and which observed the separation of powers between the treaty-making power of the Sovereign and the law-making power of Parliament.

7. Section 2 of the Act provided –

   "2. **Where arrangement for surrender of criminals made, Order in Council to apply Act**

   Where an arrangement has been made with any foreign state with respect to the surrender to such state of any fugitive criminals, Her Majesty may, by Order in Council, direct that this Act shall apply in the case of such foreign state.

   Her Majesty may, by the same or any subsequent order, limit the operation of the order, and restrict the same to fugitive criminals who are in or suspected of being in the part of Her Majesty's dominions specified in the order, and render the operation thereof subject to such conditions, exceptions, and qualifications as may be deemed expedient.

   Every such order shall recite or embody the terms of the arrangement ……………".

8. The power to arrest and surrender fugitive criminals was specified in section 6-

   "6.Where this Act applies in the case of any foreign state, every fugitive criminal of that state who is in or suspected of being in any part of Her Majesty's dominions, or that which is specified in the Order applying this Act (as the case may be) shall be liable to be apprehended and surrendered in manner provided in this Act…….."

9. "Fugitive criminal" was defined in section 26 of the Act, together with "extradition crime" which forms part of the definition –

   "The term "extradition crime" means a crime which, if committed in England or within English jurisdiction, would be one of the crimes described in the first schedule to this Act;"

   "The term "fugitive criminal" means any person accused or convicted of an extradition crime committed within the jurisdiction of any foreign state who is in or suspected of being in some part of Her Majesty's dominions;……".

10. The first schedule to the Act provided as follows –

> "LIST OF CRIMES
>
> The following list of crimes is to be construed according to the law existing in England, or in an English possession (as the case may be), at the date of the alleged crime, whether by common law or by statute made before or after the passing of this Act;
>
> > Murder, and attempt or conspiracy to murder
> >
> > Manslaughter
> >
> > [other generic descriptions of criminal activity of various kinds, including e.g. "Crimes by bankrupts against bankruptcy law"]."

11. For the purposes of the Act, Bermuda was within the definition of "British possession" in section 26. The operative provision regarding the application of the Act in Bermuda was section 17 –

> "17. **Proceedings as to fugitive criminals in British possessions**
>
> This Act, when extended by Order in Council, shall, unless it is otherwise provided by such order, extend to every British possession in the same manner as if throughout this Act the British possession were substituted for the United Kingdom or England, as the case may require, but with the following modifications: namely
>
> > [requisitions to be made to the Governor, and the Governor to exercise the powers given to the Secretary of State, etc.]"

12. It is also necessary to note section 8 of the Act, which provided for the issue of a warrant by a police magistrate on receipt of instructions from the Secretary of State (section 8 paragraph 1) and also empowered the magistrate to issue a provisional warrant "on such information or complaint and such evidence or after such proceedings as would in the opinion of the person issuing the warrant justify the issue of a warrant if the crime had been committed or the criminal convicted in that part of the United Kingdom in which he exercises jurisdiction………" (section 8 paragraph 2). A magistrate's provisional warrant was required to be reviewed by the Secretary of State.

13. The Extradition Act 1873 of the United Kingdom contained certain supplementary provisions, and a significant addition to the List of Crimes in the first schedule to the 1870 Act. The list had to be read as if it included the following –

    "Kidnapping and false imprisonment

    Perjury, and subordination of perjury, whether under common or statute law

    Any indictable offence under the Larceny Act 1861, or any Act amending or substituted for the same, which is not included in the first schedule to the principal Act [followed by similar references to e.g. the Malicious Damage Act 1861, the Forgery Act 1861, the Offences against the Person Act 1861, and other United Kingdom statutes]."

14. These statutory developments were noted and acted upon in Bermuda, where the Extradition Act 1877 conferred "All powers vested in, and acts authorised or required to be done by, a Police Magistrate or any Justice of the Peace in relation to the surrender of fugitive criminals in the United Kingdom, under the Extradition Acts, 1870 and 1873, are hereby vested in, and may in Bermuda be exercised and done by, any magistrate, in relation to the surrender of fugitive criminals under the said Acts" (section 1).

Application to the Netherlands

15. The procedure provided for in section 2 of the 1870 Act was duly followed when a Treaty was concluded "between Her Majesty and the Queen of the Netherlands, for the mutual extradition of fugitive criminals" on 26 September 1898. The Treaty was ratified on 14 December 1898, and by Order in Council No.83 of 1899, dated 2 February 1899, "Her Majesty, by and with the advice of Her Privy Council, and in virtue of the authority committed to her by the said recited Acts, doth order, and it is hereby ordered, that from and after the fourteenth day of March 1899, the said Acts shall apply in the case of the Netherlands, and of the said Treaty with the Queen of the Netherlands:………".

16. The 1899 Order set out the terms of the 1898 Treaty, among them Article II which contained a list of 28 numbered crimes, all described generically. The list was prefaced

by "The crimes or offences for which the extradition is to be granted are the following", and each was given in English and in the Dutch language. Article II concluded –

> "In the foregoing cases extradition shall take place only when the crime, if committed within the country on which the claim for surrender is made, would constitute an extradition crime by the laws of that country.
>
> Extradition may also be granted at the discretion of the State applied to in respect of any other crime for which, according to the laws of both the Contracting Parties for the time being in force the grant can be made."

17. Also relevant is Article XVIII –

> "Article XVIII
>
> The stipulations of the present Treaty shall apply to the Colonies and foreign possessions of the two High Contracting Parties, but being based upon the legislation of the mother country, shall only be observed on either side so far as they may be compatible with the laws in force in those Colonies or possessions……."

18. The effect of the 1898 Order, therefore, was to apply the 1870 Act, as amended in 1873, as part of the law of the United Kingdom in the case of the Netherlands, and by virtue of section 17 the Act was extended to every British possession, including Bermuda, with the procedural modifications listed in section 17 sub-sections (1) to (4) (but with the exception of Canada which was expressly excluded from the Treaty).

(1) JURISDICTION

19. All parties to the present appeal accept that the Bermudian magistrate had jurisdiction under these pre-1900 enactments to issue a warrant under the 1870/1873 Extradition Acts at the request of the Netherlands, when the statutory requirements were satisfied. The Respondent contends that that remains the position today. The issue raised on behalf of the Appellant is whether those statutory arrangements remain in force between Bermuda

20. A new extradition regime was introduced by the Extradition Act 1989. This was described in its long title as "An Act to consolidate enactments relating to extradition under the Criminal Justice Act 1988, the Fugitive Offenders Act 1967 and the Extradition Acts 1870 to 1935, with amendments to give effect to recommendations of the Law Commission and the Scottish Law Commission". Two noteworthy features of the new regime were, first, that the 1989 Act was concerned with extradition arrangements between the United Kingdom and foreign states and with those between the United Kingdom and other Commonwealth countries. Secondly, the definition of extradition crimes by reference to a statutory List of Crimes was replaced by the formula "an offence punishable with imprisonment for a term of twelve months, or any greater punishment" (section 2(1) (a)). The 1870/3 Acts were repealed (section 37(1) and Schedule 2), but section 37(3) provided –

> "(3) The repeal of this Act of the Extradition Act 1870 does not affect an Order in Council made under section 2 of the Act or the power to revoke or alter such an order."

This provision reflected section 1(3) of the Act which provided –

> "1(3) Where an Order in Council under section 2 of the Extradition Act 1870 is in force in relation to a foreign state, Schedule 1 to this Act (the provisions of which derive from that Act and certain associated enactments) shall have effect in relation to that state, but subject to the limitations, restrictions, conditions, exceptions and qualifications, if any, contained in this Order."

21. In short, the 1989 Act established a new extradition regime which could be introduced by an Order in Council made under the Act in cases where appropriate arrangements were in place with a foreign state (section 3) or a Commonwealth State (section 4), but it also

provided that existing arrangements under the 1870/3 Acts should remain in force. The legislative technique of repealing the earlier Acts but giving them a new lease on life where existing arrangements were in place probably means that technically it was correct for the Warrant in the present case to be headed with a reference to the Extradition Act 1989. We need not rule on this matter because no issue as to the heading was raised before us.

22. The 1989 Act in fact reflected the terms of the European Convention on Extradition which had been agreed and opened for signature by Members of the Council of Europe in Paris as long before as 13 December 1957. This was a multi-lateral treaty arrangement which replaced the scheme based on bilateral arrangements embodied in the earlier Acts. Although most of the parties to the Convention by 1990 were European States and members of the European Union, not all of them were; they included Iceland, Israel and Turkey.

23. The United Kingdom acceded to the Convention in 1990 and its terms were given effect in domestic law as regards other states parties to the Convention by an Order in Council made under section 4 of the 1989 Act (corresponding to section 2 of the 1870 Act). This, the European Convention on Extradition Order 1990, was made on 24 July 1990. It provided as follows –

> "2.-(1) Subject to the provisions of this Order, the 1989 Act, so far as it relates to extradition procedures under Part III of that At, shall apply as between the United Kingdom and any foreign State, party to the Convention, which is listed in Part I of Schedule 2 to this Order; and any such State is in this Order referred to as a "Convention State".
>
> …………………………………………………..
>
> 4. The operation of this Order is limited to the United Kingdom, the Channel Islands and the Isle of Man.
>
> 5. (1) Subject to the following provisions of this article, the Orders listed in Schedule 5 to this Order are hereby revoked.

(2) Notwithstanding the foregoing paragraph, the Orders listed in Schedule 5 to this Order shall continue to have effect

(a) for the purposes of disposing of any requisition for the surrender of a fugitive criminal to a Convention State in respect of which an order under paragraph 4(2) of Schedule 1 to the 1989 Act was made before this Order came into force;

(b) insofar as they relate to extradition between any territory for whose international relations a Convention State is responsible, but to which the Convention does not apply, and the United Kingdom, the Channel Islands, the Isle of Man or any colony."

24. The list of states who were parties to the Convention included the Netherlands (Schedule 2 Part I). Article 27 of the Convention provided –

"TERRITORIAL APPLICATION

1. This Convention shall apply to the metropolitan territories of the Contracting Parties.

2. ……….in respect of the United Kingdom of Great Britain and Northern Ireland, [it shall also apply] to the Channel Islands and to the Isle of Man."

Article 28 provided –

"RELATIONS BETWEEN THIS CONVENTION AND BILATERAL AGREEMENTS

1. This Convention shall, in respect of those countries to which it applies, supersede the provisions of any bilateral treaties, conventions or agreements governing extradition between any two Contracting Parties",

and the respective "Reservations and Declarations" made by the Netherlands and the United Kingdom on acceding to the Convention included the following –

> "NETHERLANDS
>
> **Declaration made at signature**
>
> …. the term "metropolitan territories" used in paragraph 1 of Article 27 of the present Convention……shall be deemed to signify, so far as concerns the Kingdom, "European Territory"."
>
> (Schedule 3 to the 1990 Order)
>
> "UNITED KINGDOM
>
> **Article 28**
>
> This Convention supersedes the provisions of bilateral treaties between the United Kingdom and other Contracting Parties only to the extent that the Convention applies, by or under Article 27, to the United Kingdom, the Contracting Parties, and any territories for whose international relations the United Kingdom or the Contracting Parties are responsible."
>
> (Schedule 4 to the 1990 Order).

25. Against this background, Schedule 5 to the 1990 Order, listing the Orders revoked under Article 5 (supra), included –

    > "Order in Council dated February 2 1899 directing that the Extradition Acts shall apply in the case of the Netherlands (S.R.& O. 1899)",

    i.e. what we have called "the 1899 Order".

26. The overall objective of these complex provisions is clear. The European Convention was to come into force between the United Kingdom and other states who were parties to it, but only in respect of their respective "metropolitan territories". Between the United Kingdom and the Netherlands, as regards those territories, the 1898 Treaty and the 1899 Order made under the 1870/1873 Acts ceased to apply. However, as the United Kingdom reservation made clear, the 1898 Treaty was superseded by the Convention "only" to the extent stated in the reservation, and Miss Montgomery accepts on behalf of the Appellant

that the 1898 Treaty remains in force between the two countries in respect of their non-metropolitan territories, including Bermuda. But she submits that the possibly unintended effect of Article 5 of the 1990 Order was to revoke the 1899 Order altogether even as regards Bermuda (and other non-metropolitan territories) subject only to the express reservations stated in Article 5(2) itself. If that were correct, it would mean that despite the 1898 Treaty obligations remaining in force between the two states, as regards non-metropolitan territories including Bermuda, they would no longer have the force of law in the United Kingdom, or in Bermuda (and incidentally, the United Kingdom would have been in breach of its international obligations, at least as regards Bermuda, ever since).

27. The first question is whether either of the two express reservations in Article 5(2) permits the continued application of the 1899 Order, as regards the United Kingdom's overseas territories, in the case of the Netherlands. Sub-Article 5(2)(a) applies only to cases pending in 1990, but sub-Article 5(2)(b) is in more general terms –

> "(b) insofar as they relate to extradition between any territory for whose international relations a Convention State is responsible, but to which the Convention does not apply, and the United Kingdom, the Channel Islands, the Isle of Man and any colony".

28. As Miss Montgomery astutely points out, this provision has to be read in the light of the definition of "Convention State" in Article 2(1) which limits it to "any foreign State, party to the Convention". Therefore, the saving only applies as regards "any territory for whose international relations [the Netherlands] is responsible", on the one hand, and "the United Kingdom etc." on the other hand. It does not apply as regards the Netherlands itself. It follows from this, she submits, that the 1899 Order was revoked by Article 5(1) and no longer has effect in the present case.

29. We agree that the savings in Article 5(2) are not relevant, but in our judgment the argument overlooks the overriding effect of Article 4. "The operation of this Order is limited to the United Kingdom, the Channel Islands and the Isle of Man". That limit applies to Article 5 as it applies to the rest of the Order. Therefore, Article 5(1) does not

revoke the 1899 Order as regards territories for whose international relations the United Kingdom is responsible but which are outside the "metropolitan area" defined in Article 4. The drafting is not as clear as it might have been, and the lack of clarity derives in part from the technique of wholesale revocation followed by partial rehabilitation which is apparent in the 1990 Order as it is in the 1989 Act. Nevertheless we conclude without difficulty that the repeal of the 1899 Order by Article 5(1) was subject not only to the express savings in Article 5(2) but also to the overriding limitation in Article 4.

30. This interpretation of the 1990 Order is supported by the terms of the later Order which extended the application of the European Convention to Dependent Territories of the United Kingdom. This was the European Convention on Extradition (Dependent Territories) Order 1996 (S.I.1996 No. 2875). The Dependent Territories listed in Schedule 1 Part II included Bermuda, but the "States Parties to the Convention" listed in Schedule 1 Part I did not include the Netherlands. Nor was the 1899 Order relating to that country included in the list of "Orders Partially Revoked" in Schedule 3.

31. The apparent scope of the 1996 Order was limited to relations between the named Dependent Territories and the named Convention States. The operative part was Article 2(1) reading as follows –

> "2(1) In relation to the countries listed in Part I of the Schedule, and subject to the following provisions of this Order, the operation of the principal Order shall extend to the territories listed in Part II of that Schedule".

Article 2(1) had no effect, therefore, in relation to the Netherlands, which was not listed in Part I, even though Bermuda was one of the territories listed in Part II.

32. However, Article 2(2) provided –

> "(2) Article 4 of the principal Order (providing for extent) is hereby revoked."

The qualifying words in Article 2(1) "in relation to the countries listed in Part I" do not appear in Article 2(2). Grammatically, therefore, Article 2(2) appears not to be subject to

them; but if that were the correct interpretation, the sub-Article would have the effect of revoking Article 4 of the 1990 Order for all purposes, including ones which were outside the scope of the Preamble to the Order, and despite the qualification in Article 2(1), with the remarkable result that extradition arrangements which were expressly preserved by Article 4 of the 1990 Order, insofar as they related to United Kingdom's overseas territories, and which were outside the scope of the 1996 Order, were revoked by that Order in 1996. That extravagant result is avoided by interpreting Article 2(2) of the 1996 Order as being subject to the same limitation as Article 2(1), and we hold that that interpretation is correct.

33. Finally, for the sake of completeness, we should record that a further fresh approach to extradition legislation was introduced by the Extradition Act 2003 following the Framework Decision of the Council of the European Union on 13 June 2002 regarding the European Arrest Warrant and the surrender procedures between Member States (2002/584/JHA). This Act can be extended to British Overseas Territories by Order in Council under section 177, but no such Order has been made in respect of Bermuda.

34. For these reasons, we hold that the extradition arrangements established between Bermuda and the Netherlands under the Extradition Acts 1870/3 by the 1899 Order in Council following the 1898 Treaty between the United Kingdom and the Netherlands have not been revoked by subsequent legislation, and they continue to apply.

(2) EXTRADITION CRIMES

35. The second appeal raises practical issues of considerable general importance. It concerns the correct approach for the Bermudian Magistrate, and Courts, to adopt to the question whether the crime which the person against whom an extradition order is sought has committed or is alleged to have committed in a foreign state is an "extradition crime" in respect of which his arrest and surrender can properly be ordered.

36. As Miss Montgomery helpfully reminded us, it would be a mistake to consider this issue in terms of "double criminality". Notwithstanding the reciprocal basis on which

extradition arrangements, particularly bi-lateral treaties, are habitually concluded between states, as a matter of domestic law a clear distinction is drawn between the crime committed under a foreign law and in a foreign state, and the question whether the alleged misconduct would constitute an extraditable offence if it took place within the domestic jurisdiction.

37. This was exemplified by the leading judgment of the House of Lords, contained in the speech of Lord Diplock, in *In re Nielsen* [1984] A.C.606. Previously, "So far as living memory stretches it appears to have been the invariable practice of the requisitioning foreign government…….to call expert evidence of its own criminal law in order to prove that what the fugitive criminal is accused of having done, within the jurisdiction of its courts, is not only criminal under its domestic law but is also a crime that is "substantially similar" (or "similar in concept") to one or more of the English crimes [contained in the relevant statutory list] and reproduced in the English language version of the extradition treaty with that state" (page 622B).

38. The House of Lords held that the practice was unjustified. The correct approach was stated as follows –

> "At the hearing, ……the magistrate must first be satisfied that a foreign warrant [as defined] has been issued for the accused person's arrest and is duly authenticated in a manner for which [section 15] provides. Except where there is a claim that the arrest was for a political offence or the case is an exceptional accusation case, the magistrate is not concerned with what provision of foreign criminal law (if any) is stated in the warrant to be the offence which the person was suspected of having committed and in respect of which his arrest was ordered in the foreign state.
>
> The magistrate must then hear such evidence……as may be produced on behalf of the foreign requisitioning government, and by the accused if he wishes to do so; and at the conclusion of the evidence the magistrate must decide whether such evidence would,

> *according to the law of England*, justify the committal for trial of the accused for an offence that is described in the 1870 list [as amended] provided that such offence is also included in the extraditable crimes listed in the English language version of the extradition treaty. In making this decision it is English law alone that is relevant……" (page 624F).

39. It was correct, therefore, for the Magistrate to record in this Warrant that "it has been shown…that [Mr. Deuss] is accused of Extradition Crimes of Handling Stolen Property…….within the jurisdiction of the Netherlands" (quoted in full in paragraph 4 above). He then embarked on his inquiry into whether "the Information presented to me…….would authorise the issue of a warrant for the arrest of a person accused of committing a corresponding offence within the jurisdiction of Bermuda" (ref. paragraph 5 above). It might have been more accurate to refer to "extradition crime" rather than "a corresponding offence" because it is important not to emphasize the "double criminality" aspect, but with that amendment his objective in our view was correct.

40. The inquiry can be limited to "Handling Stolen Property" because Ms. Tyndale for the DPP does not contend that the other alleged crimes mentioned in the warrant can be regarded as "extradition crimes" if committed in Bermuda, and it appears to be common ground that the Warrant is valid if that allegation alone is justified.

41. The judgment in *In re Nielsen* was also concerned with the interpretation by a British magistrate of the "List of Crimes" contained in the schedules to the 1870 and 1873 Acts. Lord Diplock described the correct approach as follows-

> "It is, however, appropriate at this juncture to draw attention to the fact that when one is describing crimes committed in a foreign state that are regarded in the United Kingdom as serious enough to warrant extradition of the offender by whom they have been committed, one is describing the way in which human beings have conducted themselves and their state of mind at the time of such

> conduct. Since conduct of those kinds consists of wicked things that people do in real life it is possible to describe them either in broad generic terms and using popular language, or in varying degrees of specificity, as had been done in minute detail, nine years before the Act of 1870 itself was passed, in the five Acts that had been passed in 1861, consolidating and amending the statute law of England relating to criminal offences of larceny [etc.]. These Acts condescended to minute detail in their descriptions of numerous distinct offences included within the broad genus of crimes with which, as their titles indicate, each Act dealt…….
>
> The 1870 Act uses the former technique. It describes each of the list of 19 "extradition crimes" in general terms and popular language…….So the 1870 list covered all offences under the [1861 Acts] that fell within any of the 19 genera of conduct described in the list………..The 1870 list would not extend to offences created by any of the Acts of 1861 which did not fall within any of these generic descriptions. The list in the Schedule to the Act of 1873 as well as adding two additional genera to the list of extradition crimes …..filled these lacunae by adding to the list any indictable offence under any of the [five 1861 Acts] which is not included in Schedule 1 to the [1870 Act].
>
> The list in the Act of 1873 has been subsequently amended by replacing the reference to the Larceny Act by a reference to the Theft Acts 1968 and 1978………"(page 614H).

42. It is also necessary to have regard to the terms of the extradition arrangements between the United Kingdom and the relevant foreign state. Lord Diplock referred to his speech in the earlier House of Lords decision in *Reg. V. Governor of Pentonville Prison ex p. Sotiriadis* [1975] A.C.1 in which he said –

> "(2) that the magistrate's jurisdiction and powers under the Acts are subject to such limitations, restrictions, conditions, exceptions

> and qualifications as may be provided for in the extradition treaty with the particular foreign state. [His jurisdiction] cannot be extended beyond [the maximum stated in the Acts] but it may be limited…by the terms of the extradition treaty with that state" (page 616E).

43. The question whether the alleged offence of "handling stolen property" is included in the statutory lists is complicated by the fact that when the reference to the Larceny Act 1861 in the schedule to the 1873 Act was replaced by "the Theft Act 1968" (Theft Act 1968 Schedule 2 Part II) the 1870 Act was also amended, under the heading "Consequential Repeals", by deleting various of the generic descriptions of crimes, including "embezzlement and larceny" (Theft Act 1968 Schedule 3 Part III). The statutory list in the 1870/1873 Acts, therefore, as amended, no longer includes any generic category which even arguably could include the offence of "handling stolen goods".

44. However, the statutory list, as amended, includes "any indictable offence under the Theft Act 1968" and "handling stolen goods" is one such offence. A British magistrate would necessarily conclude, therefore, that the alleged offence was included in the statutory lists, in a case where the 1870/1873 Acts still applied and as a matter of English law.

45. The primary objective of the Bermudian magistrate is to determine whether the alleged misconduct, if committed in Bermuda, would have constituted a crime included in the statutory lists, as amended. He would have no difficulty in concluding that "handling stolen goods" is a crime under Bermudian law, as it has been since before 1870. The Offences against Property Act, 1839, made "receiving stolen goods" a crime, including provision for the person concerned to be charged with being an accessory after the fact, presumably to the offence of larceny itself. This was followed by the Bermuda Criminal Code in 1907, and the present law is to the same effect as the Theft Act 1968. The offence charged against the Appellant in the Netherlands has at all times been an offence under Bermudian law, if committed in Bermuda. However, the question remains whether the Bermudian crime is one of those included in the amended statutory list.

46. Miss Montgomery submits that it is not, and cannot be, because the statutory list includes no relevant generic description, and the reference to the Theft Act 1968 is one which must be interpreted with the high degree of specificity to which Lord Diplock referred in *In re Nielsen*. The Theft Act 1968 does not apply in Bermuda; therefore, she contends, the list does not include the specific crime which would have been committed, if the alleged offence had taken place in Bermuda.

47. We remind ourselves that under section 17 the 1870 Act extends to Bermuda "in the same manner as if throughout this Act [Bermuda] were substituted for the United Kingdom or England, as the case may require", and that in both the 1870 and the 1873 Acts the List of Crimes in the schedules is prefaced by "The following list of crimes is to be construed according to the law existing in England, or in a British possession (as the case may be) at the date of the alleged crime, whether by common law or by statute made before or after the passing of this Act". This expressly authorised the Bermudian magistrate to consider whether alleged offence was a crime under Bermudian law, and where the descriptions were generic this presented no difficulty. It is only when the relevant description is specific, as opposed to generic, that it can be argued that the list must be interpreted, even by a Bermudian magistrate, as specifying the English crime only.

48. We were informed that this issue has not been raised, so far as is known, in any reported case, and there is no authority to guide us. We observe that, if the argument were correct, it would mean that the Bermudian magistrate, though satisfied that the alleged misconduct was both an offence under Bermudian law, if committed in Bermuda, and under the Theft Act, if committed in England, would have no power to regard it as an extradition crime or to issue a warrant in respect of it.

49. We also respectfully observe that *In re Nielsen* was not concerned with the powers of a magistrate outside the United Kingdom who is authorised to act by section 17 of the 1870 Act, nor with the effect of the introductory words "the law existing …. in a British possession (as the case may be)" which prefaced the List of Crimes in the schedules to

both Acts on the crimes described specifically by reference to the relevant English statutes.

50. In our judgment, these words require the Bermudian magistrate to have regard to the corresponding Bermudian legislation in relation to the specific crimes listed by reference to the United Kingdom Acts, and this approach is not inconsistent with the approach approved for the English magistrate in *In re Nielsen.* To hold otherwise would, it seems to us, be inconsistent with the object of section 17 of the 1870 Act and of the introductory words to the schedules of both Acts, that *mutates mutandis* the Bermudian Magistrate should be the same position as his English counterpart. Moreover, by Article XVIII of the Treaty (quoted above) the United kingdom agreed that its stipulations should apply in its foreign possessions "but being based upon the legislation of the mother country shall only be observed on either side so far as they may be compatible with the laws in force in those ….possessions". The intention was clear, therefore, that extradition crimes should be defined by reference to the laws of the overseas territories, as well as of the "mother country" concerned.

51. For this reason, as well as the fact that Orders in Council made under the Act could limit but not widen the scope of the Act, it is necessary for the [Bermudian] magistrate to consider, not merely whether the alleged offence would be a crime under the law of Bermuda, if committed in Bermuda, but also whether it would be a crime included in the statutory list, as amended, if committed in England. As indicated above, this was readily apparent, and is not disputed, in the present case.

52. The remaining question for the Magistrate in Bermuda, as for his English counterpart, is whether the alleged offence is an extradition crime for the purposes of the extradition arrangements made with the foreign state concerned (see paragraph 42 above). In the present case, the 1898 Treaty included the generic description "larceny" but it is doubtful whether this could include what is now established as the separate and specific offence of "handling" and we assume that it does not. (The possibility that, in Bermuda, the person concerned could be charged as an accessory to the original stealing might suggest,

however, a different result.) But the concluding words of Article II establish that, in the present case, the discretionary power to grant extradition does exist. The relevant provision is "Extradition may also be granted at the discretion of the State applied to in respect of any other crime for which, according to the laws of both the Contracting Parties for the time being in force, the grant can be made". It is beyond the scope of this judgment to consider by whom the discretion shall be exercised in the present case.

CONCLUSION

53. For these reasons, the appeals on both issues are dismissed, and the learned judge's judgments are upheld.

SIGNED

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Zacca, President

SIGNED

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Stuart-Smith, JA

SIGNED

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Evans, JA