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| Reportable: | YES / NO |
| Circulate to Judges: | YES / NO |
| Circulate to Regional Magistrates: | YES / NO |
| Circulate to Magistrates: | YES / NO |



**IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY**

Case No.: CA&R 40/2022
Date Heard: 27 September 2022
Date Delivered: 04 October 2022

In the matter between:

CLYDE LEWIS-SPRINGFIELD Appellant

and

THE STATE Respondent

Coram: Kgopa AJ

ORDER

The appeal is dismissed.

JUDGMENT

Kgopa AJ

- [1] This is an appeal against refusal of bail pending the extradition enquiry by the Magistrate.
- [2] Appellant and his four children are citizens of the United States of America (USA). He came to South Africa towards the end of October 2021. He used a visitor's visa expiring 29 January 2022 to be in South Africa. Three of the children he brought were minors and one was aged 18 years.
- [3] There was a custody agreement between the appellant and the mother of the children NM and it was made a court order. In the court order, the appellant was to return the children on 3 November 2021 at 2pm but he did not. The mother reported the matter to the authorities and appellant was subsequently sought on allegations or charge of "*International Parental Kidnapping*".
- [4] The U.S Department of Justice made a request to the South African Department of Justice to assist in the arrest and extradition of the appellant.
- [5] On the 1st of February 2022 the Pretoria Magistrate's Court authorised and issued a warrant for the arrest of the appellant.
- [6] Appellant was subsequently arrested on 16 March 2022 in Upington, Northern Cape. He appeared in court and was remanded in custody pending the

holding of extradition enquiry in terms of the Extradition Act 67 of 1962 (The Extradition Act).

[7] The children were “rescued” and returned to their home country (and to the custodian parent).

[8] The appellant brought bail applications on the 4th of April 2022 and on the 11th of May 2022 on new facts, and bail was denied.

[9] It need be noted that extradition enquiry or proceedings are still to be addressed or attended to at a later stage. For purposes of these appeal proceedings, the Extradition Act will be referred to where relevant.

[10] Section 3(1) of the Extradition Act provides, “*Any person accused or convicted of an offence included in an extradition agreement and committed within the jurisdiction of a foreign state a party to such agreement, shall, subject to the provisions of this Act, be liable to be surrendered to such state in accordance with the terms of such agreement, whether or not the offence was committed before or after the date upon which the agreement comes into operation and whether or not the court in the Republic has jurisdiction to try such person for such offence.*”

[11] Section 9(1) provides that, “*any person detained under a warrant of arrest or a warrant for his further detention, shall, as soon as possible be brought before a magistrate in whose area of jurisdiction he has been arrested,*

whereupon such magistrate shall hold an enquiry with a view to the surrender of such person to the foreign State concerned.”

- [12] And in terms of section 9(2) , *“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 has at a preparatory examination so held.”*

Therefore, a Magistrate is empowered in terms of section 9(2) of the Extradition Act to entertain bail pending extradition enquiry or proceedings.

- [13] Mr Van Der Berg for the appellant argued that, the basis for the appeal is that the magistrate was not to have held bail application as there is no offence in South African Law that appellant committed or that is equivalent to *“International Parental Kidnapping”*. There is no offence here (in South Africa) as contemplated by section 60(1)(a) of the Criminal Procedure Act 51 of 1977 for purposes of bail proceedings and that meant the detention of appellant was wrong and the appeal must be upheld.

- [14] Mr Makhaga for the Respondent argued that the appellant is facing an extraditable offence and that bail provisions are applicable in extradition proceedings. The proceedings in the Magistrate’s court proceeded under the

correct bail Schedule 5 and the Magistrate correctly denied appellant bail as there was a likelihood that if appellant was to be granted bail he might evade trial and his release might jeopardize the proper functioning of the justice system. He submitted that the Appeal should be dismissed.

[15] It was agreed by the parties at the bail proceedings that the offence appellant charged with or circumstances falls under the provisions of section 60(11)(b) of the Criminal Procedure Act (schedule 5 offence). The appellant could only be released from detention if he adduces evidence which satisfies the court that the interests of justice permit his release. In the United States, appellant has previous convictions involving a firearm and others were of domestic violence and was now facing kidnapping of children.

[16] The appellant submitted an affidavit to support his application to be released on bail. His visa expired on 29 January 2022. He was staying with the children in tents together with a group referred to as a missionary group praying together at a farm 10km near the border of Namibia in Upington. On the issue of returning the children, he indicated that he had financial constraints. He could not afford flights back to the United States and the Covid-19 restrictions added to his problems as he had to undergo tests before flying to the United States. He and his older child had to work at the farm to gather funds to return to the United States as well survive in South Africa. He was also intending touring Africa with the children. He insisted he was not in the wrong in the United States and is going to oppose his extradition. He however was silent on the expired visa and him being illegally in the Republic

of South Africa between 29 January 2022 and 16 March 2022 when he was arrested. He conceded that at the farm where they stayed in tents, other “missionaries” were also arrested and released on bail. From the record it appears that their charges were illegal possession of firearms and ammunition. He insisted that he wishes to stay in the Republic and continue his prayer sessions with the missionary group and also to continue his relationship with the lover he found as well work in South Africa.

[17] Evidence by the State was that, other than the arrest warrant as had been sought by the United States, at the farm where appellant and company lived, there were also allegations of children being taught how to shoot.

[18] In terms of section 1 of the Extradition Act, an extraditable offence is, “*Any offence which in terms of the law of the Republic and the Foreign State concerned is punishable with a sentence of imprisonment or other form of deprivation of liberty for a period of 6 months or more...*”

[19] The appellant contended that there is no crime called “International Parental Kidnapping” and therefore no extraditable offence and consequently no crime or offence where bail was to have been entertained by the magistrate.

[20] In the United States, the conduct of appellant clearly constituted an offence hence the pending extradition proceedings or enquiry.

[21] In the case, **Geuking v President of the Republic of South Africa and others**, 2003(3) SA 34 (CC) at p50 [40], the court held that, *“the name of the offence would not be determinative. The question for consideration is whether the conduct which the evidence discloses constitute an offence in our law which would be punishable with a sentence of imprisonment for a period of six (6) months or more.”*

[22] The author, CR Snyman in his book, “Criminal Law 6th Edition” at page 471 describes the crime of kidnapping as *“consisting in unlawfully and intentionally depriving a person of his or her freedom of movement and/or if such person is under the age of 18 years, the custodian of their control over the child.”* On page 473[7], further wrote, *“A parent cannot commit the crime in respect of his or her own child. Accordingly, if the father and natural guardian of a child, having divorced his wife, removes the child from her care in order to keep her in his own care, he does not commit the crime. This true even if the court awarded custody and control of the child to the mother. However, this does not mean that the divorced father can with impunity remove a child from the care of the mother to whom the court has awarded custody and control, since by so doing he infringes a court order, and may be guilty of contempt of court.”*

[23] Following this discussion, it appears conduct of appellant in South African Law would fall under the definition of kidnapping or contempt of court as there is a court order in the United States for joint custody and there was also an order

pertaining to when the children were to be returned to the United States and to the custodian parent.

[24] In dealing with Child Abduction, Chapter 17 of the Children's Act 38 of 2005 gives effect to the Hague Convention, see section 274(a). In combating parental child abduction, section 275 provides that *"The Hague convention on International Child Abduction is in force in the Republic and its provisions are law in the Republic, subject to the provisions of this Act."*

[25] Section 45(2) of the Children's Act empowers a children's court to *"try or convict a person for non-compliance with an order of a children's court or contempt of such a court (see section 45(2)(a), and in terms of section 45(2)(c), the Magistrate's Court has jurisdiction in such criminal matters referred to in section 45(2)(a)."*

[26] Further in terms of section 305(1)(q) of the said Act ("Children's Act"), *"a person is guilty of an offence if that person contravenes or fails to comply with an order of a High Court, divorce court in a divorce case and Children's Court in terms of this Act or fails to comply with any condition contained in such/that order."*

[27] Article 12 of the Hague Convention provides that, *"where a child has been wrongfully removed or retained in term of article 3 and at the date of the commencement of the proceedings before the judicial or administrative authority of the contracting state where the child is, a period of less than a*

year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.”

[28] The Children’s Act and article 12, of the Hague Convention are a further illustration of possible crimes and the powers or jurisdiction the Magistrate has in dealing with the said possible crimes.

[29] In the case of **Geuking** (*supra*), the court emphasised at p51 [44]-[45] that, *“Extradition proceedings do not determine the innocence or guilt of the person concerned. They are aimed at determining whether or not there is reason to remove a person to a foreign state in order to be put on trial, ... The enquiring Magistrate does not have to know the intricacies of the offence of the foreign jurisdiction, as this is an aspect which South African Lawyers and Judicial Officers will usually have no knowledge or expertise.”*

[30] The discussion above illustrates that the magistrate had sufficient information on possible crimes and the international crime of *“International Parental Kidnapping”* to entertain a bail application after the detention of appellant on a warrant pending an extradition enquiry. It therefore follows that the contention by the Appellant that there was no offence and bail application was not to have been entertained cannot be sustained in the circumstances.

[31] It is true that the right not to be deprived of freedom arbitrarily or without just cause applies to all persons in South Africa whether they are here illegally or

not, see, ***Lawyers for Human Rights and Another v Minister of Home Affairs and Another***, 2004,(4) SA 125 (CC).

[32] Mr Van Der Berg in paragraph 35 of his heads of argument for the appellant, submitted that the magistrate misdirected himself holding that a likelihood of flight risk had been established. Also that, *“Appellant clearly lacks the means to abscond: He is virtually impecunious; he has no travel documents; the notion that he would escape over rugged terrain into Namibia without money, passport or friendly contacts at the other end is with respect far-fetched and unsustainable.”*

[33] Section 60(11)(b) of the Criminal Procedure Act 51 of 1977 provides, *“Notwithstanding any provision of this Act, where an accused is charged with an offence referred to in schedule 5, but not in schedule 6, the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused having given a reasonable opportunity to do so, adduces evidence which satisfies the court that the interests of justice permit his or her release.”*

[34] The appellant is facing a serious offence in the United States. He has previous convictions in the United States involving a firearm and others involving domestic violence. In South Africa, his visa has expired, he has no *“work”*, do not have permanent residence, money neither any ties except to the *“missionary group”* he found in Upington and a possible lover. Appellant’s position can be summed by what his legal representative placed on record in

paragraph 32 above. Nowhere in the bail record did the appellant indicate what steps he took to correct the visa situation. He did not lay as basis or reasons why he will be opposing his extradition, instead, through his legal representative in the appeal, argued that the charges in the United States will not stand.

[35] From the discussion above, there were objective facts before the magistrate to support the decision that the interests of justice did not permit the release of appellant on bail (pending the extradition enquiry).

[36] Section 65(4) of the Criminal Procedure Act provides, *“the court or judge hearing the appeal shall not set aside the decision against which the appeal is brought, unless such court or judge is satisfied that the decision was wrong, in which event, the court or judge shall give the decision which in his or her opinion the lower court should have given.”*

[37] As set out above, there are no basis for this court to fault the decision of the court a quo.

[38] In consequence, the following order is made:

The appeal is dismissed.

C.K KGOPA

ACTING JUDGE

On behalf of the Appellant: **Adv. John Van Der Berg**

Instructed by: Liddell, Weeber, Van Der Merwe Inc, Wynberg, Western Cape

On behalf of the Respondent: **Adv. R.R Makhaga**

Instructed by: Director Public Protection, Kimberley