SPECIAL COURT FOR SIERRA LEONE

OFFICE OF THE PROSECUTOR

FREETOWN – SIERRA LEONE

Before: Judge Benjamin Mutanga Itoe, Presiding Judge
Judge Bankole Thompson
Judge Pierre Boutet

Registrar: Robin Vincent

Date filed: 25 February 2005

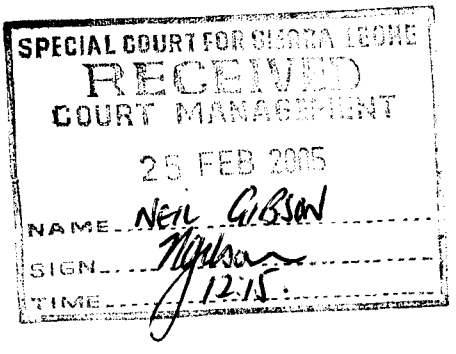
THE PROSECUTOR

Against

SAMUEL HINGA NORMAN
MOININA FOFANA
ALLIEU KONDEWA
(Case No. SCSL-2004-14-T)

PROSECUTION RESPONSE TO THE FIRST ACCUSED'S ABUSE OF PROCESS MOTION

Office of the Prosecutor:
Luc Côté
James C. Johnson
Kevin Tavener



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Dr. Bu-Buakei Jabbi
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Defence Counsel for Moinina Fofana
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I. INTRODUCTION

1. The Prosecution's general response to the First's Accused's Abuse of Process Motion[1] ("**Motion**") is that the submission is fundamentally flawed both in its timing and in its purported application of the relevant law. The Response does not seek to address all of the contents of the Motion, as the submissions are somewhat convoluted.
2. The Prosecution submits that the doctrine of Abuse of Process raised by the Motion has no application in the present circumstances. The Motion raises issues that are either the subject of current or concluded court proceedings, or arose subsequent to the pre-trial investigatory stage. The Motion seeks to create a superfluous layer of protection in addition to the substantive level of protection already available to the accused person.

II. ARGUMENT

Current or Concluded Court Proceedings

3. The Prosecution's primary objection to the First Accused's Motion is that it inappropriately invokes the doctrine of abuse of process in respect of issues that have already been ruled upon, or are currently before the Trial Chamber and the Appeals Chamber for resolution.
4. The Motion seeks to re-argue matters that the Court has already ruled on. Under 'Mode of Genesis' the Motion speaks of a Violation of Standard Practice and a

[1] *Prosecutor v. Norman, Fofana and Kondewa*, Case No. SCSL-04-14-T, "Abuse of Process Motion By First Accused for Stay of Trial Proceedings," 15 February 2005.

Violation of Joinder Rules. The Motion again presents a complaint by the First Accused that the prosecution failed to annex a draft text of the proposed consolidated indictment to the Motion. Similarly, the Motion again raises the validity of the joinder rules. Both of these issues were conclusively resolved by the Decision and Order on Prosecution Motions for Joinder[2].

5. There is no basis upon which the matters can be resurrected in this manner. The First Accused does not have the right to constantly and repetitively raise matters that have been raised before or should have been raised at the appropriate time.
6. Furthermore, to the extent that any of the issues raised have not been ruled upon, they are the subject of current court proceedings. Both the Prosecution and the First Accused have been granted leave to appeal to the Appeals Chamber and have both since filed appeals against the Decision on First Accused's Motion for Service and Arraignment on the Consolidated Indictment[3] ("**Decision**"). The Prosecution simultaneously sought to ensure compliance with the Decision by seeking leave from the Trial Chamber to amend the Indictment.[4]

Abuse of Process Doctrine

(a) Seeks to address pre-trial investigatory misconduct

7. In the *Prosecution v. Barayagwiza*, which was referred to in the Motion, the Appeals Chamber of the ICTR outlines the circumstances in which the abuse of process doctrine is triggered:

> *" As noted above, the abuse of process doctrine may be relied upon in two distinct situations: (1)* ***where delay*** *has made a fair trial for the accused impossible; and (2) where in the circumstances of a particular case, proceeding with the trial of the accused would contravene the court's sense of justice,* ***due to pre-trial*** *impropriety or misconduct. "*[5]

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[2] *Prosecutor v. Norman, Fofana and Kondewa*, Case No. SCSL-2003-08-PT, "Decision and Order on Prosecution Motions for Joinder," 27 January 2004.
[3] *Prosecutor v. Norman, Fofana and Kondewa*, Case No. SCSL-2004-14-T, "Decision on the First Accused's Motion for Service and Arraignment on the Consolidated Indictment," 29 November 2004 (RP 10888-10894).
[4] *Ibid.* The Trial Chamber ordered: "That the identified portions of the Consolidated Indictment...be stayed and that the Prosecution is hereby put to its election either to expunge completely from the Consolidated Indictment such identified portions or seek and amendment of the said indictment in respect of those identified portions, and that either option is to be exercised with leave of the Trial Chamber."
[5] ICTR Appeals Chamber, ICTR-97-19, 3 November 1999 at para 77.

8. Where delay is not at issue, the doctrine of abuse of process is triggered by misconduct during the pre-trial investigatory stage of the case. This is re-emphasised by the national case law on abuse of process. The Courts of the United Kingdom, New Zealand and South Africa have most often applied the doctrine of abuse of process to redress the illegal abduction of accused persons by enforcement officers, which took place *before the Court was seised of the case.*[6] As explained in *Regina v. Horseferry Road Magistrates, ex parte Bennett*,

> The Courts of course, have no power to apply direct discipline to the police or the prosecuting authorities, but they can refuse to allow them to take advantage of abuse of power by regarding their behavior as an abuse of process and thus preventing a prosecution.[7]

The alleged abuses of process, nominated in paragraph 10 of the Motion, occurred **after** the pre-trial investigatory stage. The Motion cites, **at paragraph 11**, the 'mode of genesis' as being "its joint-charging or consolidation of existing indictment aspects", which occurred after the pre-trial investigatory stage and has been dealt with according to the procedures of the court. Delay is not an issue in this trial.

9. The conduct complained of in the Motion simply does not fall within the definition of a pre-trial event. The allegations raised in the Motion occurred within the trial and, importantly, can and have been appropriately dealt with by the Trial Chamber. The matters complained of, such as they can be identified within the convoluted Motion, are not such that their resolution requires the application of the doctrine of abuse of process.

(b) No violation of the accused's rights

10. The issue of timing aside, the Motion seems to allege that the prosecution has committed procedural errors, which have been perpetuated by the Court, and which, 'egregiously violate the substantive fundamental rights of the accused persons.'

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[6] See for example: *Regina v. Horseferry Road Magistrates' ex parte Bennett* (1993) 3 All E.R. 138 HL (UK) [hereinafter *Bennett*]; *R. v. Hartley* [1978] 2 NZLR 199; *S. v. Ebrahim* 1991 (2) SA 553, cited in *Bennett* at p. 149, *Regina v. Bow Street Magistrates' ex parte Mackeson* (1982) 75 Cr. App. R. 24 DC; *Regina v. Plymouth Justices and Another, ex parte Driver* [1986] Q.B. 95.

[7] *Bennett*, page 151.

11. However, the Motion fails to explain how the alleged procedural errors have resulted in 'material prejudice' to the accused, let alone amounted to a violation of any of the accused's substantive rights listed in paragraphs 10 through 15 of the Motion. Having made the unsupported assertion that the accused's fundamental human rights have been violated, the Motion then declares that certain curative remedies, entirely devised by the Motion, must follow.
12. There is insufficient substantial material provided in the Motion to respond fully to that proposal. The Prosecution would simply submit that the accused's substantive rights listed in paragraphs 10 through 15 have not been violated. Should there be ever be a breach of any of the accused's rights, the corresponding relief would flow from the Statute.
13. Finally, the Motion clearly asserts impropriety on the part of the Prosecution. At paragraph 25, the Motion states that:

> The factors and circumstances that may give rise to operation of abuse of process doctrine include delay and ***if "the prosecution have manipulated or misused the process of the court so as to deprive the defendant of a protection provided by the law or to take unfair advantage of a technicality"***[8] [emphasis original]

However, the Motion, despite leveling similar accusations throughout, cites no act of the Prosecution which in any way amounts to the dishonourable conduct envisaged by the abuse of process doctrine. Further, it was both inappropriate and baseless to suggest, **at paragraph 8 of the Motion**, that the court is in some way, "even if unintended", involved in a gross and sustained abuse of process. The Court has followed and continues to follow the appropriate statutory procedures in resolving the issues that have arisen during the trial.

III. CONCLUSION

14. To the extent that new issues are now being raised, which are not covered by the respective applications before the Appeals Chamber and the Trial Chamber, they have no significant application to current stage of the proceedings. Indeed, such

[8] Citing Sir Roger Omrod, in *ex p. Brooks* (1984) at pp. 168 – 169.

matters should have been raised prior to the commencement of the trial rather then at a stage where they cause an unwarranted delay.

Freetown, 25 February 2005.

For the Prosecution,

Luc Côté

Kevin Tavener

James C. Johnson

ANNEX A
INDEX OF AUTHORITIES

1. *Prosecutor v. Norman, Fofana and Kondewa*, Case No. SCSL-2004-14-T, "Decision on the First Accused's Motion for Service and Arraignment on the Consolidated Indictment," 29 November 2004 (RP 10888-10894).

2. *Prosecutor v. Norman, Fofana and Kondewa*, Case No. SCSL-2003-08-PT, "Decision and Order on Prosecution Motions for Joinder," 27 January 2004.

3. *Prosecutor v. Barayagwiza,* ICTR Appeals Chamber, ICTR-97-19, 3 November 1999.

4. *Regina v. Horseferry Road Magistrates' ex parte Bennett* (1993) 3 All E.R. 138 HL (UK).

5. *R. v. Hartley* [1978] 2 N.Z.L.R. 199.

6. *S. v. Ebrahim* 1991 (2) SA 553, cited in *Bennett* at p. 149.

7. *Regina v. Bow Street Magistrates' ex parte Mackeson* (1982) 75 Cr. App. R. 24 DC.

8. *Regina v. Plymouth Justices and Another, ex parte Driver* [1986] Q.B. 95.

ANNEX A

5. *R. v. Hartley* [1978] 2 N.Z.L.R. 199.

*[1978] 2 NZLR 199; 1977 NZLR LEXIS 595, **

R v **Hartley**

Court of Appeal, Wellington

[1978] 2 NZLR 199; 1977 NZLR LEXIS 595

14, 15, 16 March, 5 August 1977

DECIDED-DATE: 5 August 1977

CATCHWORDS:
[*1]

Criminal law -- Man killed by firearm during gang raid -- Whether Court has jurisdiction to commit an accused for trial if he has been illegally brought back to New Zealand by the police -- Discretion of Court to prevent abuse of its own process -- Whether an accessory under s 66(2) of the Crimes Act 1961 may be convicted of a lesser crime than the principal offender -- Whether an accomplice warning is necessary as a matter of law when a coaccused gives evidence in his own defence implicating another.

HEADNOTES:
Members of a motorcycle gang made a retaliatory raid on a house believed to be occupied by members of a rival gang. Those making the raid armed themselves with metal tools, bars and wooden staves, and two firearms were carried. Several of the occupants of the house were assaulted and required minor medical attention. One young man was killed by a shotgun fired by **Hartley.** After the shot had been fired the gang members dispersed, and one of the men (Bennett) went to Australia. **Hartley** was charged with murder and 11 others (including Bennett whom the police had brought back from Australia) were charged under s 66(2) of the Crimes Act 1961 with being parties to that offence. **Hartley [*2]** and eight of those charged were convicted of manslaughter. The Judge had directed the jury that no accused charged with being an accomplice could be convicted of a greater or lesser crime than the principal offender. Some of the accused had given evidence at the trial in their own defence implicating others and the Judge's summing up was challenged inter alia on the ground that it lacked an accomplice warning. Bennett appealed on two grounds: first, that the Court had no jurisdiction to try him because he had been illegally brought back to New Zealand. The police had not obtained a warrant for Bennett's extradition and had merely asked the Melbourne police by telephone to put Bennett on the next plane to New Zealand; a request which they had complied with. Second, oral and written statements made by Bennett to the police after his return should have been excluded either because of breach of the Judges' Rules or because of the illegality in bringing him back to New Zealand.

Held: 1 An accomplice may be convicted of a lesser crime than the principal offender, though he could never be convicted of a greater crime than the principal offender (see p 203 line 46).

R v Malcolm [1951] **[*3]** NZLR 470 referred to.

2 It was not desirable for the Court to lay down a rigid rule that an accomplice warning was required whenever one accused gave evidence in his own defence implicating another. It was a rule of practice that usually such a warning would be given to a jury, but in exceptional circumstances the Judge may justifiably, in his discretion, omit any warning altogether or give one in terms that might not satisfy the fairly strict requirements that have to be observed when an accomplice had been called by the Crown (see p 206 line 45).

R v Te Whiu [1965] NZLR 420, 424 and R v Terry [1973] 2 NZLR 620, 623 considered.

3 The Court had jurisdiction to try Bennett on the indictment because, although he was unlawfully brought back to New Zealand, he was then lawfully arrested within the country and by due process of law brought before the Court. But where there was evidence of improper dealings by the authorities the Court had a discretion to discharge the accused under either s 347(3) of the Crimes Act 1961 or its inherent jurisdiction to prevent abuse of its own process. This was a case in which if asked to exercise its discretion on that ground, the trial Judge would **[*4]** probably have been justified in doing so (see p 215 line 42, p 217 line 18).

R v O/C Depot Battalion, RASC, Colchester, ex parte Elliott [1949] 1 All ER 373 applied.

Connelly v Director of Public Prosecutions [1964] AC 1254; [1964] 2 All ER 401 considered.

4 The statements made by Bennett to the police had been obtained by means of a persistent and unsatisfactory form of cross-examination during a prolonged period, in serious breach of the Judges' Rules, and should not have been used against him. In the absence of these statements the Crown had insufficient evidence against Bennett and his conviction was accordingly quashed (see p 219 line 24).

R v Convery [1968] NZLR 426 considered.

NOTES:
Refer 3 Abridgement 468; 4 Abridgement 29, 215, Perm Supp (1962-1973) 158.

CASES-REF-TO:
Other cases mentioned in judgment
Brown v Lizars (1905) 2 CLR 837.
Davies v Director of Public Prosecutions [1954] AC 378; [1954] 1 All ER 507.
Kelleher v The Queen (1974) 131 CLR 534.
R v O'Connor (Court of Appeal, Wellington, CA 161/76, 4 May 1977).
R v Royce-Bentley [1974] 1 WLR 535; [1974] 2 All ER 347; (1974) 59 Cr App R 51.
R v Rowley [1948] 1 All ER 570; (1948) 32 Cr **[*5]** App R 147.
R v Russell (1968) 52 Cr App R 147.
R v Teitler [1959] VR 321.
R v Terry (1961) 45 Cr App R 180.
Scott, ex parte (1829) 9 B & C 446; 109 ER 166.
Sinclair v H M Advocate (1890) 17 R (Ct of Sess) 38.
Taylor v Attorney-General [1975] 2 NZLR 675.

INTRODUCTION:
Appeals
These were appeals by nine accused. Six of them (Bennett, Brown, MacKay, Moore, Nolan and Simmons) appealed against conviction for manslaughter. **Hartley** and Brown sought leave to appeal against a sentence of 10 years imprisonment for manslaughter (**Hartley's** appeal was discontinued during the hearing). The remaining seven accused sought leave to appeal against a sentence of seven years imprisonment for manslaughter.

COUNSEL:
G F Little for Bennett and **Hartley.**

P C East for Brown.

K Ryan for Moore.

B J Hart for Simmons and MacKay.

A S Vlatkovich for Dalhousie, Nolan and Wickman.

D S Morris and S B Grieve for the Crown.

JUDGMENT-READ: Cur adv vult

JUDGES: Richmond (P), Woodhouse and Cooke JJ

JUDGMENT BY: WOODHOUSE J.

JUDGMENTS: WOODHOUSE J. (Delivered the judgment of the Court). At about 5 am on 29 December 1975 fourteen or more members or ex members of the so-called Hells Angels motorcycle gang burst into a residence in Prospect Terrace, Auckland. They carried weapons with them **[*6]** in the form of metal tools, bars and wooden staves; and two firearms were brought to the place -- a 0.22 rifle and a sawn-off shotgun. Several of the occupants of the house were assaulted and required minor medical attention. But there was a fatality. A young man named Haora who had been asleep in one of the rooms was struck about the body and kicked. Then, probably while he was half crouching on the floor, he was killed when the shotgun was placed against, or very close to, his head and fired by the appellant **Hartley.** The intruders then fled.

Hartley was apprehended and charged with murder. Eleven others were eventually jointly charged with him as being parties to that offence in terms of s 66(2) of the Crimes Act 1961. They all faced an alternative charge of breaking and entering the premises. All pleaded not guilty. In the result **Hartley** and eight others (being the present nine appellants) were convicted of manslaughter. Two of those charged were acquitted. During the trial a youth named Lazarus manifested serious symptoms of mental illness and he was discharged and sent by the Judge to a mental institution. **Hartley** and Brown were sentenced to 10 years imprisonment. **[*7]** The other seven were sentenced to imprisonment for seven years. All the appellants appeal against sentence but during the hearing of the appeal counsel for **Hartley** informed the Court that he was instructed not to proceed with the latter's appeal against sentence. Application for leave to appeal against sentence in his case is refused accordingly. In addition to the appeals against sentence all the appellants, other than **Hartley,** Dalhousie and Wickman, appeal against conviction on grounds associated with the summing up.

The reason advanced for the raid on the house at Prospect Terrace was bad feeling that had arisen between members of the Hells Angels gang and a rival motorcycle gang describing itself as Highway 61. It was alleged as an example of provocation by the second group, that a motorcycle owned by the appellant Moore had been stolen on some day in December 1975 and that they were responsible for that theft. In addition there had been some incident at a house at Bellwood Avenue occupied by two young women named Cora and Dallas Burridge who were closely associated with Brown (one of the appellants) and Zidich (who was acquitted). It was said in the evidence that earlier **[*8]** in December some members of the Hells Angels gang had been attacked at the place by members of the Highway 61 group. Then at about 8 pm on 28 December a much more serious offence took place. A petrol bomb

was flung at the wall of the Bellwood Avenue house. The young {202} women communicated with Brown and messages were quickly sent to other members of the gang concerning the matter. Before long a number of them gathered together at a flat at Paice Avenue occupied by the appellant Nolan. They went there for the purpose of considering who had been responsible for the bombing of the Burridge premises and to consider reprisals. There is evidence that all the appellants were at this meeting (or at least at some stage of it) and during the discussion that took place the two girls were present in the flat. There seems to have been much debate as to what should be done but it is clear enough that there was general agreement that the Highway 61 gang had been responsible for the attempted arson. During the meeting there was also discussion of the loss of Moore's motorcycle and of other reasons for grievance felt by the Hells Angels group.

It was decided that action was required. **[*9]** It was thought that some of the rival gang were living at the Prospect Terrace house and it was agreed to go there for the purpose of attack by way of reprisal upon those of the occupants who were members of the other gang. There is evidence given by one of the girls that at some stage the appellant Brown went off to borrow a 0.22 rifle which he brought back to Paice Avenue. **Hartley** obtained the sawn-off shotgun which had been in his possession for some time. Others armed themselves with bars or tools and similar weapons. Then all concerned went to the place in Prospect Terrace. Two cars were certainly used, one driven by Nolan and the other by Wickman and there was possibly a third vehicle as well. Moore claimed that he and Lazarus used such a third vehicle in order to go to the property independently. Moore said that he got there before the main body arrived and went to the back of the house for the single purpose of recovering his, or a similar, motorcycle; and that he left the premises before any of the others had entered the house. In any event upon arrival some of the attacking force burst in the front door while others went to the back and used the rear entrance. The **[*10]** raid probably had not lasted more than two or three minutes before **Hartley** fired the shot which killed Haora. Then they all made off and scattered. Brown and Zidich, for example, rejoined the two Burridge girls and went by motor vehicle on a journey about the North Island. The appellant Bennett was seen by the police. He was allowed to leave their presence and went for a short holiday out of Auckland. On his return he took the opportunity to travel by air to Melbourne in Australia. Bennett was brought back in circumstances which will need to be described in some detail. As time went by all those concerned were interviewed at various times by various police officers and then charges laid as indicated.

The Crown case was that **Hartley** committed murder in a direct sense by firing the shotgun after placing the muzzle against Haora's head. All the others were charged as parties to that offence and the common purpose provisions of s 66(2) of the Crimes Act 1961 were relied upon. In the circumstances it was necessary to prove that all concerned had joined in a common intention to assist one another to break into the Prospect Terrace house for the purpose of violent assault. And, **[*11]** of course, since the charge was murder it was also necessary for the Crown to prove that such a crime was known to each of the accused to be a probable consequence of the prosecution of the common purpose. In this regard the jury was asked in effect to act on a clear inference that everybody realised either that firearms were to be taken to the Prospect Terrace house or certainly putting the matter at its lowest, that a good number of offensive and dangerous weapons of a different sort would be taken and probably used there. In addition there was evidence given by each of the two girls which was intended to provide a clear picture of what had occurred at the Paice Avenue meeting. But also, in the case of nine of {203} those accused out of the 11 who remained after Lazarus had been discharged to a mental institution, importance was attached by the Crown to written or oral statements made to the police. Then during the trial some of those accused gave evidence on their own behalf. Parts of that evidence so given at the trial have been described at the hearing of the appeal as adversely affecting one or more of the other accused persons.

At the end of the trial which lasted for **[*12]** just over three weeks, Mahon J gave directions

to the jury in a comparatively short summing up. It clearly was designed to bring to their minds the salient features of the case, while avoiding any unnecessary complication in a trial which involved the individual interests of as many as 11 persons being tried together. The general pattern adopted by the Judge in summing up was to give the jury usual directions as to onus of proof and similar matters of a formal kind. Then he went on to indicate in relation to the first count that it was open to the jury as an alternative finding to return a verdict of manslaughter; he explained the implications of s 66 of the Crimes Act, and in fact left with the jury for consideration during their deliberations a copy of that section; and after providing a short outline of the Crown case and the defence that had been raised in respect of each of the individual accused he indicated that the second count of burglary could be looked at as an alternative charge if the jury should decide that verdicts of not guilty should be returned in respect of the first count raising murder or manslaughter. When dealing with the Crown case against each of the accused **[*13]** the Judge was careful to explain that it was essential that any evidence given by the police of an oral or written statement made outside the trial by any of the accused should be used only against the person so making that statement. Then he added, quite rightly of course, that where an accused person had given evidence in Court "his evidence is admissible for and against his co-accused". However, concerning that sort of evidence, given in Court by those who were standing trial, he did not go on to give an accomplice warning in terms of the corroboration concept. Nor did he make any comment upon the possibility that one or other of the girls had been so implicated as an accessory as to require that evidence to be evaluated against a similar warning. The absence of any reference to the possible need for corroboration is one of the broad grounds for the various appeals.

At the outset it should be mentioned that in dealing with the first count and after referring to the possible alternative verdicts of murder or manslaughter, the Judge directed the jury by reference to s 66(2) of the Crimes Act that no one of the accused could be found guilty of a greater or a lesser crime than **[*14]** the principal offender **Hartley:** that if the jury found **Hartley** to be guilty of murder then they could not find the others, or any of them, guilty of manslaughter; "it must be murder or nothing" the Judge indicated. And similarly if the verdict in respect of **Hartley** was manslaughter. The point was not debated during the appeal but it should be said that such a direction may be open to question. The Judge may understandably have had in mind what was said in R v Malcolm [1951] NZLR 470, 485, but that is not necessarily the last word on the subject. Obviously an accessory could not be guilty of a greater crime than that committed by the principal offender. But if, in such a case as this, murder were proved against the principal offender a jury might still find that although a probable known consequence of the common purpose had included culpable homicide there was no anticipation of a killing done with murderous intent. In those circumstances it is likely that the accessory could properly be convicted of manslaughter. In this regard see Adams on Criminal Law (2nd ed) para 664.

It is convenient to deal seriatim with the broad grounds of appeal that {204} are common to several of **[*15]** the appellants and then to describe the individual arguments which each has advanced.

Direction as to criminal negligence

On behalf of MacKay, Nolan and Simmons there was a suggestion that the Judge had failed to direct the jury that if they felt death may have resulted from an act of criminal negligence done by **Hartley** not as part of any joint enterprise but while embarked on an independent adventure of his own, then the fatal act or omission could not be regarded as a product of the alleged common purpose. The submission had reference to evidence given by **Hartley** in cross-examination where he agreed to suggestions put to him that he had been told to put the shotgun aside and not to go into the house after he had got out of the car on arrival at the place: that instead he had gone inside but on an expedition of his own. In so far as that evidence is concerned the submission is really a complaint of non-direction upon the facts.

But be that as it may, once the jury had accepted that there was a common purpose, as they clearly did, the evidence overwhelmingly supported a purpose which would involve contemplated injury by the use of solid weapons such as the bars and tools that were **[*16]** carried there, whatever may have been the intent in relation to firearms. There can be no reasonable doubt on the evidence that the sort of force contemplated during this sudden raid by night would probably end in serious injury and even homicide unless the weapons were applied to the occupants with unlikely discrimination and restraint. So if it could be said that **Hartley** acted independently at all, then, against the verdict of manslaughter it was simply that he carried a firearm which he handled inside the house with criminal negligence rather than one of the other types of weapon which had been taken to the place and which in his, or any other hands, could easily have produced the same result. The jury had been given a clear direction as to what is embraced by the words in s 66(2) which refer to offences "known to be a probable consequence of the prosecution of the common purpose". Section 66(2) is designed to deal inter alia with the very type of conduct that can so suddenly erupt on the sort of confused occasion under review in the present case. We are satisfied that there is nothing in this ground of appeal.

Non-direction

On behalf of the appellant Nolan it was said that **[*17]** the Judge had failed to give the jury an adequate explanation of the concept of proof beyond reasonable doubt by failing to contrast the civil with the criminal onus of proof. But the case is not one in our opinion which required any particular elaboration upon the point and we are satisfied that the jury was left with an accurate understanding concerning onus of proof. It was also said in support of Nolan's appeal that the Judge erred in putting before the jury a copy of s 66 of the Crimes Act and we were referred to R v Terry (1961) 45 Cr App R 180. There is nothing in this complaint. The summing up includes a detailed explanation of the meaning of the section by reference to the way in which it could be applied to the facts of the case. Against that explanation the jury could not have been left in any doubt as to its ambit or effect.

Then in a submission adopted by the various appellants it was said that insufficient attention was given in the summing up to the alternative count of burglary so that effectively the jury was left to decide the issue in terms of the first count alone. It is true that the Judge felt it necessary to deal quite briefly **[*18]** with the issue of burglary; but he made it perfectly plain towards the end of the summing up that the second count had been put forward as an {205} alternative charge. We are satisfied that the jury was well able to appreciate that it was there to be considered as an alternative and capable of application one way or the other in the case of any accused person found not guilty in respect of count number one.

A different submission was advanced on behalf of the appellant Brown. It was said that his defence was not adequately or accurately put to the jury. He had said in evidence that he had not intended to go to Prospect Terrace as a member of a raiding party and that any agreement regarding a concerted assault on the place had been made during his absence from the meeting at Paice Avenue. In the course of an interview with one of the detectives he had been asked about the part he played and had given an explanation to the same general effect. He indicated that he had wished to deal himself with the other gang. But the detective in his evidence described a number of questions and answers which he had noted during the interview with Brown and in the course of which Brown had **[*19]** said that he had been at the front of the house at the critical time and could see right down the hallway; that he had been armed; and that when he was asked what type of firearm did he have he had replied "a 0.22 Winchester". However Brown gave evidence in Court and then he explained that he had endeavoured to persuade **Hartley** not to take the shotgun to Prospect Terrace and he said that he himself had not taken the 0.22 rifle there: that he had found Lazarus with it at the front entrance to the place and had actually disarmed Lazarus. The criticism of the summing up can be explained on the basis that the Judge interpreted the answers given to the detective during the interview as an admission by Brown that he had gone to Prospect

Terrace armed with the rifle. It is contended that this interpretation of what the detective had said was misleading especially as it was accompanied by a somewhat elliptical reference by the Judge to Brown's evidence in the course of which the Judge indicated that Brown "says he gave the rifle to Lazarus and indeed disarmed Lazarus at the scene". However even if it be assumed that the explanation given to the detective was misconstrued by the Judge we **[*20]** do not think there could have been any possibility of misunder-standing by the jury as to what Brown himself intended to say about the matter in Court. They had heard his evidence and no doubt submissions of counsel upon it and we are satisfied that the way in which the point was discussed by the Judge in the summing up could not by itself have led to any possible miscarriage of justice.

Evidence of Cora and Dallas Burridge

On behalf of Brown, Nolan and Simmons the point is taken that one or other of the Burridge witnesses are to be regarded as accomplices by reason either of s 66 or s 71 of the Crimes Act. The argument as it relates to s 66 is concerned with the events immediately leading up to the meeting at Paice Avenue and the presence of the two girls at that meeting. In effect it is said that one or other or both of them had encouraged or incited the decision which led to the raiding party setting off for the attack upon the Prospect Terrace house and that there was sufficient evidence upon which a reasonable jury could find them to have been participants in that sense. But the Judge aparently thought otherwise and in our opinion it is not possible on the evidence to get **[*21]** beyond the area of speculation as to what may have been the attitude of the two young women to the talk of reprisals following the fire bomb attack. Certainly there is nothing which would enable a jury to think that they may have been lending their active support and agreement to any contemplated criminal purpose of the members of the Hells Angels gang let alone the concentrated attack with weapons which was actually decided upon at the meeting.

{206} Then there is s 71 of the Crimes Act. It was submitted that by joining Brown and Zidich immediately after the assault on the house and then taking steps to abandon a few articles of disguise that had been used there one or each of them had become an accessory after the fact. But s 71 speaks of an accessory after the fact as one who, knowing any person has been a party to the offence, takes certain action to aid or assist that person; and here the only evidence concerning the articles said to have been abandoned was given by Dallas Burridge and she said she had been given them by Zidich: that it was he who had told her to throw them away. And Zidich was acquitted: cf R v Rowley [1948] 1 All ER 570; (1948) 32 Cr App R 147. **[*22]** So that even if the rather casual and slight action taken to destroy or part with the evidence in question could be regarded as assistance significant enough to come within the ambit of s 71(1) of the Act it certainly does not appear that the action was taken to aid or assist a person who can be regarded as a party to the offence.

In this part of the case there remains an argument that at least the young women should be regarded as sufficiently on the periphery as to require that their evidence should be the subject of a warning as a matter of mere prudence; and we were referred to R v Terry [1973] 2 NZLR 620, 623. However, as is made plain in that case, a warning in such circumstances is within the exercise of judicial discretion and we do not think it can be said in all the circumstances of the case that the discretion must necessarily have been exercised in favour of a warning on the present occasion.

Evidence of co-accused

When an accomplice has given evidence for the prosecution it is well settled that the Judge has a duty to warn the jury that although they may convict upon his evidence, it is dangerous to do so without corroboration. Since Davies v Director of Public Prosecutions **[*23]** [1954] AC 378; [1954] 1 All ER 507 that requirement has been treated as a rule of law. But there Lord Simonds LC said that the rule applied only to witnesses for

the prosecution and that their Lordships were not concerned with the proper procedure as to warning and the like where one defendant gives evidence implicating another. The latter class of case was considered by this Court in R v Te Whiu [1965] NZLR 420, and at p 424 it was said:

"For ourselves we cannot see why, if a warning is necessary when a coaccused is called for the Crown, the same warning should not be required when a co-accused gives evidence on his own account and the effect of that evidence is to incriminate the accused. We think that the giving of such a warning is a practice which should be followed in this country."

In R v Terry [1973] 2 NZLR 620, 623, this Court returned to the subject, saying as to a warning in the case of evidence given by a co-accused, "Since Davies v Director of Public Prosecutions there has been some movement in England towards this extended requirement".

We do not regard those two New Zealand decisions as going as far as to lay down that an accomplice warning **[*24]** is required as a matter of law when one accused gives evidence implicating another. Nor do we think it desirable to lay down such a rigid rule. Our reasons for these views are as follows.

As to what was said in Te Whiu it is significant that the very words used by McCarthy J in delivering the judgment of the Court were a practice which should be followed in this country; and he did not repeat what he had said earlier in the same judgment about the ordinary case of an accomplice giving evidence for the prosecution, namely "The rule which was once a rule of practice had hardened into a rule of law". It may also be significant that in {207} citing R v Teitler [1959] VR 321, evidently as supporting the approach that the Court was adopting in New Zealand, McCarthy J described that case as establishing that in Victoria

". . . a warning should be given where a co-accused gave evidence; and that where there was a failure to give the required warning, the conviction would be quashed unless there was, apart from the evidence of the accomplice, substantial evidence implicating the accused and upon which the jury could properly have convicted, even if they had **[*25]** disregarded the evidence of the accomplice".

That reflects the majority opinion in Teitler. The test for quashing so propounded by the majority is less strict from the prosecution's point of view than the test established in New Zealand for applying the proviso -- whether a reasonable jury, being properly directed, would, on the evidence properly admissible, without doubt convict. The proviso test would be appropriate, however, if the rule were one of law. In the end the Court in Te Whiu disposed of the case by applying the proviso; so it must be acknowledged that the judgment left the precise status of the rule somewhat open. When the majority judgment in Teitler is examined it becomes apparent that, while no distinction seems to be there drawn according to whether the accomplice has been called for the Crown or has given evidence in his own defence, the same test for quashing is treated as appropriate in either situation; and this is said to be a matter on which Victorian practice differs from English practice. But again the position is perhaps left not entirely clear, as the judgment also speaks of the requirement in the case of a prosecution witness as one which although "a **[*26]** rule of practice, now has the force of a rule of law". More recently, in Kelleher v The Queen (1974) 131 CLR 534, a majority of the High Court of Australia, on an appeal from New South Wales, have held that a conviction of a sexual offence secured on the evidence of the prosecutrix will not be quashed on the ground of failure by the trial Judge to warn the jury of the danger of acting on the word of the woman alone, if there is in fact substantial corroboration of her evidence. The tenor of the majority judgments is that in Australia the requirements as to warnings in sexual cases, and possibly accomplice cases also, are less absolute and more related to the precise circumstances of the case than in England.

As to what was said in Terry, mention was there made of some movement in England since Davies v Director of Public Prosecutions; but the cases cited in Terry and subsequent cases show that even in England any extended requirement is not a rule of law: see R v Russell (1968) 52 Cr App R 147, 150, per Diplock LJ delivering the judgment of the Court of Appeal.

As to what is desirable, the trend in both England and Australia is against formulating any **[*27]** new rule of law in this field. And in R v O'Connor (CA 161/76, decided on 4 May 1977), a case about evidence from the wife of an accomplice, we have said that we would be reluctant to add another hard-and-fast requirement to the task of a Judge summing up to a jury. Nor did we think that the interests of justice required such an addition in that kind of case. The same applies, we think, to the question of a warning when one defendant has given evidence inculpating another. Probably it is regrettable that the requirement of a warning when an accomplice has been called for the Crown hardened into a rule of law. We see no need to take the rigidity further. Certainly a co-defendant may have no less strong a motive for giving false evidence, if it helps to pass the blame from himself; but that danger tends to be more obvious to the jury than with a Crown witness.

Among the consequences of treating the rule as one of practice are these. When one accused has given evidence having an adverse effect on the defence {208} of another, failure to give an accomplice warning must be recognised to be unusual and to be likely in many cases to give rise to a significant risk of a miscarriage **[*28]** of justice. But in exceptional cases the Judge may justifiably in his discretion omit any warning altogether or give one in terms that might not satisfy the fairly strict requirements that have to be observed when an accomplice is called by the Crown. For example, much of an accused's evidence may have been favourable to his co-accused; and as to any unfavourable part there may be no substantial reason for suspecting that he has distorted the facts either intentionally or otherwise, against the co-accused. In a borderline case of evidence partly favourable and partly unfavourable, the practice of consulting counsel before finally deciding whether or not to give a warning may be found helpful: see R v Royce-Bentley [1974] 2 All ER 347; [1974] 1 WLR 535. When the Judge has omitted a warning and on that ground his summing up is challenged on appeal, the question will be whether in terms of s 385(1)(c) of the Crimes Act 1961 there was a miscarriage of justice. In considering whether that is made out this Court will be able to take into account all the circumstances of the particular case -- including, but not limited to, the strength **[*29]** of the other evidence against the appellant.

In the present case it was argued in this Court for three of the appellants that in certain respects evidence adverse to their respective defences was given by a co-accused. The Judge gave no warning in this connection. He did explain clearly that any police statement was admissible only against the maker but that evidence by an accused was admissible for or against his co-accused. We think it would have been better if in that context he had expressly warned the jury of the danger that, to save himself, one accused might give evidence which happened to have the effect of falsely incriminating another. The absence from the summing up of any reference to this aspect gave rise to extended arguments on the appeals and has caused us anxious consideration. But in the end, and for the reasons now to be given, we are not prepared to hold that in any of the three cases it amounted to or caused a miscarriage of justice.

Simmons

For Simmons it was submitted that an accomplice warning was required as to evidence given by Brown and by **Hartley.** Simmons himself gave no evidence. In a long written statement to the police he had claimed that he did **[*30]** not arrive at the meeting at Paice Avenue until it was about to end, and so had taken no part in any important decision and was uncertain about exactly what was to be done at Prospect Terrace. He admitted seeing the firearms at Paice Avenue but maintained that he had not expected them to be taken on the raid. It was argued for him that the evidence of Brown and **Hartley** had the effect of implicating him

more seriously. At one point in his evidence Brown, having been asked who were present during the meeting, answered by saying that all were there other than Bennett, who had arrived at the end. Then, answering a specific question as to when Simmons had arrived, he gave the answer: "I would say about the middle or so, offhand". The evidence of **Hartley** included a few answers to questions concerning any knowledge Simmons may have had about the shotgun before its production at the Paice Avenue meeting. He indicated that Simmons had not known of the shotgun before then; and one of the answers suggested that Simmons had probably gained knowledge of the weapon, which had been mentioned in Simmons' written statement, during a conversation with **Hartley** at the meeting. But, when **Hartley [*31]** was asked directly whether Simmons was involved in that conversation, he answered: "He arrived late. I do not know whether he was present {209} at the conversation or not".

When those fleeting and rather uncertain references to Simmons are put against the explanation and admissions he himself provided in his written statement to the police, we are satisfied that they cannot be regarded as likely to have had an adverse effect upon his defence, or as implicating him further than the written statement would suggest. For that reason, in so far as Simmons is concerned an accomplice warning was not required in respect of either of the two witnesses.

Moore

Moore's defence was that he had listened to a good deal of discussion at the meeting and then had decided to go off to Prospect Terrace in advance of any raiding party and quite independently, merely for the purpose of recovering his own or a similar motorcycle from the place. He gave evidence to that effect, claiming that he had been driven to Prospect Terrace by Lazarus, whom he left at the roadside when they arrived there, and had then crept up a long drive and round to the back of the house, which is at a higher level and some **[*32]** distance from the road. He said that he found a motorcycle similar to his own and wheeled it back past the house and down the drive towards the road; that as he was doing so he passed a person wearing a mask who, on the basis of Moore's explanations, would have been the first of the raiding party to arrive. He said that he had heard two cars pull up at the roadway and that when he himself had got back to the road other members of the gang had begun to come on to the property and were arguing. But, he said, Lazarus seemed to have gone off, so he continued to push the motorcycle down the road and took it into a driveway; at which point one of the other cars drove quickly past, and at the same time people were running across the road near the property he had recently left. Police and ambulances began to arrive, and he claimed that he pushed the motorcycle into a hiding place nearby and made his own way, first back to Paice Avenue to borrow some money and then by taxi to an Auckland suburb where he was staying. The effect and purpose of his evidence was that he had disengaged himself from any common enterprise that may have been agreed upon at the meeting in so far as it included **[*33]** assaulting any of the people in the house at Prospect Terrace: that he meant to do no more than recover a motorcycle.

The evidence so given by Moore contrasted with the evidence of Detective Sergeant McKenzie about what Moore had told him in the course of long conversations. The Crown case against Moore rested essentially on this evidence. According to the detective sergeant, although Moore at times maintained the attitude that he had got a bike and that was all he did, he also said at one stage that he went to the house with the others: "There were two vehicles full of us. Both vehicles arrived together". He also admitted, the detective sergeant said, going to Prospect Terrace after a meeting when it was decided "to give them a good stomping". Apparently he told the detective sergeant nothing about an alleged separate expedition with Lazarus; his evidence about Lazarus was given after the latter had been removed from the trial with signs of mental illness.

The Judge dealt with Moore's case as follows:

"Then there is the accused Moore. He gave evidence, you will remember, and he is the man who said he went around and removed the motor-bike. He said that was the only part that **[*34]** he played in the matter. The Crown agrees that if that was the sole intention of Moore and that was the only part he played that he is not guilty of murder or manslaughter. But the Crown contends that the position is not that at all. The Crown says that he was at Paice Avenue and that while he certainly {210} took a motor-bike from the back of the house at 23 Prospect Terrace and subsequently hid it down the road at 52 Prospect Terrace that he really went there for a dual purpose -- the Crown relies here on what he said to the detective who interviewed him. He said that he went there not only to get the bike but because the occupants of the house were to get a hiding, and the inference is that he had two reasons for going. One was to join in the assault and the other was to get a bike. So the Crown says that you have only his word that he did nothing but take the bike. The Crown asks you to infer that he went there with the others, he took his part in the raid, and subsequently got the bike and took it away. The defence advanced to you by Mr Ryan is primarily that you should accept his evidence entirely, and that he left the scene at Prospect Terrace before any incident **[*35]** occurred with the gun. Mr Ryan, along with other counsel, presses the view that the shooting, in any event, was neither murder nor manslaughter and Moore cannot be involved. Mr Ryan primarily relies on the evidence given by **Hartley** to the effect that Moore had left before the shooting and so it was contended by Mr Ryan that he only went to get a bike, that he was gone before there was any shooting, and there is nothing upon which he can be convicted in this trial. He did, I think, admit that he was wearing a mask at the premises at Prospect Terrace and, of course, the Crown relies upon that as well as his mere presence to establish or prove to you that he was indeed a party to this armed raid." In the light of the way the Crown case was put against Moore and his defence to it, the crucial question was whether he arrived as one of the raiding party. As regards **Hartley's** evidence the Judge referred only to a part favourable to Moore. Mr Ryan argued in this Court, however, that another part was unfavourable and should have been the subject of a warning. He contended that **Hartley's** evidence could have conveyed the impression that Moore had arrived with the others, and also could **[*36]** have given rise to an inference that Moore might have seen that **Hartley** had a shotgun. As we understand it, the procedure recommended in Royce-Bentley was not followed. If it had been, counsel for Moore might have been content for the Judge to deal with **Hartley's** evidence in the way he did. But we cannot be sure of this and Mr Ryan's submissions have called for much thought.

Hartley's evidence-in-chief did not make it clear whether or not he was saying that Moore was already at the back of the house when he arrived. The first part of the cross-examination of **Hartley** for Moore produced answers somewhat favourable to Moore on this point, as did some later cross-examination; but at an intermediate stage counsel, pursuing his questions on the point, received answers perhaps suggesting that Moore could have seen the shotgun and certainly denying that Moore was wheeling the motorcycle down the drive when **Hartley** got there. In cross-examining Moore, counsel for the Crown made something of differences in the accounts of Moore and **Hartley.** Finally there was some re-examination by Moore's counsel, re-emphasising his client's account.

Having studied all the relevant passages in the evidence, **[*37]** we think that **Hartley's** evidence was equivocal and did not go to the length of clearly putting Moore in the raiding party. Nor did the Judge indicate to the jury that they could use **Hartley's** evidence in that way. Evidently it was not a case of **Hartley** deliberately attempting to inculpate Moore: from **Hartley's** own point of view it could not have mattered whether or not Moore went round the house with him, as he admitted being the first of the party inside. If **Hartley** had wanted to incriminate Moore he could presumably have said much more against him than he did. If the Judge had decided to give a warning {211} in respect of possible adverse inferences from **Hartley's** evidence, he would also have been entitled to place greater emphasis than he did on the differences between Moore's story in Court and the evidence of what he told the police. Taking all these matters into account, we conclude that the omission of a warning is

not sufficiently likely to have prejudiced Moore to give rise to a significant risk of a miscarriage of justice.

Brown

As regards a warning, the submission on Brown's behalf relates to evidence given by Moore, whose own case we have just been discussing.

Brown **[*38]** had been the president of the Hells Angels gang two or three years previously. At the time of the events in issue the accused Brazendale appears to have been the president for some time but was anxious to resign. He had been trying to persuade Brown to become the president again. Brown had been living in a house at Bellwood Avenue, Mount Eden. Also living in that house at that time was the Crown witness Cora Burridge together with her sister-in-law Dallas Burridge and another accused Zidich. It seems that Brown had a de facto relationship with Cora Burridge, who said that Brown and Zidich had left the house about 4 o'clock in the afternoon of the Sunday on which the petrol bomb was thrown at the Bellwood Avenue house. When the bomb had been thrown Cora got in touch with Brazendale, and Brazendale seems to have been initially responsible for getting members and associates of the gang together at Paice Avenue. Cora seems to have been the one, however, who eventually succeeded in getting in touch with Brown, who then arrived at Paice Avenue with Zidich. On his own evidence Brown telephoned Lazarus and Bennett, who appear to have been his particular stalwarts from the time when **[*39]** he was president. On Brown's own evidence he and Lazarus left Paice Avenue and went to a place where they obtained possession of a Winchester 0.22 rifle. According to Dallas Burridge, it was Brown who told **Hartley** to go and get the shotgun. This was denied by Brown and by **Hartley, and Hartley** agreed with Brown that he had been told by Brown not to take the shotgun to Prospect Terrace but had done so in defiance of Brown's instructions. According to Dallas Burridge also, the 0.22 rifle was taken from Paice Avenue by Lazarus when the group left for Prospect Terrace. There is a good deal of evidence, especially from the Burridge girls, to the effect that Brazendale did not want to go to Prospect Terrace that night. Brown, on the other hand, had the special motive that it was the house where Cora had been living that was fire bombed. Brazendale was acquitted by the jury. Brown maintained that he wanted to go to Prospect Terrace, taking only Bennett and Lazarus with him but also the 0.22 rifle as a threat, to deal with the problem in his own way. He claimed it was a personal problem and not a Hells Angels problem; but others thought it was a Hells Angels problem, and obviously **[*40]** in the end Brazendale's views were not heeded and Brown elected to go with the others on the raid. He denied knowing how Lazarus had got to Prospect Terrace, but said that when the party arrived there he himself went round to the back of the house and then came back to the front, where he saw Lazarus with the 0.22 rifle; and that he then disarmed Lazarus and took the gun himself. In cross-examination he said that he was standing at the foot of the front steps when he heard a shot from inside the house (this would have been the fatal shot) and that he then went up the steps and took up a position at the front door, looking inside the house down the hall. At this stage, he said, he operated the lever mechanism of the gun to make it safe. The result was to eject an unfired round, which was later found by the police in a position consistent with Brown having ejected it in the way he described. {212} Evidently the rifle (which we have not seen) was a repeating rifle which was lever operated.

We can find nothing in the cross-examination of Brown amounting to a challenge to his statement that he took the rifle from Lazarus. Indeed it is possible that Lazarus did have the rifle -- **[*41]** as already mentioned, Dallas Burridge said it was Lazarus who took it from Paice Avenue. Nor does there seem to have been any challenge to Brown's statement that he operated the rifle in the manner described. But in cross-examination the Crown strongly challenged his statement that he operated the rifle to make it safe. In the end Brown admitted that as a result of what he did the gun was loaded (being an automatic). As to Brown's having the 0.22 rifle in his possession on the front steps of the house, we think that

little if any significance could attach to whether or not he had obtained it from Lazarus. A question for the jury, relevant to his general part and motives in the raid, was whether or not he operated the gun to make sure it was loaded. It is perhaps important in this connection that he admitted that he did not know at the time that the rifle had a live round in it. Apparently he only learnt of that when informed by Detective McElhinney.

In these circumstances it is submitted on behalf of Brown that the Judge should have warned the jury against acting on the uncorroborated evidence of Moore to the effect that Lazarus had taken Moore to Prospect Terrace in his utility **[*42]** and that Lazarus and his vehicle had then vanished from the scene. Further, Moore said that he did not see the 0.22 rifle in the possession of Lazarus. It is argued that this evidence by Moore tends to undermine the explanation given by Brown: namely, that he had obtained possession of the rifle solely to disarm Lazarus. In our opinion the answer to this submission is twofold. First, the jury convicted Moore. This must have meant that they rejected Moore's evidence as to being taken there separately by Lazarus. When that is taken into account along with the fact, admitted by Brown, that he and Lazarus had earlier been associated in getting the rifle and taking it to Paice Avenue, and the evidence of Dallas Burridge that Lazarus had taken the rifle from Paice Avenue, it seems most unlikely that the jury could have relied in any way on the evidence of Moore as undermining the explanation given by Brown. Second, whether or not Brown got the rifle from Lazarus was not really important. What the jury may have thought more important, as bearing on Brown's credibility and motives, was the purpose for which he operated the lever of the rifle when, according to him, he had heard a **[*43]** shot inside the house and saw some masked members of the raiding party coming down the hallway towards him from the direction where the shot had been fired.

We add that the Crown relied on an interview which Brown had had with Detective McElhinney. The detective had noted the questions which he asked and Brown's replies. In evidence he described how Brown told him that he was standing at the front of the house where he could see right down the hallway, and that he was wearing a mask. There then followed these questions and answers:

Q Were you armed? A Yeah. Yeah.

Q What type of firearm did you have? A 0.22 Winchester.

Q Pump action? Single shot? or what? A Lever action.

There was no reference in that conversation to having obtained the rifle from anybody else for the purpose of making it safe, although Brown could easily have said that to the detective without implicating Lazarus by name. Having regard to the strength of the Crown case against Brown, we are not persuaded that any miscarriage of justice resulted from the failure of the Judge to warn the jury of danger in acting on the evidence of Moore. Brown's admission of {213} having gone away from Paice Avenue to get **[*44]** the rifle and the extent to which he had to acknowledge getting others to the meeting tell heavily against him. As far as can be judged from the transcript, he did not emerge at all well from cross-examination. Against that background the effect of Moore's evidence on Brown's defence appears to us as rather an academic question.

Bennett's appeal

There remains for consideration the appeal against conviction by Bennett. It rests upon two claims. First, that without warrant or the least vestige of any lawful authority he was taken in charge by police officers in Melbourne; that this was done at the express request of the police in New Zealand; and that he was then arbitrarily delivered to them in this country. The second point concerns the acceptance in evidence of certain statements he made to the police after he had returned here. The matter developed in the following way.

The police seem to have suspected at an early stage that Bennett had been involved in the attack on the Prospect Terrace house. So he was interviewed by two detectives at his home at 4.40 pm on Monday 29 December -- a little more than 12 hours after it had taken place. But they learned nothing from him and **[*45]** agreed that there was no reason why he should not proceed with plans he had made to leave the Auckland district with his wife for a short holiday. Within a day or so he did that. He returned to Auckland on Saturday 3 January and then decided with his wife that he should travel to Melbourne where he could stay with her sister. He later explained that he intended to return to New Zealand to recommence his work on 19 January, after the expiration of his annual leave; and that he had gone to Melbourne "to think things out", as he put it. He left for Melbourne by air on the following night, 4 January, but within 48 hours of his arrival at Melbourne several members of the local police force arrived at the home of his sister-in-law. It was then about midnight and he was in bed. They required him to dress and go with them at once to a police station. He said he left the place "with a detective each side of me, who had holds of the loops of my pants" and that he was not permitted to re-enter the house to obtain his watch which had been left behind. At the police station they refused his request that he be permitted to communicate with someone for the purpose of obtaining advice. Instead, **[*46]** after they had made a number of telephone calls, he was told that they had instructions to place him aboard the first aircraft leaving for New Zealand. It was due to depart for Wellington on the same morning -- Wednesday 7 January. He was then placed in a cell. Later he was escorted by the police to the airport at Melbourne where they obtained a ticket from the airline attendant and then just as the aircraft was about to leave he was put aboard. On arrival at Wellington he was met on the tarmac by members of the New Zealand police force and they took him directly to the central police station where he was interrogated at length. A verbatim account of oral questions and answers during this interview was given in evidence by the detective concerned. The transcript extends to some 16 foolscap pages. A warning that he need not answer any question is referred to about one quarter way through the transcript. Later on the same day he was taken by air to Auckland and during the evening he provided a long written explanation of his movements in relation to the Prospect Terrace raid. By the time it was completed he had been without sleep for about 32 hours.

The critical parts of Bennett's **[*47]** account of what he had done on the occasion of the raid indicate that he had been awakened at 1.30 am on the morning of 29 December by a telephone request from the appellant Brown that he {214} should go to Paice Avenue; that he had not been a member of the Hells Angels gang for five years; and that reluctantly he had agreed to Brown's request although he did not arrive at the meeting until it was virtually at an end. He admitted travelling to Prospect Terrace by car but claimed that he had gone without disguise and without any weapon. He denied taking part in any assault on any person at the place and that immediately after the raid he had returned to his own home. But he admitted that he had entered the house with the others.

Concerning the method and manner adopted by the police to remove him from Australia and have him returned to New Zealand there is evidence by a detective inspector who appears to have been in charge of the police inquiries. He said quite plainly that he "was instrumental in having Bennett returned to this country from Australia". He said that on Tuesday 6 January he had become aware that Bennett had left New Zealand and was then in Melbourne; that he **[*48]** had telephoned the criminal investigation branch at Melbourne to tell officers there "of our interest in him"; and that as the result of his discussions action was taken by the Australian police to ensure that Bennett would be returned to New Zealand. He also said that after those arrangements were made he gave instructions for Bennett to be met by police officers at the Wellington airport.

The lawful means by which a person may be extradited or delivered from one Commonwealth country to another is provided by the Fugitive Offenders Act 1881 (UK). (As to which see now the Fugitive Offenders Amendment Act 1976 enacted in New Zealand on 15 July 1976.) The

statute permits a rather simpler procedure than is usually applicable in the case of extradition to or from a foreign State; but as one would expect it specifically provides safeguards that are intended to give ample protection to individual citizens against any possible risk of arbitrary arrest or any unwarrantable interference by officials or others with their right to liberty and to move about freely. If for the purposes of extradition a man is to be lawfully arrested or detained or surrendered there must be the sanction of an **[*49]** endorsed or provisional warrant; and every step taken in the one country or the other must have the authority of processes recognised by the Courts: cf Brown v Lizars (1905) 2 CLR 837, 852. But on the present occasion all the essential statutory precautions were blithely disregarded by the police in both countries. Not a move was made to get lawful authority for what was contemplated. Indeed in the absence of any direct admission by Bennett before he had left for Melbourne it is probable that the police in New Zealand could not have obtained the warrant which alone could initiate any lawful proceedings for his extradition from Victoria. So a telephone call to Melbourne was used instead. And as a result the man was removed from his bed and bustled back to the New Zealand police on the next flight. Mr Morris for the Crown said that "it was not acknowledged that Bennett was in any way forced to return to New Zealand". No acknowledgement of the fact is needed. The detective who interviewed Bennett candidly admitted himself that "it would be fairly obvious that he did not return voluntarily"; and the cavalier fashion in which Bennett's few requests to the police in Melbourne were **[*50]** brushed aside and the way in which the whole illegal transaction was hurried forward make that clear beyond any question.

Against that unhappy background Bennett's appeal against conviction is put forward upon the basis of two submissions: First, that by reason of his arbitrary and unlawful detention in Australia and removal from that country back to New Zealand the Courts did not have, or should have declined, jurisdiction to accept the indictment and have him brought forward for trial. {215} This was supplemented at the hearing by adopting the suggestion that, assuming there was jurisdiction, nevertheless the Court should have discharged the accused in the exercise of a discretion to prevent abuse of its own process. Second, that in any event the oral and written statements made by him to the police in New Zealand after his return should have been excluded in terms of fairness and justice either because of breach of the Judges' Rules or because of the illegality in bringing him back to New Zealand and thus obtaining evidence; or for both reasons in combination.

The issue of jurisdiction

The jurisdictional point was raised in the Supreme Court on a motion that no indictment be **[*51]** presented. The motion was dismissed on the ground, as we understand it, that the means by which Bennett had been brought back within the territorial boundaries of New Zealand could not raise any issue as to whether he had been properly brought before the Courts. In this Court the submission concerning jurisdiction was advanced on an argument that the steps taken by the police in New Zealand and at Melbourne had clearly been illegal; and (in effect) that the illegality tainted any subsequent attempt to have him committed for trial: that there was no jurisdiction to have him so committed because he had been brought back here unlawfully. A rather similar point was taken but rejected in R v O/C Depot Battalion, RASC [1949] 1 All ER 373; and we were asked to distinguish that case. However, we are of the opinion that if a person is found within New Zealand and is then lawfully arrested and brought before the Court it must follow, considering the matter merely in terms of jurisdiction, that he can certainly be tried. In the Depot Battalion case Lord Goddard CJ said at p 376:

"If a person is arrested abroad and he is brought before a court in this country charged **[*52]** with an offence which that court has jurisdiction to hear, it is no answer for him to say, he being then in lawful custody in this country: 'I was arrested contrary to the laws of the State of A or the state of B where I was actually arrested'. He is in custody before the court which has jurisdiction to try him."

Lord Goddard then referred to Ex parte Scott (1829) 9 B & C 446; 109 ER 166 and to Sinclair v H M Advocate (1890) 17 R (Ct of Sess) 38. In the second of those cases there was a complaint that the Government of Portugal had acted arbitrarily in returning Sinclair to Scotland. However, the Court held that since the extradition of a fugitive was an act of sovereignty on the part of the surrendering State, it was entitled to apply its own rules to the process and so it would not be relevant for the Court in Scotland to inquire into the nature of those proceedings. "We must be content to receive the fugitive on these conditions", said Lord M'Laren at p 43.

As to the bare question of jurisdiction, we think that the observations of Lord Goddard and of Lord M'Laren must be accepted as applicable to this country. It is the **[*53]** presence within the territorial boundaries that is the answer to the initial question of jurisdiction. In the present case, although Bennett was brought here unlawfully, he was eventually lawfully arrested within the country and then by due process of law he was brought before the Court. The Court was accordingly in a position to exercise jurisdiction in respect of him.

The issue of discretion

But having said that, we do not think the matter can be left there. It is worth observing that in the Sinclair case the Lord Justice-Clerk (Lord Macdonald) first said that the Court could not be "the judges of the wrongdoing of the Government of Portugal", and that Sinclair was, "properly {216} before the Court of a competent jurisdiction on a proper warrant". But then he added:

"I do not think we can go behind this. There has been no improper dealing with the complainer by the authorities in this country, or by their officer . . ." (ibid, 41).

It may be implicit in those last remarks that if there had been evidence of improper dealings by the authorities in Scotland then the Court might well have taken some appropriate action in regard to the matter. However, as the complaint had centred **[*54]** merely upon the actions of the Government of Portugal, no domestic issue of the sort referred to by Lord Macdonald required attention. But if the Courts are faced, as in this case, by a deliberate decision of one of the executive arms of Government to promote in a direct way the very illegality that has had a person returned to this country, then the question does arise as to what might be done. That sort of consideration caused Lord Goddard CJ in the Depot Battalion case to add a rhetorical question to the passage to which we have referred. He asked, "What is it suggested that the court can do?" And his answer was that "The court cannot dismiss the charge at once without its being heard". As we understand it, Lord Goddard was not dealing in that passage with the inherent jurisdiction of the Court to prevent abuse of its own process. As to the extent of that inherent jurisdiction, reference may be made to Connelly v Director of Public Prosecutions [1964] AC 1254; [1964] 2 All ER 401 and in particular the speech of Lord Devlin and also to Taylor v Attorney-General [1975] 2 NZLR 675. In addition in New Zealand there is the wide statutory discretion conferred **[*55]** by s 347 of the Crimes Act 1961 which enables a Judge to direct that no indictment shall be presented, or that other appropriate steps may be taken for proceedings to be terminated after an indictment has been presented or at any stage of any trial. Of course powers such as these should be exercised by a Judge with proper circumspection but they are nevertheless available "to prevent anything which savours of abuse of process": Connelly v Director of Public Prosecutions [1964] AC 1254, 1296; [1964] 2 All ER 401, 406, per Lord Reid. In the same case Lord Devlin referred to the constitutional importance which attaches to the power of the Courts to control the successive prosecution of charges, despite the safeguards generally provided by the propriety surrounding decisions taken by the Crown in that regard. And he said:

"Are the courts to rely on the Executive to protect their process from abuse? Have they not

themselves an inescapable duty to secure fair treatment for those who come or are brought before them? To questions of this sort there is only one possible answer. The courts cannot contemplate for a moment the transference to the Executive of **[*56]** the responsibility for seeing that the process of law is not abused" (ibid, 1354; 442).

On the following page he said plainly that in the sort of situation he was then discussing "the only way in which the court could act . . . would be by refusing to allow the indictment to go to trial". We think that sort of consideration arises directly in the present case.

There are explicit statutory directions that surround the extradition procedure. The procedure is widely known. It is frequently used by the police in the performance of their duty. For the protection of the public the statute rightly demands the sanction of recognised Court processes before any person who is thought to be a fugitive offender can properly be surrendered from one country to another. And in our opinion there can be no possible question here of the Court turning a blind eye to action of the New Zealand police which has deliberately ignored those imperative requirements of the statute. Some may say that in the present case a New Zealand citizen attempted to {217} avoid a criminal responsibility by leaving the country: that his subsequent conviction has demonstrated the utility of the short cut adopted by **[*57]** the police to have him brought back. But this must never become an area where it will be sufficient to consider that the end has justified the means. The issues raised by this affair are basic to the whole concept of freedom in society. On the basis of reciprocity for similar favours earlier received are police officers here in New Zealand to feel free, or even obliged, at the request of their counterparts overseas to spirit New Zealand or other citizens out of the country on the basis of mere suspicion, conveyed perhaps by telephone, that some crime has been committed elsewhere? In the High Court of Australia Griffith CJ referred to extradition as a "great prerogative power, supposed to be an incident of sovereignty" and then rejected any suggestion that it "could be put in motion by any constable who thought he knew the law of a foreign country, and thought it desirable that a person whom he suspected of having offended against that law should be surrendered to that country to be punished": Brown v Lizars (1905) 2 CLR 837, 852. The reasons are obvious.

We have said that if the issue in the present case is to be considered merely in terms of jurisdiction then Bennett, being in **[*58]** New Zealand, could certainly be brought to trial and dealt with by the Courts of this country. But we are equally satisfied that the means which were adopted to make that trial possible are so much at variance with the statute, and so much in conflict with one of the most important principles of the rule of law, that if application had been made at the trial on this ground, after the facts had been established by the evidence on the voir dire, the Judge would probably have been justified in exercising his discretion under s 347(3) or under the inherent jurisdiction to direct that the accused be discharged. As it is, however, the matter was not put to either Speight J or Mahon J in that way. Before the trial Speight J was only asked to rule on the jurisdiction to try the accused. At the trial Mahon J was only asked to exclude evidence as obtained illegally or in breach of the Judges' Rules. In this Court the submissions based on discretion were evolved only during the course of the argument. In that context we refrain from deciding whether the case should have been disposed of on the discretionary ground alone; and we turn to consider the points relating to the obtaining of evidence. **[*59]**

Bennett's statement to the police

The second ground for the appeal against conviction in the case of Bennett relates to the more confined but nevertheless important question as to whether oral and written statements made to the police on his return to the country should have been excluded in exercise of the Judge's discretion. The factual basis for the submission falls into two parts.

First, reference is made to the circumstances surrounding the way in which the man was apprehended in Melbourne and required to return to New Zealand in order to be received by

the police here. Second, there are the circumstances associated with the interview they had with him immediately upon his arrival in Wellington; and the later interview in Auckland after which he finally signed a lengthy typed statement. By that later stage he had been in effective custody for about 20 hours, and without sleep for a great deal longer. The complaint is that there was a failure to give him as a person in custody the warning contemplated by the Judges' Rules until the oral questioning in Wellington had continued for a prolonged period; that even after that warning was given the interview was conducted by a persistent **[*60]** and determined process of cross-examination; and that taking those and the background {218} circumstances together he had been treated unfairly and the statements should have been excluded.

In explanation for the failure to give the appropriate warning immediately the interview in Wellington had commenced, it was said in evidence by the detective concerned that he then considered there was insufficient material in the hands of the police to enable the man to be charged. In passing it may be remarked that quite clearly that sort of inhibition had not operated at all when the decision was made to enlist the assistance of the authorities in Melbourne to have him apprehended and brought back here. In any event there can be no doubt that he was effectively in custody and under the charge of police officers from the time that he was found at the Melbourne apartment, and that situation had changed in no way from the time he was escorted from the airport at Wellington. Indeed when dealing with the matter on the voir dire the Judge himself was in no doubt about the point. So that there was at least a technical breach of the third of the Judges' Rules: Bennett was questioned while "in **[*61]** custody" without the usual warning being first administered. However, in ruling upon the admissibility of the statements he made, the Judge held that they were voluntary and also that there had in fact been no undue cross-examination or harrassment of Bennett, who he thought had indicated a degree of intelligence and discrimination in dealing with the questions that had been put to him. He said that there was nothing which should cause him to exclude the statements in terms of his discretion.

The implications that may arise from a breach of the Judges' Rules are discussed by this Court in R v Convery [1968] NZLR 426 where it is pointed out that they are not rules of law but are to be regarded rather as a general guide as to the circumstances which would require an exercise of judicial discretion to exclude the statement of an accused person: see, for example, at p 433. And at p 438 Turner J said:

"The Court, in deciding whether a statement had been so unfairly obtained as to result in its rejection in the exercise of the Judge's discretion, does not narrowly inquire whether the Judges' Rules, or any of them, technically construed, have been broken in the course of the inquiry under **[*62]** review; but rather whether the course of the inquiry, as proved in evidence, makes it unjust that the statements should be received."

But there statements in Convery ought not to be interpreted or applied in such a way as to leave an assumption that where there has been a clear breach of the Judges' Rules the Court will in general excuse the fact. It is true enough that the mere fact of some technical breach of the rules will often be insufficient to have the evidence excluded. But, as Turner J himself has made clear in the portion of his judgment to which we have referred, in answering the inquiry as to whether such statements should be received, "the Court may consider not only the case immediately before it, but also the necessity of maintaining effective control over police procedure in the generality of cases".

In the present case it has been mentioned that the account of the questions and answers during the interview in Wellington occupies a considerable number of pages of the written record and, with all respect to the contrary view of the Judge, leaves a clear impression that there was indeed a determined and successful effort by a process of cross-examination to extract **[*63]** a series of acceptable answers from the man. Quite frequently an answer to the effect that he did not have knowledge concerning the information asked of him was not

accepted. Then, when the critical stage was reached as to {219} whether he had entered the house at Prospect Terrace, the following passage appears:

Q Did you go to Prospect Terrace then? A Yeah.

Q What happened there? A You know.

Q Did you go inside? A No.

Q Come on, now, There's no way that you were going to stand out there. You were seen to go in the house. A Yeah, I did go inside.

It was only then that Bennett was given an abbreviated form of warning that he was not obliged to say anything further unless he wished to do so. But even after the warning had been given a similar form of cross-examination was continued, as the following example makes plain:

The detective said Now show me where you went and I gave him a pen. A Well I went to this bedroom (and he indicated this front left-hand room as you look at the house plan).

Q That's the one on the left? A Yeah.

Q That's where you hit the joker with the chair-leg? A No, you don't. I didn't hit nobody. I didn't take any weapons.

Q You told someone you did. **[*64]** A No I didn't.

Q Remember that statement we've got? A I'll bet it doesn't say that.

Q It does, you know. Look, here's who made it, Les Edwards. A I didn't tell him.

Q You did. Look, that's his writing isn't it. I showed him the signature on the statement. A It looks like it.

In our opinion the record of the interview as reconstructed by the detective in his notes shows quite clearly that it proceeded by means of a persistent and unsatisfactory form of cross-examination during a prolonged period. There was clearly a serious breach of the spirit and purpose of the Judges' Rules, and for this reason alone we think the evidence should have been excluded as a matter of discretion. We do not overlook that Bennett ultimately had legal advice before signing the typed statement; but we think that Mr Lange's evidence shows that he was not fully aware of all that had gone before, and even so he was concerned about Bennett's tiredness and state of resignation. When to the breaches of the Judges' Rules is added the fact that the man had been brought back from Australia in the fashion described, we are in no doubt that in terms of justice and fairness the admissions so obtained should **[*65]** not have been used against him. Without them the prosecution had no sufficient evidence against him. It follows that on this second ground his appeal must be allowed and his conviction quashed, irrespective of the matters we have discussed under the first ground.

Appeals against sentence

Submissions have been made on behalf of the various appellants to the effect that the sentences imposed by the learned Judge were manifestly excessive. It will be remembered that **Hartley,** the principal offender, and Brown were each sentenced to imprisonment for terms of 10 years. All the other appellants were sentenced to imprisonment for seven years. In sentencing **Hartley** the Judge remarked that the evidence had suggested, as he put it, "a

callous execution" and that the verdict of manslaughter may have been some reflection of the ability with which he had been defended. Rightly, he took a very serious view of the part played by **Hartley** and the latter's appeal against sentence has not been pursued. Then when dealing with Brown the Judge remarked that Brown had carried a loaded firearm in the attack upon the house at Prospect Terrace and mentioned that some years earlier he had been sentenced **[*66]** to imprisonment for a long term for a bad assault. He considered {220} Brown to be the prime instigator of the attack. But he felt it impossible to draw any distinction in terms of culpability between the other appellants.

We are not prepared to differ from Mahon J's view that a distinction should be drawn between Brown and the other appellants. Brown had been president of the Hells Angels. The Judge saw him and was able to assess his capacity to dominate others. He had a special motive in the whole matter. The Judge was rightly conscious of the need for deterrent sentences against gang warfare in Auckland. And Brown had a bad record. On the other hand there was no evidence that he was in the room when **Hartley** fired the fatal shot, nor that he gave any encouragement to **Hartley** to go to that extreme. On the evidence **Hartley's** was a bad case of manslaughter, and as the Judge indicated he was perhaps fortunate to have escaped conviction on the graver charge. We do not think the evidence against Brown was by any means as strong. A clear differentiation in sentence was called for. Accordingly Brown's application for leave to appeal against sentence will be granted. The sentence **[*67]** of 10 years imprisonment will be quashed and a sentence of seven years imprisonment will be substituted.

None of the other six appellants against sentence was shown by the evidence to have played as full a part in planning or carrying out the raid as Brown. According to the evidence, none carried a firearm. The pattem of distinction in sentence between them and Brown which the Judge followed is appropriate. In all the circumstances we think a sentence of five years imprisonment in each of their cases is sufficiently severe. Accordingly the applications for leave to appeal against sentence by Dalhousie, MacKay, Moore, Nolan, Simmons and Wickman will likewise be granted and each will be sentenced to five years imprisonment in lieu of the seven years originally imposed. Except in the case of Bennett, the appeals against conviction are all dismissed.

ORDER:
Judgment accordingly.

SOLICITORS:
Solicitors for the appellants: Lange & Brown (Auckland), East, Brewster, Parker & Co (Rotorua), K Ryan (Auckland), B J Hart (Auckland), Gubb, Ragg & Partners (Auckland).

Solicitor for the Crown: Crown Solicitor (Auckland). #020509M001USPENK#

ANNEX A

6. *Regina v. Bow Street Magistrates' ex parte Mackeson* (1982) 75 Cr. App. R. 24 DC.

(1982) 75 Cr. App. R. 24
1982 WL 222023 (DC), (1982) 75 Cr. App. R. 24
(Cite as: (1982) 75 Cr. App. R. 24)

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***24** R. v. Bow Street Magistrates ex parte. Mackeson

Court of Appeal

DC

The Lord Chief Justice and Mr. Justice Michael Davies

June 25, 1981

Extradition--Deportation--Deportation Order in Guise of Extradition Order--Jurisdiction of English Court--Fraud Charges Laid Against Applicant in England--Applicant in Zimbabwe--Rhodesia--No Extradition Possible or Sought at Time--Subsequent Communication Between Metropolitan Police and Authorities in Zimbabwe--Rhodesia--Deportation Order Made Against Applicant--Whether Lawful--Whether Jurisdiction to Hear Charges Against Applicant in England-- Whether Court Should Exercise Discretion to Discharge Applicant.

The applicant, a British citizen, was in Zimbabwe, formerly Rhodesia, in 1979 when allegations of fraud were made against him in the United Kingdom. ***25** The Metropolitan police did not then ask the Zimbabwe-Rhodesian authorities to extradite him because at that time the *de facto* government of Rhodesia was in rebellion against the Crown and considered illegal. Subsequently, the Metropolitan Police informed the Zimbabwe-Rhodesian authorities that the applicant was wanted in England in connection with fraud charges. He was arrested in Zimbabwe-Rhodesia and a deportation order made against him. His passport was returned to the Metropolitan Police and sent back to the applicant with authorisation for one journey only, to return to the United Kingdom. He brought proceedings in Zimbabwe-Rhodesia for the deportation order to be set aside which succeeded at first instance but that decision was set aside on appeal. No attempt was made to extradite the applicant after Zimbabwe-Rhodesia had returned to direct rule under the Crown in December 1979. The applicant was escorted back to the United Kingdom under the deportation order and handed over to the Metropolitan Police. No evidence was offered against him in respect of the three charges of fraud but further charges were alleged against the applicant under the Theft Acts 1968 and 1978. He applied for judicial review by way of an order of prohibition to prevent the hearing of committal proceedings against him in the Magistrates' Court in respect of those other charges.

Held, that although the Court had jurisdiction to hear the charges against the applicant since by whatever means he had arrived in the United Kingdom he was subject to arrest by the police force in the United Kingdom, and the mere fact that his arrival might have been procured by illegality did not in any way oust the jurisdiction of the Court; nevertheless, since the applicant had been removed from Zimbabwe-Rhodesia by unlawful means, *i.e.* by a deportation order in the guise of extradition, he had in fact been brought to the United Kingdom by unlawful means. Thus, the Divisional Court would, in its

discretion, grant the application for prohibition and discharge the applicant.

Officer Commanding Depot Battalion R.A.S.C., Colchester, Ex parte Elliot [1949] 1 All E.R. 373 and Hartley [1978] 2 N.Z.L.R. 199 applied. Brixton Prison Governor, Ex parte Soblen [1963] 2 Q.B. 243 ; [1962] 3 All E.R. 641 considered.

Application for judicial review.

The applicant, Sir Rupert Henry Mackeson, Bart., pursuant to leave granted by Russell J., on January 6, 1981, applied for judicial review by way of (1) certiorari to remove into the High Court and quash 16 charges of obtaining property by deception contrary to section 15 of the Theft Act 1968 and of obtaining services by deception contrary to section 1 of the Theft Act 1978; and (2) for an order of prohibition to prohibit the Bow Street Magistrates' Court from proceeding with the committal proceedings against him to stand his trial on indictment in respect of the aforesaid 16 offences. The facts appear in the judgment of Lord Lane C.J.

The grounds of the application were (1) that the applicant's presence within the jurisdiction was obtained by means of deportation from Zimbabwe-Rhodesia in circumstances that amounted to a disguised extradition; (2) that upon the applicant's enforced return within the jurisdiction the Director of Public Prosecutions dropped the original charges against the applicant and ***26** substituted 19 new charges; and (3) that in the circumstances proceedings against the applicant in respect of the 19 new charges would be oppressive and an abuse of the process of the court.

Louis Blom-Cooper, Q.C. and *J. Causer* for the applicant.

Paul Purnell for the Director of Public Prosecutions, the respondent.

The Lord Chief Justice:

This is an application for judicial review directed to the Bow Street magistrates, pursuant to leave granted by the single judge in January 1981.

The brief outline of the facts, which will have to be dealt with in more detail at a later stage of this judgment, are as follows. The applicant, Sir Rupert Henry Mackeson, Baronet, is a citizen of this country. In the back end of 1977 he left England, for reasons which are not material, and eventually in 1978 he went to Rhodesia, where he obtained a number of different types of employment, finally that of a school teacher.

It seems that in May 1979 allegations of fraud were made against him by the Metropolitan Police and, in short, on June 13, 1979, the Minister in Zimbabwe-Rhodesia, on whom fell this type of duty, deemed Sir Rupert to be a prohibited person. On June 15 of that year he was detained in a Salisbury prison pending removal from that country. In brief on April 15, 1980, after a number of matters had intervened which will have to be explained later, he was deported to this country by air. I shall refer hereafter to the deporting country

as "Zimbabwe-Rhodesia" for purposes of convenience, though that name is not always strictly correct.

On April 19, 1980, he, in the meantime having been arrested, was brought before the Court on three charges laid under section 20 of the Theft Act 1968. Those charges were that he on three separate occasions, in different circumstances, had dishonestly, with a view to gain for himself, by deceit procured the execution of cheques. On August 27, 1980, a further 16 charges were preferred against him, 14 under section 15 of the Theft Act 1968 and two under section 1 of the Theft Act 1978. However, on November 5, 1980, the prosecution dropped the original three charges, offering no evidence upon them. That left the other 16 charges, and committal proceedings in respect of those were due to start on January 15, 1981. But the present application was in the interim made and consequently those proceedings stand in abeyance, awaiting the outcome of the decision of this Court.

What Mr. Blom-Cooper, on behalf of Sir Rupert, applies for in the present case is an order of prohibition to prevent anyone from proceeding with the committal proceedings.

It was, as I said, on June 13, 1979, that the applicant was declared a prohibited immigrant under section 14 (1) (h) of the Immigration Act 1979of Zimbabwe-Rhodesia. The principal grounds for that declaration were the three fraud charges which by this time had been levelled against him in the United Kingdom. For verification of that one turns to the affidavit of Basil Ross Burne who is, or was, an assistant secretary in the Ministry in Zimbabwe-Rhodesia dealing with prohibited persons and such like. This affidavit was sworn in proceedings which took place in Zimbabwe-Rhodesia at a time when the applicant was detained there with a view to his being deported.

What the deponent said was: "I deny that the petitioner's present detention ***27** is unreasonable, unjustifiable, inhuman and contrary to the Declaration of Rights and state that it has been brought about solely because of his behaviour in making it impossible for him to be removed by aircraft. I state that it would be in conflict and inconsistent with the first respondents deeming of the petitioner as a prohibited person to release him at large. The main reason for his detention is that he is due to face charges of fraud in the United Kingdom and it is the policy of my Ministry to ensure that such a person is brought to justice in the country having jurisdiction over him in respect of such charges. Failure to comply with this policy would also result in fugitives from justice using this country as a refuge and could create a precedent for similar behaviour on the part of other prohibited persons."

As the learned judge in Zimbabwe-Rhodesia observed at the hearing of the habeas corpus application there, the second part of that deposition is a *non sequitur*.

On June 14, 1979, the applicant was detained in Zimbabwe-Rhodesia. On June 15 his passport was sent to the United Kingdom, that passport having been, so it seems, surrendered by the applicant, or taken from him, and the passport was, without his knowledge, sent to the United Kingdom. The material passage of the letter from the

Assistant Commissioner, Frauds, Salisbury and Mashonaland Provinces, dated June 19, 1979, reads: "It is advised that Sir Rupert's British Passport No. 680012B was despatched by registered post on June 15, 1979, to the Metropolitan Police, New Scotland Yard, London." The significance of that piece of evidence will emerge shortly.

If one turns to p. 64 of the bundle, there we find the affidavit by Mr. Hughes, superintendent of the Fraud Squad of the Criminal Investigation Department of the British South African police, which was the force involved in Africa with this matter. Paragraph 3 of the affidavit says: "... the petitioner's passport was sent to England to establish its authenticity." It is, I say in passing, now alleged by Mr. Purnell on behalf of the Director of Public Prosecutions that it was sent to England as a means of proving that the applicant was indeed the applicant.

On June 28 in the United Kingdom that passport was revalidated for one month for a single journey, that is a single journey to the United Kingdom. The significance of that is that the only use to which the passport could be put was for the single journey from Zimbabwe-Rhodesia or South Africa, as the case may be, to the United Kingdom.

On July 24 the applicant was removed from Zimbabwe-Rhodesia to South Africa. The passport was then handed to him by a representative of the Consular Service and on August 5, 1979, the applicant returned to Zimbabwe-Rhodesia from South Africa. It was at that stage that he took proceedings in Zimbabwe-Rhodesia in an endeavour to set aside the deportation order and the declaration that he was an illegal immigrant. He took steps to do that before the Courts of Zimbabwe-Rhodesia.

The action was heard by Gubbay J. and the judgment is now to be found in the South Africa Law Reports *sub nom.* Mackeson v. Minister of Information, Immigration and Tourism [1980] 1 S.A. 747. He found certain matters proved and he held at p. 755 that "as the applicant had shown clearly that the true purpose for his detention pending the completion of arrangements for his removal was and remained an ulterior one--to effect his illegal extradition to the United Kingdom--that the detention was, therefore, unlawful and that the applicant was entitled to his immediate release." In other words what Gubbay J. decided was ***28** that what had taken place between the authorities and the applicant was in fact a disguised extradition and that in the circumstances the applicant was entitled to be released, and released he was.

But then there was an appeal (see Minister of Information, Immigration and Tourism v. Mackeson [1980] 2 S.A. 747). The Appeal Court reversed the decision of Gubbay J., but they did so on a basis which left the findings of fact of Gubbay J. intact, but they ruled that Gubbay J. had in effect been wrong in looking behind the actual order of deportation and questioning the rights of the Zimbabwe-Rhodesia Minister to make the order that he did. So Mr. Blom-Cooper submits that the ruling of the Appeal Court is irrelevant so far as the present proceedings in this country are concerned, and with that submission I would agree.

What is important is to examine the findings of fact of Gubbay J., not because they are

in any way binding upon us; they are not. We have anew to look at the facts and decide whether the inferences we draw from the available information are the same as those drawn by Gubbay J. or not. But it is instructive to see what it was that he found to be the case.

The learned judge ([1980] 1 S.A. 747, 753) first of all reviewed the authorities and paid particular attention to the judgment in the well-known case of Brixton Prison Governor, Ex parte Soblen [1963] 2 Q.B. 243 ; [1962] 3 All E.R. 641. He cites a passage from the judgment of Lord Denning M.R. (it may be instructive just to make reference to it in passing), which at p. 302 and p. 661B respectively reads as follows: "So there we have in this case the two principles; on the one hand the principle arising out of the law of extradition under which the officers of the Crown cannot and must not surrender a fugitive criminal to another country at its request except in accordance with the Extradition Acts duly fulfilled; on the other hand the principle arising out of the law of deportation, under which the Secretary of State can deport an alien and put him on board a ship or aircraft bound for his own country if he considers it conducive to the public good that that should be done. How are we to decide between these two principles? It seems to me that it depends on the purpose with which the act is done. If it was done for an authorised purpose, it was lawful. If it was done professedly for an authorised purpose, but in fact for a different purpose with an ulterior object, it was unlawful. If, therefore, the purpose of the Home Secretary in this case was to surrender the applicant as a fugitive criminal to the United States of America, because they had asked for him, then it would be unlawful; but if this purpose was to deport him to his own country because he considered his presence here to be not conducive to the public good, then his action is lawful. It is open to these Courts to inquire whether the purpose of the Home Secretary was a lawful or an unlawful purpose. Was there a misuse of the power or not? The Courts can always go behind the face of the deportation order in order to see whether the powers entrusted by Parliament have been exercised lawfully or not."

Having cited that passage, Gubbay J. goes on as follows [1980] 1 S.A. 747, 754: "That is the approach I propose to adopt. It is, of course, for the petitioner to satisfy me that his detention was ordered for the purpose of effecting his surrender to the United Kingdom. In this regard his task has been lightened considerably by the commendable candour of the Assistant Secretary to the first respondent, who in his affidavit deposes:" then comes the passage I have already cited, namely: "The *main* reason for his detention is that he is due to face ***29** charges of fraud in the United Kingdom...." Then he deals with the *non sequitur* statement.

He then goes on (*ibid.*): "On May 21, if not a few days earlier, information was received by the Criminal Investigation Department that the petitioner was accused of having offended against the laws of the United Kingdom. He was not forthwith deemed to be an undesirable inhabitant, as he could have been. It was only on June 13 that the first respondent took that measure. During the intervening three weeks or so the overwhelming probability is that there was further communication between the Criminal Investigation Department and New Scotland Yard, and that the surrender of the petitioner was requested.

I say this because on June 15, the very day the petitioner was detained, his passport was remitted to the United Kingdom. If the real purpose were to remove from this country a person whose continued presence was detrimental to public good, why then frustrate the expeditious execution of that purpose? The explanation that the authenticity of the passport was suspected is unconvincing, for, as it had been in the possession of the police for three weeks, there was ample opportunity before June 15 to have despatched it. Moreover, the petitioner's attorney was not advised by Hughes that the veracity of the passport was doubted, but that it was required for 'evidential purposes' by the United Kingdom authorities. Hughes refused to elaborate as to what he meant by that. The passport was examined by the attorney who satisfied himself, as best he could, that it was a genuine document--a view that proved correct. He believes the police were similarly satisfied. But the most telling factor is that the endorsement subsequently placed upon the passport was designed to ensure the petitioner's reception in the United Kingdom. It is not suggested that that was done without the prior knowledge of the Criminal Investigation Department and took the first respondent's officials by surprise. Indeed that is hardly likely, for there was close liaison between the respective authorities. Against that background, I have no cause to disbelieve the assertion made by the petitioner in his answering affidavit that when he enquired of Glanville, the immigration officer, the reason for his being declared a prohibited person he was told, 'this has been done at the request of the British authorities'."

Mr. Blom-Cooper in asking us to take the same view as Gubbay J. on those facts, emphasises a number of points, because in the end, upon the authorities which I shall cite, it does become very largely a question of fact as to whether this action by the Metropolitan Police, in conjunction with the police in Zimbabwe-Rhodesia, fell on one side of the line or the other: on the Soblenside (*supra*) of the line or on the Hartley [1978] N.Z.L.R. 199 side of the line, that being a New Zealand case which I shall have to cite in a moment. And these are the matters upon which Mr. Blom-Cooper seeks principally to rely to show that this case falls on the Hartley side of the line.

First of all the finding by Gubbay J. that this was indeed disguised extradition. Secondly, that the Metropolitan Police were clearly in communication with the South African police at the material time, that is particularly May 1979. That is a matter of irresistible inference. I, speaking for myself, would agree. Thirdly, that the Metropolitan Police in May 1979, were well aware that no extradition was lawfully possible, because at that time the Zimbabwe-Rhodesia Government was in rebellion and was, in the eyes of the law in this country, illegal. The police accordingly knew that any extradition order made by the authorities in Zimbabwe-Rhodesia would be illegal in English eyes. Mr. Blom-Cooper submits ***30** that it is perfectly plain that the Metropolitan Police must have concurred in the operation of this device of deportation, which was really extradition, extradition not being possible to be operated legally in the circumstances. This was an oblique method of surrendering the applicant to the police in the United Kingdom. It is clear that it is not established that the Metropolitan Police initiated the proceedings in Zimbabwe-Rhodesia. But the submission is, and it is one with which I agree,

that it is plain that they adopted the procedure being carried out willingly and quickly.

Fourthly, Mr. Blom-Cooper submits that the United Kingdom authorities quite plainly decided not to apply for extradition proper after December 1979 as they might well have done, because by then the applicant was free under the order of Gubbay J. and by that time legality had returned to Zimbabwe-Rhodesia because the "Soames" regime had taken over, and there was direct rule pending independence. But they took, even after the proceedings, no steps to get extradition and allowed the appeal to continue.

Fifthly he points out this very significant event of the passport being sent to the United Kingdom and then revalidated in such a way that the only way in which it could be used was to return the applicant to the United Kingdom where he would be arrested. What, he asks, had the Metropolitan Police to do with the passport? because, as appears from the evidence to which I have already referred, it was sent to the Metropolitan Police. It must plainly have been requested by them, and the reason which is stated for it being required by them is, to my mind, as it appeared to Gubbay J. one which will not hold water on an objective view of the case, the reason for its return being "for the purpose of confirming its authenticity."

Finally, the circumstances of his return. It is apparent from the affidavit which we have read that the applicant returned by air under close escort in the aircraft. The close escort may have been provided because the applicant had previously exhibited himself to be capable of violent behaviour. One cannot afford to risk violent behaviour in an aircraft. But at Gatwick, when one would have thought that the purpose of the Zimbabwe-Rhodesia authorities had been successfully accomplished, namely to get the applicant out of Zimbabwe-Rhodesia, where he was unwelcome, back to England, which is his home territory, they still maintained their arrest of him and it was not until the Metropolitan Police arrived on the scene--the Metropolitan Police must obviously have had information when and where he was going to arrive in this country--that the escort from Zimbabwe-Rhodesia gave up their job by handing him over to the English police. It would have been sufficient, if deportation was the principal object of the exercise, simply to ask him to walk down the steps on to the tarmac and then to return about their lawful occasion. They did not.

Those being the circumstances it seems clear to me that the object of this exercise was simply to achieve extradition by the back door. It seems equally plain to me that the English police authorities were, to say the least, concurring in that exercise.

Mr. Purnell submits that the way in which Gubbay J. reached his decision is now not the way in which the matter should be approached, because, he says, and perfectly correctly, that there have been further affidavits, the benefit of which Gubbay J. did not have. There are affidavits first of all from Mr. Yelloly, a senior legal assistant in the Department of the Director of Public Prosecutions, secondly an affidavit from Mr. David Colin Bascombe Beaumont, who is the ***31** desk officer in the Central African Department, who was responsible for handling the Department's affairs in relation to Sir Rupert. Neither of those two gentlemen is able to give any information about what happened between

the Metropolitan Police and the Zimbabwe-Rhodesia authorities.

It was the Metropolitan Police who were in charge of operations in this country. The only affidavit we have from that organisation is from Commander Jim Sewell, who says as follows: "1. The officers conducting the inquiry into allegations of crime concerning the applicant are under my command."--There is no doubt about that. "2. On November 24, 1978, a warrant for the arrest of the applicant was issued. His whereabouts were unknown."--There is no reason to doubt that. "3. There were no extradition proceedings."--There is no reason to doubt that. "4. On April 17, 1980, the applicant was arrested by Officers of the Metropolitan Police on his arrival at Gatwick Airport."--There is no doubt about that.

To say the least, that affidavit is somewhat uninformative on the matters about which this Court has to make up its mind, particularly so when one looks at the certificate of the Home Secretary, the Right Honourable William Whitelaw, which was before this Court this morning on an application for discovery of documents, in paragraph 3 of which the Home Secretary says: "I have personally read and carefully considered a bundle of documents consisting of telex messages, letters passing between and notes of telephone conversations between members of the Metropolitan Police and the Rhodesian Police in connection with Sir Rupert Mackeson's presence in Zimbabwe-Rhodesia in 1979-80 and his return to the United Kingdom. The documents include requests for information about Sir Rupert Mackeson made by the overseas police and consideration of and details of arrangements made for his return to the United Kingdom." He then asks for these documents to be treated as confidential, a request which was upheld by this Court earlier today.

It may be that Mr. Sewell was in doubt as to how much he should say in his affidavit in the light of the possibility of the Secretary of State taking that attitude. Even so it seems to me that he might have been a little more informative. Taking the matter objectively, one does not derive any assistance at all from that affidavit, and certainly no reason exists upon that affidavit, which is the only material one so far as the prosecuting authority is concerned, to differ in any way from the judgment and findings of Gubbay J.

I turn now, as I said I would, to the case of Hartley [1978] 2 N.Z.L.R. 199 . I better read the facts of this case, because Mr. Purnell has rightly submitted that the facts of the case are very different indeed from the facts of the present case, and indeed one would not expect very much similarity in these circumstances. The headnote reads: "Members of a motorcycle gang made a retaliatory raid on a house believed to be occupied by members of a rival gang. Those making the raid armed themselves with metal tools, bars and wooden staves, and two firearms were carried. Several of the occupants of the house were assaulted and required minor medical attention. One young man was killed by a shotgun fired by Hartley. After the shot had been fired the gang members dispersed, and one of the men (Bennett) went to Australia. Hartley was charged with murder and 11 others (including Bennett whom the police had brought back from Australia) were charged under section 66 (2) of the Crimes Act 1961 with being parties to that offence. Hartley and eight of those

charged were convicted of manslaughter. The judge had directed the jury that no accused charged ***32** with being an accomplice could be convicted of a greater or lesser crime than the principal offender. Some of the accused had given evidence at the trial in their own defence implicating others and the judge's summing up was challenged *inter alia* on the ground that it lacked an accomplice warning. Bennett appealed on two grounds: first, that the Court had no jurisdiction to try him because he had been illegally brought back to New Zealand. The police had not obtained a warrant for Bennett's extradition and had merely asked the Melbourne police by telephone to put Bennett on the next plane to New Zealand." The second one was not dealt with.

The judgment of the Court was delivered by Woodhouse J. So far as the appellant's appeal was concerned, Woodhouse J. dealt with the allegation of wrongful actions by the police under two heads: first, the issue of jurisdiction. It had been submitted that in the circumstances of the arrest and bringing back to New Zealand from Melbourne of this man, the Court had no jurisdiction to try Bennett on the charges against him. That submission was rejected, and in rejecting it the learned judge at p. 215 cited the passage from the judgment of Lord Goddard C.J. in Officer Commanding Depot Battalion, R.A.S.C. Colchester, Ex parte Elliott [1949] 1 All E.R. 373, 376 as follows: "If a person is arrested abroad and he is brought before a court in this country charged with an offence which that court has jurisdiction to hear, it is no answer for him to say, he being then in lawful custody in this country. 'I was arrested contrary to the laws of the State of A or the State of B where I was actually arrested.' He is in custody before the court which has jurisdiction to try him."

The learned judge, Woodhouse J. went on to say at p. 215: "As to the bare question of jurisdiction, we think that the observations of Lord Goddard and of Lord M'Laren must be accepted as applicable to this country. It is the presence within the territorial boundaries that is the answer to the initial question of jurisdiction. In the present case, although Bennett was brought here unlawfully, he was eventually lawfully arrested within the country and then by due process of law he was brought before the Court. The Court was accordingly in a position to exercise jurisdiction in respect of him."

That applies precisely here and indeed no one in this Court has argued to the contrary. Whatever the reason for the applicant being at Gatwick Airport on the tarmac, whether his arrival there had been obtained by fraud or illegal means, he was there. He was subject to arrest by the police force of this country. Consequently the mere fact that his arrival there may have been procured by illegality did not in any way oust the jurisdiction of the Court. That aspect of the matter is simple.

But it is the second half, the issue of discretion, which again was dealt with by the judgment in Hartley (*supra*), which is the nub of the present application. It was dealt with in this way ([1978] 2 N.Z.L.R. 199, 216, 217: "There are explicit statutory directions that surround the extradition procedure. The procedure is widely known. It is frequently used by the police in the performance of their duty. For the protection of the public the statute rightly demands the sanction of recognised Court processes before any

person who is thought to be a fugitive offender can properly be surrendered from one country to another. And in our opinion there can be no possible question here of the Court turning a blind eye to action of the New Zealand police which has deliberately ignored those imperative requirements of the statute. Some may say that in the present case a New Zealand citizen attempted to avoid a criminal responsibility by leaving ***33** the country: that his subsequent conviction has demonstrated the utility of the short cut adopted by the police to have him brought back. But this must never become an area where it will be sufficient to consider that the end has justified the means. The issues raised by this affair are basic to the whole concept of freedom in society. On the basis of reciprocity for similar favours earlier received are police officers here in New Zealand to feel free, or even obliged, at the request of their counterparts overseas to spirit New Zealand or other citizens out of the country on the basis of mere suspicion, conveyed perhaps by telephone, that some crime has been committed elsewhere? In the High Court of Australia Griffith C.J. referred to extradition as a 'great prerogative power, supposed to be an incident of sovereignty' and then rejected any suggestion that it 'could be put in motion by any constable who thought he knew the law of a foreign country, and thought it desirable that a person whom he suspected of having offended against that law should be surrendered to that country to be punished': Brown v. Lizars (1905) 2 C.L.R. 837, 852. The reasons are obvious. We have said that if the issue in the present case is to be considered merely in terms of jurisdiction then Bennett, being in New Zealand, could certainly be brought to trial and dealt with by the Courts of this country. But we are equally satisfied that the means which were adopted to make that trial possible are so much at variance with the statute, and so much in conflict with one of the most important principles of the rule of law, that if application had been made at the trial on this ground, after the facts had been established by the evidence on the *voir dire*, the judge would probably have been justified in exercising his discretion under section 347 (3) or under the inherent jurisdiction to direct that the accused be discharged."

Although the Court in that case were able to decide the case on a different ground, the admissibility of certain evidence, it is plain what would have happened had that been the only issue which was before them for decision.

The circumstances in this case were somewhat complicated by the position which existed by reason of the Unilateral Declaration of Independence. Until 1967 the Fugitive Offenders Act 1881held good. That was, so to speak, a Commonwealth statute. It applied equally, and affected equally, all the countries in the Commonwealth. But in 1967 that situation changed, because then each country became, for this purpose so to speak, a separate entity and each country, or nearly every country, passed its own Act. This could not happen in Zimbabwe-Rhodesia, because of the illegal regime. Consequently no extradition could take place because of the illegal nature of the *de facto* government. On April 20, 1979, direct rule started, and in those circumstances, technically at least, the 1881 Act started once again to apply in Zimbabwe-Rhodesia, and would have been available had anyone seen fit to use it in order properly to extradite this applicant to the United Kingdom, whereas, as I have already said, that was not done.

In short I have come to the conclusion that this application is made out. I repeat, it is very largely a question of fact and the inference which one draws from the available facts on affidavits and on documentary evidence which are before us. But it seems to me that Mr. Blom-Cooper has made out his argument and he has shown sufficiently that the Metropolitan Police, no doubt due to an excess of enthusiasm, certainly not due to any conscious intent to do wrong, have in fact transgressed the line, that line between Soblen (*supra*) and Hartley (*supra*). In my view this application must succeed.

***34** Michael Davies J.:

I agree with the conclusions reached by Lord Lane C.J. and with the reasons contained in his judgment. I wish only to add by way of emphasis that in my view the principles to be applied in a case of this nature are now well established. The question is, as Lord Lane has said, on which side of the line the facts in a particular case fall. I have no doubt that here they fall in favour of the applicant's contentions and he is, in my opinion, entitled to the order for which he asks.

Representation

Solicitors: Lynn, Relton & Co. for the applicant. Director of Public Prosecutions.

Prohibition granted.

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ANNEX A

8. *Regina v. Plymouth Justices and Another, ex parte Driver* [1986] Q.B. 95.

[1986] Q.B. 95 Page 1
1985 WL 312186 (DC), (1985) 149 J.P. 465, [1986] Q.B. 95, [1985] 2 All E.R. 681, (1986) 82 Cr. App. R. 85, [1985] 3 W.L.R. 689, (1985) 129 S.J. 716
(Cite as: [1986] Q.B. 95)

C

***95** Regina v. Plymouth Justices and Another, Ex parte Driver

Divisional Court

DC

Stephen Brown L.J., Stuart-Smith and Otton JJ.

1985 Feb. 25, 26; April 3

Justices--Committal proceedings--Jurisdiction--Co--operation by Turkish authorities following murder in England--Applicant's deportation from Turkey unlawful in Turkish law--Applicant arrested on arrival and charged with murder--Whether court having power to inquire into circumstances of applicant's presence within jurisdiction for purpose of refusing to try him--Whether discretion to refuse trial where abuse of process--Whether improper dealing by authorities

The applicant, an Australian citizen, came to England on holiday. During his stay, an elderly woman was killed, and on the following day, before her body was discovered, he left England for France. The police, suspecting him of the woman's murder, made inquiries as to his whereabouts through Interpol. He was subsequently arrested in Turkey, and the English police, while not requesting his detention or continued detention sought, and received, the co-operation of the Turkish authorities to confirm the applicant's identity and assist in establishing his connection with the killing. There was no extradition treaty between the United Kingdom and Turkey and the police told the Turkish authorities that they had no authority to request the applicant's extradition or deportation from Turkey, but that if it was within their power to deport him to the United Kingdom it would assist the police to interview him. The Turkish authorities replied that they would expel the applicant "United Kingdom direction" but that he would not be accompanied by a police officer on the journey and his arrival could not be guaranteed and they asked the English police to pay for his fare, which they did on the same day. The Turkish authorities told the applicant that the English police were no longer interested in him and that he was to be released, but they required him to leave Turkey and put him, unaccompanied, on a non-stop flight to London. The action of the Turkish authorities in returning the applicant to England was unlawful in Turkish law. Upon his arrival in London the applicant was arrested and charged with the woman's murder.

On an application for judicial review by way of orders of certiorari to quash the charge and of prohibition to prevent committal proceedings, on the ground, inter alia, that the applicant had been brought into the jurisdiction by unlawful means, in that he had been deported from Turkey in circumstances amounting to disguised extradition:-

Held, dismissing the application, that the court had no power either to inquire into the

circumstances in which a person was found within the jurisdiction for the purpose of refusing to try him or prohibiting his trial, or to refuse to try a person who had been lawfully arrested within the jurisdiction for a crime committed there (see post, pp. 113C-E, 123C-F, 124E-F).

Ex parte Susannah Scott (1829) 9 B. & C. 446; Sinclair v. H.M. Advocate (1890) 17 R. (J.) 38 and Rex v. Officer Commanding Depot Battalion, R.A.S.C., Colchester, Ex parte Elliott ***96** Rex v. Officer Commanding Depot Battalion, R.A.S.C., Colchester, Ex parte Elliott [1949] 1 All E.R. 373, D.C. followed.

Reg. v. Hartley [1978] 2 N.Z.L.R. 199 not followed.

Reg. v. Bow Street Magistrates, Ex parte Mackeson (1981) 75 Cr.App.R. 24, D.C. and Reg. v. Guildford Magistrates' Court, Ex parte Healy [1983] 1 W.L.R. 108, D.C. decided per incuriam.

Held, further, that even if the court had a discretion to prohibit committal proceedings against a person where there had been an abuse of process within the jurisdiction which had procured his presence there, since there had been no irregular or improper dealing on the part of the English police or any other English authority and since the applicant had been lawfully arrested, there had been no such abuse and the application would, in any event, be refused (see post, pp. 114A-B, E-F, 124E-F).

The following cases are referred to in the judgment of Stephen Brown L.J.:

Brown v. Lizars (1905) 2 C.L.R. 837

Ker v. Illinois (1886) 119 U.S. 436

Reg. v. Bow Street Magistrates, Ex parte Mackeson (1981) 75 Cr.App.R. 24, D.C..

Reg. v. Governor of Brixton Prison, Ex parte Soblen [1963] 2 Q.B. 243; [1962] 3 W.L.R. 1154; [1962] 3 All E.R. 641, C.A..

Reg. v. Greater Manchester Coroner, Ex parte Tal [1985] Q.B. 67; [1984] 3 W.L.R. 643; [1984] 3 All E.R. 240, D.C..

Reg. v. Guildford Magistrates' Court, Ex parte Healy [1983] 1 W.L.R. 108, D.C..

Reg. v. Hartley [1978] 2 N.Z.L.R. 199

Rex v. Officer Commanding Depot Battalion, R.A.S.C., Colchester, Ex parte Elliott [1949] 1 All E.R. 373, D.C..

Scott (Susannah), Ex parte (1829) 9 B. & C. 446

Sinclair v. H.M. Advocate (1890) 17 R. (J.) 38

United States of America v. Sobell (1956) 142 F. Supp. 515; (1957) 244 F. 2d 520

Young v. Bristol Aeroplane Co. Ltd. [1944] K.B. 718; [1944] 2 All E.R. 293, C.A..

The following additional cases were cited in argument:

Arton, In re [1896] 1 Q.B. 108, D.C..

Attorney-General v. Cass (1822) 11 Price 345

Barton v. Commonwealth of Australia (1974) 3 A.L.R. 70

Government of the United States of America v. McCaffery [1984] 1 W.L.R. 867; [1984] 2 All E.R. 570, H.L.(E.).

Reg. v. Derby Justices, Ex parte Brooks [1984] Crim.L.R. 754; 148 J.P. 609, D.C..

Reg. v. Lopez (1858) Dears. & B. 525

APPLICATION for judicial review.

On an application for judicial review, made pursuant to leave granted by McNeill J. on 5 December 1984, the applicant, Andrew Michael Driver, sought (1) an order of certiorari to remove into the High Court and quash a charge of murder preferred against him by the police; and (2) an order of prohibition to prohibit the Plymouth justices from proceeding with committal proceedings against him in respect of the charge of murder. The grounds of the application were that the ***97** applicant's presence within the jurisdiction had been obtained by means of deportation from Turkey in circumstances which amounted to a disguised extradition; that the applicant had been brought to the United Kingdom by unlawful means; and that the Director of Public Prosecutions had suggested by a letter dated 31 August 1984 that the circumstances of the applicant's being brought to the United Kingdom should be canvassed before the High Court. The proceedings were also served on the justices, the Director of Public Prosecutions, and the Secretary of State for the Home Department.

The facts are stated in the judgment of Stephen Brown L.J.

Arthur Mildon Q.C. and *Anthony Donne* for the applicant. The applicant's presence in the United Kingdom was procured by irregular co-operation between the British and Turkish police. He did not come here of his own free will; he was not extradited from Turkey and could not have been; and his deportation from Turkey was unlawful in Turkish law. Thus his case is on all fours with Reg. v. Bow Street Magistrates, Ex parte Mackeson (1981) 75 Cr.App.R. 24. There are 17 points of comparison which on the whole show the applicant's case to be stronger than Mackeson's.

Two questions arise. (1) Was the applicant's arrest at Heathrow valid? (2) Ought the court to exercise its inherent jurisdiction to grant prohibitory relief where irregular

means have been used to procure the return to the United Kingdom of a fugitive and the United Kingdom authorities have concurred in the irregularity?

There is no such irregularity where (1) the fugitive returns voluntarily, unless he has been tricked; or (2) the fugitive returns through the happening of an unplanned or unintended event, e.g. a diverted flight; or (3) the fugitive's return is brought about by deportation, lawful or otherwise, which has not been procured by irregular action by the British police: see Reg. v. Guildford Magistrates' Court, Ex parte Healy [1983] 1 W.L.R. 108. There is such an irregularity where the United Kingdom authorities seek and secure the return of a fugitive where (1) extradition is not available, or is available but is not used properly; or (2) in the absence of extradition arrangements, the Crown or the police conspire with the authorities of the deporting state to secure the fugitive's return, otherwise than in accordance with the law of the deporting state. In Reg. v. Governor of Brixton Prison, Ex parte Soblen [1963] 2 Q.B. 243, 302, Lord Denning M.R. said that the Crown could require an alien to leave the United Kingdom either under the extradition rules, in which case the requirements of the Extradition Acts 1870-1935 must be fulfilled, or under the deportation laws, if he considered it conducive to the public good; and that it would not be lawful to use the deportation powers if the real purpose were extradition, or vice versa. If the United Kingdom authorities concur in the irregular deportation of a fugitive from another country in order to secure his presence here, similar considerations to those in Soblen's case should be applied. It is permissible for the United Kingdom to provide the potential deporting ***98** state with information relevant to its consideration of whether or not to deport.

The British police did co-operate with the Turkish authorities to bring about the applicant's disguised, unlawful extradition; at the very least they acquiesced in, and did not dissent from, it. The deportation was not in accordance with Turkish law, and there was therefore an irregularity which enables the court to exercise its discretion to grant the relief claimed. A passage in Reg. v. Hartley [1978] 2 N.Z.L.R. 199, 216-217 encapsulates the principles upon which the court's discretion should be exercised. If that discretion were not to be exercised in a case such as this, and the prosecution were permitted to proceed, there would be no need for extradition, and arbitrary arrest and deportation would become the order of the day. If the applicant had been deported to Australia, the only proper destination, then he could probably have been extradited from there; the method used was therefore not the only means by which the applicant could have been brought to justice. It is irrelevant that the applicant would escape trial if the court granted this application. There are two conflicting public interests here, but the greater one is that arbitrary action should be discouraged and shown not to pay. If the court were to exercise its discretion to prohibit these proceedings, it would not do so for the applicant's benefit but because the greater public interest requires that this kind of arbitrary action should not be tolerated.

The arrest at Heathrow was not valid because, although the police had a genuine suspicion that the applicant was guilty of murder, they were acting mala fide, since the Director of Public Prosecutions had already advised that there was insufficient evidence

to seek his extradition from any country which did have an extradition treaty with the United Kingdom.

Clive Nicholls Q.C. and *John Laws* for the Secretary of State. Four propositions are advanced. (1) The court has jurisdiction to try any person found within the jurisdiction for any offence committed within the jurisdiction. (2) The court has no power to inquire into the circumstances in which a person is found within the jurisdiction for the purpose of refusing to try him. (3) Alternatively, if the court does have such power, it arises only where there has been an abuse of process consisting of a manipulation or misuse of procedure or where a fugitive is found within the jurisdiction as a result of improper dealing by the authorities here. An irregularity abroad without such impropriety here cannot amount to an abuse of process such as to entitle the court to refuse to try the fugitive, and therefore the power does not arise in this case since there was no irregular or improper dealing on the part of the Devon and Cornwall police or any other English authority. (4) Where there has been a breach of foreign sovereignty or of foreign law, it is for the foreign state to vindicate its own law and for the complainant to prosecute his own wrong there.

The second proposition has been established in England since the early 19th century (see Ex parte Susannah Scott (1829) 9 B. & C. 446) and has been approved by this court in Reg. v. Officer Commanding Depot Battalion, R.A.S.C., Colchester, Ex parte Elliott [1949] 1 All E.R. 373. ***99** The first departure from that principle was in Reg. v. Hartley [1978] 2 N.Z.L.R. 199, which was concerned with statutory powers under the New Zealand Crimes Act 1961 and is clearly obiter, having been decided on another, unconnected basis, viz. that New Zealand law had not been complied with and that there had therefore been an abuse of process within the jurisdiction after the defendant had been brought there. The basis upon which the earlier cases, Ex parte Susannah Scott, Sinclair v. H.M. Advocate (1890) 17 R. (J.) 38 and Elliott's case, were distinguished in Hartley's case, viz. that they dealt only with whether the courts had jurisdiction to try persons irregularly brought here, was wrong; it is clear that the courts in those cases were dealing also with whether they had a discretion to prohibit proceedings for abuse of process. Hartley's case was followed in Reg. v. Bow Street Magistrates, Ex parte Mackeson, 75 Cr.App.R. 24, where only two other cases are referred to in the judgment: Elliott's case and Reg. v. Governor of Brixton Prison, Ex parte Soblen [1963] 2 Q.B. 243. Neither Scott's case nor Sinclair's case was drawn to the court's attention in Mackeson's case, nor was it pointed out that the decision in Elliott's case and the earlier cases went beyond jurisdiction in the strict sense; and it was not argued that the principle in Reg. v. Hartley was wrong. The approach in Mackeson's case was adopted in Reg. v. Guildford Magistrates' Court, Ex parte Healy [1983] 1 W.L.R. 108, again without argument, but relief was refused because the court found on the facts that there had been no abuse or irregularity.

In Mackeson's case there was no consideration of the statutory provisions which affect the rights of fugitive criminals returned here. The only rights acquired by returned criminals are the rights of specialty which arise only where a person has been returned under an extradition arrangement. There is therefore no right of specialty in this case.

The circumstances of a fugitive's return are governed by the municipal law of the returning state, which is not part of the law of the United Kingdom. The Extradition Act 1870 and the Fugitive Offenders Act 1967 deal with the surrender of fugitives *by* the United Kingdom, and do not affect fugitives returned *to* the United Kingdom. The only restrictions governing what may be done with returned fugitives are treaty obligations, which exist in international law and are not part of our municipal law.

In the earlier English and Scots cases there were excesses of authority on the part of the authorities here. In Ex parte Susannah Scott, 9 B. & C. 446, 448, where it was argued that the irregular return of the applicant constituted an abuse of process, it was held that the court could not inquire into the circumstances under which she had been brought into the jurisdiction. In Attorney-General v. Cass (1822) 11 Price 345, 348 the Court of Exchequer held that it would be an abuse of process to allow a legal process to keep in custody a person who had been arrested or detained illegally in England; that authority was relied upon by the applicant in Scott's case, but the court nevertheless held that it was powerless to intervene on that basis. In Reg. v. Lopez (1858) Dears. & B. 525, 547, it was held that the fact that a person had been brought forcibly and unlawfully onto an English ship, and thus into the jurisdiction, did not prevent him being "found" within the jurisdiction. ***100** In Sinclair v. H.M. Advocate, 17 R. (J.) 38, 40-41, 42, 42-43, 43, 44, the High Court of Justiciary held that it could not inquire into the legality in Portuguese law of the prisoner's surrender by Portugal, that the absence of an extradition treaty made no difference, that even if there had been irregularities relating to his apprehension and detention on the part of inferior officers, they were not to prejudice the public interest in the punishment of crime, and that where a court of competent jurisdiction had a person before it upon a competent complaint it must proceed to try him. That decision was adopted in Reg. v. Officer Commanding Depot Battalion, R.A.S.C., Colchester, Ex parte Elliott [1949] 1 All E.R. 373, 377-378 as showing that the law of England and Scotland is exactly the same on that point, viz. that once a person is in lawful custody in this country, the courts have no power to go into the question of the circumstances in which he was brought here.

In parallel with the United Kingdom courts, the courts of the United States of America have had to consider the proper principles to be applied in these circumstances. There they have applied the common law of the United States, which encompasses the common law of England, and also the United States' Constitution. In Ker v. Illinois (1886) 119 U.S. 436, 444 and United States of America v. Sobell (1956) 142 F. Supp. 515; (1957) 244 F. 2d 520, the American courts have applied the English and Scots cases which support the second proposition viz. Ex parte Susannah Scott, Reg. v. Lopez and Sinclair v. H.M. Advocate. The American cases are important and persuasive, since the United States' Constitution gives a wider remedy (which does not depend on discretion) than that given to our courts in the exercise of their inherent jurisdiction to prevent abuses of process, and the United States' courts have also had to consider breaches of constitutional rights. None of the American cases was cited in Mackeson's case, 75 Cr.App.R. 24.

It follows that Reg. v. Hartley [1978] 2 N.Z.L.R. 199 is not good law in the United

Kingdom. The court does have an inherent jurisdiction to prohibit proceedings for abuse of process within the jurisdiction, i.e. a manipulation or misuse of procedure: see Attorney-General v. Cass, 11 Price 345, and Reg. v. Derby Justices, Ex parte Brooks (1984) 148 J.P. 609. There is nothing in this case in the nature of manipulation or oppression in the use of procedure in England.

The ratio in Mackeson'scase 75 Cr.App.R. 24, is that where there are available extradition arrangements which are circumvented by improper dealing by authorities within the jurisdiction, the court may exercise its discretion to prohibit the resulting proceedings. That is wrong, and in any event does not bite on the facts of this case. In the light of Scott's, Sinclair's and Elliott's cases, properly understood, the decision in Mackeson's case cannot stand, and neither can Reg. v. Hartley.Reg. v. Governor of Brixton Prison, Ex parte Soblen [1963] 2 Q.B. 243 is irrelevant to this issue, since it deals with an entirely different question, viz. whether the exercise of prerogative power by the Secretary of State within the jurisdiction was proper, and whether the applicant had been lawfully ordered to be deported from the United ***101** Kingdom; it cannot be doubted that the court has jurisdiction to review the exercise of the Secretary of State's executive discretion.

Extradition arrangement would not be circumvented by the success of the second proposition. The observance and enforcement of the rules governing the surrender of fugitives is a matter solely for the municipal law of the surrendering state, not that of the receiving state, unless the municipal law of the receiving state otherwise requires: see Sinclair's and Elliott's cases. In the United Kingdom there is no municipal law governing requests for extradition by the United Kingdom; in Australia there is. To hold otherwise would be to impugn the acts of foreign states, which is contrary to the whole concept of extradition, and allegations of collusion by British officers with foreign states ought not in law to be entertained: see In re Arton [1896] 1 Q.B. 108, 111-112. The fact that there is no extradition treaty with Turkey makes no difference; if a foreign power wishes to surrender a fugitive and does so it is not for our courts to inquire into the regularity of the arrest or surrender under foreign law: see Sinclair v. H.M. Advocate, 17 R. (J.) 38, 43, *per* Lord M'Laren.

Even if Hartley's, Mackeson's and Healy's cases were rightly decided, neither irregularities outside the jurisdiction in the absence of improper dealing by the authorities here, nor, where there is no extradition treaty, a request by the United Kingdom authorities which resulted in the return of the fugitive will amount to an abuse of process on which the court will act. Both the surrender and requests for the return of fugitives are acts of prerogative power: see Brown v. Lizars, 2 C.L.R. 837, 852, *per* Griffiths C.J., Barton v. Commonwealth of Australia (1974) 3 A.L.R. 70, 74, *per* Barwick C.J., and Reg. v. Hartley [1978] 2 N.Z.L.R. 199, 217 *per* Woodhouse J. Being an act of prerogative power, an incident of sovereignty, a mere request for the return of a fugitive cannot be impugned as improper. There was no improper procuring here by the English police of any unlawful act by the Turkish authorities.

It is now clear that a Divisional Court exercising its supervisory jurisdiction is not bound to follow a previous decision of a Divisional Court, and may depart from it if it is convinced that the earlier judgment is wrong: see Reg. v. Greater Manchester Coroner, Ex parte Tal [1985] Q.B. 67, 78-79, 81. In Government of the United States of America v. McCaffery [1984] 1 W.L.R. 867, 873, Lord Diplock said that a previous decision of a Divisional Court was "prima facia binding" upon a Divisional Court. [Reference was made to Young v. Bristol Aeroplane Co. Ltd. [1944] K.B. 718.] In this case, the court should say that in view of the earlier authorities, one of them being a decision of a Divisional Court, the decisions in Mackeson's and Healy's cases were wrong, and it is free to do so.

John Nutting for the Chief Constable of Devon and Cornwall. The submissions made on behalf of the Secretary of State are adopted and supported. There is no suggestion that the English police have abused the process of the court or have done anything wrong. If the court were to adopt the course urged on behalf of the applicant, the police would effectively be reprimanded for doing their duty. Had they failed to seek ***102** the applicant's return they could properly have been criticised for neglecting that duty.

Mildon Q.C. in reply. In Ex parte Susannah Scott, 9 B. & C. 446, the arresting officer was sent abroad, with the knowledge of the British authorities, with a warrant for the applicant's arrest, there had been judicial process which had resulted in the issuing of a valid arrest warrant, and there was no evidence of any irregularity in the arrest in Brussels. In Sinclair v. H.M. Advocate, 17 R. (J.) 38 too the arresting officer had a valid warrant. That case does not deal with the situation where there is complicity between British and foreign officers. Sinclair's case is not binding on this court, and the principles stated at pp. 42 and 44 are too wide. The court has jurisdiction to grant prohibition to express its displeasure at the procedure followed. Reg. v. Officer Commanding Depot Battalion, R.A.S.C., Colchester, Ex parte Elliott [1949] 1 All E.R. 373 was decided on its own special facts, concerned as it was with the provisions of the Army Act, and is stated too widely since there must be circumstances where the court can inquire into the course of conduct of the police. In none of those three cases is there any suggestion of impropriety by British officers or of collusion, and all three cases are wrong if they purport to deprive the court of power to intervene where police officers conspire to produce a result which is an abuse of power.

[STEPHEN BROWN L.J. Surely there was collusion in Sinclair's case?]

Yes. Where questions are raised as to how evidence has been obtained, the court will look at the conduct of the police in deciding whether the evidence affected should be admitted. The court's inherent jurisdiction exists to stop police officers behaving irregularly and to encourage the regular use of procedure, where there are procedures, and to prevent arbitrary actions where there are not.

If the Secretary of State's argument were to succeed, it would give rise to very strange and unjust results. It would be a great disincentive to the executive to negotiate extradition treaties, since it would be more difficult to get a fugitive back by

extradition than by arbitrary action. The police could simply go abroad, kidnap a fugitive and bring him back, and the courts would be powerless to intervene. People could be brought here and tried as the result of dishonest activity by police officers, in spite of promises of immunity, or by virtue of perjured evidence having been given to a foreign court, and nothing could be done to stop the proceedings.

There is a distinction between the general exercise of the court's discretion and an exercise of discretion which inhibits arbitrary action abroad. The mere fact that there may be other remedies for abuses of process does not mean that the court does not have the power to do what it did in Reg. v. Bow Street Magistrates, Ex parte Mackeson, 75 Cr.App.R. 24. This is a stronger case than Mackeson's. The only relevant distinction is that in that case there was a valid extradition procedure in place, but that is not a ground on which Mackeson's case is to be distinguished.

***103** The justices and the Director of Public Prosecutions did not appear and were not represented.

Cur. adv. vult.

3 April. STEPHEN BROWN L.J.

read the following judgment. This is an application for judicial review by Andrew Michael Driver. By his notice of motion he seeks an order of prohibition to prohibit the Plymouth Justices from proceeding with committal proceedings in respect of a charge of murder, and an order of certiorari to remove into this court and to quash the said charge of murder and to order his discharge. The applicant, who is 23 years of age, was born in England, but emigrated to Australia in 1978. He is now an Australian citizen. He returned to England on holiday on 6 March 1984, and stayed with his brother at his bungalow in Plymouth. The brother's bungalow is divided into two separate living units. Next door to the brother lived a Mrs. Hopkins, an elderly lady. On the morning of 3 April 1984, Mrs. Hopkins was found dead in her home in circumstances which gave rise to suspicion of murder. For the purpose of these proceedings it has been assumed - and the applicant concedes - that Mrs. Hopkins was indeed murdered in her home on 2 April 1984.

On the morning of 3 April, before Mrs. Hopkins' body had been discovered, the applicant left Plymouth for France. He had made the arrangements for his travel some time previously. He became the prime suspect of the murder investigation. The police accordingly wished to interview him in order to pursue their investigations. They made inquiries as to his whereabouts through Interpol. In his affidavit the applicant states that he travelled through various European countries, going to Morocco and then eventually arriving in Turkey some three or four weeks after crossing from Folkestone to Calais. He intended to return to Australia via Turkey, Iran, Pakistan, India and Malaysia. He visited the Australian Embassy in Ankara to obtain a visa to enter and pass through Iran and there met another Australian who was reading an Australian newspaper. According to his affidavit, the newspaper contained an article which said that he, the applicant, was

wanted in connection with an alleged murder and was thought to be in the Earl's Court area of London. The other Australian showed the newspaper to an Embassy official who called the police.

The police took the applicant to the central police station where he was interviewed about the newspaper report and he told the chief inspector that he knew nothing about it. He states that the police told him that they intended to contact the British police and he was detained in a cell overnight. On the following day, he was fingerprinted and questioned further. He denied committing the murder and said that he had no motive and did not believe that Mrs. Hopkins was rich. That afternoon an English-speaking Turkish lawyer went to see him and he was told that he was going to appear in court to see if extradition was needed and that the authorities were waiting to see whether the fingerprints which had been taken from him matched those in Plymouth. He was then told that he would be taken to Ankara Central Jail until ***104** everything had been sorted out. He was taken there and put in the "United Nations Block" and was kept there for four days.

He was then taken to court with an interpreter. He states that the judge asked his name and address in Australia. He was asked whether he was employed and whether he knew Mrs. Hopkins. He said that he did. He was asked whether he knew that his fingerprints had been sent to the United Kingdom to be checked. He said that he did and then, according to his affidavit, he said the judge then told him that the fingerprints did not match and that the British police were no longer interested in him and that he was to be released and then all he had to do was to collect his belongings and his passport. His Turkish lawyer was there, but took no part in the proceedings. He was then taken from the court and asked to sign what he was told were release papers. Having done that, he was told by the lawyer that he would be taken back to jail to collect his belongings and would be released after an evening meal. He was given an evening meal and then two officials from the Australian Embassy came to see him. They said that they had received a telex from London and a telephone call from the Turkish Interpol police to confirm that he was to be released as the British police were no longer interested in him. He was then released and told to collect his passport from the police the following morning and his money was returned to him.

On the following morning he went to the Passport Control Office to collect his passport. Whilst there he was told that he had to leave Turkey and was asked where he wanted to go and was told that a ticket was to be supplied for him. He states that he assumed that this was by the Australian Embassy and he said that he wanted to return to Sydney. Australian Embassy officials subsequently arrived and gave him a ticket to London. He was told, so he states, that the ticket was to London because the Turks wanted him out of Turkey and a flight to London was the first available flight on which he could be put. He says that he said that he did not particularly want to return to London. A police officer offered to take him to Ankara airport and did so. At Ankara airport he boarded a plane from Ankara to Istanbul. It appears that he travelled by himself and was not accompanied on that flight. At Istanbul he was met by a policeman who asked if he would care to wait with him for the plane and asked whether there was anything he could do for him. He asked where to put his

belongings in readiness for the flight and asked him for lunch and he was taken to a restaurant where his lunch was ordered for him, but he paid for it himself. He was then told that if he wanted to, he could wait for his flight in the Passport Control Office and he did so. His affidavit continues by saying that at about 2.30 p.m. the police officer returned and told him that he could put his belongings out ready for the flight. His passport was stamped and he then went out to join the flight.

He did not pay for the ticket and believed that this was paid for by the Australian Embassy and he assumed that he would be required to refund the cost in due course. He did not have to pass through the metal detector before boarding the flight as did other passengers. He travelled in the business class of a British Airways flight which was a ***105** non-stop flight to London, Heathrow. Again, it does not appear that he was accompanied by any person on the flight. About 20 minutes before landing, the chief steward asked him to remain in his seat as they had received a radio message that he was to be met at the airport. He remained in his seat and all the other passengers left the aircraft before him on arrival. His affidavit then continues:

"As I stepped off the plane, I was met by a number of officials including Detective Inspector Bell and Detective Superintendent Hodson of the Devon and Cornwall Constabulary, three uniformed police officers and an Australian Embassy official who was not allowed to speak to me. At the top of the stairs I was told that I was being arrested for an offence of murder. I was then taken to a police station where my clothing was removed for forensic tests and I was again fingerprinted. I was given new clothes. I was then brought back to Plymouth where I was interviewed and charged."

He states that he has remained in custody ever since and although no date had been fixed at the time of the swearing of the affidavit, committal papers have been served on his solicitors. He states that no extradition proceedings took place and submits that his presence within the jurisdiction of this court was obtained by means of deportation in circumstances that amounted to "a disguised extradition" and that "I was removed from Turkey by unlawful means." He asks the court to exercise its discretion to grant his application for judicial review by way of certiorari and prohibition.

In support of his application, the applicant filed an affidavit sworn by a Mr. Rahmi Umur Aksan, a member of the Ankara bar, who states that he had read and had translated to him the affidavit of the applicant. He states that there is no extradition treaty between Turkey and England and that so far as he is aware the applicant had not committed any offence on Turkish territory. He further states that it is possible for Mr. Driver to have been lawfully arrested on suspicion and information, but that it is against the current law and therefore unlawful for him, having been discharged by the court, not to have been released, but instead and in the absence of the decision to extradite to a treaty country to have been sent to England. Further, although the actions of the Turkish police in relation to Mr. Driver are not legitimate or legal, nevertheless they do not constitute an offence of kidnapping or unlawful imprisonment. The actions complained of constitute the offence of "a public official using the powers of his office in bad faith." In that connection, he states, it is possible for a defendant to commence proceedings for

compensation against the Home Affairs department of the Turkish Government. In his opinion, the circumstances leading to the return of the applicant from Turkey to England as disclosed to him in the affidavit of the applicant are not in accordance with the legal provisions. Accordingly, he expresses the opinion that the actions of the Turkish authorities in what he describes as the arrest and return of Mr. Driver to England are unlawful, that is to say, contrary to the municipal law of Turkey.

***106** In an affidavit sworn on 20 February 1985, Mr. Donald Elliott, the Chief Constable of the Devon and Cornwall Police, states that following the discovery of the death of Mrs. Hopkins on 3 April 1984 the applicant became the prime suspect. Thereafter, the police through Interpol sought information of his whereabouts. On 1 May 1984 the police were first made aware that the applicant was in custody in Turkey. The police at no time sought his detention or continued detention. In paragraph 5 of his affidavit the chief constable states:

"The co-operation of the Turkish authorities was sought and received between 1 and 11 May to confirm his identity and assist in establishing his connection with the crime."

Paragraph 6 states that on 1 May the Turkish authorities were told that there was no extradition treaty between the United Kingdom and Turkey and that on 4 May the advice of the Director of Public Prosecutions was that the applicant's extradition at that stage would not be sought from any state. Paragraph 7 states that on 8 May the Turkish authorities were told that the police had no authority to request the applicant's extradition or deportation from Turkey but if it was within their power to deport him to the United Kingdom it would assist the police to interview him. Paragraph 8 states that on 9 May the police were informed that the Turkish authorities intended to expel the applicant "United Kingdom direction," but that his arrival was not guaranteed. The police were asked if they would arrange to pay for his fare and this was done the same day. Paragraph 9 states that on 10 May the Turkish authorities informed the police that their competent authorities had decided to expel the applicant "United Kingdom direction" on 11 May, but that he would not be accompanied by any police officers on the journey. Arrangements were then made for his flight and for him to be met at Heathrow. Paragraph 10 states that the applicant landed at Heathrow on 11 May 1984. He was arrested under common law powers on suspicion of the murder of Mrs. Hopkins, interviewed, and admitted that he was responsible for her death, and he was charged the following day.

This affidavit is supported in every material particular by an affidavit sworn by Mr. David John Hodson, Superintendent of Police at Plymouth. The superintendent states that he is and was the Detective Superintendent in charge of the investigation into the death of Mrs. Hopkins. He confirms that the applicant was arrested at Heathrow on 11 May 1984 under the provisions of the Criminal Law Act 1967 for the murder of Mrs. Hopkins, that he was interviewed and that he admitted that he was responsible for her death and was charged on the following day.

Affidavits sworn by the purser and captain of the aircraft in which the applicant travelled to Heathrow show that he was not dealt with as a deportee on the flight, although the steward states that a member of the British Airways ground staff told him

just before the aircraft doors were closed before take-off that there was a man in a particular seat who was a deportee. An affidavit has been filed on behalf of the Director of Public Prosecutions by a senior legal assistant in his department. This was sworn on 8 January 1985 and states that the Devon and Cornwall ***107** Constabulary consulted the Director of Public Prosecutions, following the discovery of the body of Mrs. Hopkins and the departure of the applicant from England, about the launching of extradition proceedings in the event that the applicant should be found within a country with which the United Kingdom had a treaty. On 1 May, the director was consulted by the Devon and Cornwall police on the telephone as to whether he would apply for the extradition of the applicant from Turkey and the director informed the police that there is no extradition treaty with Turkey. Subsequently, the director informed the Devon and Cornwall police that in his opinion the evidence available was insufficient to charge the applicant with murder and that there could be no application for extradition from any country. This decision would be reviewed should further evidence come to light. The affidavit shows that the director did not learn that the applicant had been arrested at Heathrow on 11 May until 18 May 1984, and he was not consulted or informed about any steps taken to return the applicant to this country at that time. In paragraph 5 of the affidavit it is stated that at a conference on 25 July 1984, the Devon and Cornwall Constabulary was requested to supply the director with copies of all messages passing between them and the authorities in Turkey and other places through Interpol, and in paragraph 6 it is stated that after considering the relevant documents the director considered it proper to draw the attention of solicitors acting for the applicant to Reg. v. Bow Street Magistrates, Ex parte Mackeson (1981) 75 Cr.App.R. 24, in which a person returning to this country from Rhodesia in the absence of extradition arrangements successfully applied for committal proceedings against him to be quashed. It appears that a letter dated 31 August 1984, was written on behalf of the Director of Public Prosecutions to that effect to the solicitor acting for the applicant. It would appear that it was that letter which prompted the present application for judicial review by the applicant.

Upon the basis of the evidence contained in those affidavits, Mr. Mildon submits, first, that the applicant did not come to the United Kingdom of his own free will. Although he was technically free in Turkey after his discharge from custody by the judge in Ankara, nevertheless he was under what Mr. Mildon describes as "surveillance." He did not have a free choice so far as his destination was concerned. Secondly, Mr. Mildon submits that the applicant was not extradited to England and could not have been extradited in the absence of an extradition treaty. Thirdly, Mr. Mildon submits that the applicant was not lawfully deported from Turkey, basing his submission upon the evidence contained in the affidavit of Mr. Aksan. Fourthly, Mr. Mildon submits that the applicant's presence in England was procured by irregular co-operation between the British and Turkish police. Accordingly, he submits that the case is "on all fours" with the decision of this court in Reg. v. Bow Street Magistrates, Ex parte Mackeson, 75 Cr.App.R. 24.

In the Mackeson case the facts were as follows. I read from the headnote:

"The applicant, a British citizen, was in Zimbabwe, formerly Rhodesia, in 1979 when

allegations of fraud were made against him in the United Kingdom. The Metropolitan Police did not then ask ***108** the Zimbabwe-Rhodesian authorities to extradite him because at that time the de facto government of Rhodesia was in rebellion against the Crown and considered illegal. Subsequently, the Metropolitan Police informed the Zimbabwe-Rhodesian authorities that the applicant was wanted in England in connection with fraud charges. He was arrested in Zimbabwe-Rhodesia and a deportation order made against him. His passport was returned to the Metropolitan Police and sent back to the applicant with authorisation for one journey only, to return to the United Kingdom. He brought proceedings in Zimbabwe-Rhodesia for the deportation order to be set aside which succeeded at first instance but that decision was set aside on appeal. No attempt was made to extradite the applicant after Zimbabwe-Rhodesia had returned to direct rule under the Crown in December 1979. The applicant was escorted back to the United Kingdom under the deportation order and handed over to the Metropolitan Police. No evidence was offered against him in respect of the three charges of fraud but further charges were alleged against the applicant under the Theft Acts 1968 and 1978. He applied for judicial review by way of an order of prohibition to prevent the hearing of committal proceedings against him in the magistrates' court in respect of those other charges.

"Held,that although the court had jurisdiction to hear the charges against the applicant since by whatever means he had arrived in the United Kingdom he was subject to arrest by the police force in the United Kingdom, and the mere fact that his arrival might have been procured by illegality did not in any way oust the jurisdiction of the court; nevertheless, since the applicant had been removed from Zimbabwe-Rhodesia by unlawful means, i.e. by a deportation order in the guise of extradition, he had in fact been brought to the United Kingdom by unlawful means. Thus, the Divisional Court would, in its discretion, grant the application for prohibition and discharge the applicant."

There were two elements in this decision. The first was the question of the jurisdiction of the court to hear the charges against the applicant and the second was the issue of "discretion." As is apparent from the headnote, the court held that there was clearly jurisdiction to hear the charges against the applicant notwithstanding the means by which he had arrived in the United Kingdom. In reaching its decision on the issue of "discretion" the court followed the decision of the New Zealand Court of Appeal in Reg. v. Hartley [1978] 2 N.Z.L.R. 199. The facts of that case were very different from the facts in Reg. v. Bow Street Magistrates, Ex parte Mackeson, 75 Cr.App.R. 24, or the facts in the present case. Since, however, the court in Mackeson's case relied upon the principle expressed in Reg. v. Hartley [1978] 2 N.Z.L.R. 199 so far as the exercise of discretion was concerned, it is relevant to refer to the facts of that case. I read the headnote:

"Members of a motorcycle gang made a retaliatory raid on a house believed to be occupied by members of a rival gang. Those making the raid armed themselves with metal tools, bars and wooden ***109** staves, and two firearms were carried. Several of the occupants of the house were assaulted and required minor medical attention. One young man was killed by a shotgun fired by Hartley. After the shot had been fired the gang members dispersed, and one of the men (Bennett) went to Australia. Hartley was charged with murder and 11 others (including Bennett whom the police had brought back from Australia) were

charged under section 66(2) of the Crimes Act 1961 with being parties to that offence. Hartley and eight of those charged were convicted of manslaughter. The judge had directed the jury that no accused charged with being an accomplice could be convicted of a greater or lesser crime than the principal offender. Some of the accused had given evidence at the trial in their own defence implicating others and the judge's summing up was challenged inter alia on the ground that it lacked an accomplice warning. Bennett appealed on two grounds: first, that the court had no jurisdiction to try him because he had been illegally brought back to New Zealand. The police had not obtained a warrant for Bennett's extradition and had merely asked the Melbourne police by telephone to put Bennett on the next plane to New Zealand; a request which they had complied with."

The remainder of the facts are not relevant to the issue before this court.

The relevant part of the court's decision is contained in paragraph 3 of the ratio of the court's decision, at p. 200:

"The court had jurisdiction to try Bennett on the indictment because, although he was unlawfully brought back to New Zealand, he was then lawfully arrested within the country and by due process of law brought before the court. But where there was evidence of improper dealings by the authorities the court had a discretion to discharge the accused under either section 347(3) of the Crimes Act 1961 or its inherent jurisdiction to prevent abuse of its own process. This was a case in which if asked to exercise its discretion on that ground, the trial judge would probably have been justified in doing so."

In so holding, the court purported to apply the decision of the Divisional Court of England presided over by Lord Goddard C.J. in Rex v. Officer Commanding Depot Battalion, R.A.S.C., Colchester, Ex parte Elliott [1949] 1 All E.R. 373 so far as the issue of jurisdiction was concerned. However, in his judgment Woodhouse J. divided the matter into two parts: first, the issue of jurisdiction and, secondly, the issue of discretion. He concluded his consideration of the issue of jurisdiction in the following way [1978] 2 N.Z.L.R. 199, 215:

"As to the bare question of jurisdiction, we think that the observations of Lord Goddard and of Lord M'Laren [in Sinclair v. H.M. Advocate (1890) 17 R. (J.) 38] must be accepted as applicable to this country. It is the presence within the territorial boundaries that is the answer to the initial question of jurisdiction. In the present case, although Bennett was brought here unlawfully, he was ***110** eventually lawfully arrested within the country and then by due process of law he was brought before the court. The court was accordingly in a position to exercise jurisdiction in respect of him."

His judgment then proceeds under the heading "The Issue of Discretion," at pp. 215-217:

"But having said that, we do not think the matter can be left there. It is worth observing that in the Sinclair case the Lord Justice-Clerk (Lord MacDonald) first said that the court could not be 'the judges of the wrong-doing of the Government of Portugal,' and that Sinclair was, 'properly before the court of a competent jurisdiction on a proper warrant.' But then he added: 'I do not think we can go behind this. There has been no improper dealing with the complainer by the authorities in this country, or by their officer ...' It may be implicit in those last remarks that if there had been evidence of

improper dealings by the authorities in Scotland then the court might well have taken some appropriate action in regard to the matter. However, as the complaint had centred merely upon the actions of the Government of Portugal, no domestic issue of the sort referred to by Lord MacDonald required attention. But if the courts are faced, as in this case, by a deliberate decision of one of the executive arms of Government to promote in a direct way the very illegality that has had a person returned to this country, then the question does arise as to what might be done. That sort of consideration caused Lord Goddard C.J. in the Depot Battalion case to add a rhetorical question to the passage to which we have referred. He asked, 'What is it suggested that the court can do?' and his answer was that 'The court cannot dismiss the charge at once without its being heard.' As we understand it, Lord Goddard was not dealing in that passage with the inherent jurisdiction of the court to prevent abuse of its own process. As to the extent of that inherent jurisdiction, reference may be made to Connolly v. Director of Public Prosecutions [1964] A.C. 1254... and in particular the speech of Lord Devlin and also to Taylor v. Attorney-General [1975] 2 N.Z.L.R. 675. In addition in New Zealand there is the wide statutory discretion conferred by section 347 of the Crimes Act 1961 which enables a judge to direct that no indictment shall be presented, or that other appropriate steps may be taken for proceedings to be terminated after an indictment has been presented or at any stage of any trial. Of course powers such as these should be exercised by a judge with proper circumspection but they are nevertheless available ' to prevent anything which savours of abuse of process': Connolly v. Director of Public Prosecutions [1964] A.C. 1254, 1296, ... *per* Lord Reid. In the same case Lord Devlin referred to the constitutional importance which attaches to the power of the courts to control the successive prosecution of charges, despite safeguards generally provided by the propriety surrounding decisions taken by the Crown in that regard. and he said [at p. 1354]: 'Are the courts to rely on the Executive to protect their process from abuse? Have they not themselves an inescapable duty ***111** to secure fair treatment for those who come or are brought before them? To questions of this sort there is only one possible answer. The courts cannot contemplate for a moment the transference to the Executive of the responsibility for seeing that the process of law is not abused.' ... On the following page he said plainly that in that sort of situation which he was then discussing, ' the only way in which the court could act ... would be by refusing to allow the indictment to go to trial.' We think that sort of consideration arises directly in the present case.

"There are explicit statutory directions that surround the extradition procedure. The procedure is widely known. It is frequently used by the police in the performance of their duty. For the protection of the public the statute rightly demands the sanction of recognised court processes before any person who is thought to be a fugitive offender can properly be surrendered from one country to another. and in our opinion there can be no possible question here of the court turning a blind eye to action of the New Zealand police which has deliberately ignored those imperative requirements of the statute. Some may say that in the present case a New Zealand citizen attempted to avoid a criminal responsibility by leaving the country: that his subsequent conviction has demonstrated the utility of the short cut adopted by the police to have him brought back. But this must never become an area where it will be sufficient to consider that the end has justified

the means. The issues raised by this affair are basic to the whole concept of freedom in society. On the basis of reciprocity for similar favours earlier received are police officers here in New Zealand to feel free, or even obliged, at the request of their counterparts overseas to spirit New Zealand or other citizens out of the country on the basis of mere suspicion, conveyed perhaps by telephone, that some crime has been committed elsewhere?"

Woodhouse J. then referred to Griffith C.J. who in the High Court of Australia in Brown v. Lizars (1905) 2 C.L.R. 837, 852 had spoken of extradition as "a great prerogative power, supposed to be an incident of sovereignty" and rejected any suggestion that it

"could be put in motion by any constable who thought he knew the law of a foreign country, and thought it desirable that a person whom he suspected of having offended against that law should be surrendered to that country to be punished."

Woodhouse J. continued [1978] 2 N.Z.L.R. 199, 217:

"The reasons are obvious. We have said that if the issue in the present case is to be considered merely in terms of jurisdiction then Bennett, being in New Zealand, could certainly be brought to trial and dealt with by the courts of this country. But we are equally satisfied that the means which were adopted to make that trial possible are so much at variance with the statute, and so much in conflict with one of the most important principles of the rule of law, that if application had been made at the trial on this ground, after ***112** the facts had been established by the evidence on the voir dire, the judge would probably have been justified in exercising his discretion under section 347(3) or under the inherent jurisdiction to direct the accused be discharged."

In his judgment in Reg. v. Bow Street Magistrates, Ex parte Mackeson, 75 Cr.App.R. 24, 32, Lord Lane C.J. said: "But it is the second half, the issue of discretion, which again was dealt with by the judgment in Hartley..., which is the nub of the present application." He then cited passages from the judgment of Woodhouse J. in Reg. v. Hartley to which I have already referred and concluded, at p. 33:

"In short I have come to the conclusion that this application is made out. I repeat, it is very largely a question of fact and the inference which one draws from the available facts on affidavits and on documentary evidence which are before us. But it seems to me that Mr. Blom-Cooper has made out his argument and he has shown sufficiently that the Metropolitan Police, no doubt due to an excess of enthusiasm, certainly not due to any conscious intent to do wrong, have in fact transgressed the line, that line between Soblen and Hartley. In my view this application must succeed."

The reference to Soblen is a reference to Reg. v. Governor of Brixton Prison, Ex parte Soblen [1963] 2 Q.B. 243 which had been cited in argument and to which I shall have to refer in due course. Basing his submissions upon the decision of this court in Reg. v. Bow Street Magistrates, Ex parte Mackeson, 75 Cr.App.R. 24, which in its turn appears to have been largely based upon the decision of the New Zealand Court of Appeal in Reg. v. Hartley [1978] 2 N.Z.L.R. 199, Mr. Mildon submits that in this case the court has within its inherent jurisdiction a discretionary power to grant the relief claimed if irregular means have been employed to effect the return of the offender in which the British authorities

have participated or concurred. He concedes that there would be no such irregularity: (1) if the applicant had come back voluntarily; (2) if he came back through the happening of events which were not planned or intended; or (3) if he came back because he was deported, whether lawfully or not, but his deportation had not been brought about by irregular action on the part of British police. He points out that such a situation obtained in Reg. v. Guildford Magistrates' Court, Ex parte Healy [1983] 1 W.L.R. 108. But, submits Mr. Mildon, there is an irregularity: first, where extradition is available but is not used or is not used properly; and, secondly, where in the absence of extradition, the Crown or the police co-operate with the authorities of the deporting state to secure the offender's return otherwise than in accordance with the law of the deporting state. He submits that on the evidence available in this case it is to be inferred that the police in this country did concur with the Turkish authorities in bringing about a disguised and unlawful extradition of the applicant, and that the applicant was consequently deported otherwise than in accordance with the municipal law of Turkey, and therefore that there was an irregularity which should lead this court to grant the relief claimed in the exercise of its discretion within its inherent jurisdiction. He submits that the relief ***113** claimed in this case is available to mark the court's disapproval of what he termed "this kind of arbitrary action." It is also right to observe that Mr. Mildon made a second but subsidiary submission. He asked the question: "Was the applicant's arrest at Heathrow valid?" suggesting that the police at Heathrow did not act in good faith, particularly having regard to the Director of Public Prosecution's earlier advice that insufficient evidence was available to ask for extradition from any country which did have an extradition treaty with the United Kingdom. However, it is fair to say that Mr. Mildon did not place much confidence in that submission, because he had to concede that on all the facts it was plain that the police did have a genuine suspicion of the applicant's part in the alleged crime.

On behalf of the Secretary of State, Mr. Clive Nicholls put forward four propositions. First, he says, that the court has jurisdiction to try any person found within the jurisdiction. In point of fact, this proposition is not dissented from by the applicant. The clear authority of Rex v. Officer Commanding Depot Battalion R.A.S.C., Colchester, Ex parte Elliott [1949] 1 All E.R. 373 establishes the proposition. Secondly, the court has no power to inquire into the circumstances in which a person is found in the jurisdiction for the purpose of refusing to try him. Mr. Nicholls recognises that the acceptance of this proposition would require this court to decline to follow the judgment in Reg. v. Hartley [1978] 2 N.Z.L.R. 199 as being either wrong in law so far as the power to exercise discretion is concerned, or applicable only to New Zealand in the special circumstances of the conditions and of the law of New Zealand. It would also follow that Reg v. Bow Street Magistrates, Ex parte Mackeson, 75 Cr.App.R. 24 would have to be regarded as having been decided per incuriam. Mr. Nicholls invites this court to distinguish the decision in Mackeson's case upon that basis. He recognises the boldness of such a submission, but nevertheless contends that a careful examination of the authorities demonstrates its validity.

His third proposition is put forward upon the basis that this court might feel itself bound to follow the decision in Mackeson's case and in such an event he would have to accept as an alternative proposition that the court may in the exercise of its inherent jurisdiction discharge a prisoner where there has been an abuse of process within the jurisdiction. This could obtain where there is an abuse of process consisting of a manipulation or misuse of procedure, or, secondly, where a fugitive is found within the jurisdiction as a result of an improper dealing by authorities here - for example "disguised extradition." But he submits that the mere fact that the return of a fugitive is a de facto extradition is not of itself an abuse of process in the absence of improper dealing by the authorities of this country. It is not in fact contested that an irregularity outside the jurisdiction of this court without any improper dealing by the authorities here would not amount to an abuse of process sufficient for a court to refuse to try such a person. The submission is made on the facts of this case that there is no evidence of improper dealing on the part of the authorities here. All that the Devon and Cornwall police did was first to inquire of the whereabouts of the suspected person, and, secondly, to invite the Turkish authorities acting ***114** *within their powers* to make such arrangements as would enable the Devon and Cornwall police to interview the fugitive.

He submits that there was no irregular or improper dealing on the part of the Devon and Cornwall police or any other English authority. The evidence before this court does not establish any impropriety, illegality or collusion on the part of the Devon and Cornwall police in relation to any unlawful act which the Turkish authorities may have committed in requiring the applicant to leave Turkey. The affidavit of the Chief Constable of the Devon and Cornwall police and the affidavit of Superintendent David John Hodson show that the only action taken by the Devon and Cornwall police was to notify the Turkish police that the applicant was suspected of a crime committed in this country and that they desired to interview him. They agreed to pay his fare. However, they did not at any time seek his detention or continued detention in Turkey. They sought and received the co-operation of the Turkish police to establish the applicant's identity. They told the Turkish authorities that the police in this country had no authority to request the applicant's extradition or deportation from Turkey. It is true that they notified the Turkish authorities that the applicant was wanted in the United Kingdom on suspicion of having committed the murder of Mrs. Hopkins and said that if it was within their power to deport him to the United Kingdom it would assist the police to interview him. I stress that both the affidavits make it clear that this request was subject to the important condition that any action taken should be within their power. There was no request by the British police to encourage the Turkish authorities to act illegally in any way, although they agreed to pay his fare. In these circumstances, it is not established that the authorities in this country were guilty of any improper dealing. The fact that a request was made in the terms indicated in the affidavits to which I have referred cannot in my judgment amount to improper dealing which would justify a court in taking the step sought by the applicant of refusing to try him, always assuming that the court has the discretionary power so to do. The suggestion that the applicant's arrest at Heathrow was illegal is not sustainable. In these circumstances I would in any event refuse this application, even assuming that the

court does have power to exercise a discretion such as was assumed in the New Zealand case, Reg. v. Hartley [1978] 2 N.Z.L.R. 199. The facts in this case differ markedly from those in Reg. v. Bow Street Magistrates, Ex parte Mackeson, 75 Cr.App.R. 24.

Although the conclusion to which I have come that no abuse of process has been established in this case would be sufficient to lead to the rejection of this application, Mr. Nicholls on behalf of the Secretary of State has argued cogently that in any event the court has no power to inquire into the circumstances in which a person is found within the jurisdiction for the purpose of refusing to try him. He submits that this is an undoubted principle which has been established in this country from the early part of the 19th century and has been approved by this court in Rex v. Officer Commanding Depot Battalion, R.A.S.C., Colchester, Ex parte Elliott [1949] 1 All E.R. 373. Further, he submits it is a principle which has been followed in parallel decisions in the courts ***115** of the United States of America. The basis of the principle is that it is in the public interest to try and punish crime, and that this predominates. Further, he submits, there is also the principle that if there is a breach of foreign sovereignty or of foreign law it is for the foreign state to vindicate its own law and for the complainant to prosecute his own wrong.

The first departure from this principle is to be found in the New Zealand case, Reg. v. Hartley [1978] 2 N.Z.L.R. 199, submits Mr. Nicholls. In support of this proposition, Mr. Nicholls cited first Ex parte Susannah Scott (1829) 9 B. & C. 446. The headnote reads:

"A rule nisi had been obtained for a habeas corpus to bring up S. Scott in the custody of the marshal, in order that she might be discharged. It appeared by the affidavits that a bill of indictment for perjury had been found against her, and on 11 February, Lord Tenterden C.J. granted a warrant for her apprehension, in order that she might appear and plead to the indictment, etc. Ruthven, a police officer, to whom the warrant was specially directed, apprehended Scott at Brussels; she applied to the English ambassador there for assistance, but he refused to interfere, and Ruthven conveyed her to Ostend, and thence to England, and on 9 April, she was brought before Lord Tenterden, and by him committed to the K.B. prison.

"Brougham and Platt shewed cause. A true bill having been found against the prisoner for a misdemeanour, there is no doubt that she is now rightfully in custody for want of bail. and when a party is liable to be detained on a criminal charge, the court will not inquire into the manner in which the caption was effected, Rex v. Marks (1802) 3 East. 157, Ex parte Krans (1823) 1 B. & C. 258. ...

"Chitty, contra. In civil cases, the rule laid down in those cited has always been adhered to; and although in Rex v. Marks, and Ex parte Krans, the court refused to discharge parties brought before them, on account of a defect in the commitment, it is to be observed, that in each of those cases the prisoners were charged with felony. This is the case of a misdemeanour only, and in favour of the liberty of the subject the court ought to refuse to extend the rule established as to charges of felony."

The judgment was given by Lord Tenterden C.J. and I quote from p. 448:

"I consider the present question to be the same as if the party were now brought into court under the warrant granted for her apprehension; she ought not to sustain any

prejudice from the circumstance of her having been committed by me to the custody of the marshal. The question, therefore, is this, whether if a person charged with a crime is found in this country, it is the duty of the court to take care that such a party shall be amenable to justice, or whether we are to consider the circumstances under which she was brought here. I thought, and still continue to think, that we cannot inquire into them. If the act complained of were done against the ***116** law of the foreign country, that country might have vindicated its own law. If it gave her a right of action, she may sue upon it. I am not, indeed, aware of any cases where the government of a foreign country has interposed, in order that a person might be brought here on a charge of misdemeanour. In cases of felony, I know it has been done; I have granted a warrant for the apprehension of the party accused, and I do not know how, for this purpose, to distinguish between one class of crimes and another. It has been urged that the same principle will warrant an arrest in the case of a common assault. That certainly will follow, but there is little danger that a foreign country would allow such an arrest, and if the party making it is guilty of misconduct, the verdict of a jury will teach him not to repeat it. For these reasons, I am of opinion that the rule must be discharged."

The point was considered in Scotland in Sinclair v. H.M. Advocate (1890) 17 R. (J.) 38. This was a decision of the High Court of Justiciary consisting of the Lord Justice-Clerk, Lord Adam and Lord M'Laren. The headnote reads:

"The Sheriff-substitute of Lanarkshire, on the petition of the procurator-fiscal, granted warrant to apprehend a person charged with breach of trust and embezzlement, and authority to a Glasgow sheriff-officer to receive him into custody from the Government of Spain. The accused was brought before the Sheriff-substitute on this warrant, and committed to prison to await his trial. He brought a bill of suspension and liberation in which he alleged that he had been arrested and imprisoned in Portugal by the Portuguese authorities without a warrant; that he had been put by them on board an English ship in the Tagus, and there had been taken into custody by a Glasgow detective-officer without production of a warrant; that during the voyage to London the vessel had been in the port of Vigo, in Spain, for several hours; that the complainer had demanded to be allowed to land there but had been prevented by the officer; that on arriving in London he was not taken before a magistrate, nor was the warrant endorsed, but he was brought direct to Scotland, and there committed to prison, and that no warrant whatever was produced or exhibited to him. *Held* that these allegations did not set forth any facts to affect the validity of the commitment by the Sheriff-substitute, which proceeded upon a proper warrant."

The facts upon which Sinclair based his case are rather striking and I cite from at pp. 39-40:

"Sinclair presented a bill of suspension and liberation, praying for suspension of the warrants under which he was apprehended and detained in prison, and for liberation. He averred that he had been living at Barcelona, in Spain, since February 1887, and had been carrying on business there; that in the month of January 1890 he had taken a furnished lodging near Lisbon in Portugal; that he was there arrested by the Portuguese authorities, and taken to the prefecture or police-office, where William Warnock, a detective ***117** from

Glasgow, identified him, and undertook to pay for his keep. He was then, without any charge being made against him, or any inquiry instituted, or warrant produced, locked up in the police-office for some days, and thereafter detained in prison 27 days. He was then taken by two Portuguese officers to the docks, and thence in a boat to the English ship 'Malaga,' of London, then in the roads at the mouth of the Tagus, and in Portuguese waters, and put on board thereof. William Warnock accompanied the complainer and the officers, and assumed the custody of the complainer on board. Immediately thereafter the vessel sailed, viz., about 3 February 1890. No warrant was then produced, nor did such exist. There is no Extradition Treaty between the United Kingdom and Portugal. The 'Malaga,' on its voyage to London, went into the port of Vigo in Spain, and anchored in Vigo Bay, in Spanish waters, for nearly 10 hours. The complainer demanded to be allowed to land, but was refused by Warnock. The vessel sailed from Vigo to London, where it arrived on 10 February 1890, and the complainer was at once taken in custody of Warnock straight from the docks to Euston Station, and thence, after waiting an hour, by train to Glasgow. The complainer was not taken in London before any magistrate or official, nor was any warrant procured there to justify the complainer being kept in custody, and he was brought to Glasgow and lodged in the prison there without any warrant whatever being produced or exhibited. The petitions on which the warrants of commitment were afterwards granted only contain warrants to search for and apprehend and bring the complainer up for examination, but the said warrants only run in Scotland, and are not endorsed or viseed in any way by any authority out of Scotland, and there was thus no authority for William Warnock taking or detaining the complainer in custody and lodging him in prison in Glasgow, nor is there any authority in the warrant of commitment for detaining him in prison. William Warnock acted throughout upon orders received from the respondents, but without any judicial or other warrant or authority whatever. The officials who apprehended him, and those who subsequently set him on board the said vessel, had no authority or judicial or other warrant to do so, and of this William Warnock was at the time well aware."

The Lord Justice-Clerk gave the first judgment. He said, at pp. 40-41:

"There are three stages of procedure in this case - first, there are the proceedings abroad where the complainer was arrested; second, there are the proceedings on the journey to this country; and third, the proceedings here. As regards the proceedings abroad and where the complainer was arrested, they may or may not have been regular, formal, and in accordance with the laws of Portugal and Spain, but we know nothing about them. What we do know is that two friendly powers agreed to give assistance to this country so as to bring to justice a person properly charged by the authorities in this country with a crime. If the Government of Portugal or of ***118** Spain has done anything illegal or irregular in arresting and delivering over the complainer his remedy is to proceed against these Governments. That is not a matter for our consideration at all, and we cannot be the judges of the regularity of such proceedings.

"In point of fact the complainer was put on board a British vessel which was at that time in the roads at the mouth of the Tagus, and given into the custody of a person who held a warrant to receive him, and who did so receive him. This warrant was perfectly regular, as also his commitment to stand his trial on a charge of embezzlement. If there

was any irregularity in the granting or execution of these warrants the person committing such irregularity would be liable in an action of damages if any damage was caused. But that cannot affect the proceedings of a public authority here. The public authority here did nothing wrong. The warrants given to the officer to detain the prisoner were quite formal, and it is not said that he did anything wrong.

"It is said that the Government of Portugal did something wrong, and that the authorities in this country are not to be entitled to obtain any advantage from this alleged wrongdoing. As I have said, we cannot be the judges of the wrongdoing of the Government of Portugal. What we have here is that a person has been delivered to a properly authorised officer of this country, and is now to be tried on a charge of embezzlement in this country. He is therefore properly before the court of a competent jurisdiction on a proper warrant. I do not think we can go behind this. There has been no improper dealing with the complainer by the authorities in this country, or by their officer, to induce him to put himself in the position of being arrested, as was the case in two of the cases cited. They were civil cases in which the procedure was at the instance of a private party for his own private ends, and the court very properly held that a person could not take advantage of his own wrongdoing. But that is not the case here."

The Lord Justice-Clerk then proceeded to deal with submissions made about the process adopted on arrival in England.

A submission was made on behalf of Sinclair that there was an irregularity in that part of the journey which should lead the court to quash the whole proceedings. The Lord Justice-Clerk said that he did not think so and said, at p. 42:

"No irregularity, then, involving suspension can be said to have taken place on his arrival in London and on his journey here. But even if the proceedings here were irregular I am of opinion that where a court of competent jurisdiction has a prisoner before it upon a competent complaint they must proceed to try him, no matter what happened before, even although he may have been harshly treated by a foreign government, and irregularly dealt with by a subordinate officer." (My emphasis)

In his judgment, Lord Adam said, at pp. 42-43, if there was "anything irregular and illegal in the mode in which the suspender was ***119** brought here, he will have his remedy against the wrongdoer." Lord M'Laren, in the course of his judgment, said, at pp. 43, 44:

"With regard to the competency of the proceedings in Portugal, I think this is a matter with which we really have nothing to do. The extradition of a fugitive is an act of sovereignty on the part of the state who surrenders him. Each country has its own ideas and its own rules in such matters. Generally it is done under treaty arrangements, but if a state refuses to bind itself by treaty, and prefers to deal with each case on its merits, we must be content to receive the fugitive on these conditions, and we have neither title nor interest to inquire as to the regularity of proceedings under which he is apprehended and given over to the official sent out to receive him into custody. ... I am of opinion with your Lordships that, when a fugitive is brought before a magistrate in Scotland on a proper warrant, the magistrate has jurisdiction, and is bound to exercise it

without any consideration of the means which have been used to bring him from the foreign country into the jurisdiction. In a case of substantial infringement of right this court will always give redress, but the public interest in the punishment of crime is not to be prejudiced by irregularities on the part of inferior officers of the law in relation to the prisoner's apprehension and detention."

In Rex v. Officer Commanding Depot Battalion R.A.S.C., Colchester, Ex parte Elliott [1949] 1 All E.R. 373, 377-378 Lord Goddard C.J. specifically approved the judgment of Lord M'Laren in Sinclair v. H.M. Advocate, 17 R. (J.) 38 as being

"a perfectly clear and unambiguous statement of the law administered in Scotland. It shows that the law of both countries is exactly the same on this point and that we have no power to go into the question, once a prisoner is in lawful custody in this country, of the circumstances in which he may have been brought here. The circumstances in which the applicant may have been arrested in Belgium are no concern of this court."

That case concerned an application for a writ of habeas corpus by a deserter from the R.A.S.C. who had been arrested in Belgium by British officers accompanied by two Belgian police officers. It was submitted on his behalf that the arrest was illegal, because he was arrested in Belgium contrary to Belgian law. There were other points in the case, but that is the material point for consideration in the present circumstances. The Divisional Court held that if a person is arrested abroad and is brought before a court in this country charged with an offence which that court has jurisdiction to hear, the court has no power to go into the question, once that person is in lawful custody in this country, of the circumstances in which he may have been brought here and the court has jurisdiction to try him for the offence in question.

In Reg. v. Hartley [1978] 2 N.Z.L.R. 199 the New Zealand Court of Appeal appears to have considered that Elliott's case was only authority for the proposition that a court had jurisdiction to try a prisoner who was found within its territory. As has been seen, the judgment in Reg. ***120** v. Hartley divided the consideration of the problem into first "jurisdiction" and secondly "discretion." It would appear, however, that Lord Goddard C.J. clearly did have in mind the question of "discretion." There were other points in Elliott's case, including an allegation of unreasonable delay. The importance of the judgment of the Divisional Court in Elliott's case is that it adopted without qualification the decision in the Scottish case, Sinclair v. H.M. Advocate, 17 R. (J.) 38, as representing the law of this country. Lord Goddard C.J. also referred in the course of his judgment to Ex parte Susannah Scott, 9 B. & C. 446 which had been decided in England in 1829. The decision in Reg. v. Hartley [1978] 2 N.Z.L.R. 199 did not appear to take into account the fact that Ex parte Susannah Scott did involve consideration of an allegation of abuse of process. It may be that in Reg. v. Hartley the court misunderstood Lord Goddard C.J., because he went on to consider the question of the allegation of delay in that case, in respect of which there was a clear discretion in the court due to its inherent jurisdiction.

Mr. Nicholls has also referred to cases in the United States of America applying the common law of the United States which itself encompasses in part the common law of

England. In addition, of course, the United States courts have to apply their own constitutional provisions. However, Mr. Nicholls submits that it is clear that United States courts have adopted the principle involved in his second proposition and have applied the principles deriving from the decisions in Ex parte Susannah Scott, 9 B. & C. 446 and Sinclair v. H.M. Advocate, 17 R. (J.) 38. He has cited certain decisions to indicate that the United States courts have moved, as it were, in parallel with the courts of this country in approaching this particular problem. He referred to Ker v. Illinois (1886) 119 U.S. 436, which is a decision of the Supreme Court of the United States. The case came to the Supreme Court by what is termed a writ of error. The plaintiff was a man named Frederick M. Ker who had been indicted, tried and convicted in the criminal court of Cook County in the State of Illinois for larceny. The indictment also included charges of embezzlement. During the proceedings before the court of trial, the defendant, Ker, had presented a plea in abatement which, on demurrer, was overruled. The substance of the plea in abatement was that he, being in the city of Lima in Peru after the offences were charged to have been committed, was in fact kidnapped and brought back to the United States against his will. He had alleged that from the time of his arrest in Lima until he was delivered over to the authorities of Cook County he was refused any opportunity of communicating with any person or seeking any advice or assistance in regard to procuring his release by legal process or otherwise. He alleged that that proceeding was a violation of the provisions of the treaty between the United States and Peru negotiated in 1870 which was finally ratified by the two governments in 1874.

He invoked the jurisdiction of the Supreme Court, contending inter alia that the proceedings in the arrest in Peru and the extradition and delivery to the authorities of Cook County were not "due process of law." The "due process of law" was assumed by the court to be a reference to a clause in the Amendments to the Constitution of the ***121** United States, which declares that "no State shall deprive any person of life, liberty, or property 'without due process of law.'" The "due process of law" there guaranteed is complied with when the party is regularly indicted by the proper grand jury in the State court and has a trial according to the forms and modes prescribed for such trials and when in that trial and proceedings he is deprived of no rights to which he is lawfully entitled. The opinion of the Supreme Court was delivered by Miller J. He said, at p. 440:

"We do not intend to say that there may not be proceedings previous to the trial, in regard to which the prisoner could invoke in some manner the provisions of this clause of the Constitution, but, for mere irregularities in the manner in which he may be brought into the custody of the law, we do not think he is entitled to say that he should not be tried at all for the crime with which he is charged in a regular indictment. He may be arrested for a very heinous offence by persons without any warrant, or without any previous complaint, and brought before a proper officer, and this may be in some sense said to be 'without due process of law.' But it would hardly be claimed, that after the case had been investigated and the defendant held by the proper authorities to answer for the crime, he could plead that he was first arrested 'without due process of law.' So here when found within the jurisdiction of the State of Illinois and liable to answer for a crime against the laws of that State, unless there was some positive provision of the

Constitution or of the laws of this country violated in bringing him into court, it is not easy to see how he can say that he is there 'without due process of law,' within the meaning of the constitutional provision."

He said, at p. 444:

"There are authorities of the highest respectability which hold that such forcible abduction is no sufficient reason why the party should not answer when brought within the jurisdiction of the court which has the right to try him for such an offence, and presents no valid objection to his trial in such court. Among the authorities which support the proposition are the following: Ex parte Scott, 9 B. & C. 446; ..." and he added a number of other cases.

The decision in Ker's case was followed in United States of America v. Sobell (1956) 142 F. Supp. 515; (1957) 244 F. 2d. 520, which was the subject of a motion to set aside the verdict and judgment of conviction for conspiracy to commit espionage upon the allegation that the defendant's constitutional rights had been violated and that the court was without jurisdiction to try him. The motion was heard first in the United States District Court, New York, in June 1956. The headnote reads, 142 F. Supp. 515:

"Extradition alone will not permit a person to be kidnapped or decoyed within the jurisdiction for the purpose of being compelled to answer to a mere private claim, but in criminal cases the interest of the public overrides that which is after all a mere privilege from arrest."

***122** The basis of the motion was that the court was without jurisdiction to try Sobell because he had been returned to the United States after being kidnapped in Mexico where it appeared that the Mexican police were the chief actors in his abduction. The court denied the motion which claimed that the court lacked jurisdiction to try the defendant because of his alleged illegal abduction. On appeal to the United States Court of Appeal's second circuit in 1957, the court held that the fact that the defendant had been forcibly returned to the United States authorities by Mexican security police did not impair the power of the federal district court to try the defendant for espionage conspiracy. Judge Medina referred to the appellant's supplementary motion which he said, 244 F. 2d. 520, 524:

"rests upon the charge that he was forcibly abducted from Mexico by the Mexican security police as agents of the United States. He contends that the alleged abduction was a violation of the Extradition Treaty between the United States and Mexico, ... As appellant says, his ' objection to national and, consequently, judicial power does not rest on the kidnapping or abduction of appellant as such, but rather upon the violation of the treaty.'"

The circuit judge, giving the judgment of the court, said, at p. 524:

"It seems too plain for reasonable debate that Ker v. Illinois, 119 U.S. 436... answers that question in the negative, even if appellant's factual assertions be taken as true."

He then referred to the facts of Ker's case. Mr. Nicholls accordingly submits that his second proposition is consistent with decisions in the parallel jurisdiction of the United

States courts. He submits that the American cases are important and persuasive, because the United States Constitution gives a wider remedy - which does not depend only on inherent jurisdiction - than that available to the United Kingdom courts in the exercise of their inherent jurisdiction to prevent an abuse of process. He submits that the only right acquired by a returned criminal is that which arises where he is returned to the jurisdiction as a result of extradition: that is the right of "specialty. " In Reg. v. Bow Street Magistrates, Ex parte Mackeson, 75 Cr.App.R. 24 it would appear that the only authorities cited to the court and considered by it were Rex v. Officer Commanding Depot Battalion, R.A.S.C., Colchester, Ex parte Elliott [1949] 1 All E.R. 373, Reg. v. Hartley [1978] 2 N.Z.L.R. 199 and Reg. v. Governor of Brixton Prison, Ex parte Soblen [1963] 2 Q.B. 243. However, Soblen's case concerned the validity of a deportation order; that is to say, the executive act of deportation *from* the United Kingdom. Mr. Nicholls has submitted that that case is not really relevant because it cannot be doubted that the courts have jurisdiction to review the exercise by the Home Secretary of his executive discretion.

The case concerned an application for a writ of habeas corpus by Soblen to prevent his deportation from the United Kingdom. He had arrived at London Airport having been expelled from Israel. Before that, he had fled from the United States following his conviction for conspiring to obtain and deliver defence information to the Soviet ***123** Union. He had been sentenced to life imprisonment but had been released on bail pending an application to the Supreme Court for a new trial. The court rejected the allegation that there had been a misuse of power by the Secretary of State in that case. Mr. Nicholls submits that, although that decision was referred to in Reg. v. Bow Street Magistrates, Ex parte Mackeson, 75 Cr.App.R. 24, it does not bear upon the present issue, for it was, he submits, a case where quite properly the court was reviewing the exercise of a discretionary power by a minister of the Crown. In Mackeson's case, the court referred to the line between Soblen and Hartley. Mr. Nicholls submits that they are two quite different situations and, accordingly, the question of a line between them does not strictly arise.

He further submits that in Mackeson's case the court was not referred to the actual decisions in Ex parte Susannah Scott, 9 B. & C. 446 or Sinclair v. H.M. Advocate, 17 R. (J.) 38 and may well have considered Rex v. Officer Commanding Depot Battalion R.A.S.C., Colchester, Ex parte Elliott [1949] 1 All E.R. 373 in the light of the New Zealand Court of Appeal's reference to it in Reg. v. Hartley [1978] 2 N.Z.L.R. 199. He submits that in the light of Sinclair v. H.M. Advocate, 17 R. (J.) 38 and Ex parte Susannah Scott, 9 B. & C. 446 it is clear that this court in Elliott's case did consider the question of whether any discretion to refuse to try the fugitive existed. Having adopted and approved the law as set out in Sinclair v. H.M. Advocate, 17 R. (J.) 38, Mr. Nicholls submits that the court must be taken to have accepted that the true state of the law in this country is that there is no power in a court to refuse to try a person who is within the jurisdiction and who has been lawfully arrested within the jurisdiction for a crime committed within the jurisdiction.

After careful consideration of the authorities to which Mr. Nicholls has referred this

court, I have come to the conclusion that his second proposition is well founded; that is to say, that the court has no power to inquire into the circumstances in which a person is found in the jurisdiction for the purpose of refusing to try him. It follows that in expressing that view I am differing from the view of this court as expressed in Reg. v. Bow Street Magistrates, Ex parte Mackeson, 75 Cr.App.R. 24 in so far as it held that the court did have such a discretion by reason of its inherent jurisdiction. We have had to consider whether this court is nevertheless bound in this respect by the decision in Mackeson's case on the basis of stare decisis. In Reg. v. Greater Manchester Coroner, Ex parte Tal [1985] Q.B. 67, a Divisional Court of three judges presided over by Robert Goff L.J. held that a Divisional Court on judicial review was bound by the relevant principle of stare decisis in the same way as a puisne judge exercising jurisdiction at first instance would follow a decision of a judge of equal jurisdiction, although not bound to do so, unless the decision appeared to be clearly wrong. However, it appears to me that in the absence of fuller reference to the authorities which have been drawn to the attention of this court, Reg. v. Bow Street Magistrates, Ex parte Mackeson, 75 Cr.App.R. 24, so far as the existence of a discretion is concerned, can be said to be a ***124** decision per incuriam: see Young v. Bristol Aeroplane Co. Ltd. [1944] K.B. 718.

It must also follow that Reg. v. Guildford Magistrates' Court, Ex parte Healy [1983] 1 W.L.R. 108 which followed Reg. v. Bow Street Magistrates, Ex parte Mackeson was also decided per incuriam in so far as the court accepted the existence of a discretion in the court. In my judgment, this court should follow Rex v. Officer Commanding Depot Battalion, R.A.S.C., Colchester, Ex parte Elliott [1949] 1 All E.R. 373 which endorsed the law as stated in Sinclair v. H.M. Advocate, 17 R. (J.) 38. The relevant passage is in the judgment of Lord Goddard C.J., at pp. 377-378:

"Lord M'Laren put the matter extremely shortly and clearly in a judgment in which he said: [in Sinclair's case, at p. 45:] 'With regard to the competency of the proceedings in Portugal, I think this is a matter with which we really have nothing to do. The extradition of a fugitive is an act of sovereignty on the part of the state who surrenders him. Each country has its own ideas and its own rules in such matters. Generally it is done under treaty arrangements, but if a state refuses to bind itself by treaty, and prefers to deal with each case on its merits, we must be content to receive the fugitive on these conditions, and we have neither title nor interest to inquire as to the regularity of proceedings under which he is apprehended and given over to the official sent out to receive him into custody.' That, again, is a perfectly clear and unambiguous statement of the law administered in Scotland. It shows that the law of both countries is exactly the same on this point and that we have no power to go into the question, once a prisoner is in lawful custody in this country, of the circumstances in which he may have been brought here."

Accordingly, both on the facts of this case and on the basis of the principle to be applied as a matter of law where the applicant has been lawfully arrested within the jurisdiction, I would refuse this application and dismiss the application for judicial review.

1985 WL 312186 (DC), (1985) 149 J.P. 465, [1986] Q.B. 95, [1985] 2 All E.R. 681, (1986) 82 Cr. App. R. 85, [1985] 3 W.L.R. 689, (1985) 129 S.J. 716
(Cite as: [1986] Q.B. 95)

STUART-SMITH J.

I agree.

OTTON J.

I agree.

Representation

Solicitors: Norman Sitters & Son, Plymouth; Treasury Solicitor; Chief Prosecuting Solicitor, Devon and Cornwall Constabulary, Exeter.

Application dismissed. Chief Constable's costs to be paid out of central funds. Legal aid taxation of applicant's costs. ([Reported by CLIVE SCOWEN ESQ., Barrister-at-Law])

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