

28/04/2018
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IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)



Case number: A318/2017

Date:

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED

28/3/2018
DATE

SIGNATURE

In the matter between:

EUGENE MARC WALTER TYRRELL

APPELLANT

And

THE STATE

RESPONDENT

JUDGMENT

PRETORIUS J.

- (1) This is an appeal against the finding of the Magistrate, Pretoria that the appellant was extraditable to the United Kingdom in terms of section

10 of the **Extradition Act**¹ for purposes of standing trial in the UK on charges of contravening section 10(1) of the **British Sexual Offences Act of 2003**².

- (2) The appellant exercised his automatic right of appeal in terms of the **Extradition Act**. The appellant has been legally represented throughout all proceedings.

LEGISLATIVE BACKGROUND:

- (3) Section 1 of the **Extradition Act** defines an extraditable offence as:

"...any offence which in terms of the law of the Republic and of the foreign State concerned is punishable with a sentence of imprisonment or other form of deprivation of liberty for a period of six months or more, but excluding any offence under military law which is not also an offence under the ordinary criminal law of the Republic and of such foreign State;"

- (4) The appellant was arrested pursuant to a request for his extradition submitted by a foreign state, according to section 2 of the **Extradition Act**, being the United Kingdom ("the UK"), to the Republic of South Africa ("the RSA").

¹ Act no 67 of 1962

² Causing or inciting a child to engage in sexual activity

- (5) The request was submitted in terms of the **European Convention on Extradition** to which both the RSA and the UK are signatories and which **Convention** came into force in the RSA on 13 May 2003³.

- (6) According to sub article 2(1) of the **Convention** the offence must be punishable with a sentence of imprisonment of a year or more. Article 12 of the **Convention** sets out the documents and information that are required, which are *"the original or authenticated copy of the warrant of arrest or other order having the same effect and issued in accordance with the procedure laid down in the law of the requesting party"*.

- (7) Upon receipt of the said request the Minister of Justice issued a certificate in terms of section 5 of the **Extradition Act**, notifying that a request for extradition for the appellant has been received to stand trial on two charges of causing or inciting a child to engage in sexual activity in contravention of section 10(1) of the **UK Sexual Offences Act of 2003**.

- (8) This offence is regarded as a serious offence in the UK as a period of imprisonment of 6 months up to 3 years may be imposed in terms of section 10(3) and on conviction on indictment, to a term of imprisonment not exceeding 14 years.

³ GG 24872 volume 455 dated 13 May 2003 (See also section 2(1) of the Act)

- (9) This conduct is prohibited in the RSA by the **Criminal Law (Sexual Offences and Related Matters) Amendment Act**⁴. Section 18 of this Act deals with sexual grooming of children and is punishable with a period of imprisonment of 1 year and more⁵.
- (10) The **Extradition Act** provides that there should be sufficient evidence in the foreign state to warrant the prosecution of the person sought. A mere statement of the offences is enough to facilitate extradition, provided all other extradition requirements are met. There is no requirement of *prima facie* evidence. The offences for which the appellant's extradition is sought are extraditable offences.
- (11) An enquiry is held in terms of section 9(2) of the **Extradition Act**, which provides:

"Subject to the provisions of this Act the magistrate holding the enquiry shall proceed in the manner in which a preparatory examination is to be held in the case of a person charged with having committed an offence in the Republic and shall, for the purposes of holding such enquiry, have the same powers, including the power of committing any person for further examination and of admitting to bail any person detained, as he

⁴ Act no 32 of 2007

⁵ See section 56A of the Act

has at a preparatory examination so held."

- (12) This enquiry is *sui generis* and is a preparatory examination. The appellant is not an accused in such an enquiry by the Magistrate. Section 35(3) of the **Constitution**⁶ is therefor not applicable as this enquiry is not a criminal trial. See **Geuking v President of the Republic of South Africa and Others**⁷ where it was held:

"In considering the constitutionality of section 10(2) it must be borne in mind that:

(a) the proceedings before the magistrate do not constitute a trial. In the event of the surrender of the person, his or her trial will be held in the foreign state. That, after all, is the purpose for which the extradition is sought;

(b) if the magistrate finds that the person is liable to be surrendered to the foreign state, the person has a right of appeal to the High Court;

(c) if there is no appeal or if the decision of the magistrate is confirmed on appeal, the record of the proceedings together with such report as the magistrate may deem necessary must be forwarded to the Minister;

(d) the Minister is then required to exercise a discretion under section 11 of the Act and notwithstanding the finding of the magistrate, may refuse the surrender on any one or more of the

⁶ Act no 108 of 1996

⁷ 2003 (3) SA 34 (CC) at paragraph 42

grounds specified in that section of the Act.

(e) the person concerned is entitled to give and adduce evidence at the enquiry which would have a bearing not only on the magistrate's decision under section 10, but could have a bearing on the exercise by the Minister of the discretion under section 11."

- (13) The Minister of Justice has to make the final decision in terms of section 11 of the **Extradition Act** whether a person should be extradited. Such a decision by the Minister is subject to review. In **Director of Public Prosecutions: Cape of Good Hope v Robinson**⁸ the court found:

"The declaratory order in Mohamed's case was made after a finding of unconstitutionality not in the apprehension that someone might act unconstitutionally later. There was no statement there that an extradition magistrate is obliged to order a discharge where the extradition, if it ensued, would put the fair trial rights of the person sought in jeopardy. Nor is Mohamed's case authority for the proposition that an extradition magistrate must discharge the person sought if the death sentence might be imposed. The proper approach of a magistrate, if all other requirements are met, would be to grant an order for the committal of the person sought. It is for the Minister in terms of section 11 of the Act to determine that issue. Mohamed's case

⁸ 2005 (4) SA 1 (CC) at paragraph 59

does not support the High Court conclusion."

(14) The only purpose of an enquiry in the Magistrate's Court is to determine whether there is a reason to remove a person to a foreign state to stand trial there. The Minister will ultimately decide in terms of section 11 of the **Extradition Act** whether the appellant should be extradited.

(15) In **Geuking**⁹ the purpose of the enquiry was set out in paragraph 15 as:

"The purpose of the enquiry is to be found in section 10(1) of the Act. It is for the magistrate to determine, upon a consideration of the evidence, whether:

- (a) the person is liable to be surrendered to the foreign state concerned; and*
- (b) in the case where such person is accused of an offence, there is sufficient evidence to warrant a prosecution for the offence in the foreign state.*

If so satisfied, the magistrate is required to issue an order committing such person to prison and there to await the decision of the Minister with regard to surrender. At the same time the magistrate is obliged to inform the person that he or

⁹ Supra

she may within 15 days appeal against such order to the High Court."

Should the Magistrate find that an accused is extraditable then the Magistrate has to commit such a person to prison pending the Minister's final decision.

- (16) Section 11(b) of the **Extradition Act** provides the circumstances whereby the Minister may decide not to extradite an accused person.

Section 11(b) provides:

"The Minister may-

(b) order that a person shall not be surrendered-

(i) where criminal proceedings against such person are pending in the Republic, until such proceedings are concluded and where such proceedings result in a sentence of a term of imprisonment, until such sentence has been served;

(ii) where such person is serving, or is about to serve a sentence of a term of imprisonment, until such sentence has been completed;

(iii) at all, or before the expiration of a period fixed by the Minister, if he or she is satisfied that by reason of the trivial nature of the offence or by reason of the surrender not being required in good faith or in the interests of justice, or that for any other reason it would, having regard to the distance, the facilities for communication

and to all the circumstances of the case, be unjust or unreasonable or too severe a punishment to surrender the person concerned; or

(iv) if he or she is satisfied that the person concerned will be prosecuted or punished or prejudiced at his or her trial in the foreign State by reason of his or her gender, race, religion, nationality or political opinion."

It is thus clear that the ultimate decision is that of the Minister.

BACKGROUND:

(17) The applicant was arrested on 8 March 2017 following a request for extradition by the UK. He was released on bail, after a bail hearing on 16 March 2017.

(18) An enquiry in terms of section 9 and 10 of the **Extradition Act** was held on 7 April 2017 before Magistrate Thelede in Tshwane Central Magistrate's Court. She found the appellant to be liable for extradition to the UK.

BACKGROUND: DOCUMENTS TO BE SUBMITTED:

(19) In the present instance the UK warrant of arrest forms part of the extradition bundle. This warrant was issued for contravention of section 10(1) of the **British Sexual Offences Act of 2003** by the

appellant.

- (20) A warrant of arrest was issued in the RSA, which specifically refers to the charges the appellant is being sought for in the UK, section 10(1) of the **Sexual Offenders Act** that provides that it is an offence to cause or incite a child to engage in sexual activity. The RSA warrant equated the British offences with a charge of similar offences and rape in the RSA. At no stage did the appellant contest the South African warrant as being irregular. It must be reiterated that the appellant had at all times been legally represented. The RSA warrant of arrest was never an issue during the hearing by the Magistrate and was accepted.
- (21) I must agree with counsel for the State that the appellant cannot on appeal raise the issue that the RSA warrant was irregular. In any event, the RSA warrant clearly indicated the charges he had been facing in the UK. There can be no doubt as to which charges the appellant would be facing in the UK. In any event, he has already appeared in court in the UK, before leaving for RSA.
- (22) Counsel for the State's argument that the purpose of the warrant issued in an extradition enquiry differs vastly from that issued in a criminal trial, must be accepted.

(23) The statement of offences, with the relevant details as to time, date, place of commission, legal description and reference to relevant legal provisions was provided¹⁰ to the appellant. A copy of the legal enactments were provided¹¹ to the appellant. The photograph and fingerprints are those of the person sought by the UK and is that of the appellant. All the requirements regarding the request and supporting documents have been met.

(24) In an extradition application there is no requirement for prima facie evidence. Section 10(2) of the **Extradition Act** provides:

"For purposes of satisfying himself or herself that there is sufficient evidence to warrant a prosecution in the foreign State the magistrate shall accept as conclusive proof a certificate which appears to him or her to be issued by an appropriate authority in charge of the prosecution in the foreign State concerned, stating that it has sufficient evidence at its disposal to warrant the prosecution of the person concerned."

Such a certificate was provided¹² and the court found that there is sufficient evidence.

(25) Counsel for the appellant argued that the court has to consider the merits of the case, as well as the evidence. The introduction of the

¹⁰ See pages 69 to 80 of the record

¹¹ See page 89 and 90 of the record

¹² See pages 83 and 84 of the record and pages 15 and 16 of the extradition documents

section 10(2) certificate causes the Magistrate's Court not to evaluate and decide evidence that may be provided in the UK court. The argument that the law of evidence of the RSA emanated from the English law and therefor this court should evaluate and decide on the evidence cannot be entertained. It is clearly not the duty of the Magistrate's Court to do so where a section 10(2) certificate has been furnished. All this will be done in the court in the UK. That court will also deal with the defences provided by the appellant, as it is not for this court of enquiry to deal with it.

- (26) The appellant is clearly raising a defence when he alleges his trial rights were not considered. It is not for this court to decide thereon, but for the trial court in the UK¹³ and this defence should be dealt with in the court in the UK.

¹³ Abel v Minister of Justice and Others 2001(1) SA 1230 (C) at paragraph 50:

"In The Political Offence Exception of Extradition: The delicate problem of balancing the rights of the individual and the international public order (1980) 40 Van Den Wijngaert deals inter alia with judicial control of decisions in respect of extradition and states:

"The legal control on extradition is not a true criminal procedure, and is limited to a general examination of the extradition conditions. If it appears that, in a given case, the different conditions provided for by the extradition act are fulfilled, then the court will render a positive advisory opinion or declare extradition proper."

See also IA Shearer Extradition in International Law (1971) at 156 where the author deals with the law in the United States:

"The fugitive is permitted to present evidence at the hearing to explain the evidence produced against him or otherwise to establish want of probable cause, but he is not permitted to present evidence to sustain a defence, since this is appropriate to the trial of the offence only."

See further at 157:

"The law and practice of most other countries reject production of evidence of guilt. The law of France and of most other civil law systems looks only to proof of identity and the conformity of the request to the treaty and the statutory requirements."

(27) In **Robinson's case**¹⁴ it was held:

"This judgment holds that an extradition magistrate conducting an enquiry in terms of section 10(1) of the Act has no power to consider whether the constitutional rights of the person sought may be infringed upon extradition. That aspect must be considered by the Minister in terms of section 11 of the Act. The correctness or otherwise of the decision of the Minister to extradite the respondent is subject to judicial control. This judgment also holds that the documents before the extradition magistrate were all properly authenticated as required by the extradition agreement. The consequences of this judgment are that the extradition magistrate's order for the committal of the respondent to prison stands and that it is for the Minister to decide whether the respondent should be extradited in all the relevant circumstances including the fact that he will, if extradited, have to serve a term of imprisonment that was imposed upon him in his absence."

(28) The allegation that the evidence is not sufficient for the prosecution in the UK cannot be entertained, due to the fact that the section 10(2) certificate was furnished to the enquiry court and no further evidence needs to be submitted. According to the requesting documents there had been an interview with the appellant. The facts canvassed in the interview regarding the texts he had sent to both Emily and Megan,

¹⁴ Supra at paragraph 71

who were 13 and 10 years old, respectively, at the time of the alleged crimes, have been included in the extradition bundle. These facts have to be tested during a criminal trial in the UK, which had already commenced when the appellant left the UK.

(29) In terms of section 11 of the **Extradition Act** the Minister has to make the final decision and grant a final order. The Minister may consider the allegations and come to a different conclusion. However, the finding by the Magistrate that the appellant must be extradited is based on the above facts and documents, which have been authenticated. The Minister will act in terms of section 11 of the **Extradition Act** once the appeal has been finalised and only if the Magistrate's findings are confirmed¹⁵.

(30) It is further argued that in terms of RSA legislation extraterritorial jurisdiction is provided for sexual offences committed by RSA citizens in the UK and have concurrent jurisdiction with the UK, although the offences had been committed in the UK. It is at the discretion of the prosecuting authority as to where to prosecute and whether to prosecute.

(31) In the present instance the trial had already started in the UK, the

¹⁵ Garrido v Director of Public Prosecutions, Witwatersrand Local Division and Others [2007] 4 All SA 1100 (SCA)


witnesses, some of whom are young children, are in the UK and there is no reason to prosecute the appellant in the RSA for his convenience. The section 5 certificate issued by the Minister of Justice makes it clear that there was a request from the UK for the extradition of the appellant. It is evident that the appellant will not be charged in the RSA and therefore there is an obligation in terms of the **Convention** to extradite.

(32) I find that the argument by the appellant's counsel that the Magistrate should have refused extradition and ordered that the matter proceed in RSA cannot be entertained. The argument that the appellant left for RSA as he could not afford to stay in the UK after losing his employment, cannot be used to stave off an extradition. In any event the appellant has made no attempt to return to the UK to stand trial, since he became aware of the application to extradite him.

(33) The court have considered the record of proceedings, the authenticated documents, the heads of argument, the oral arguments by counsel and come to the conclusion that the appellant was correctly found to be liable to be extradited to the UK. He should be committed to prison pending the final decision of the Minister in terms of section 11 of the **Extradition Act**.

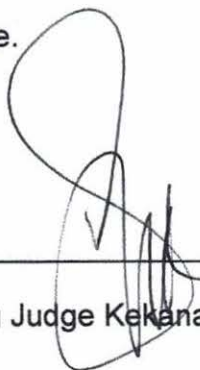
(34) In the result the following order is made:

The appeal is dismissed.



Judge C Pretorius

I agree.



Acting Judge Kekana

Case number : A318/2017

Matter heard on : 27 February 2018

For the Appellant : Adv AD Theart

Instructed by : Johan Du Preez Attorneys

For the Respondent : Adv E Leonard SC

Instructed by : Director of Public Prosecutions

Date of Judgment : 28/3/2018.