LADY BENWELL
V.
THE ATTORNEY-GENERAL AND ANOTHER

COURT OF APPEAL
DHEERARATNE, J. (PRESIDENT) AND S. N. SILVA, J.
C. A. APPLICATION NO: 20/87.
OCTOBER 31, 1988.
NOVEMBER 01, 02, 04 and 07, 1988.

Habeas Corpus — Extradition — Extradition Law No. 8 of 1977 SS. 8, 10, 11, 14, 16 — Revision — Authority to proceed — Who should grant it — Requisites for the grant of Extradition — Should order of committal be made by the same Judge who heard the evidence? — Admissibility of record of evidence given in the requesting State — Standard of proof required for committal — When is extradition unjust and oppressive because of passage of time?

Benwell was the Chief Securities Officer of the United Dominion Corporation (U.D.C.) an Australian financial institution. He was charged under the relevant Australian statutes for offences committed during 12.01.77 to 09.06.78, corresponding to the extraditable offences of criminal breach of trust and cheating under our law. Benwell left Australia escaping arrest. Upon a request for his extradition to the President who was also the Minister of Defence his Secretary signed the authority to proceed on which was initiated committal proceedings for extradition in the High Court. Oral evidence of a superior officer of the U.D.C. was led before Court and evidence recorded in Australia was also produced. The Judge made order discharging Benwell. This order was set aside by the Court of Appeal, acting in revision and the case was remitted to the High Court. The order was affirmed by the Supreme Court. Committal proceedings were resumed before a new judge. No further evidence was led, only written submissions were tendered. Benwell was committed to custody to await extradition by order dated 12.01.87.

Held

(1) In terms of Section 8 the Minister of Defence is the appropriate functionary to consider and to make a decision as to whether an authority to proceed should issue upon a request for extradition. The authority to proceed issued, signed by the Secretary to the President instead of the Secretary to the Ministry as required by section 16, is a defect which pertains only to the form of communicating it and does not effect the validity of the order itself.

(2) Proceedings for extradition do not take the character of a trial and proceedings before the new Judge need not be taken *de novo*. The gist of the matters to be considered in the first instance regarding a person not convicted

of an offence under sec. 10(4) are (a) Is the offence extraditable? (b) Has the required standard of proof been established (c) Is committal prohibited by law? These matters could be decided, and an order made upon the evidence taken in the requesting State. It is not essential that the same judge who heard the evidence should make the order.

(3) The standard of proof required in committal proceedings for extradition in terms of section 10(4) (a) is not higher than what is required for committal for trial in non-summary proceedings under sec. 154 of the Code of Criminal Procedure Act No. 15 of 1979.

(4) The words "Shall be admissible in evidence" appearing in the provisions of sections 14(1) (a) and 14 (1) (b) have the legal effect of eliminating the procedural steps that would otherwise have to be complied with in order to adduce evidence before the judge.

(5) The facts in issue are whether the cheques were received at the U.D.C. and if so whether they were misappropriated in the manner stated in the charges, and NOT the making of each cheque. Therefore it is unnecessary to call the persons who signed the cheques in terms of sec. 67 of the Evidence Ordinance. The evidence can sustain charges of criminal breach of trust and cheating under our law and these are offences for which extradition is permissible.

(6) The test whether passage of time renders extradition unjust and oppressive is will delay cause prejudice to the corpus at the trial to be had in the requesting State and will it result in an injustice to him in terms of section 11(3) (b) of the Extradition Law.

Cases referred to:

1. *Benwell v. Republic of Sri Lanka* [1978 - 79] 1 Sri LR 194, 205
2. *Union of India v. Manohar Lal Marang* [1977] 2 All ER 348, 353
3. *Government of Australia v. Harrod* [1975] 2 All ER 1, 10, 11
4. *Schtraks v. Government of Israel* [1962] 3 All ER 529
5. *Henderson v. Secretary* for Home Affairs [1950] All ER 283, 287
6. *Kakis v. Government of Cyprus* [1978] Weekly LR 779

APPLICATION for writ of Habeas Corpus

R. K. W. Goonasekera with *P. Illangakoon* and *Sanatha Senadira* for the petitioner.

Upawansa Yapa, D.S.G. with *K. Kamalasabaysan,* D.S.G. for the respondents.

Cur. adv. vult.

December 16, 1988

S. N. SILVA, J.

Applications for a writ of Habeas Corpus and for the exercise of the revisionary jurisdiction of this Court, have been filed, in respect of the Order dated 12-01-1987 made by the High Court Judge, Colombo, in terms of section 10(4) of the Extradition Law No. 8 of 1977, committing Philip Gorden James Benwell to custody to await his extradition to the Commonwealth of Australia. This Order was made in proceedings initiated upon an authority to proceed dated 08-07-1981 issued by the President being the Minister in charge of the subject of Extradition, in terms of section 8(3) of the said Law.

The request for extradition is based on 19 warrants issued for the arrest of Benwell in the Commonwealth of Australia. These warrants relate to eighteen offences of fraudulent misappropriation (punishable under section 178 A of the Crimes Act No. 40 of 1900 of New South Wales) and one offence of obtaining money under a false pretence (punishable under section 179 of the said Act), alleged to have been committed by Benwell during the period 12-01-1977 to 09-06-1978. The requesting state has also sent the evidence recorded by the Stipendiary Magistrate of New South Wales, against Benwell. This consists of the evidence of 43 witnesses and of 352 documents. The total loss alleged to have been caused to the United Dominions Corporation of Pitt Street, Sydney (U.D.C.) consequent to the said offences, is stated as $ 108,431.25.

The initial request for the extradition of Benwell was made in 1978. In these proceedings the High Court Judge made order dated 02-02-1979 committing Benwell to custody to await extradition, in terms of section 10(4). The order was set aside

by this Court in an application for a Writ of Habeas Corpus (*Benwell vs. Republic of Sri Lanka* (1)). Thereafter, evidence referred to above was recorded in the requesting State and a fresh authority to proceed dated 08-07-1981 was issued to the High Court. In addition to producing the record of the evidence, an employee of the U.D.C., Berg Oliver, under whom Benwell worked at one stage, was called as a witness and was cross-examined by the Counsel appearing for Benwell. At the conclusion of the proceedings, the High Court judge upheld one of the objections urged by Counsel that the record of the evidence had not been duly authenticated in the requesting State and discharged Benwell. The Attorney-General moved in revision against the order. A bench of three Judges of this Court allowed the application and set aside the order of the High Court Judge discharging Benwell. It was held that the depositions and documents led in evidence were duly authenticated within the meaning of section 14(2) of the Extradition Law. The case was remitted to the High Court "for an appropriate order in terms of section 10 of the Extradition Law upon a consideration of the deposition and documents and other evidence already recorded against the Respondent, after hearing the parties". This order was affirmed by the Supreme Court after hearing an appeal filed by Benwell.

When proceedings resumed before the High Court, no further evidence was led and both Counsel tendered written submissions. Thereupon the learned High Court Judge made the order that is now challenged. In the said order the learned High Court Judge dealt with the evidence relevant to each of the charges separately. He found that the offence of fraudulent misappropriation being the subject of eighteen charges constitute the offence of criminal breach of trust under our law and as such is an extraditable offence. The offence of obtaining money under false pretence was found to constitute the offence of cheating under our law, which is also extraditable. He also held that the evidence led by the State was sufficient to warrant the trial of Benwell if the offences were committed in Sri Lanka.

The learned High Court Judge observed that Benwell adopted a certain modus operandi in respect of the transactions covered by the eighteen charges of fraudulent misappropriation. Counsel for the Petitioner did not address this Court specifically with regard to the said charges but urged grounds that are generally applicable to them. Therefore, I will now set down the facts as disclosed by the evidence, relating to these charges.

The U.D.C. is a financial institution that took deposits placed by the public and lent money inter alia on the security of real estate. Benwell was an employee of that institution from 20-11-1972 up to 09-06-1978 and at the material time served as a Securities Officer. His functions included the custody of security documents (original mortgage bonds, title deeds etc.) and the settlement and discharges of real estate transactions entered into with the U.D.C. Ordinarily the amount due is amortized by periodic payments. However, in certain instances, mortgagors seek to discharge their liabilities prematurely because they intend to sell the properties. The money for such settlement is advanced by the intending purchasers. The procedure followed in the case of such premature settlement is as follows:

The mortgagor or his solicitor or agent requests the U.D.C. to notify the pay out figure for the purpose of the settlement of the mortgage. This request is attended to by a Securities Officer who gets the pay out figure calculated by at least two officers, one whom may be the Securities Officer himself. The Securities Officer notifies the pay out figure to the mortgagor or his solicitor or agent by letter. He also gets ready to effect the discharge of the mortgage by preparing the form titled "Discharge of Mortgage" and the Attorneys who are authorised to sign on behalf of the U.D.C. place their signatures at this stage without writing the date. The Securities Officer retains the form until payment is made. On receipt of the cheque for the pay out figure that had been notified, the Securities Officer signs as a witness on the discharge form and also writes in the date. According to the evidence the practice of the Attorneys signing prior to receiving payment had to be evolved because several mortgages were discharged every day and it was not possible for the Attorneys to be present at the time each payment was

effected. Further, the mortgagors wanted the form of discharge to be given at the time of payment in view of the impending sale of the property. Thus it was the sole responsibility of the Securities Officer to ensure that payment is received before the form of discharge duly signed and dated is issued.

The Securities Officer then sends the cheque and/or the cash received in settlement of the mortgage to the cashier. For this purpose he writes out a coupon specifying the name and account number of the mortgagor and the amount received and sends the cheque and/or the cash with the coupon to the cashier. The cashier issues a receipt in duplicate. The original is despatched to the mortgagor and the copy called the posting voucher is sent to the ledger keeping clerk who credits the amount received in the mortgagor's ledger card.

Members of the public invested money with the U.D.C. and were paid interest at a floating rate. The members of the staff of the U.D.C. were also permitted to avail of this facility and they were paid interest at 1% higher than the public rate. Benwell had an investment account which at the relevant time bore the number B.E.N. 9000. The amounts credited to this account are described as unsecured deposits and could be withdrawn on twenty-four hour's notice. He also had two real estate accounts with the U.D.C., where money had been borrowed on the security of property owned by him and two hire purchase accounts relating to motor cars used by him at different stages.

In the transactions that relate to charges 1,2,5,7,8,9,10,11, and 14 it is in evidence that the cheques (made out in favour of the U.D.C.) received for the settlement of the mortgages were used by Benwell to purchase unsecured deposits to the credit of his investment account B. E. N. 9000. For the purpose of making each deposit a document titled "Application form for unsecured deposit" has to be submitted. The relevant forms signed and dated by Benwell were produced marked 'E 181' to E 191'. It is also in evidence that in respect of the transactions relating to charges 1,5,7,8,10,11 and 14, at the time of making each deposit in addition to cheque received from the mortgagors Benwell had added a relatively small sum out of his funds to make a deposit of a round figure. For instance in respect of

charge No.1 the application for the deposit (E 181) submitted by Benwell was for $ 18,400/- which comprised of the cheque for $ 18,355.96 sent by the mortgagor and a cheque for $ 44.04 made out by Benwell. The statement of the account B.E.N. 9000 was produced marked 'E 221'. This opens with a deposit of $ 2500 made on 04-05-1976. By 03-11-1976 the account had a nil balance. Thereafter the amounts that relate to the several charges referred to above were credited and a total of $ 110,884/30 was deposited to his account. From time to time amounts had beeen withdrawn from this account with interest. The final withdrawal of $ 23,563/74 was made on 07-06-1978, two days before Benwell left the U.D.C. and Australia. Thereupon the account had a nil balance, once again. It is in evidence that in connection with the nine charges referred to above, Benwell functioned as the Securities Officer who attended to the settlement and discharge of the mortgages. He had signed as a witness and placed the date in the forms of discharge. The forms of discharge thus perfected by Benwell had been received by the respective mortgagors or their agents who attended to the settlement.

In respect of the transactions that relate to charges 3,4,6,9,13,15,16 and 19, the cheques received from the repective mortgagors at different times were utilized by Benwell to settle the amounts due from the mortgagors whose transactions constitute the subject of the charges dealt with in the preceding paragraph. For instance, the sum of $ 18,355/96 paid by Winter (charge No. 1) on 12-01-1977 was used by Benwell to make an unsecured deposit to the credit of his account B.E.N. 9000. The sum of $ 18,450 paid by Jayer Pty.Ltd. (charge No. 3) on 12-02-1977 was paid by Benwell to the account of Winter. The sum in excess of what was required to settle Winter's account, i.e. a sum of $ 124/04 had been credited by Benwell to the Sundry Debtors Account into which Registration Fees, valuation fees and the like are credited. In all these instances coupons to credit the cheques to the particular accounts were written by Benwell. In certain instances the number of the account had been written on the reverse of the cheque by Benwell. In respect of the transactions dealt with in this paragraph as in the case of the transactions dealt with in the

previous paragraph, the forms of discharge had been perfected and handed over to the mortgagors or their agents. In respect of the transactions covered by charges 4,5,6,8,9,10,11 and 13, Benwell made periodic payments of interests to the credit of the respective accounts although the mortgages had been previously settled. The coupons to effect these payments were written by Benwell and the funds were provided by him. For instance, on 23-2-1977 Pavletic paid $ 17,875/- to settle his mortgage. This cheque (E 227) was used by Benwell to settle a previous transaction which is the subject matter of charge No. 3. Thereafter, Benwell made six periodic payments $. 286.64 each to the credit of Pavletic's account. The six coupons (E 294) to effect these payments were written by Benwell and the relevant cheques (E 155, 156, 157, 157, 158, 70; 71 and 72) were secured by him. Thus the accounts were kept in order (without going into default) by Benwell, until they were paid up fully from the proceeds of a subsequent settlement or up to the time Benwell left the U.D.C. and Australia. The sum referred to in charges 6, 13, 15, 16, 17, 18 and 19 remained unpaid although Benwell had discharged the mortgages and received payment. The total loss suffered by the U.D.C. as stated above, is $. 108,431/25.

In respect of the transaction relevant to charge No. 9, on 12-01-1970 Benwell received two cheques to the value of $ 9731.23 from Wilson, being the pay out figure on the latter's mortgage. The receipt issued to Wilson (E 231) has been written and signed by Benwell. At the bottom of the receipt (E 231), Benwell made the following endorsement:

"Being full & final payment for loan Ac R. L. T. 2478/4". This is the number of Wilson's account. Thereafter Benwell used one of these cheques (E 230) to settle the amount due from Zilma (mortgager in charge No. 7) and the other cheque (E 196) to make an unsecured deposit in his personal account B. E. N. 9000. Benwell has written out the account number of Zilma on the reverse of the cheque (E 230). Benwell paid the periodic instalments on Wilson's account until the sum due was paid from the proceeds of a later settlement which is the subject of charge No. 13. Thus the evidence with regard to this charge discloses the different aspects of the modus operandi adopted by Benwell.

It was noted above that Benwell had two real estate accounts where he had borrowed money from the U.D.C. It is in evidence that caveats had not been lodged in favour of the U.D.C. in respect of the mortgaged properties, as required. The mortgages were also not registered, as required. Thus Benwell was able to sell the properties and appropriate the proceeds without disclosing the sales to the U. D. C. However, he continued to make the periodic instalment payments up to May 1978 to avoid the loan accounts from going into default. In June 1978, shortly prior to his departure, Benwell used two cheques given by Bechara (charges 17 and 18) to pay out the latter's mortgage, to settle his two real estate accounts with the U.D.C.

Charge No. 12 relates to a hire purchase agreement that Benwell entered into with the U.D.C. in respect of a Toyota Motor car bearing registered No. "C.O.P. 301". Whilst the agreement was in force Benwell sold the car to S. Warmeant for full consideration. Warmeant purchased the car on the basis that Benwell was the owner. It is in evidence that under the applicable law in New South Wales, there is no provision as in Sri Lanka, to register the name of the absolute owner. Even after the sale to Warmeant, Benwell continued to make the periodic instalment payments on the hire purchase agreement up to the time of his departure, to prevent the account from going into default. After his departure, Warmeant who was unaware of the hire purchase agreement did not make payments to the U.D.C. and the vehicle was repossessed by the U.D.C. being the owner. The charge is that Benwell obtained money on false pretences from Warmeant.

Counsel for the Petitioner urged the following specific ground against the order of committal made by the learned High Court Judge:

(i) that the authority to proceed issued in terms of section 8 of the Extradition Law by the President as the Minister in charge of the subject of Extradition has been signed by the Secretary to the President and not by the Secretary to the appropriate Ministry as required by section 8 read with section 16 of the said law;

(ii) that the learned High Court Judge should have taken proceedings *de novo* after the case went back to the High Court upon the order of this Court, which was affirmed by the Supreme Court;

(iii) that in respect of the 18 charges of fraudulent misappropriation, the cheques given by the mortgagors had in fact gone into the account of the U.D.C. Even assuming the evidence is accepted, Benwell had only failed to comply with instructions of the U.D.C. with regard to the manner in which cheques should be dealt with after they are received at the U.D.C. Such non-compliance of instructions by Benwell do not amount to fraudulent misappropriation of the cheques;

(iv) that certain documents relied upon by the learned High Court Judge are inadmissible under our Law of Evidence;

(v) that the evidence with regard to charge No. 12 does not warrant a trial of Benwell for the offence of cheating as held by the learned High Court Judge;

(vi) that in any event, it would be unjust or oppressive to extradite Benwell.

In terms of section 8(1) of the Extradition Law no person shall be dealt with under the provisions of the Law except in pursuance of an order of the Minister. This order is referred to as the "authority to proceed". Section 16 provides that any order required to be made by the Minister "shall be in the prescribed form and shall be given under the hand of the Secretary to the Ministry".

Article 44(1) of the Constitution requires the President to determine the number of Ministers and the subjects and functions of such Ministers. This division of subjects and functions constitute the constitutional process of creating Ministries. In terms of Article 44(2) the President may determine the number of ministries to be in his charge. Further, the residuary subjects and functions, being the subjects and

functions not assigned to any Minister, remain with the President. The sub-article also provides that where any subject or function is with the President, the reference in the Constitution or any written law to the Minister in relation to such subject or function shall be read and construed as a reference to the President.

According to the determination of subjects and functions contained in Government Gazette 86/8 dated 30-04-1980 the function of extradition has been assigned to the Minister of Defence. The President is in charge of this Ministry. Therefore, the reference in section 8(2) of the Extradition Law to the Minister has to be read and construed as a reference to the President.

Article 52(1) of the Constitution provides that there shall be for each Ministry, a Secretary appointed by the President. It is common ground that at the relevant time there was a person appointed as Secretary to the Ministry of Defence as distinct from the Secretary to the President. Therefore, the reference in section 16 of the Extradition Law to the Secretary has to be taken as a reference to the Secretary to the Ministry of Defence.

A further aspect comes up for consideration in view of the Regulation that has been made in terms of section 16 of the Extradition Law. In terms of this section, the authority to proceed has to be in the prescribed form and given under the hand of the Secretary to the Ministry. The regulation made for this purpose is contained in Government Gazette 5/3 dated 09-10-1978.

The relevant prescribed "Form A" contained in the schedule to Regulation cannot provide, for the authority to proceed, to be signed by any other than the Secretary to the appropriate Ministry. Therefore the provision in "Form A" of the Regulation for the signature of the Secretary to the President is in conflict with the specific provision in section 16 and is to that extent of no force or avail in law.

Now, it has to be considered whether the authority to proceed is itself illegal because it was signed by the Secretary to the

President and not by the Secretary to the Ministry of Defence. In terms of section 8 the Minister is the appropriate functionary to consider and to make a decision as to whether an authority to proceed should issue upon a request for extradition. The Secretary is vested with no statutory power in this regard. It is his function merely to put down in writing the order of the Minister, for the purpose of communicating it. In this case, the appropriate Minister empowered to make the order in terms of section 8 is the President. The document dated 08-07-1981 contained in the record shows on its face, that the President considered the request for extradition and decided to issue the authority to proceed. Further, when proceedings commenced in the High Court on the basis of this order, Benwell appeared in Court and contested the extradition without raising this objection. It was not urged as a ground of objection in the previous proceedings had in this Court and the Supreme Court. For the reasons stated above, I hold, that the authority to proceed being given under the hand of the Secretary to the President, instead of the Secretary to the Ministry of Defence, is a defect that only pertains to the form of communicating the order and that this defect does not affect the validity of the order itself which was made by the President as the appropriate Minister.

I will now consider the second ground of objection urged by Counsel for the Petitioner, that proceedings should have been taken *de novo* before the High Court. In the earlier proceedings before the High Court the State led the evidence of witness Oliver who was cross-examined by Counsel appearing for Benwell and also produced the record of the evidence taken before the Stipendiary Magistrate in New South Wales. Thereafter Counsel for the State submitted that he was not leading any further evidence and Senior Counsel for Benwell submitted that he was not calling any evidence on behalf of "the accused". Submissions were made by both Counsel and the learned High Court Judge upheld the objection with regard to the authentication of the evidence taken in New South Wales. In revision, this Court held against that ground of objection and B.E. de Silva, J. with the other Judges agreeing, made order as follows:

> "I remit the case to the High Court for an appropriate order in terms of section 10 of the Extradition Law No. 8 of 1977

upon a consideration of the depositions and documents and other evidence already recorded against the respondent, after hearing the parties."

This order was affirmed by the Supreme Court.

Counsel contended that since the earlier proceedings were had before a different High Court Judge, the High Court Judge who finally made the order should have commenced *de novo* proceedings.

Proceedings for extradition do not take the character of a trial against the person whose extradition is sought. In respect of a person who has not been convicted of an offence, the matters to be considered by the Judge, as contained in section 10(4) of the Extradition Law are as follows:

(i) whether the offence to which the authority to proceed relates is an extraditable offence under the Law;

(ii) whether the evidence tendered in support of the request for extradition of the person is sufficient to warrant his trial for that offence if it had been committed within the jurisdiction of the Court. This requirement stems from the rule of "double criminality" in the Law of extradition;

(iii) whether the committal of the person is prohibited by any provision of the law. This relates to the general restrictions on extradition contained in section 7 of the Law.

Section 10(4) read with section 14(1) (a) and (b) of the Extradition Law provides for the evidence recorded in the requesting State and the documents received in such evidence, to be tendered in support of the request for extradition.

In the light of the matters to be considered by the Judge and the nature of the evidence that may be tendered in support of the request for extradition, it is not essential that the order for committal should be made by the same Judge who heard the evidence. It is apparent from the contents of the respective

judgments that, neither this Court nor the Supreme Court contemplated a rehearing of the evidence to take place before the High Court. The order remitting the case to the High Court was clearly intended for the purpose of affording the parties an opportunity to make submissions on the matters referred to above, since these matters had to be considered in the first instance by that Court. Further, the requirement for the Judge to observe the demeanour of witnesses, being an important consideration at an ordinary criminal trial, does not apply to extradition proceedings where an order could be made on the basis of evidence taken in the requesting State. The learned High Court Judge provided an adequate opportunity to the parties to make submissions. The Petitioner did not move to lead evidence on his behalf. In the circumstances, I see no merit in this ground of objection urged by Counsel for the Petitioner.

The next two grounds urged by Counsel relate to the evidence that was led as to the charges of fraudulent misappropriation and, may conveniently be dealt with together. Counsel submitted that the several cheques given by the mortgagors were made out in favour of the U.D.C. and that the U.D.C. in fact received the proceeds of these cheques. He therefore submitted that Benwell did not misappropriate the cheques. Further, that the impugned acts constituted, if at all, a failure to comply with the instructions of the U.D.C. as to the manner in which the cheques should be dealt with. As to the other ground of objection Counsel submitted that the cheques received in settlement of the several mortgages were not proved, in that the persons who signed these cheques were not called as witnesses. Since these objections relate to the sufficiency and admissibility of evidence, it is necessary to consider the law on these aspects.

Section 14(1)(a) and (b) of the Extradition Law provides that, the evidence given on oath and the documents received in evidence in the requesting State, upon the authentication, shall be admissible as evidence, in proceedings for extradition. The identical provisions are contained in section 11(1) (a) and (b) of the Fugitive Offenders Act, 1967 of England. In **Halsbury's Laws of England (4th Edition)** Vol.18, p.144 and 146, it is stated that this section "is an enabling provision which allows documents with due authentication to be considered, it does not prevent the

rejection of evidence taken abroad which infringes the English Law of Evidence". In the book titled, Extradition, Law and Practice, by Stanbrook and Stanbrook (1980) at pages 55, it is stated as follows:

> "Depositions, affidavits and statements or declarations made on oath or by affirmation are admissible as evidence under these provisions but their contents will be rejected if they infringe the rules of evidence. Section 11 covers the procedure and method of presentation of evidence, not its content."

In the case of *Union of India vs. Manohar Lal Marang* (2) the Queen's Bench Division following what was said by Viscount Dilhorne in *Government of Australia vs. Harrod* (3) ruled that in proceedings for committal the law of the requesting State is not relevant to the question of the admissibility of evidence but that the matter should be dealt with under English Law. The decision of the Queen's Bench Division in this case was overruled by the House of Lords but on another issue.

In *Benwell vs. Republic of Sri Lanka* (1) it appears that this Court followed the authorities stated above on this aspect. At page 205, Colin-Thome, J. stated as follows:

> "Section 14(1)(a) of the said Law is only an enabling provision and is not intended to prevent the rejection of evidence taken abroad contrary to the rules of evidence in Sri Lanka or inadmissible thereunder."

Our Law of Evidence, is contained in the Evidence Ordinance which in section 5 provides that evidence may be given in any proceeding only of the existence or non-existence of facts in issue, and of other facts declared by the provisions of the Ordinance to be relevant. Even within this area of relevancy laid down by the Ordinance, prohibitions are contained in specific provisions that provide for certain facts not to be proved (section 25) or that certain facts are irrelevant (section 24). Facts of which evidence is thus permitted to be given may be proved by oral or documentary evidence (section 59). Specific limitations are contained in the Ordinance with regard to both types of evidence.

The following legal position will emerge when the provisions of section 14(1) (a) and (b) are related to the framework of the Evidence Ordinance, as outlined above. The record of the oral evidence given on oath in the requesting State and, any document received in evidence in that State or a copy of such document, where such record and documents are duly authenticated will be considered as evidence given and tendered before the Judge in the committal proceedings. The words "shall be admissible in evidence" appearing in both sub-paragraphs referred above, has the legal effect of eliminating the procedural steps that would be otherwise necessary to comply with in order to adduce such evidence before the Judge. But, in considering the sufficiency of evidence in terms of section 10 (4) (a) of the Extradition Law, the Judge will take into account only the facts of which evidence may be given under the Evidence Ordinance and are proved by oral or documentary evidence as provided for in that Ordinance.

Counsel for the Petitioner submitted that the cheques received at the U.D.C. for the settlement of the mortgages relating to the several charges were not proved in that the persons who signed those cheques were not called as witnesses. In most instances the original cheques were produced and if they are missing, copies have been produced. Therefore, these cheques have been proved by primary or secondary evidence as provided for in the Evidence Ordinance. The cheques are drawn in favour of the U.D.C. by the paying Bank itself, so that funds are assured. The making of each cheque is not a fact in issue in this case.

The facts in issue are whether the cheques were received at the U.D.C. and if so, whether they were misappropriated in the manner stated in the charges. The mortgagors or their agents who attended at the settlement, have in their evidence sought to identify each cheque (with reference to the amount and other particulars) as the one tendered in settlement of the respective mortgages. Thereafter each cheque is linked up with an application form for an unsecured deposit signed by Benwell or a coupon written by him. In these circumstances I am of the view that it is unnecessary to lead the evidence of the official of the particular Bank, who initially signed the cheque. Since the

making of each cheque is not in issue in this case, it will not be necessary to call its maker in terms of section 67 of the Evidence Ordinance. The evidence recorded in respect of each transaction leads clearly to the inference that the particular cheques were received at the U.D.C. for the settlement of the mortgages and that Benwell as the Securities Officer dealt with these cheques.

In dealing with the sufficiency of evidence to establish the charge, I have to consider the law relating to the standard of proof in extradition proceedings. In terms of section 10 (4) (a) of the Extradition Law the Judge hearing committal proceedings has to be satisfied that the evidence is sufficient to warrant the trial of the person sought to be extradited, if the offence had been committed within the jurisdiction of the Court. The provision is the same as section 7(5) (a) of the Fugitive Offenders Act, 1967, of England. A provision to similar effect was found even in the earlier law operative in England. In the case of *Schtraks vs. Government of Israel* (4) the House of Lords held "that the proper test for the Magistrate to apply was whether, if this evidence stood alone at the trial, a reasonable jury properly directed could accept it find a verdict of guilty" (Judgment of Lord Reid at pg. 533). In *Benwell vs. Republic of Sri Lanka* (Supra at pg. 205) Colin-Thome, J. observed as follows:

> "The interpretation of the expression "sufficient" with reference to the English authorities suggests that the standard of proof required is nothing less than a prima facie case".

When the provisions of section 10(4) (a) of the Extradition Law are considered in relation to our Law of Criminal Procedure, I observe a similarity between the provisions of that section and of section 154 of the Code of Criminal Procedure Act No. 15 of 1979 dealing with non-summary proceedings. Therefore, it is reasonable to infer that the standard of proof in committal proceedings is not higher than what obtains in a non-summary proceeding under the Code of Criminal Procedure. The Judge hearing the committal proceedings under the Extradition Law does not have to decide whether or not the person to be extradited is guilty of the offences with which he is accused of.

The Judge has to only decide whether or not, on the entirety of the evidence before him, the person to be extradited is so implicated in the commission of the offences that are alleged against him, that he should be compelled by law to plead to the charges and face trial thereon. It is for this reason that the law provides for a review of the order of committal by way of a Writ of Habeas Corpus as distinct from a regular appeal.

According to the evidence, it is clear that the U.D.C. employed Benwell in such capacity, where he had control over cheques and cash received in settlement of mortgages. Upon receipt of such cheques and cash he had to comply with a specific procedure. The evidence discloses that instead of following that procedure he used these cheques to make a wrongful gain to himself. In the result he caused a wrongful loss to the U.D.C. His subsequent conduct in certain transactions, of paying the periodic instalments that fell due, amount to concealing the commission of the offences to avoid discovery. Counsel's submission that, the cheques went into the account of the U.D.C. and as such there was no misappropriation, is clearly without basis. The cheques should ordinarily go into the account of the U.D.C. as 'credit' (a payment to the U.D.C. by the particular mortgagor) instead the cheques went as debts owing to Benwell. Thereby Benwell was able to draw large sums of money and interest from time to time on his account B.E.N. 9000. On the evidence stated in the preceding paragraphs, it is clear that Benwell is implicated in the commission of the eighteen offences of fraudulent misappropriation being the offence of Criminal Breach of Trust under our law, so that he should be compelled by law to plead to the charge and face trial thereon. I hold that the learned High Court Judge acted within jurisdiction in ordering the committal of Benwell in respect of these charges.

As regards charge No. 12, Counsel submitted that Warmeant had not inquired from Benwell whether or not the car was subject to a hire purchase agreement. He submitted that there was no deception by Benwell in respect of this transaction. In this connection it is important to consider the explanation to section 398 of the Penal Code which provides that a dishonest concealment of facts is a deception within the meaning of that

section. Benwell was not the owner of the motor car and according to the evidence he concealed this fact from Warmeant. To avoid a discovery of this fact Benwell paid the instalments due on the hire purchase account, after the sale to Warmeant, up to the time of his leaving Australia. Therefore I hold that on the evidence, Benwell is implicated in the commission of the offence of cheating under our law, so that he should be compelled by law to plead to that charge and face trial thereon. I also hold that the learned High Court Judge acted within the jurisdiction in ordering the committal of Benwell in respect of this charge.

I have to now consider the submission of Counsel that it is unjust and oppressive to extradite Benwell and that his discharge should be ordered by Court on that ground. This submission is based on section 11(3) of the Extradition Law, which enacts as follows:

> (3) On any such application the Court of Appeal may, without prejudice to any other jurisdiction of the Court, order the person committed to be discharged from custody if it appears to the Court that —
>
> (a) by reason of the trivial nature of the offence of which he is accused or was convicted; or
>
> (b) by reason of the passage of time since he is alleged to have committed it, or to have become unlawfully at large, as the case may be; or
>
> (c) because the accusation against him is not made in good faith in the interests of justice, it would, having regard to all the circumstances, be unjust or oppressive to extradite him.

Counsel based his submission on sub-paragraph (b) and urged that due to the passage of time since the alleged commission of the offences it is unjust and oppressive to extradite Benwell. This is a ground that may be urged in the first instance before this Court in an application for a Writ of Habeas Corpus. The same

provision is found in section 8(3) of the Fugitive Offenders Act, 1967 of England which in turn was inherited from section 10 of the Fugitive Offenders Act of 1881.

The matters to be considered on a plea based on the passage of time, have been dealt with in several cases decided in England. In the case of *Henderson vs. Secretary for Home Affairs* (5) Tucker, C.J. made an observation which sets out the basis on which such plea is considered. That is, whether due to the passage of time, it would be "impossible for the applicant to obtain justice" in the requesting State. This was followed in the case of *Union of India vs. Manchar Lal Marang* (Supra) where the House of Lords reversed the decision of the Queen's Bench Division given in favour of the fugitive based on the lapse of time. In the case of *Kakis vs. Government of Cyprus* (6) the House of Lords observed that the test as to what is unjust or oppressive with regard to the passage of time is not so much its "quantity" as its "quality". "Unjust" relates to the prejudice caused to the corpus in the conduct of the projected trial; "oppressive" relates to resulting hardship that stems from changed circumstances. Applying the said observations, I hold that the mere fact that a period of ten years has elapsed since the commission of the alleged offences does not by itself constitute a sufficient basis to discharge the corpus in terms of section 11(3) (b) of the Extradition Law. It is incumbent on the Petitioner to satisfy this Court, that whatever be the period, such delay will cause prejudice to the corpus at the trial to be had in the requesting State and that it would result in an injustice to him. The Petitioner has not urged any grounds to support such an inference. On the contrary I observe that the case against Benwell is based mainly on documentary evidence. The witnesses have already given evidence on oath. Copies of the evidence and documents have been furnished to Benwell. In these circumstances the delay, which has resulted from the legal proceedings in Sri Lanka, will not cause any prejudice to Benwell in the trial that will take place in the requesting State. There is also no material to support the inference that the extradition will be "oppressive" as construed above.

For the reasons stated above, I hold that no ground has been made out for the issue of a Writ of Habeas Corpus or for the exercise of the revisionary jurisdiction of this Court. Accordingly, I dismiss both applications. The Petitioner in Application No. 20/87 is ordered to pay a sum of Rs. 2500/- as costs to the 1st Respondent.

DHEERARATNE, J. — I agree.

Application refused.