HOUSE OF LORDS SESSION 2007–08

[2008] UKHL 59

on appeal from: [2007]EWHC (Admin) 762

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

McKinnon (Appellant) *v* Government of the United States of America (Respondents) and another

Appellate Committee

Lord Scott of Foscote
Lord Phillips of Worth Matravers
Baroness Hale of Richmond
Lord Brown of Eaton-under-Heywood
Lord Neuberger of Abbotsbury

Counsel

Appellant :
David Pannick QC
Ben Cooper

(Instructed by Kaim Todner LLP)

Respondents :
Clare Montgomery QC
Mark Summers

(Instructed by Crown Prosecution Service)

Interveners (Liberty)
Edward Fitzgerald QC
Joseph Middleton

(Instructed by Liberty)

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McKinnon (Appellant) *v* Government of the United States of America (Respondents) and another

[2008] UKHL 59

LORD SCOTT OF FOSCOTE

My Lords,

1. I have had the advantage of reading in draft the opinion of my noble and learned friend Lord Brown of Eaton-under Heywood and for the reasons he gives, with which I am in full agreement, I would dismiss this appeal.

LORD PHILLIPS OF WORTH MATRAVERS

My Lords,

2. I have had the benefit of reading in draft the speech of my noble and learned friend, Lord Brown of Eaton-under-Heywood For the reasons that he gives, I too would dismiss this appeal.

BARONESS HALE OF RICHMOND

My Lords,

3. For the reasons given by my noble and learned friend, Lord Brown of Eaton-under-Heywood, with which I entirely agree, I too would dismiss this appeal. The answer to the certified question is 'not in this case'.

LORD BROWN OF EATON-UNDER-HEYWOOD

My Lords,

Introduction

4. The appellant is a 42 year old British citizen, an unemployed computer systems administrator. On 7 October 2004 the respondent government requested his extradition to the United States alleging that between 1 February 2001 and 19 March 2002 he had gained unauthorised access to 97 US Government computers from his home computer in London.

5. The extradition request had been preceded by:

(i) Requests by the respondent government to the UK in March 2002 for mutual legal assistance pursuant to which the appellant's home computer was seized and he was twice interviewed under caution.

(ii) Indictments returned against the appellant by Grand Juries respectively of the District of New Jersey on 31 October 2002 and the Eastern District of Virginia on 12 November 2002.

(iii) Plea-bargaining discussions between November 2002 and April 2003 during which the US prosecutors indicated to the appellant's legal representatives what attitude they would take depending upon whether he went to the US voluntarily and pleaded guilty or instead contested extradition and the charges against him. The discussion involved the particular charges he would face and the sentence he could expect and in addition his prospects of repatriation pursuant to the European Convention on the Transfer of Sentenced Persons 1983 (ETS 112 of 21 March 1983) to which the US is a party.

6. The US has been designated a category 2 territory under section 69 of the Extradition Act 2003 (the Act) so that part 2 of the Act applies to the present proceedings. On 10 May 2006 District Judge Evans in the Bow Street Magistrates' Court sent the appellant's case to the Secretary of State to decide whether the appellant should be extradited and on 4 July 2006 the Secretary of State ordered the appellant's extradition.

7. The appellant appealed against the decisions both of the District Judge and of the Secretary of State to the Divisional Court (Maurice Kay LJ and Goldring J) which on 3 April 2007 dismissed both appeals: [2007] EWHC 762 (Admin). Two points of law, however, were certified by the court under section 114(4) of the Act as being of general public importance and on 11 October 2007 the House granted leave to appeal in respect of the following one of them:

> "Is it an abuse of process of extradition proceedings, such that the proceedings should be stayed, and/or an unjustified interference with the defendant's human rights, for the requesting state to engage in plea bargaining, including a threat to the defendant that, unless he agrees to be extradited, repatriation to the United Kingdom to serve any sentence imposed in the requesting state will not be supported by the prosecuting authority in the requesting state?"

8. Pursuant to section 87 of the Act the District Judge had to decide whether the appellant's extradition would be compatible with his Convention rights under the Human Rights Act 1998 and, if not, to discharge him. The District Judge also had jurisdiction to consider whether the extradition proceedings constituted an abuse of process so as to protect the integrity of the statutory regime, the Secretary of State having no general discretion to refuse extradition. So much was stated by Laws LJ in the Divisional Court in *R (Bermingham and Others) v Director of the Serious Fraud Office* [2007] QB 727, para 97 and by Lord Phillips of Worth Matravers CJ in *R (Government of the USA) v Bow Street Magistrates' Court* [2007] 1 WLR 1157, paras 82-83. What was not expressly stated in these decisions but was necessarily implicit was that the abuse of process for consideration was such as to require the extradition proceedings to be permanently stayed and the accused discharged.

9. It is common ground on the present appeal that any rights the appellant may have under articles 5(4) and 6 of the Convention add nothing to his abuse of process claim. Accordingly the essential question for your Lordships' determination is whether the requesting state's "engage[ment] in plea bargaining, including a threat to the defendant that, unless he agrees to be extradited, repatriation to the United Kingdom to serve any sentence imposed in the requesting state will not be supported by the prosecuting authority in the requesting state" constitutes an abuse of process requiring the defendant's discharge from the extradition proceedings.

10. With those few introductory paragraphs it is necessary to turn in a little detail to the facts of the case.

The appellant's alleged criminality

11. Using his home computer the appellant, through the internet, identified US Government network computers with an open Microsoft Windows connection and from those extracted the identities of certain administrative accounts and associated passwords. Having gained access to those accounts he installed unauthorised remote access and administrative software called "remotely anywhere" that enabled him to access and alter data upon the American computers at any time and without detection by virtue of the programme masquerading as a Windows operating system. Once "remotely anywhere" was installed, he then installed software facilitating both further compromises to the computers and also the concealment of his own activities. Using this software he was able to scan over 73,000 US Government computers for other computers and networks susceptible to similar compromise. He was thus able to lever himself from network to network and into a number of significant Government computers in different parts of the USA.

12. The 97 computers the appellant accessed were: 53 army computers, including computers based in Virginia and Washington that control the army's military district of Washington network and are used in furtherance of national defence and security; 26 navy computers, including US Naval Weapons Station Earle, New Jersey, which was responsible for replenishing munitions and supplies for the deployed Atlantic fleet; 16 NASA computers; one Department of Defense computer; and one US Air Force computer.

13. Having gained access to these computers the appellant deleted data from them including critical operating system files from nine computers, the deletion of which shut down the entire US Army's Military District of Washington network of over 2000 computers for 24 hours, significantly disrupting Governmental functions; 2,455 user accounts on a US Army computer that controlled access to an Army computer network, causing these computers to reboot and become inoperable; and logs from computers at US Naval Weapons Station Earle, one of which was used for monitoring the identity, location, physical condition, staffing and battle readiness of Navy ships, deletion of these files rendering the Base's entire network of over 300 computers inoperable at a critical time immediately following 11 September 2001 and thereafter leaving the network vulnerable to other intruders.

14. The appellant also copied data and files onto his own computers, including operating system files containing account names and encrypted passwords from 22 computers comprising: 189 files from US Army computers, 35 files from US Navy computers (including some 950 passwords from server computers at Naval Weapons Station Earle); and six files from NASA computers.

15. The appellant's conduct was alleged to be intentional and calculated to influence the US Government by intimidation and coercion. It damaged computers by impairing their integrity, availability and operation of programmes, systems, information and data, rendering them unreliable. The cost of repair was alleged to total over $700,000.

16. Analysis of the appellant's home computer confirmed these allegations. During his interviews under caution, moreover, he admitted responsibility (although not that he had actually caused damage). He stated that his targets were high level US Army, Navy and Air Force computers and that his ultimate goal was to gain access to the US military classified information network. He admitted leaving a note on one army computer reading:

> "US foreign policy is akin to government-sponsored terrorism these days . . . It was not a mistake that there was a huge security stand down on September 11 last year . . . I am SOLO. I will continue to disrupt at the highest levels . . ."

The plea-bargaining process (including discussion of repatriation)

17. In August 2002 the appellant instructed Ms Karen Todner, senior partner of Kaim Todner, to act as his solicitor. In November 2002 Ms Todner learned that an American prosecutor, Scott Stein, had applied for a formal indictment against the appellant and telephoned him to register her interest. There followed a number of communications during which Mr Stein indicated how much better a deal would be available to the appellant if he went voluntarily to the United States and pleaded guilty than if he contested extradition and denied the charges. Some of these communications were by telephone, some in writing, others at meetings with Mr Ed Gibson, the FBI legal attaché at the American Embassy in London. It is sufficient to set out the substance of what was said at the final such meeting on 14 April 2003, attended by Ms Todner and Mr Edmund Lawson QC for the appellant, and by Mr Stein, his superior Mr Hanly, and Mr Gibson as representatives of the US Government. I take this from a recent witness statement made by Mr Lawson dated 6 June 2008. (A broadly similar account taken from statements made by Ms Todner is set out in the Divisional Court's judgment which also contains a detailed account of the earlier communications.)

18. Mr Stein confirmed that he was authorised to offer the appellant a deal in return for not contesting extradition and for agreeing to plead guilty to two of the counts laid against him of "fraud and related activity in connection with computers". On this basis it was likely that a sentence of 3-4 years (more precisely 37-46 months), probably at the shorter end of that bracket, would be passed and that after serving 6-12 months in the US, the appellant would be repatriated to complete his sentence in the UK. In this event his release date would be determined by reference to the UK's remission rules namely, in the case of a sentence not exceeding four years, release at the discretion of the parole board after serving half the nominal sentence, release as of right at the two-thirds point. On that basis, he might serve a total of only some eighteen months to two years.

19. The predicted sentence of 3-4 years was based upon sentencing guidelines themselves based upon a points system. The prosecution would recommend to the court a particular points level which the court would be likely to accept. Similarly the prosecutor would recommend to the section of the US Department of Justice responsible for administering the Convention on the Transfer of Sentenced Persons that the appellant be transferred and this recommendation too was in practice likely to be accepted.

20. If, however, the appellant chose not to cooperate, and were then extradited and convicted, he might expect to receive a sentence of 8-10 years, possibly longer, and would not be repatriated to the UK for any part of it. He would accordingly serve the whole sentence in a US prison (possibly high security) with at best some 15% remission.

21. Mr Lawson clearly recalls the prospect of repatriation being stated to depend upon the appellant's application for transfer being supported by the prosecution. If the support were withheld as it would be if extradition was contested, there was said to be no prospect of repatriation, a refusal by the Department of Justice being unreviewable in the US courts.

22. The proposed "deal" was conditional upon the appellant entering into a form of Plea Agreement, a lengthy document including the provision in para 4 that:

> "the defendant is aware that the defendant's sentence will be imposed in accordance with the Sentencing Guidelines and Policy Statements. The defendant is aware that the Court has jurisdiction and authority to impose any sentence within the statutory maximum set for the offense (s) to which the defendant pleads guilty. The defendant is aware that the Court has not yet determined a sentence. The defendant is also aware that any estimate of the probable sentencing range under the sentencing guidelines that the defendant may have received from the defendant's counsel, the United States, or the probation office, is a prediction, not a promise, and is not binding on the United States, the probation office, or the Court. The United States makes no promise or representation concerning what sentence the defendant will receive, and the defendant cannot withdraw a guilty plea based upon the actual sentence."

The Plea Agreement included a further term in para 12 that the US Attorney's Offices respectively for the Eastern District of Virginia and the District of New Jersey "will not oppose the defendant's application to transfer any sentence imposed by the Court made pursuant to the Council of Europe Convention".

23. Subsequent to the Divisional Court's judgment but prior to Mr Lawson's statement an affidavit was sworn by Robert Wiechering on behalf of the US Attorney's Offices for both districts stating that they "will not oppose any prisoner transfer application that may be made by Gary McKinnon (if extradited and convicted) based, in whole or in part, on his refusal to waive or consent to extradition from the United Kingdom."

24. Following the meeting of 14 April 2003 Ms Todner took advice from an American defense lawyer and, subsequently, the appellant declined the "deal".

25. Before moving from this section of the judgment it is convenient to take brief note of the essential reasons why, under the sentencing guidelines, the predicted sentences respectively on a plea of guilty and on conviction were so widely different. Principally this was because of the different bases upon which the prosecutor proposed to put the case. As was made clear, upon a plea of guilty, the prosecutor was prepared to put the damage resulting from the appellant's actions (the extent of the damage being of substantial relevance to the points calculation) in a lower bracket ($400,000 - $1m) than they believed they could prove. The lower figure is based merely on calculating the hours it took employees to conduct a damage assessment and to restore the compromised computer systems, multiplying the hours by the employee's hourly wage. Nothing was included for the further losses caused through the inability to access the computers whilst the networks were being assessed for damage and repair. Furthermore, on a plea of guilty the prosecution were prepared to overlook the disruption to US Government functions based on the damage to the military District of Washington network and the Earle Weapons Station. They would not pursue enhancements of the sentence for significantly endangering national security and for substantial non-monetary harm, both provided for under the points system. In addition, of course, the sentence would be reduced by "acceptance of responsibility" over and above the reduction attracted merely by entering a timely guilty plea.

The course of proceedings

26. In August and September 2004, following the appellant's refusal of the "deal", the respective Districts of Virginia and New Jersey issued warrants for the appellant's arrest and, as stated, on 7 October 2004 the respondents submitted an extradition request to the Secretary of State.

The request was certified by the Secretary of State under section 70 of the Act and a warrant was issued by Bow Street Magistrates' Court under section 71. On 7 June 2005 the appellant was arrested under section 72 and the following day appeared before the Court. The extradition hearing commenced on 27 July 2005 and continued on 14 and 15 February and 12 April 2006. The District Judge, as stated, sent the case to the Secretary of State on 10 May 2006 and on 4 July 2006 the Secretary of State informed the appellant under section 100(1) of the Act that he had made the order for extradition. Both claims were then appealed to the Divisional Court respectively under sections 103 and 108 of the Act.

27. It is unnecessary for present purposes to relate the various points raised by the appellant either before the District Judge, or, for the most part, before the Divisional Court. Suffice it to note that the abuse of process argument, the subject of the certified question, was raised for the first time before the Divisional Court, the appellant's legal advisers having previously felt bound by the US authorities' stipulation that, if the matter proceeded to extradition, the discussions were to be treated as confidential and off the record. The argument failed before the Divisional Court and is now repeated, this time with the support of Liberty as intervener, before Your Lordships.

The appellant's argument

28. The appellant's main argument focuses on the wide disparity between on the one hand the predicted likely outcome if the appellant cooperated with the US authorities—a sentence of 3-4 years of which 6-12 months would be served in a low security prison in the US after which there were good prospects of repatriation with the expectation of release after serving only half the sentence—and on the other hand the threatened likely outcome if the appellant refused to cooperate—a sentence of 8-10 years or more in a US high security prison with remission of only 15%. Such a disparity, it is submitted, is disproportionate and subjected the appellant to impermissible pressure to surrender his legal rights, particularly his right to contest extradition. Pressure of this kind, it is submitted, indeed plea bargaining generally, runs flatly counter to the principle of English law recently clarified in the judgment of the five-judge Court of Appeal delivered by Lord Woolf CJ in *R v Goodyear* [2005] 1 WLR 2532: essentially that a judge may respond to a defendant's request that he be told the maximum sentence that would be imposed on a plea of guilty but is not to volunteer such information unasked nor to indicate what sentence might be passed on

the defendant's conviction by the jury. As the Court stated at para 54: "With some defendants at any rate, the very process of comparing the two alternatives would create pressure to tender a guilty plea."

29. Where, as here, the respondent government is seeking the assistance of the English courts to extradite an accused, it must, submits the appellant, comply with the legal principles of this jurisdiction. True it is that he has in fact resisted the pressure improperly put upon him but that, he submits, is no answer to the contention that it constituted an abuse of process: it was calculated to interfere with the extradition proceedings.

30. For this submission and indeed more generally in support of the abuse of process argument the appellant relies principally upon the judgment of the Supreme Court of Canada in *USA v Cobb* [2001] 1 SCR 587. The USA there had indicted a large number of defendants, including the two Canadian appellants, on mail fraud charges. Many had submitted voluntarily to the Court in Pennsylvania and on sentencing one of them the trial judge had said (p 593):

> "I want you to believe me that as to those people who don't come in and cooperate and if we get them extradited and they are found guilty, as far as I am concerned they are going to get the absolute maximum jail sentence that the law permits me to give."

About a week before the Canadian extradition hearing the American prosecuting attorney was interviewed on Canadian television and said:

> "I have told some of these individuals, 'look, you can come down and you can put this behind you by serving your time in prison and making restitution to the victims, or you can wind up serving a great deal longer sentence under much more stringent conditions' and describe those conditions to them."

Asked by the interviewer "How would you describe those conditions?", the attorney replied: "You are going to be the boyfriend of a very bad man if you wait out your extradition". That was understood by the Court to mean that they would be subject to homosexual rape. Asked then: "And does that have much of an impact on these people?", the

attorney answered: "Well, out of the 89 people we have indicted so far, approximately 55 of them have said, 'We give up'".

31. In allowing the appeal and reinstating the extradition judge's order staying the extradition process, Arbour J, giving the judgment of the Supreme Court, said, at paragraphs 52 and 53:

> "By placing undue pressure on Canadian citizens to forego due legal process in Canada, the foreign state has disentitled itself from pursuing its recourse before the courts and attempting to show why extradition should legally proceed. The intimidation bore directly upon the very proceedings before the extradition judge . . . [The judge] was also correct in concluding as he did that this was one of the clearest of cases where to proceed further with the extradition hearing would violate 'those fundamental principles of justice which underlie the community's sense of fair play and decency' (*Keyowski* [1988] 1 SCR 657, 658-659), since the requesting state in the proceedings, represented by the Attorney General of Canada, had not repudiated the statements of some of its officials that an unconscionable price would be paid by the appellants for having insisted on exercising their rights under Canadian law."

32. Arbour J had earlier (at para 50) dealt with the argument based on the appellants not in fact having been dissuaded from exercising their procedural rights:

> "I find no merit in this argument. It may very well be that the threats of the severe and illegal consequences that may follow their resistance to extradition may have made the appellants more, not less, determined to resist their surrender. Frankly, this would have been quite understandable. The abuse of process here consists in the attempt to interfere with the due process of the court. The success or failure of that interference is immaterial."

33. Did the US prosecuting authority here "attempt to interfere with the due process of the Court"? Did it place "undue pressure [on the

appellant] to forego due legal process" in the UK and so disentitle itself from pursuing extradition proceedings? Would extradition in this case "violate those fundamental principles of justice which underlie the community's sense of fair play and decency"? Would the appellant following extradition be paying "an unconscionable price . . . having insisted on exercising [his] rights under [English] law"? These are the questions plainly raised by the Supreme Court's judgment in *Cobb* (and by the closely related case of *USA v Shulman* [2001] 1 SCR 616). They are also to my mind the essential questions underlying the single question certified for your Lordships' determination on this appeal.

34. Before answering these questions, however, it is as well to recognise that the difference between the American system and our own is not perhaps so stark as the appellant's argument suggests. In this country too there is a clearly recognised discount for a plea of guilty: a basic discount of one-third for saving the cost of the trial, more if a guilty plea introduces other mitigating factors, and more still (usually one half to two thirds but exceptionally three-quarters or even beyond that) in the particular circumstances provided for by sections 71-75 of the Serious Organised Crime and Police Act 2005—see *R v P; R v Blackburn* [2007] EWCA Crim 2290. No less importantly, it is accepted practice in this country for the parties to hold off-the-record discussions whereby the prosecutor will accept pleas of guilty to lesser charges (or on a lesser factual basis) in return for a defendant's timely guilty plea. Indeed the entire premise of the principle established in *Goodyear* [2005] 1 WLR 2532 is that the parties will have reached an agreed basis of plea in private before the judge is approached. What, it must be appreciated, *Goodyear* forbids are *judicial*, not prosecutorial, indications of sentence. Indeed, *Goodyear* goes further than would be permitted in the United States by allowing the judge in certain circumstances to indicate what sentence he would pass.

35. Your Lordships will also appreciate that in April 2008 the Attorney General issued a consultation paper regarding the possible introduction here of a formal court-sanctioned plea negotiation framework for fraud cases: "The Introduction of a Plea negotiation Framework for Fraud Cases in England and Wales: a consultation". The framework would enable the prosecutor to agree (without binding the court) that a specific sentence or sentencing range is appropriate. The paper summarises the current system, recognising the legitimacy of the informal plea negotiations that currently take place, unregulated though these are. In the Federal Courts of the United States, by contrast, the practice of plea bargaining *is* regulated and the courts have a duty to discuss the consequences of a guilty plea with the accused in open court

and to ensure that it has been entered voluntarily and with a full understanding of those consequences. The contents of any plea agreement must be disclosed in open court and the trial judge has the power to accept or reject it.

36. Moving to the other aspect of the plea bargaining discussions in the present case, the question of repatriation, the Convention confers no rights on prisoners: a state is not obliged to comply with a repatriation request nor to provide reasons if it refuses to do so. By the same token that a plea of guilty routinely attracts a lesser sentence, understandably it is likely also to attract a more sympathetic response to a repatriation request where, as here, that involves a greatly enhanced prospect of early release. After all, the extent of remission (the critical consideration in a request for repatriation from the US to the UK) affects the length of the prison sentence to be served no less than the nominal term itself.

37. The Divisional Court expressed their "cultural reservations" about the general American style of plea-bargaining (para 60) and in particular "a degree of distaste" as to the prosecutor's approach towards providing or withdrawing support for repatriation (para 54). These comments seem to me somewhat fastidious. Our law is replete with statements of the highest authority counselling not merely a broad and liberal construction of extradition laws (to serve the transnational interest in bringing to justice those accused of serious cross-border crimes—see, for example, *In re Ismail* [1999] 1 AC 320, 326-327), but also the need in the conduct of extradition proceedings to accommodate legal and cultural differences between the legal systems of the many foreign friendly states with whom the UK has entered into reciprocal extradition arrangements.

38. Turning, with these considerations in mind, to the questions raised by *Cobb* and central to the determination of the present appeal, I for my part would unhesitatingly answer all of them in the negative. As the Divisional Court itself pointed out (at para 34), the gravity of the offences alleged against the appellant should not be understated: the equivalent domestic offences include an offence under section 12 of the Aviation and Maritime Security Act 1990 for which the maximum sentence is life imprisonment. True, the disparity between the consequences predicted by the US authorities dependent upon whether the appellant cooperated or not was very marked. It seems to me, however, no more appropriate to describe the predicted consequences of non-cooperation as a "threat" than to characterise the predicted

consequences of cooperation as a "promise" (or, indeed, a "bribe"). In one sense all discounts for pleas of guilty could be said to subject the defendant to pressure, and the greater the discount the greater the pressure. But the discount would have to be very substantially more generous than anything promised here (as to the way the case would be put and the likely outcome) before it constituted unlawful pressure such as to vitiate the process. So too would the predicted consequences of non-cooperation need to go significantly beyond what could properly be regarded as the defendant's just desserts on conviction for that to constitute unlawful pressure.

39. The differences between this case and *Cobb* are striking. In *Cobb* it was the judge who stated that non-cooperation would result in "the absolute maximum jail sentence that the law permits me to give" and he, after all, unlike the prosecuting authority, had the power to pass sentence. And in *Cobb* the prosecutor, so far from forewarning the defendant of the differing consequences which could be expected to follow (perfectly properly) from his decision whether or not to cooperate, effectively threatened (and here I use the word advisedly) those not cooperating with homosexual rape.

40. The high watermark of the appellant's case here consists of Mr Lawson's recollection that, unless the appellant consented to extradition (as opposed merely to pleading guilty if extradited), the prosecuting authorities would oppose his repatriation. That, however, even were it to be regarded as an unlawful threat, has now been expressly repudiated by Mr Wiechering, again in marked contrast to the position in *Cobb*.

41. In my judgment it would only be in a wholly extreme case like *Cobb* itself that the court should properly regard any encouragement to accused persons to surrender for trial and plead guilty, in particular if made by a prosecutor during a regulated process of plea bargaining, as so unconscionable as to constitute an abuse of process justifying the requested state's refusal to extradite the accused. It is difficult, indeed, to think of anything other than the threat of unlawful action which could fairly be said so to imperil the integrity of the extradition process as to require the accused, notwithstanding his having resisted the undue pressure, to be discharged irrespective of the strength of the case against him.

42. In my judgment this is far from being such a case and accordingly I would dismiss the appeal.

LORD NEUBERGER OF ABBOTSBURY

My Lords,

43. I have had the benefit of reading in draft the opinion of my noble and learned friend Lord Brown of Eaton-under-Heywood, and, for the reasons that he gives, I too would dismiss this appeal.