IN THE SUPREME COURT OF
THE TURKS AND CAICOS ISLANDS

CR 35/12 R v. THOMAS CHALMERS MISICK
CR 36/12 R v. MCALLISTER HANCHELL
CR 37/12 R v. MELBOURNE WILSON
CR 38/12 R v. CLAYTON GREENE
CR 40/12 R v. JEFFREY HALL
CR 44/12 R v. FLOYD HALL
CR 18/14 R v. MICHAEL MISICK

THE QUEEN

AND

MICHAEL MISICK, FLOYD HALL, MCALLISTER EUGENE HANCHELL, JEFFERY CHRISTOVAL HALL, CLAYTON STANFIELD GREENE, THOMAS CHALMERS ("CHAL") MISICK, AND MELBOURNE ARTHUR WILSON

CORAM: AGYEMANG CJ

FOR THE CROWN: MR A. MITCHELL QC; WITH HIM MR. Q. HAWKINS AND MS K. DUNCAN
FOR THE FIRST DEFENDANT: MR. R. ARMOUR SC, WITH HIM MR. A KAYNE
HANDED DOWN ON 7TH MAY 2021

JUDGMENT ON DEFENCE APPLICATION FOR A STAY OF PROCEEDINGS FOR ABUSE OF PROCESS IN HIS EXTRADITION FROM BRAZIL

1. This judgment, while related to the application of the first defendant brought along with the other defendants for a stay of the criminal proceedings in ***R v. Michael Misick and Ors***., is concerned with the discrete point of the first defendant's extradition from Brazil. It must however be read together with the main judgment.

2. By this application the first defendant raises issues regarding the propriety of his extradition, as well as the propriety of the charges that have been preferred against him in the new Information of 3rd March 2021.

3. He contends that his trial on the Information of January 2016, and the impending retrial on the Information of 3rd March 2021, constitute an abuse of this court's process. For these reasons, he seeks a declaration that proceeding against him on the new Information is an abuse of the process of this court, and that this court ought to stay the proceedings against him.

Background Facts:

4. The first defendant applied for political asylum in Brazil on or about 24th November 2011. A warrant for his arrest on a charge of: Conspiracy to

Receive Bribes, was issued by a Magistrate's Court in Providenciales on **6 February 2012**. The charge read:

"Michael Eugene Misick conspired to receive bribes with Floyd Hall, Jeffrey Hall, Lisa Hall And Thomas Chalmers Misick and with McAllister Hanchell, and other persons, allowed the aforementioned Michael Misick, Floyd Hall, Jeffrey Hall and McAllister Hanchell to receive incentives through illegal and corrupt payments or other gratuities (in the form of cash, credit, entertainment and other benefits), while serving as Ministers of the Crown in the Government of the Turks and Caicos Islands, acting contrary to the common rules of honesty and integrity expected of Ministers of the Crown"

5. On **5th July 2012**, a twenty-three count Information charging the first defendant's current co-accused and a number of others who are no longer before the court, was lodged with the Supreme Court. The said defendants were charged variously with conspiracy to receive bribes; bribery; conspiracy to defraud; conspiracies to "money launder"; substantive money laundering offences; and conspiracy to pervert the course of justice. Apart from Count 23, the first defendant was named in the particulars of each of the conspiracy counts as an alleged co-conspirator.

6. On 18th July 1995, an Extradition Treaty was signed between the United Kingdom and Brazil, see: ***The Brazil (Extradition) Order 1997***. On the 25th of September 2012, by an Exchange of Notes, the treaty was extended to include the Turks & Caicos Islands.

7. On 1st August 2012, before the extension, Inspector Tony Noble of the Royal Turks and Caicos Islands Police Force had deposed to the following in an affidavit:

"...in the event that the Court issues an arrest warrant for Misick, it is the intention of the prosecutor to seek his extradition ... I can say that the reasons for the urgency in respect of this request are that Michael Misick is aware that a warrant for his arrest has been issued and is attempting to evade capture. Should he become aware that a process to seek his extradition has commenced I have a firm belief that he will go into hiding to evade arrest.".

8. On 7th December 2012, the first defendant was arrested and detained in Brazil pursuant to an extradition request from the Turks & Caicos Islands.

9. On 6th February 2013, the Brazilian Court which had not received the formal request for the defendant's extradition, revoked the defendant's arrest but restrained him from leaving that country without the leave of the court.

10. On 14th March 2013, the defendant was re-arrested, and the extradition proceedings commenced. On 29th October 2013, the court in Brazil ordered the defendant's extradition to the Turks & Caicos Islands on the said charge of: Conspiracy to Receive Bribes upon which a warrant had been issued in Turks and Caicos Islands, and extradition had been sought.

11. In the extradition hearing, the Brazilian Court was provided with two affidavits: a seventeen-paragraph affidavit sworn to by Inspector Tony Noble of the Royal Turks and Caicos Islands Police Force, and a one hundred and

ten-paragraph affidavit sworn by Inspector Christopher Brian Martin, a qualified Barrister.

12. On 7th January 2014, the first defendant was returned to the Turks & Caicos Islands where he was charged with a series of offences contained in an Information dated 26th March 2014 containing: 1 (One) count of Conspiracy to Receive Bribes; 5 (Five) counts of Conspiracy to Defraud; Conspiracy to Disguise the Proceeds of Crime and 2 (Two) counts of Conspiracy to Conceal or Transfer the Proceeds of Crime.

13. Eventually, he was charged on an Information along with co-accused (the defendants herein and others since discharged), dated January 2016 on which the now-aborted trial was conducted.

Arguments

14. The first defendant submits that the extension of the Extradition Treaty between the Government of the United Kingdom of Great Britain and Northern Island and the Government of the Federative Republic of Brazil (the "Treaty") to the Turks and Caicos Islands which did not happen after the current proceedings had commenced, constituted an abuse of process.

15. The first defendant must in the absence of the domestication of the Treaty under which he was extradited, be in the position to rely on unincorporated Treaty rights in Turks & Caicos Islands in order to invoke the Speciality Rule.

16. Upon the invocation of the Speciality Rule, the charges against the first defendant apart from the charge of Conspiracy to Receive Bribes upon which he was extradited, must be held to be an abuse of the court's process.

Ground 1

17. On this ground, the first defendant contends that the extension to the Treaty was unlawful, as it could only have been done upon "an informed and targeted decision" of the then Governor of the Turks and Caicos Islands, and/or, (ii)the Government in the Turks and Caicos Islands, and/or, (iii) the United Kingdom Government, and/or (iv) the Foreign and Commonwealth Office, or all the said persons and entities, upon any or all of them becoming aware that the defendant was living in Brazil and could not lawfully be extradited to the Turks and Caicos Islands.

18. He argues that the extension of the Treaty was undertaken and directed at him personally after the authorities realised that any lawful extradition would entail a necessary change in the law, directed *"entirely and squarely at him"*.

19. He submits that all this was done through executive involvement and/or interference in the intended criminal prosecution of the defendant carried out at the highest levels in the Governments of and the United Kingdom Government, and that but for this action, the first defendant could not lawfully have been extradited from Brazil to the Turks and Caicos Islands. This is because the Treaty did not apply at the times of the offences alleged to have been committed, which was: between 1 August 2003 and 31 August 2009; nor did it apply at the time of the issue of the arrest warrant against him on 6

February 2012, or at the time of the swearing of the affidavit of Inspector Tony Noble on 1 August 2012.

20. The extension, he asserts, was a formal and serious act that changed the legal relations of two countries, and "not a trivial or inconsequential act", requiring the two actions of: an express agreement between the United Kingdom and Brazil, and a formal international legal act to extend the Treaty through the Exchange of Notes.

21. Thus, to do this simply to cause the extradition of the first defendant - a single individual, was unusual (as the extradition could have been achieved through the comity of nations), and in the circumstances, constituted a "disproportionate, oppressive and unfair measure" by the Executive, amounting to an *ad hominem* change to international extradition treaty arrangements between two sovereign nations" targeting him to secure his return. This, it is contended, amounts to an abuse of this court's process by the Executive.

Ground 2

22. On the second ground, the first defendant submits that the extradition treaty between the United Kingdom and Brazil in 1995 was an expressed intention to regulate extraditions between the two nations and that by the extension, it binds the Turks & Caicos Islands. Thus it must be complied with in good faith in accordance with international law. However, to date, the Treaty provisions which gives the first defendant rights and protections thereunder, have not been incorporated into the domestic laws of the Turks & Caicos Islands although its provisions have been incorporated into the domestic legislation

of the United Kingdom by virtue of the former Extradition Act 1989 and after its repeal, the Extradition Act 2003. He argues that the absence of domestication notwithstanding, the first defendant must be able, as a private citizen, to invoke Treaty rights and cite contraventions in domestic proceedings so as to invite the Court to consider whether the rule against Speciality was breached following his extradition to the Turks & Caicos Islands.

Ground 3

23. It is the case of the first defendant that on application of the Rule of Speciality, the Prosecution has breached Article 12 of the Treaty which narrows the scope of extradition to only part of all criminal offences, so that each request for extradition is with respect to a particular person in respect of a specific offence and no other. He submits that the Rule of Speciality protects an extradited person from having to face any offence other than that for which he was extradited, or any extradition offence disclosed by the facts upon which he was extradited. This, apart from protecting the extradited person, it also protects the judicial process of the requested State against abuse after it has relinquished its jurisdiction over the first defendant.

24. The first defendant's contention that this has been breached is grounded upon a belief that the Brazilian court was not asked to, nor did it examine whether the charges later laid against the defendant: conspiracy to defraud and/or conspiracy to "money launder" (Conspiracy to Disguise the Proceeds of Crime and two counts of Conspiracy to Conceal or Transfer the Proceeds of Crime), were mutually reciprocal extradition offences under the laws of Brazil.

25. He therefore contends that in preferring the said charges in the original trial Information and now in the new Information of 3rd March 2021 upon which a re-trial is sought, the Prosecution, has exposed the judicial process of Brazil to abuse after it had relinquished its jurisdiction over the defendant.

26. In further elucidation, the first defendant submits that while the Treaty restricts the power to extradite to the Extradition Offences which must be serious, attracting a sentence of imprisonment for at least one year, and further, must be crimes of similar degree in both countries to ensure reciprocity, in the extradition process of the first defendant, the Brazilian court (the Brazilian Supremo Tribunal Federal) was not given the opportunity to determine whether the additional offences with which the first defendant was charged was within the scope of Article 2 of the Treaty.

27. As a result, the Brazilian court, only was able to assess the compatibility of Count 1 (Conspiracy to Receive Bribes), with the Treaty and the requirements of the Brazilian legal system. It is contended that the said court was disabled from assessing whether the other charges fell within the Treaty or were compatible with Brazilian legal requirements.

28. With regard to the new Information filed on 3rd March 2021, he questions whether the offences reflect the facts disclosed before the Brazilian court in the light of Article 12 (2) which provides that

"(2) When the description of the offence charged is altered in the course of proceedings, the extradited person shall only be proceeded against or sentenced in so far as the offence under its new description is shown by its constituent elements to be an offence which would allow extradition."

29. The evidence upon which the first defendant grounds his argument is contained in the affidavits of Inspector Tony Noble and Christopher Brian Martin which reveal that the Brazilian court was informed of an alleged conspiracy which the first defendant and other Government hatched to *"procure and receive bribes from individuals and companies who wished to develop land in the Turks & Caicos Islands"*. The deponents alleged evidence of large sums of money paid by individuals and companies in eight projects during the period of the first defendant's administration. These payments, alleged to be bribes, were said to have been received directly by the first defendant and his Ministers, and sometimes indirectly through third parties: the present fifth and sixth defendants. The details of the projects were given as (i) Seven Stars; (ii)Third Turtle Club; (iii) Dellis Cay and Joe Grants Cay; (iv) Salt Cay; (v)Juniper Hole; (vi) North West Point; (vii) Water Cay.

30. The first defendant contends that while the Brazilian court was informed of a defendant list of thirteen, it is not known whether the Information of the first defendant's co-accused was placed before that court, save that that court was informed that the co-accused had been charged with the extradition offence upon which the defendant's extradition was being sought: *"Each of the other individuals named in the charge have also been charged with this same offence"* (per Inspector Tony Noble). The first defendant contends that on the material disclosed by the Prosecution, the affidavits of Inspectors Noble and Martin, did not contain the words *"fraud" "defraud" "proceeds" "proceeds of crime" "launder"* or *"laundering"*, nor is there evidence that the Brazilian Court asked, or was asked to consider mutual reciprocity in relation to the

offences of "conspiracy to defraud" and/or conspiracy to commit a money laundering offence.

Crown's Response:

31. In response to the arguments, the Prosecution raises as a point *in limine*, the issue of this matter being *res judicata*. In this regard, they argue that an application raising the same issue was filed on the 26th of November 2015, was argued and ruled upon on the 17th of December 2015 by the trial judge Harrison J. The said judge refused to consider the argument under the treaty which had not been domesticated, but considered it under common law abuse of process and ruled against it. Thus the Prosecution contends that this is not a legitimate point to be argued, or a legitimate attempt to do so, as it is simply an attempt "*to resurrect an issue long settled"* which must be dismissed on that account.

32. They also contend that this argument is not one raised within the trial, and therefore ought not to be entertained here, for what is open to the first defendant to do in this situation is for an appeal to be lodged against the decision of Harrison J, rather than a repetition of the same arguments before this court at present constituted.

33. On the merits of the matter, the Prosecution urges this court to refuse a stay on the application of abuse of process principles. While the Prosecution points to the present 'domestication' of the treaty under the Extradition Act 2003 (Overseas Territories) Order 2016 wherein the Turks & Caicos Islands is listed as a British Overseas Territory (Schedule 1) and Brazil is listed as an Extradition territory (Schedule 2), it is asserted that the said legislation will

not avail the first defendant who was extradited before the said legislation came into force on the 10 November 2016.

34. The Prosecution further refutes the assertion of the first defendant regarding the difference in the crime for which he was extradited, and the charges he faces in the new Information. In support of their stance, they have provided the content of what was placed before the Brazilian court which was in two affidavits deposed to by Christopher Martin and Tony Noble. The Prosecution have set out some of the details provided in the said affidavits which details include an overview of the involvement of the first defendant in the eight projects contained in the Information: a. The Seven Stars; b. The Third Turtle Club; c. Dellis Cay and Joe Grants Cay; d. Salt Cay; e. Juniper Hole; f. North West Point; g. Water Cay. Regarding the conduct of the first defendant, references were made in the affidavits to Seven Stars and Mr Civre. The charge also was stated to involve a conspiracy to receive bribes with references made to the "taking or giving of a reward for offices of a public nature"; engaging in "criminal corruption" which constituted serious offences. The alleged manner of commission was also stated to be the procuring of bribes from individuals or companies who wished to develop land, in respect of a "number of developments which were planned or undertaken in the Turks & Caicos Islands, during the period when the first defendant was in office. This was said to be evidenced by large sums of money that were paid by developers and/or their companies to the first defendant and other Ministers either directly or through such third parties as the present fifth and sixth defendants well as their political party PNP. In summary, it was alleged that the first defendant was "part of a corrupt relationship with a number of "overseas" property developers" as they used their influence as members of

the Turks & Caicos Islands Government in favour of those developers in return for financial payments and other benefits.

35. It is the submission of the Prosecution that the Brazilian court, having all this evidence before it, granted the extradition request with only one condition: that there be an undertaking that the first defendant serve no more than thirty years with an allowance made for the time spent in custody in Brazil.

36. The Prosecution points out that in its decision, the Brazilian court rejected the challenges mounted by the first defendant who sought asylum which was refused at first instance and on appeal. These challenges that were rejected were arguments with respect to the validity of the extension of the Treaty between Brazil and United Kingdom to the Turks & Caicos Islands, the validity of the request for extradition, the nature of the allegations against him which he stated to be political, and furthermore, that there was the absence of double criminality; that there was a disproportionality of the sentence imposed, and the nature of the court that would try the first defendant described as an "exceptional court".

37. The court stated its disinclination to consider the evidence upon which the courts of a requesting state started a criminal investigation and ordered the preventive detention of the person.

38. The Prosecution therefore submits that the allegations of bribery and corruption satisfy the requirement of double criminality.

Issues:

39. The issues raised in the present application for a stay of proceedings for abuse of process are the following:

1. Whether or not this argument is *res judicata*.
2. Whether or not the extradition of the first defendant was contrary to law, as done in pursuance of a treaty extension that improperly targeted the first defendant.
3. Whether or not the first defendant can invoke the Treaty's protections
4. Whether or not under the Rule of Speciality, the first defendant can be charged with any offence besides the "Conspiracy to Receive Bribes".

Consideration of the Issues:

Res Judicata

40. Has the fact of its determination of this argument by Harrison J in December 2015 just before the commencement of the trial following the first defendant's extradition, robbed the first defendant of the opportunity to raise it once again? Is a court of coordinate jurisdiction being called upon to revisit the ruling/ judgment of another judge? Is an appeal of the judgment of Harrison J the proper place for raising this matter?

41. It seems to be that in all the circumstances and matters outlined, the answer must be in the negative. The 'no' response is simply due to the settled law that that there is no issue estoppel regarding a matter decided in a criminal trial, in a subsequent retrial. This is a recognition that a retrial is fundamentally a new trial which is neither encumbered nor informed by the first trial. ***DPP v. Humphrys***[1] was a case in which a person who had been acquitted after

[1] [1977] A.C. 1

perjuring himself, raised in a trial for perjury, issue estoppel against the testimony of an arresting police officer involved in the first trial. The plea which was upheld was overturned on appeal. In their judgment, Their Lordships stated that a plea of issue estoppel had no place in English criminal law.

42. The pertinent issue to determine is one that the Prosecution has raised: is the challenge of extradition a proceeding within the trial? The Prosecution argue that in a trial, the judge gives directions, but that in a challenge of extradition, the judge cannot give orders in the trial. This is a position with which I must differ.

43. This is the challenge of an impending trial. The last time it was raised, it was in respect of a trial due to begin in 2015. A determination of the matters raised in issue can lead to a dismissal of the charges altogether for abuse of process, or for orders regarding certain charges against a defendant who challenges proceedings against the Rule of Speciality. It is therefore proper to raise it before the trial judge. This is a new trial, the effect of which is that the first defendant was never tried for his offences. What the first defendant is challenging is the trial on the new Information of 3rd March 2021. That was not the matter that was determined by Harrison J. In my judgment, it is proper for the first defendant to raise the matter before trial judge in a new trial. The trial before Harrison J was aborted. Even in a trial that proceeds to conclusion as *Humphreys* shows, a matter decided in the old trial may be raised in a retrial, as no issue estoppel applies. In this matter in which the trial was aborted, and a new Information with new charges have been preferred against the first defendant, the challenge of the extradition that has brought the first

defendant to answer for offences on the new Information of 3rd March 2021, is properly made before this court. This court will not be arrogating to itself appellate power over a court of coordinate jurisdiction as the challenge is made regarding the extradition in respect of the new trial on the new Information. It is properly within the jurisdiction of the trial judge.

44. In any event, it seems to me that this appreciation of the position of the law on extradition challenges is new, and possibly belated. The present issue was raised by the first defendant against his trial on the old Information before the trial judge, not as an issue outside the trial. It was also raised before the trial judge at a time when the first defendant who had been charged on an Information was in criminal proceedings.

45. My answer is that this is an application in the criminal proceedings and must be treated as such, which is to say, that as established in *R v. Humphrys*, there is no issue estoppel. It is not *res judicata* and can be raised in these new criminal proceedings and in the circumstance of a retrial on a new Information.

Ad hominem legislation

46. The first defendant argues that the 2012 extension of the treaty between the United Kingdom and the Federative Republic of Brazil which was signed in 1995, was the act of collusion between the Turks & Caicos Islands and United Kingdom authorities to target his prosecution. He complains that securing a change in legal relations between Turks & Caicos Islands and Brazil just to bring him to Turks & Caicos Islands to face prosecution, done *ad hominem*, with the sole purpose of bringing him to Turks & Caicos Islands, is

oppressive. He seeks a declaration that the extradition that was brought about through the said extension was improper, unlawful and must be declared to be an abuse of process.

47. I find this argument, wholly without merit. In ***Liyanage and Others v Reginam [1966] 1 All ER 650*** on which the first defendant relies, Their Lordships of the Privy Council of Ceylon allowed an appeal against conviction and sentence of the appellants for *ad hominem* legislation that was aimed at interfering in the judicial process. In summary, the facts are that the following an abortive coup of 27th January 1962 which led to the arrest and detention of the coup plotters, the Criminal Law (Special Provisions) Act, No. 1 of 1962 was enacted on March 1962 and given retroactive effect to 1 January 1962; it was limited in operation to persons who had attempted a *coup d'état* in January 1962. The said legislation legalized the imprisonment of the appellants while they were awaiting trial. A section of the Penal Code was modified in order to enact a new offence tailored to meet the circumstances of the attempted coup; it altered the law of evidence regarding statements made by an accused while in custody, and it enacted a minimum punishment, accompanied by forfeiture of property for the very offences for which the appellants were standing trial. An amendment of the Criminal Procedure Code was effected to bring the appellants' case within the cases to be tried by a three panel judge instead of a jury. The Minister of Justice was by that legislation, empowered to nominate the three judges and he did so. When the Supreme Court upheld an objection as *ultra vires* the powers of the Minister of Justice, another legislation: the Criminal Law Act, No 31 of 1962 was enacted. This new law removed the power of nomination of judges from the Minister of Justice to the Chief Justice. Of significance is the speech of Lord Pearce:

"…the Acts of 1962 had no such general intention. They were clearly aimed at particular known individuals who had been named in a White Paper and were in prison awaiting their fate. The fact that the learned judges declined to convict some of the prisoners is not to the point. That the alterations in the law were not intended for the generality of the citizens or designed as any improvement of the general law, is shown by the fact that the effect of those alterations was to be limited to the participants in the January coup and that after these had been dealt with by the judges, the law should revert to its normal state.

Such a lack of generality, however, in criminal legislation need not, of itself, involve the judicial function, and their lordships are not prepared to hold that every enactment in this field which can be described as ad hominem and ex post facto must inevitably usurp or infringe the judicial power*. Nor do they find it necessary to attempt the almost impossible task of tracing where the line is to be drawn between what will and what will not constitute such an interference. Each case must be decided in the light of its own facts and circumstances, including the true purpose of the legislation,"* **(my emphasis).**

48. There was a similar conclusion in ***Ferguson v The Attorney General of Trinidad and Tobago*** [2016] UKPC 2 where a law that placed a ten-year limitation on the trial of crimes was repealed. Appeals to the Privy Council were dismissed. The court did not uphold the appellants' argument that the repealing law was targeted at them.

49. In the present circumstance, the United Kingdom sought the extension of its treaty with Brazil at a time when the first defendant regarding whom an arrest warrant had been issued, was in Brazil, seeking asylum (which was denied).

50. The extension was made in furtherance of the treaty under section 16(1) thereof: *"16(1)*

(1) This Treaty shall apply: (a) in relation to the United Kingdom: (i) to Great Britain and Northern Ireland; and (ii) to any territory for whose international relations to the United Kingdom is responsible and to which the Treaty shall have been extended by agreement between the Contracting States in an Exchange of Notes; and (b) to the Federative Republic of Brazil."

51. The first defendant complains that the extension was targeted at him and amounted to an *ad hominem* act of the Executive to target his extradition and must result in the stay of his prosecution for that reason. Frankly, I fail to see how an extension which was provided for, without any limitation on when it should be applied for, would, when accessed, result in an abuse of process. Nor was the extradition an act that usurped or interfered in the judicial function of this court. It was a lawful process. Doubtless, it was when the authorities discovered that the first defendant against whom a warrant had been issued was in Brazil that they accessed this treaty extension that was provided in the treaty. This was no *Liyanage* in which the outcome of a judicial process was sought to be achieved through legislation. Nor even the circumstance of *Ferguson* where retrospectivity appeared to be targeted at the defendants.

52. That the availability of extension of the treaty to British Overseas Territory such as the Turks & Caicos Islands (and even the mode of securing it) was contained in the Treaty suggests that it was in the contemplation of the parties to be used whenever necessary. The extension of the treaty was to be achieved

through the diplomatic channel of notes verbal: executive, not judicial acts of each Contracting State.

53. Thus, the securing of the extension by the Governor of Turks & Caicos Islands and/or the Government of the United Kingdom when it became necessary to bring home a fugitive from the criminal justice system of the Turks & Caicos Islands, was an executive act within the contemplation of the parties; it did not represent collusion or improper interference with judicial functions such as would amount to an abuse of the court's process. The question is, could the treaty extension never be lawfully undertaken once criminal proceedings had been issued against a person? Was a fugitive from justice to be allowed to live in a land with impunity simply because the extension already provided for had yet not been sought? The absurdity of such a supposition could not have been the intendment of the treaty which provided for an extension through the mode of the Exchange of Notes. In my view, that a person, in this case the first defendant was the reason for accessing what had been provided for, did not make him the target of the act of extension. That criminal proceedings had been commenced against him by the issuance of a warrant, was in my view, not improper; on the contrary, it made a stronger case for the treaty extension that would enable the first defendant fleeing the criminal justice system of the Turks and Caicos Islands, to be brought to the place of the alleged commission of the offences alleged against him.

54. In my view, the argument of the first defendant defeats itself, for he argues that the treaty extension targeted him, as extradition could have been more easily achieved by comity. But it seems to me that comity would have been rather the targeted approach, as it would have been an act between two nations

that yielded only the first defendant and no-one else. On the other hand, the treaty extension until revoked, remains a treaty between Turks & Caicos Islands and Brazil. The Governor of the Turks and Caicos Islands and the United Kingdom Government's approach of using a treaty which is of general application rather than seeking extradition as an act of comity, would negate the argument of targeting.

55. It is manifest that there was nothing oppressive about seeking the treaty extension already provided for. This was no ordinary person who had taken flight from justice. This was the leader of a Government whose Ministers were facing prosecution for matters in respect of which a warrant had been issued for the first defendant. It was not an interference with the judicial function as occurred in *Liyanage*. Nor was it unfair. What would have been unfair would have been to leave him in a country with which an extendable treaty had been made with the United Kingdom while the persons the first defendant was alleged to have committed the crimes with, who had remained in the country, were standing trial. In my view, bringing him to justice through extradition was the lawful way to ensure that he would answer for the offences alleged against him. What would have been improper and/or unlawful as happened in *ex parte Bennett*[2] and *R v. Mullen*[3], would have been an arrest by the United Kingdom or Turks & Caicos Islands authorities within Brazil, or some other manner outside an extradition treaty by which the first defendant was brought into Turks & Caicos Islands to answer for offences alleged against him.

[2] [1994] 1 A.C. 42
[3] [2000] QB 520

56. In *ex parte Bennett* where proceedings were ordered to be stayed, the defendant had been brought to the United Kingdom in breach of extradition law. He had, in effect, been kidnapped for the purpose of bringing him to the United Kingdom to stand trial. In holding that the conduct of the authorities was an abuse of process, the court held that proceedings may be stayed in the exercise of the court's discretion not only where a fair trial is impossible, but also where it would be contrary to the public interest in the integrity of the criminal justice system that a trial should take place.

57. Mullen was brought back to England from Zimbabwe as he was wanted by the police. There was evidence that English and Zimbabwean security services had colluded to make it impossible for him to get access to a lawyer during his deportation. Upon his arrival, he was arrested, charged, and convicted of conspiracy to cause explosions. He was sentenced to 30 years in prison. Mullen did not complain about the trial itself, he purely relied on the circumstances of his deportation and lack of access to a lawyer as reasons for his "unsafe" conviction.

58. The Court of Appeal allowed Mullen's appeal. It held that while Mullen was certainly guilty (he himself admitted to having been properly convicted following a fair trial), he was still a victim of abuse of the lawful administration of justice - the severity of the offence alleged had to be weighed against the authorities' conduct which denied him access to advice during detention and deportation – a breach of Zimbabwean law but also Mullen's human rights. Thus the court recognised that had Mullen's rights been respected, he may not have been tried in England.

59. Availing the Turks & Caicos Islands of what had always been provided for in the treaty between the United Kingdom and Brazil had no impropriety attached to it; it was not disproportionate or oppressive or unfair; it was by no means an abuse of this court's process.

Treaty Protections

60. In my view, the first defendant can invoke the protections of the treaty which, having been extended to Turks & Caicos Islands, was used by the Turks & Caicos Islands to cause his extradition. I say so for the following reasons: the first defendant complains that the treaty has not been domesticated in this country as its legislature has not enacted it. The Prosecution announce that it has in fact been domesticated in United Kingdom legislation which mentions Turks & Caicos Islands as a Territory to which it has been extended. Nonetheless, the Prosecution maintains that the first defendant cannot rely on the provisions of the said legislation, as it was enacted in 2016, after the extradition of the first defendant in 2014. I disagree for reasons which correspond to these two scenarios:

    1. If the treaty extension to the Turks and Caicos Islands has not been domesticated, it would not be unreasonable to expect Turks & Caicos Islands, which has received benefit from it by using it to cause the first defendant's extradition, to be bound by its terms by reason of the *"pacta sunt servanda"* principle *(Art 26 of the Vienna Convention on the Law of Treaties*), which commands good faith by parties to a treaty. It would be more so in a situation where benefit has been received from it. I would go so far as to say that the extension of a treaty between two sovereign countries to Turks & Caicos Islands would have been a strong reason why good faith must be shown by Turks & Caicos Islands which had benefitted

from it by securing the first defendant's extradition. As agreements go, it would be reasonable to expect the Turks & Caicos Islands to be bound by the terms of the treaty, and for first defendant who had been extradited under the provisions of the treaty, to invoke its protections.

2. Happily, by the Extradition Act 2003 (Overseas Territories) Order 2016, the Extradition Act has been made applicable to Turks & Caicos Islands.

61. In the circumstance of this contemplated retrial, it matters not that this legislation came in 2016. In 2015 when it was first raised, the trial was due to be held, and there was no internal legislation. That circumstance is vastly different now.

62. In the retrial that will, if commenced, be on the new Information of 3rd March 2021, the first defendant will be in a new trial, which by reason of the first one having been aborted, will be the trial for which he was extradited. This is to say that by reason of the aborted trial, a retrial on a 2021 Information means the first defendant is going to be tried in 2021. His right of right of challenge if any, must be deemed to have accrued under that legislation that was enacted after his extradition, but before the time of his trial which is 2021. Thus, the challenge to the first defendant's extradition must be governed by the 2016 legislation: The Extradition Act 2003 (Overseas Territories) Order 2016, enacted in the said period which extends the application of the Extradition Act of 2003 to the Turks and Caicos Islands.

63. Upon the application of the said legislation, the first defendant is therefore in a position to invoke the Speciality Rule in accordance with section 17(2) of the Extradition Act of 2003.

The Rule of Speciality

64. To discuss the application of this rule, there must first be set out the extension of the treaty, as well as a recapitulation of matters already set out in this judgment.

65. Article 16(1) of The Brazil (Extradition) Order 1997 (1997 No. 1176) which records the agreement between Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Federative Republic of Brazil, provides:

"(1) This Treaty shall apply:

(a) in relation to the United Kingdom:

(i) to Great Britain and Northern Ireland; and

(ii) ***to any territory for whose international relations to the United Kingdom is responsible and to which the Treaty shall have been extended by agreement between the Contracting States in an Exchange of Notes****; and*

(b) to the Federative Republic of Brazil." (my emphasis)

66. Pursuant to sub-clause 1(ii), the Government of the United Kingdom and the Federative Republic of Brazil through the medium of Exchange of Notes extended the application of the treaty to the Turks & Caicos Islands.

67. Under this extension so achieved, the Government of the Turks & Caicos Islands requested the extradition of the first defendant who had been Chief Minister, and then Premier between the years of 2003 and 2009.

68. The extradition followed due process, with the Brazilian Court considering the evidence placed before it before relinquishing its jurisdiction over the first defendant, found in its country, to the Government of the Turks and Caicos Islands.

69. As aforesaid, the extradition was sought upon a charge of Conspiracy to Receive Bribes, contained in a warrant of arrest issued on 6th of August 2012, by the Magistrate's Court at Providenciales, on evidence provided by Inspector Tony Noble and Christopher Brian Martin.

70. The affidavit of Christopher Martin refers to documents attached as exhibits that were not placed before this court. However, in summary, it was alleged that the first defendant was as Mr. Martin deposed,

"...a part of a corrupt relationship with a number of 'overseas' property developers. Mr. Misick and other members of the Government of the day exercised their influence as members of the Turks & Caicos Islands Government in favour of those developers in return for financial payments and other benefits. These payments were made either directly, or through third parties including through Mr. Misick's political party, the PNP".

71. The case against the first defendant was stated in both affidavits to be that:

"...Mr. Misick formed a conspiracy with other ministers of the Peoples National Paty ('PNP') government including Mr. Floyd Hall, Mr. Jeffrey Hall and Mr. McAllister Hanchell to procure and receive bribes from individuals and companies who wished to develop land in the Turks & Caicos Islands. The evidence for the existence of the conspiracy comes from the acts which were committed in furtherance of it. In respect of a number of developments

which were planned or undertaken in the Turks & Caicos Islands during the period Mr. Misick was in office there is evidence of large sums of money being paid by developers and/or their companies to Mr. Misick and other ministers- These payments were paid in some cases because it was necessary to do so in order to be allowed to develop/build in the first place. In other cases the payments were made to assist in securing commercial concessions and advantages for the developers.

These bribes were sometimes paid directly by the developers and/or their companies to Mr. Misick (and to other ministers). Sometimes they were paid via third parties. These third parties included attorneys Thomas Chalmers Misick and Clayton Greene who are two examples of this".

72. Upon the evidence thus set out in summary (Inspector Noble's affidavit had seventeen paragraphs while Christopher Martin's had one hundred and seventeen paragraphs), the extradition was effected. The first defendant thus extradited, was charged with the charge upon which he was extradited as well as other offences.

73. In this judgment I am concerned with the charges on the new Information of 3rd March 2021 upon which a retrial will be conducted. The said Information contains nine charges against the first defendant, the details of which are: Counts 1, 3, 5, 6 and 7 are charges of Bribery; Counts 2, 4, and 9 are charges on Conspiracy to Defraud; Count 13 is: Conspiracy to Disguise the Proceeds of Crime.

74. I have already held that the good faith principle in the law on treaties requires the Turks & Caicos Islands, to which the United Kingdom-Brazil Treaty has

been extended and which has taken advantage of the extension of the treaty to secure the extradition of the first defendant, to comply with the provisions of the said treaty under which the extradition was effected. I will therefore have regard to the Rule of Specialty contained in the said treaty. Section 17 of the Extradition Act of 2003 makes Speciality applicable to the first defendant, see: 17 (2) and (3)(a)-3(b) which contains the same restrictions as Article 12(1) of the Treaty between the United Kingdom and Brazil extended to the Turks & Caicos Islands.

75. I reproduce Article 12(1) and (2) of the Treaty:

"ARTICLE 12

RULE OF SPECIALITY

(1) A person who has been extradited shall not be restricted in his personal freedom, proceeded against, sentenced or detained with a view to the carrying out of a sentence or detention order for any offence committed prior to his surrender ***other than that for which he was extradited or any extradition offence disclosed by the facts upon which he was extradited****, except in the following cases:*

(a) when the State which surrendered him consents. A request for consent shall be submitted, accompanied by the documents mentioned in Article 5 and a legal record of any statement made by the extradited person in respect of the offence concerned…

(2) When the description of the offence charged is altered in the course of proceedings, the extradited person shall ***only be proceeded against or sentenced in so far as the offence under its new description is shown by its constituent elements to be an offence which would allow extradition***." (my emphasis).

76. I advert to the charge contained in the warrant issued by the Magistrate's Court in Providenciales upon which the first defendant was extradited: "Conspiracy to Receive Bribes".

77. It is manifest that the new Information also charges three other offences: the substantive crime of Bribery, as well as Conspiracy to Defraud, and Conspiracy to Disguise the Proceeds of Crime.

78. In my judgment, although in the new Information, the charge is "Bribery", instead of Conspiracy to Receive Bribes, no issue arises, even though the extradition was sought on the inchoate offence rather than the substantive one. In any event, in the judgment of the Brazilian court, the learned judge observed that *"…the extradition request is backed by an indictment for the commission of crimes of "conspiracy" and "bribery". The meaning attributed by the demanded State system to such charges corresponds to the types of offences of articles 288 and 317 of the Brazilian Criminal Code…" "Therefore, I understand that the requirement of double criminality has been implemented…"*

79. The charge of Bribery is therefore one that the Brazilian court had in its contemplation when it granted the extradition.

80. There is no doubt that the two charges of Conspiracy to Defraud and Conspiracy to Disguise the Proceeds of Crime are also disclosed from the facts in the combined affidavits of Inspector Tony Noble and Inspector Christopher Martin which paint a picture of illegal payments having been made by the

beneficiaries of the first defendant's favours. Some of the benefits included an alleged change to planning policy, the purchase of land at a discount; the securing of "economically advantageous concessions".

81. The question is whether the said charges meet the double criminality requirement such as will make them extraditable offences in Brazil, in accordance with Article 2 of the treaty which makes the treaty applicable to offences which are punishable under the las of both Contracting States by deprivation of liberty for at least one year.

82. The Prosecution attempted to respond to that in their skeleton arguments before Harrison J adopted before me as part of the Prosecution's arguments in this matter. The Prosecution aver that the 1998 amendment to the Brazilian Criminal Code criminalises money laundering by a criminal organisation. They define the "criminal organisation having recourse to the United Nations Convention Against Transnational Organised Crime (Palermo Convention). With no responding arguments from the first defendant, I am prepared to hold that as money laundering *per se* is an offence under Brazilian law, even if its ingredients are somewhat different from the definition in the Turks & Caicos Islands, it is an offence in like degree. Count 13 is therefore an extraditable offence as provided in Article 2 (supra).

83. The Counts on Conspiracy to Defraud present a problem. The Brazilian court painstakingly discussed the difference in approaches between the English common law and the Brazilian civil law which is Roman-Germanic. The court had regard to the deposition in the affidavit of Christopher Brian Martin regarding the common law offences of Bribery and Conspiracy and was

satisfied after due consideration that there were corresponding offences under the Brazilian Criminal Code.

84. In the absence of any legal information on the present offence of Conspiracy to Defraud, that court was not placed in a position to do the thorough examination it did with respect to Conspiracy and Bribery. The Prosecution allege that it is the burden of the first defendant who challenges the double criminality to produce evidence. I differ with that position. As aforesaid section 17 of the Extradition Act of 2003 recognises Speciality in circumstances as when the extradited person is to be tried in Turks & Caicos Islands in terms as the treaty regarding an offence *"... for which he was extradited or any extradition offence disclosed by the facts upon which he was extradited"*.

85. Thus, in charging the first defendant with offences outside what he was extradited for, the Prosecution bears the burden when such is called into question, to establish that the charges which are additional to the single charge on which the first defendant was extradited, are indeed extraditable offences which may be proven from the facts given to the Brazilian court. They failed to provide the evidence to establish it.

86. To secure the extradition, Inspector Christopher Brian Martin deposed to matters that showcased the integrity of the system of justice to which the first defendant if extradited, would be subject. These included a promise that the first defendant would enjoy constitutional guarantees set out in sections 5,6.7 and 8 of the Constitution Order 2011, as well as that on the charge on which extradition was sought, the first defendant would face no more than a twenty-year term of imprisonment which commuted by one-third, would be even less.

He also stated:

"The accusations are made in good faith and in the interests of justice. However, in the event that there is any unfairness in the trial process, or that for some reason it is thought by the court in Turks & Caicos Islands to be unfair to try Mr. Misick the trial judge has power permanently to stop these proceedings in their entirety. It follows that it is neither unjust nor oppressive to extradite him…" (my emphasis).

87. No doubt if the deponent found it necessary to give the said assurances, the court required it, and therefore must have relied on it in granting the order of extradition.

Conclusion

88. Having considered the arguments of the first defendant in relation to the issues he has raised concerning his extradition from Brazil and the charges he now faces, I hold the following:

    1. There was no wrongdoing in the extradition of the first defendant either by the Government of the Turks and Caicos Islands, the Government of the United Kingdom, The Foreign and Commonwealth Development Office or any combination of the three. The extradition was lawful, not unfair, not oppressive, not disproportionate and properly effected in order to bring a fugitive from justice to the place of alleged commission, to answer for the alleged offence for which a warrant had been issued and for which his co-accused, Ministers in his Government were standing trial.
    2. The first defendant is entitled to invoke the treaty protections, and in particular, to invoke the Rule of Speciality in relation to the offences he has been charged with in this retrial.

3. In accordance with the Rule of Speciality, Counts 2, 4, and 9 which charge the first defendant with Conspiracy to Defraud must be excluded from the charges against the first defendant as they are not within the scope of the extradition of the first defendant, not being the offence for which he was extradited, or an extraditable offence such as satisfied the double criminality rule.
4. It will therefore be an abuse of process to try him on the charge of Conspiracy to Defraud, as he should not have been charged with it at all. This brings the said charge within the second limb of the abuse of process doctrine, which I have adverted to extensively in the main judgment on the application brought by all the defendants.
5. I therefore order that should there be a trial at all, the said charge of Conspiracy to Defraud in counts 2, 4 and 9 against the first defendant be taken out of any Information that may be brought against him.

Sgd.

M.M. AGYEMANG CJ