IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA.

In the matter of an application for mandate in the nature of writ of Habeas Corpus made in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka and Section 11(1) of Extradition Law No.08 of 1977.

Ahamed Fakih
New Mar Takla, Municipality St. Caders
-2 building, 2nd Floor, Beirut.
Presently at Colombo Prison.

Corpus-Petitioner

C.A. Application No. CA/HB/01/2017
H.C. Colombo No. HC 34/2017

Vs.

01. Hon. The Attorney General,
Attorney General's Department,
Colombo 12.
(On behalf of the Government of the United States of America).

Applicant-Respondent

02. The Superintendent of Prisons,
Colombo Remand Prisons,
Colombo 08

2nd Respondent

03. Hon. Minister of Defence,
Ministry of Defense,
No.15/5, Baladaksha Mawatha,
Colombo 03.

3rd Respondent

BEFORE	:	**DEEPALI WIJESUNDERA, J. &** **ACHALA WENGAPPULI, J.**
COUNSEL	:	Upul Jayasuriya PC with Sandamal Rajapaksha, Madubashana Ariyadasa & L. Seneviratne for the Corpus-Petitioner. Parinda Ranasinghe(Jr.)A.S.G. for the Applicant-Respondents.
ARGUED ON	:	28th June 2018
WRITTEN SUBMISSONS TENDERED ON	:	17-07-2018 (by the Applicant-Respondents) 20-07-2018 (by the Corpus-Petitioner)
DECIDED ON	:	03rd August, 2018.

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ACHALA WENGAPPULI, J.

The Corpus-Petitioner (hereinafter referred to as the "Petitioner"), invokes jurisdiction of this Court seeking *inter alia;* for the issuance of a Writ of *Habeas Corpus* in terms of Article 140 of the Constitution and Section 11(1) of the Extradition Law No. 8 of 1977 as amended (hereinafter referred to as the " Extradition Law") and to declare the order of committal by the High Court of Colombo, made against him on 30th August 2017 as *null* and *void.*

The Petitioner, who holds a Lebanese passport, was arrested at the Bandaranaike International Airport in the early hours of 5th February 2017 when he presented himself to the Airport for his departure by the officers

attached to Criminal Investigations Department claiming that there was an "International Red Alert" against him. On 7th February, 2017 the Petitioner was served with a notice that the 1st Respondent had instituted extradition proceedings against him at the request of the Government of the United States of America (hereinafter referred to as the US Government).

In requesting the extradition of the Petitioner, the US Government stated that the Petitioner is named as a Defendant in case No. 13M689 before the District Court of New York in August 2013 and a warrant of arrest has been issued. During the proceedings before the High Court of Colombo, the Petitioner was enlarged on bail and after an inquiry, the High Court made the impugned order of committal directing the Petitioner to be extradited. Pending his extradition, the Petitioner was remanded again.

Thereafter, the Petitioner sought relief from this Court by filing the instant application in terms of Section 11 of the said Extradition Law. The Respondents objected for granting relief to the Petitioner and an inquiry was held after objections and counter affidavits were filed. The Respondents, thereafter sought leave to tender further affidavit in order to challenge the contents of certain documents that were tendered along with the counter affidavits of the Petitioner and were allowed to do so. Parties were afforded an opportunity to tender written submissions, in addition to the oral submissions made before us in support of their respective cases.

At the hearing of the application as well as in the written submissions, learned President's Counsel who appeared for the Petitioner

contended that the order of committal issued by the High Court of Colombo is bad in law as it had failed to consider that;

i. it had no jurisdiction over the Petitioner, since he is a citizen of a third State and therefore he is not bound by the Articles of the Extradition Treaty signed between the Governments of Sri Lanka and United States,

ii. the Respondents have failed to discharge the required evidentiary burden as per the provisions of the Extradition Law in Sri Lanka in relation to the alleged complicity of the Petitioner to the offences he was charged with in the District Court of New York,

iii. the Respondents have failed to identify the Petitioner as the alleged fugitive Ahamed Fakih.

The submissions that the High Court of Colombo had no jurisdiction to make an order of his extradition should be considered at the outset.

It is submitted by the learned President's Counsel that the Extradition Treaty, entered into by the Governments of Sri Lanka and United States, is only applicable to the citizens of the two countries as they are the parties to it and it has no authority over citizens of a third State. The treaty recognizes only two parties to it as its contents refers to "Requesting State" and "Requested State". Since the Petitioner is a Lebanese National who arrived in Sri Lanka as a tourist and not a citizen

of either the Requesting State or the Requested State, he could not be extradited to United States as the treaty has no application on him. He invited attention of Court to the fact that "... the Petitioner alleged to have committed the purported offences whilst he was in and within the territorial waters of Lebanon".

Learned President's Counsel placed heavy reliance on the Article 3 of the said treaty in support of his contention. He also relied on the maxim *"Exprassio Unius Est Exducio Alterius"*.

Article 3 of the Extradition Treaty states thus;

> *"Extradition shall not be refused on the ground that the person sought is a national of the Requested State."*

In view of the said Article, learned President's Counsel submits that "...when the two contracting States specifically covenant to extradite their own citizens, according to the core objective of the Treaty, and there is a specific nationality clause to warrant the extradition of the citizen of the Requested State, it has to be construed that the contracting States intend only to extradite citizens belonging to the two contracting States and not the extradition of citizens belonging to a third State."

Learned Additional Solicitor General in his submissions in reply referred to the preamble of the Extradition Law which states that "... *to make provisions for the extradition of fugitive persons to and from Commonwealth countries and foreign States ...*"(emphasis original) and therefore Extradition Law in Sri Lanka does not prevent extradition of nationals of a third State. He further submits that the actual obligation to

extradite arises from Article 1 under the sub heading "obligation to extradite".

It is also submitted by the learned A.S.G. that "... what Article 3, which embodies the nationality clause does is, it creates a further obligation on the parties not to refuse extradition on the ground that the wanted person is a national of the Requested State. Therefore, what can be clearly inferred this article is that, any person who is lawfully required to face trial in the Requesting State is liable to be extradited under this treaty irrespective of his nationality. In other words, he said treaty does not preclude the extradition of nationals of even third States present in the territory of the Requested State."

In the light of these submissions, it has become imperative for this Court to consider the contents of the relevant Articles of the said treaty along with the provisions of Extradition Law.

The bi-lateral treaty titled "Extradition Treaty" between the Governments of Sri Lanka and United States, in its preamble states "... *desiring to provide more effective cooperation between the two States in the suppression of crime, and, for that purpose, to conclude a new treaty for the extradition of offenders, have agreed as follows ...*".

The Article 1 of the said treaty is titled "Obligation to Extradite". The Article 1 reads as follows;

> *"The Contracting States agree to extradite to each other, pursuant to the provisions of this Treaty, persons sought by the authorities in the Requesting State for trial or punishment for an extraditable offence."*

Plain reading of the said Article gives the impression to the reader that the said treaty is applicable to *"...persons sought by the authorities in the Requesting State for trial or punishment for an extraditable offence."* No mention of nationality is found in this Article which forms the primary obligation of the contracting parties. In Article 3 of the said treaty it is stated that *"Extradition shall not be refused on the ground that the person sought is a national of the Requested State."*

When these two Articles are read together, it becomes clear that the scope of the applicability of the provisions of the treaty applies to *"persons sought by the authorities in the Requesting State for trial or punishment for an extraditable offence"* whether they are nationals of either of the contracting States or not. If the treaty is intended to be applied only to the citizens of the two contracting States, then the provisions of Article 3 becomes a mere reiteration of the very purpose for which the treaty was entered into by the two contracting States.

At the hearing before us, learned President's Counsel invited our attention to several such bi-lateral treaties for extradition of fugitives entered into by the US Government. In doing so, learned President's Counsel emphasised that there are instances where the contracting States have excluded their own citizens from the applicability of such treaties. Learned A.S.G. has annexed the Extradition Treaty of the Governments of Japan and United States to his written submissions. Common feature of all these treaties is the reservation of the applicability of the treaty provisions to their own nationals in varying degrees.

If the submissions of the learned President's Counsel on this point are accepted then it would lead to the absurd situation where the contracting States have decided to exclude their citizens from the scope of applicability of treaty provisions and thereby leaving no person who could be subjected to its provisions. If that is the case, then such a treaty simply becomes a dead letter as the exclusion has effectively defeated the very purpose of signing of such a treaty.

Coming back to the treaty between the Governments of Sri Lanka and United States, when one reads the Articles 1 and 3, it is evident that the intention of the contracting parties to have the provisions of the treaty to apply to the class of persons described as *"... persons sought by the authorities in the Requesting State for trial or punishment for an extraditable offence."* That forms the fundamental obligation between the parties. The fact that nationals of the contracting States may also include in this larger class of persons is indicative by the provisions of Article 3, which prevents any of the contracting States to refuse a request for extradition on the basis of it concerns a citizen of a contracting State. It is therefore clear that the intention of the contracting States is to apply the provisions of the said treaty on all *"... persons sought by the authorities in the Requesting State for trial or punishment for an extraditable offence"* irrespective of their nationality.

Similarly, the statutory provisions of the Extradition Law No. 8 of 1977 makes no reference to nationality of the person in respect of an order of extradition could be made. Section 6(1) refers to " ... a person accused of or has been convicted in any designated Commonwealth country or any treaty State ...". Section 7, which specifies the grounds on which a Requested State could refuse to extradite a fugitive also refers to "... a

person ...". In providing a safeguard to such a fugitive, Section 11 provides that " ... a person ..." could make an application for habeas corpus to the Court of Appeal.

In Section 17(1) of the Extradition Law, a more explicit provision which runs counter to the submissions of the Petitioner could be found. The said section reads thus;

> *"Where a person accused of or convicted of an offence in Sri Lanka, whether committed before or after the commencement of this Law, is, or suspected of being, in any designated Commonwealth country or treaty State, or within the jurisdiction of, or of a part of, such country or State the Minister may make a request to that country or State for the extradition of that parson, ...".*(emphasis added)

Thus, it is clear from the above, if a fugitive who is concerned with an extraditable offence, is within the jurisdiction of the Requested State, and if Sri Lanka makes such a request, the liability to extradite that fugitive arises for the Requested State, irrespective of his nationality. In the instant application, the situation is reversed. The fugitive is in the territory of the Requested State and the treaty obligates the extradition of that fugitive.

With due respect to the learned President's Counsel, in view of the above reasons we are not inclined to agree with his submissions on this point as it runs contrary to the provisions contained in the Extradition

Treaty between the two Governments and the provisions of the Extradition Law.

The other challenge mounted on the order of the High Court of Colombo by the Petitioner is that the Respondents have failed to discharge the required evidentiary burden as per the provisions of the Extradition Law in Sri Lanka as to the alleged complicity of the Petitioner to the offences he was charged with in the District Court of New York.

In support of this ground, learned President's Counsel submitted that in terms of Section 10(4)(a) of the Extradition Law there should be evidence "sufficient to warrant his trial for that offence ..." and in ***Benwell v Republic of Sri Lanka*** (1978-79) 2 Sri L.R. 194, it has been held that "*... the standard of proof required is nothing less than a prima facie case*" and that should be established by the rules of evidence that are applicable in Sri Lanka. The Petitioner further relies on the provisions of Section 608 of the Criminal Resource Manual which also imposes a similar burden on the US Government that it must satisfy the Court of the Requested State that a *prima facie* case against the fugitive.

It is alleged by the Petitioner that "... the purported affidavits of Richard M Tucker and James Edward do not adduce even an iota of evidence to properly and independently establish the identity of the Petitioner or the elements and ingredients of the offence...".

The Respondents state they have sufficiently discharged the evidentiary burden before the High Court. In his submissions, learned A.S.G. referred to the alleged acts of the Petitioner are criminalised by the provisions of Sections 3(1)(e) and (9) of Payment Devices Frauds Act No. 30

of 2006 and thereby they have satisfied the requirement based on the concept of dual criminality, that the offence on which the Petitioner is to be extradited is punishable within the jurisdiction of the Requested State.

In relation to the complaint of sufficiency of evidence, the learned Additional Solicitor General submits that the dicta in ***Benwell v Republic of Sri Lanka*** applies to extradition proceedings among Commonwealth countries. In this instance, the extradition request is by a treaty State and the provisions that are applicable in this instance are to be found in the Article 8(3)(c) where it is stated that the Requesting State to provide *"... such information as would provide a reasonable basis to believe that the person to be extradited committed the offence for which the extradition is requested and is the person named in the warrant of arrest."*

When the submissions of the parties on the question of sufficiency of evidence are considered a question arises whether the treaty provisions supersede the statutory provisions contained in the Extradition Law ?

Answer to this question could be found in the provisions of Section 3 of the Extradition Law. It provided the Minister, upon publication of an "Order" in the Gazette and with the approval of the Parliament, to declare any "modifications, limitations or conditions" of the Extraditions Law in relation to a treaty State, in spite of the provisions of Section 4 which restricted the scope of such "Orders".

Article 9 of the treaty provides for the "Admissibility of Documents" as it states, "the documents which accompany an extradition request shall be received and admitted as evidence in extradition proceedings" and then

it lays down certain conditions which the US Government as the Requesting State must satisfy in making a request.

Article 9(a) states as follows;

> *"in the case of a request from the United States, they are signed or certified by a judge, magistrate, or an official of the United States and sealed with the official seal of a competent authority of the United States."*

The resultant position then would be, if an accompanying document to the extradition request satisfies the requirements of Article 9(a), then it shall be received and admitted as evidence. Similar provisions are found in Section 14(1)(a) of the Extradition Law. Therefore, the accompanying affidavits of Robert Walsh and Richard M Tucker are admissible evidence, along with the documents annexed to them and marked as Exhibits A to E and Attachments 1 to 3. They were the items of evidence presented before the High Court in support of the extradition application.

It is upon this evidence the question of sufficiency of evidence should be decided.

In the affidavit of Walsh, it is alleged that the person identified as "Ahmad Fakih" operated two email accounts identified as "darkyemail@yahoo.com" and "validshop@gamil.com" and the email received by these two accounts contained compromised details of the credit/debit cards. The activities of these email accounts were monitored by Walsh and his colleagues upon search warrants obtained through Courts in the United States. It is alleged that "Ahmad Fakih" then transferred such compromised details of credit/debit cards to individuals

who purchase such compromised account information to perform unauthorised monetary transactions called "carding". These details, too voluminous and technical to be reproduced here and are found in the averments Nos. 8 to 20 in the affidavit of Walsh.

Its suffice to refer to an instance mentioned therein as an example. On 14th July 2011, email account "darkyemail.@yahoo.com" received compromised information in relation to 410 credit/debit cards. The illegal processes by which this information is retrieved from computer networks of financial service providers are known as "hacking" and "phishing". This information then distributed to prospective buyers through another account, which was identified as the "primary means" to operate the website "www.validshop.su". The connected email account to this website was also identified as "validshop@gamil.com" and Ahmad Fakih was its administrator. The prospective buyer of that compromised information would then make plastic cards containing those electronic data and use them to perform unauthorised monetary transactions.

The contents of the said averments clearly establish a *prima facie* case against the person "Ahmad Fakih" for his complicity in committing access device frauds as per the Grand Jury Charges under CR 17 00119 (formerly referred to as case No.13 M 698).

This finding warrants the consideration of the third ground upon which the Petitioner sought to challenge the order of the High Court. The Petitioner described it as an "identity crisis" as he claims that the Respondents have failed to identify the Petitioner as the alleged fugitive Ahamed Fakih.

In support of this contention, learned President's Counsel relied on the fact that the Respondents merely obtained a print from the photograph from the Facebook account of the Petitioner subsequent to his arrest to secure his connection to the person known as "Ahmad Fakih". The affidavit of Andrew P Yanchus that was tendered to High Court contained these photographs. In addition, learned President's Counsel relied on another fact which was tendered by way of counter affidavit to impress upon this Court that one "Rami Fawaz" was indicted before the District Court of Nevada for similar offences particularly in relation to illicit transactions through the "validshop" account. The Respondents counters this claim by the affidavit of Mark Mc Elrath.

The Respondents claim they obtained the photograph of the Petitioner on 14th August 2011 through his email account, long before the request for extradition is made. In support of the identity established through a photograph, the Respondents relied on the judgment of ***In Re Naresh Parsaram Butani*** (1991) 1 Sri L.R. 350 where this Court opted to follow the judgment of ***R v Governor of Holloway Prison re Siletti*** (1902) 71 LJKB 931 which held *"that a photograph may be sufficient by itself as proof of identity if attested to by the witnesses in the Requesting State and is enclosed in their depositions"*.

In the affidavit of Richard M Tucker, the attachment marked as "Attachment 1" refers to a "photograph of Ahmad Fakih from an August 14, 2011 email received by the email account darkyemail@yahoo.com". Attachment 2 refers to a "photograph of Ahmad Fakih from the Facebook account in the name of "Ahmad A. Fakih" and Attachment 3 refers to "photograph of Ahmad Fakih from his Lebanese Passport". The affidavit of

James Edward referred to an affidavit of Tucker, who states that photographs in Attachments 1 to 3 "are all photographs of the same individual".

Thus, the claim of the Petitioner of mistaken identity could not be accepted as a valid basis to interfere with the order of the High Court. The Respondents have provided sufficient proof of identity to satisfy the High Court that the person who operated the two email accounts was known as "Ahmad Fakih" and he is the person now held in custody by the Sri Lankan authorities. The Respondents have thereby complied with the requirements imposed by ***R v Governor of Holloway Prison re Siletti*** (supra).

In the light of these considerations we are of the firm view that the principle enunciated in the reproduced portion from the judgment of ***R v Governor of Brixton Prison ex parte Schtraks*** (1964) AC 556, in the judgment of ***In Re Naresh Parsaram Butani*** (supra) that " *on appeal this House can and must consider whether on the material before the Magistrate a reasonable Magistrate would have been entitled to commit the accused but neither a Court nor this House can retry the case so as to substitute its discretion for that of the Magistrate*" should be utilized to determine the Petitioner's application.

The judgment of the House of Lords in ***R v Governor of Brixton Prison ex parte Schtraks*** quoted Lord Russel of Killowen CJ where it was observed that " *we should after the order of committal, be entitled to review the Magistrate's decision, not in the sense of entertaining an appeal from it, but in the*

sense of determining whether there was evidence enough to give him jurisdiction to make the order of committal."

When the order of committal issued by the High Court of Colombo is perused, it is evident that the contention of the Respondents they have established a *prima facie* case against the Petitioner is a valid one. Therefore, we are of the opinion that there is no basis for this Court to interfere with the order of committal under Section 11(3) of the Extradition Law, issued against the Petitioner by the High Court. We are satisfied that "there was evidence enough to give him jurisdiction to make the order of committal".

Application of the Petitioner is accordingly refused.

JUDGE OF THE COURT OF APPEAL

DEEPALI WIJESUNDERA, J.

I agree.

JUDGE OF THE COURT OF APPEAL