Mr. Kefu.

IN THE COURT OF APPEAL OF TONGA

CRIMINAL JURISDICTION AC 8 of 2016

NUKU'ALOFA REGISTRY [CR63 of 2016]

BETWEEN: REX

- Appellant

AND : ANTONE THOMAS PEDRAS a.k.a CHRIS PEDRAS a.k.a CHRISTOPHER A. T. PEDRAS

- Respondent

Coram : Moore J
Blanchard J
Hansen J
Tupou J

Counsel : Mr. 'A. Kefu SC for the Appellant
Mr. L. M. Niu SC for the Respondent

Date of Hearing : 6 and 9 September 2016

Date of Judgment : 14 September 2016

JUDGEMENT OF THE COURT

Introduction

[1] The respondent resides in Tonga. He faces charges in the United States of America of what is known in short as wire fraud. The United States government applied under the Extradition Act (Cap.22) (the Act) for his extradition to the United States to stand trial. The application succeeded. On 19 April 2016 the Magistrates' Court made an order for his committal for extradition under s.9 (4) of the Act.

[2] As he is entitled to do under s.10 of the Act, the respondent applied for habeas corpus. Lord Chief Justice Paulsen granted the application. He found that the offence of which the respondent is accused in the United States is not a relevant offence for the purpose of s.3 of the Act. He set aside the committal order and directed the appellant's release from detention. The Crown appeals against the Lord Chief Justice's decision.

The Act

[3] It is convenient to first refer to the relevant provisions of the Act. Persons liable to be returned are defined in s.3 which provides as follows:

"(1) Subject to the provisions of this Act, a person found in Tonga who is accused of a relevant offence in any other country being a country designated in terms of section 4 of this Act or who is alleged to be unlawfully at large after conviction of such an offence in any such country may be arrested and returned to the country as provided by this Act".

[4] Section 4 provides for the designation of countries by Order of Cabinet. It is not in dispute that the United States has been so designated.

[5] Section 5 deals with relevant offences. It provides:

"(1) For the purpose of this Act an offence of which a person is accused or has been convicted in a designated country is a relevant offence if the offence however described is punishable both in Tonga and in the designated country concerned by imprisonment for a term of 2 years or more.

(2) An offence that is a relevant offence under subsection (1) shall not cease to be such by reason only that it is purely fiscal in character".

[6] The focus of argument before the Lord Chief Justice and in this Court was on whether the offence of which the respondent is accused is punishable in Tonga as required by s.5(1). That requires in the first instance an examination of the offence the respondent is alleged to have committed in the United States.

The offending

[7] The respondent is charged with violating Title 18, United States Code, section 1343 which relevantly provides:

> *"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretences, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signal, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both".*

[8] The indictment, returned by a Grand Jury in September 2013, recites that the respondent, then residing in California and Auckland, New Zealand, offered and sold investments in what was called the Maxum Gold Small Cap Trade Program (the Maxum Program). He is said to have induced investors to invest in the Maxum Program through false and fraudulent statements and written materials, including statements on the Maxum Program website. The false and deceptive statements are said to have included offering monthly returns of 4 to 8 percent; that an investor's money would be held in escrow and accessed only by the investor; that the investments were profitable; that the Maxum

Program was audited annually; and that the Maxum Program had been in existence for over 23 years and had over 6000 clients.

[9] The indictment recites that the respondent also offered investments in a company called FMP Renal Program. He claimed the company would operate kidney dialysis clinics in New Zealand, would be publicly traded and that for every $100,000 invested would return $28,000 immediately and between 2 and 5 percent quarterly.

[10] The indictment continues that the respondent failed to disclose that he would use investors' money to pay other investors, to pay sales commission and for his own person use; that account statements on the Maxum Program website showing investors their investment program were false; and that the investment programs were schemes to benefit the respondent personally.

[11] The scheme is said to have induced and attempted to induce investors to distribute over $5.6 million to the respondent. The eleven separate counts allege that on dates between December 2011 and December 2012, for the purpose of executing the scheme to defraud, the respondent and others "aided and abetted

each other, transmitted, caused the transmission, and aided and abetted the transmission" by wire and radio communication of sums ranging from $5000 to $100,000 from the bank accounts of investors in the United States to Maxum Program bank accounts in New Zealand and, on two occasions, sums of $5,575 and $1,580 from Maxum bank accounts in New Zealand to the accounts of investors in the Unites States. We infer that the latter two transactions were returns made to investors for the purpose of maintaining their confidence in the scheme.

[12] The offending set out in the indictment describes a scheme to defraud or obtain money by 'false or fraudulent pretences, representation or promises', the first element of the offence of wire fraud under sec 1343. The indictment then details eleven occasions on which the respondent is alleged to have transmitted or caused to be transmitted sums of money for the purpose of executing the scheme, which, on the face of it, satisfies the second element of the offence. We pass now to consider the critical question of whether the offence of which the respondent is charged is punishable in Tonga by imprisonment for a term of 2 years as required by s.5(1) of the Act.

Double criminality – the test

[13] As the Lord Chief Justice noted (at [24]), s.5(1) of the Act gives effect to the principle of international law known as double or dual criminality which requires that extradition should not occur unless the conduct in issue is a crime in both the state seeking extradition and the state which is asked to extradite. Its rationale was explained as follows by Deane J in *Riley v The Commonwealth of Australia* (1985) 159 CLR 1 at 17:

> *"Its essential utility is to provide an available safety mechanism whereby a state is not required to surrender up a person, possibly one of its own nationals, to be tried and punished for conduct which, according to the standards accepted by those within its boundaries is not deserving of punishment at all".*

[14] The way in which the principle is applied, however, necessarily depends on the terms of the extradition statute in the requested state. Different provisions can lead to different outcomes as the extensive discussion in *Norris v Government of the United States of America* [2008] UKHL 16 shows. The report from the Appellate Committee of the House of Lords traverses the modern history of extradition legislation in the United Kingdom and (at [65]) identifies what it describes as the essential choice the legislature makes in deciding what the double criminality principle requires.

> *"It is possible to define the crimes for which extradition is to be sought and ordered (extradition crimes) in terms either of conduct or of the elements of the foreign offence. This is the fundamental choice. The court can be required to make the comparison and to look for the necessary correspondence either between the offence abroad (for which the accused's extradition is sought) and an offence here or between the conduct alleged against the accused abroad and an offence here. For convenience these may be called respectively the offence test and the conduct test. It need hardly be pointed out that if the offence test is adopted the requested state will invariably have to examine the legal ingredients of the foreign offence to ensure that there is no mismatch between it and the supposedly corresponding domestic offence. If however, the conduct test is adopted, it will be necessary to decide, as a subsidiary question, where, within the documents emanating from the requesting state, the description of the relevant conduct is to be found".*

[15] Reviewing the authorities, the Lord Chief Justice noted (at [51]) that the Courts of the Commonwealth have preferred an application of the double criminality principle which has regard to conduct rather than requiring a strict correspondence between the offences. As Deane J said in *Riley* (supra) at p17, it defines the principle of double criminality in terms of substance rather than technical form. He went on to say; (at pp 17-18)

"On this view the requirement of double criminality is satisfied if the acts in respect of the requirement of double criminality is satisfied if the acts in respect of which extradition is sought are criminal under both systems even if the relevant offences have different names and elements... This view places primary emphasis upon the acts constituting the offence alleged against the accused in the warrant rather than upon general theoretical correspondence between the legal elements of the offence which he is alleged to have committed against the law of the requesting state and some offence recognized by the law of the requested state".

[16] Deane J emphasised, however, that the conduct to be considered must be confined to the acts necessary to prove a criminal offence in the requesting state. He said at (at p 18):

"The principle of double criminality is satisfied, where, and only where, any alleged offence against the law of the requesting state in respect of which extradition is sought would necessarily involve a criminal offence against the law of the requested state if the acts constituting it had been done in that state".

He concluded (at p 20):

"The result is that extradition pursuant to the relevant provisions of the Act is precluded except in a case where the acts or omissions alleged to constitute each extradition crime necessarily involved a criminal offence against the law of this country".

[17] The comments of Deane J must, of course, be read by reference to the legislative provision he was considering – a requirement

that 'the act or omission constituting the offence, or the equivalent act or omission" would constitute an offence against the law of the requested state. The United Kingdom Fugitive Offenders Act 1967 was in substantially the same terms. It was held in *Government of Canada v Aronson* [1990] 1 AC 579 to require a consideration of the conduct of which the person is accused as distinct from the course of conduct revealed by the evidence. In contrast, following the passage of the Extradition Act 1989 which required, simply, "conduct which, if it occurred in the United Kingdom, would constitute an offence..... and which, however described, in the law of the foreign State..... is so punishable under the law" was held to permit a consideration of all of the evidence described in the request: *R v Secretary for the Home Department, ex p Hill* [1990] QB 886. The two United Kingdom statutes are respectively examples of what have been described as the narrow conduct test, permitting a consideration only of the conduct constituting the offence, and the wider conduct test which allows all of the evidence relied on by the applicant to be considered.

[18] The Lord Chief Justice rejected the elements test and opted for the narrow conduct test. His reasons are contained in the following passage of his judgment:

"60. In my view, having regard to the scheme and purpose of the Act, the rationale underlying the requirement of double criminality and the relevant case law it is not necessary for the purposes of section 5 that there be a direct correlation or correspondence between the elements of an entire offence under the law of the requesting state and an entire offence under the law of a requested state. However, nor do I consider that it is sufficient if the relevant offence in both jurisdictions is only similar or that the conduct of the accused person viewed in its totality amounted to the commission of an offence according to the law of the requested state. I can find nothing in principle or in the words of the Act that support that approach.

61. In my view the appropriate focus is upon the relevant conduct of an accused which is said to constitute the offence in the requesting state, however that offence is described, and not the generality of his conduct as disclosed by the evidence submitted to the Court by the requesting state. The Court must ask itself whether that conduct, in total or in part, constitutes an offence under the law of Tonga. It follows from this that an accused person will not be subject to extradition in a case where the conduct that is the offence for which extradition is sought does not amount to an offence here in Tonga because of the absence of some essential ingredient required for an offence under the law of this country".

[19] Mr Niu SC for the respondent challenges the Lord Chief Justice's interpretation s.5(1). He submits that the words show an intention to import the offence test. He points to the fact that the legislation also extends to a person convicted of an offence and asks how

evidence of conduct could be introduced for that purpose. Mr Niu also referred to the legislation the Act replaced, the Extradition Act [Cap 22], which he said indicated an intention on the part of the legislature to introduce a stricter test.

[20] We do not accept the narrow interpretation urged on us by Mr. Niu. In our view the Lord Chief Justice was right to reject the elements test. We also agree with his conclusion that the narrower conduct test is intended.

[21] We preface our reasons by noting the prevailing view of Commonwealth courts of high authority that a liberal approach to the construction of extradition statutes should be adopted. In *Norris*, after referring to a submission that a construction should be adopted that is more favourable to the liberty of the subject, the House of Lords said (at [86]) :

> *"Against this, however, there is telling authority the other way. La Forest J, sitting in the Supreme Court of Canada, noted in United States of America v McVey [1992] 3 SCR 475, 513:*
>
> > *"Consistent with the general principle that extradition law should be liberally construed so as to achieve the purposes of the Treaty, a much less technical approach to extradition warrants and to common law warrants has been adopted..."*

Similarly, in In re Ismail [1999] 1 AC 320, 326-327 Lord Steyn said that "a broad and generous construction" should be given to extradition statutes "intended to serve the purpose of bringing to justice those accused of serious crimes. There is a transnational interest in the achievement of this aim".

[22] The House of Lords also notes (at [89]) that a wider construction avoids the need always to investigate the legal ingredients of the foreign offence which it describes as "a problem long since identified as complicating and delaying the extradition process".

[23] There is nothing in the words of the Act to indicate that the Court must confine its enquiry to the elements of the offence. The fact that it may also be necessary to examine a conviction does not indicate otherwise. Precisely the same issue is raised by a conviction as by an allegation of offending – whether to consider only the elements of the offence or to broaden the enquiry into the conduct which underlies it. The words 'however described' which appear in the 1989 United Kingdom Act (see para [17] above) as well as the equivalent provision of the previous Tongan Act tend to confirm an expectation that the offending will be assessed in its wider context.

[24] The Act as a whole does not point to an intention on the part of the Legislature to narrow the approach to extradition as Mr. Niu submits. On the contrary, it permits greater flexibility than was possible under the previous Extradition Act which required the offence to fall within one of the description of crimes listed in the Schedule to the Act. The so-called enumerative approach has been replaced by the eliminative approach which simply refers to conduct punishable by a specified sentence – see the discussion in *United States of America v Cullinane* [2003] 2 NZLR 1 (CA) at [50] – [51].

[25] Indeed the Act as a whole supports our view that the narrow conduct test is applicable. In relation to situations, such as the present, where extradition is sought because the individual has been charged with an offence, liability to arrest and removal flows from s3 of the Act. What is necessary is that the person is "accused of a relevant offence" to use the language of s3. That expression invites consideration of the terms on which the "accusation" of criminal conduct has been made in the requesting state. What that might comprehend, again in a case such as the present, is the material provided by the requesting state under s7. In certain circumstances which depend on the terms of the Order

made by Cabinet under s4 designating a particular country as a country to which the provisions of the Act apply, a requesting country should provide "a record of the case". Having regard to the terms of s7(3)(b) and (d) that record is to include "particulars of each offence and conduct in respect of which extradition is requested" as well as "a recital or summary of the evidence required to support the request for extradition". It is difficult to conceive how this material would be relevant if the task of the court of committal or the Supreme Court in an application for habeas corpus was simply to compare the elements of the offence alleged to have been committed in the country seeking extradition with those of an offence in Tonga. That such material might be provided points to the task of the court of committal or the Supreme Court being wider than a mere comparison of criminal elements. It is true that the need to provide "a record of the case" will depend on the terms of the Order made under s4 which may or may not enliven the proviso in s7(4). However in this case the Order designating the United States of America did enliven the proviso. But even if it had not, these elements of the legislative scheme requiring the production of "a record of the case" in certain circumstances point to the way the entire scheme

is intended to operate including the scope and effect of the definition of "relevant offence".

[26] The difficulty of a narrow approach which focuses exclusively on the elements of the offence becomes apparent when regard is had to the offence the respondent is alleged to have committed. The first limb of s 1343 contemplates either a scheme or artifice to defraud or, alternatively, for obtaining money or property by one of the means listed. Unless the conduct alleged to constitute the offence is examined, it simply will not be possible to determine what the person is alleged to have done for the purpose of deciding whether it involves conduct that would be punishable in Tonga. Much the same can be said about the second limb. At a minimum the assessment required by s.5(1) requires knowledge of what is alleged to have been transmitted.

Applying the test

[27] We turn to consider whether, having regard to the conduct which constitutes the alleged offending, the offence would be punishable in Tonga. For this purpose it is common ground that the only available applicable offence is section 164 of the Criminal Offences Act which reads:

"Every person who by any false pretence obtains for himself or for any other person any money, valuable security or other thing whatever shall be liable to the same punishment as if he had committed theft".

Obtaining money by false pretences is one of the extradition crimes listed in Article 3 of the Extradition Treaty 1931.

[28] On this aspect of the case the Lord Chief Justice's conclusion was as follows:

"62. When applied to the facts of this case the result is clear. The offence of obtaining by false pretences under section 164 requires that it be proved that the accused has by making the false pretence obtained some money, valuable security or other thing. This is not a requirement of the offence of wire fraud under section 1343. The evidence that is in the record of the case that Mr. Pedras did, as a result of his fraudulent activities, obtain for himself and others over USD$5million forms no part of the material that the Court may consider when determining whether section 1343 is a relevant offence for the purposes of the Act.

63. It follows from this that section 1343 is not a relevant offence for the purposes of the Act".

[29] We respectfully disagree with the Lord Chief Justice's reasoning and conclusion on this issue. It is the case, as he says, that the

offence of obtaining by false pretences under s.164 requires proof that the accused obtained for himself or another money, valuable security or other thing. It is also the case that obtaining a benefit is not an element of the offence of wire fraud under s.1343. However, it happens that in this case the allegation is that what was transmitted by wire was, in nine of the eleven counts, money which flowed from the bank accounts of investors to bank accounts controlled by the respondent. The conduct which is relied on to prove an essential element of the offence in the United States is evidence of an essential element of an offence under s164 of the Criminal Offences Act. We see no reason why this conduct should be excluded from consideration for the purpose of deciding whether the offence of which the respondent is accused is a relevant offence. As s 5(1) indicates, it does not matter how the offence is described. What is relevant is what the offending **is**. It is a rose by any other name. The requirements of s5(1) are satisfied because the conduct that constitutes the offence in the United States (and no more) is an offence in Tonga punishable by more than 2 years imprisonment.

[30] While this sufficient to dispose of the appeal, we would add that, even if the evidence of obtaining a benefit were excluded from

consideration, the conduct would, in our view, still constitute an offence in Tonga punishable by more than two years imprisonment. That is the offence of attempting to obtain by false pretences. By section 4 and 5 of the Criminal Offences Act an attempt to commit an offence is itself an offence carrying a maximum sentence of one half of the maximum sentence provided for the completed offence. If, contrary to the view we have taken, the evidence of obtaining a benefit is excluded from consideration, what remains is clearly sufficient to constitute the offence under Tongan law of attempting to obtain by false pretences.

[31] For these reasons we conclude that the Lord Chief Justice erred in finding that the offence of which the respondent is accused in the United States is not a relevant offence under the Act.

Result

[32] The orders made setting aside the order committing the respondent to custody for return to the United States of America to stand trial and releasing him from detention are quashed. The orders made in the Magistrates' Court will, consequentially, be

restored. The respondent must accordingly forthwith surrender himself into custody.

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Moore J

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Blanchard J

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Hansen J

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Tupou J