IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

REPORTABLE

CASE NO: A 531/2015

In the matter between:

DENVER WAYNE CAROLISSEN **Appellant**

And

THE DIRECTOR OF PUBLIC PROSECUTIONS **Respondent**

JUDGMENT DELIVERED ON 6 MAY 2016

GAMBLE, J *et DONEN*, AJ:

INTRODUCTION

[1.] The appellant has approached this court, under section 10(1) of the Extradition Act, 67 of 1962 ("the Act"), seeking to appeal against the finding of the magistrate, Kuils River on 22 July 2015 that he is liable to be extradited to the United States of America to stand trial in the Federal

Court in the State of Maine on charges effectively relating to the production and dissemination of child pornography.

[2.] The extradition proceedings commenced on 25 November 2014 with the arrest of the appellant pursuant to a request from the Government of the United States of America ("the USA") on 20 November 2014 for his provisional arrest. On 22 January 2015 the USA formally requested extradition of the appellant by means of the customary diplomatic note.

[3.] The appellant's first appearance in the Magistrate's Court was on 26 November 2014 when he was remanded in custody for a bail application on 9 December 2014. On that date he abandoned his bail application and the matter was postponed until 13 February, and thereafter to 20 February 2015, to enable the respondent to present the requisite documentation to the court in terms of sections 9 and 10 of the Act. This was duly done and handed up to the court on the latter date by Adv LJ Badenhorst, a senior State Advocate who has appeared throughout on behalf of the respondent. The appellant has throughout been represented by staff from Legal Aid South Africa - in the lower court by Ms G Atkins and in this court by Adv M Calitz.

[4.] When the matter came before the magistrate again on 24 March 2015, the appellant raised the issue of his mental health, alleging that he had had an earlier referral to Stikland Hospital, Bellville in that regard. After considering a report by the District Surgeon, the lower court sent the

appellant for observation in terms of sections 78(2) of the Criminal Procedure Act, 51 of 1977 ("the CPA"). On 12 May 2015 a full panel of mental health practitioners (consisting of four psychiatrists and one clinical psychologist) issued a report, in terms of section 79, stating that the appellant was not mentally ill, was not certifiable in terms of the Mental Health Care Act, No.17 of 2002, was fit to stand trial and was able to appreciate the wrongfulness of the alleged offences and to act accordingly.

[5.] The psychiatric report provides some useful background information regarding the appellant's personal circumstances which include that he was then 40 years of age, had been married for 9 years and had 2 young children, and for a number of years had been employed by the City of Cape Town as a data capturer. The report records further that in 2010 the appellant sought assistance from Stikland Hospital, "*for habitually engaging with internet pornography*", where he received psychological counseling as an out-patient. The panel was of the view that the appellant fulfilled the criteria for a diagnosis of paedophilia having reported a long-standing sexual attraction to children.

[6.] No evidence was presented before the magistrate who determined the matter on the papers after hearing full argument from both parties. The principal argument advanced on behalf of the appellant was that the alleged offences, while having been committed via cyber crime, were initiated in Cape Town and that this was where the appellant should be

indicted to stand trial. The magistrate correctly conducted the proceedings in accordance with the provisions of chapter 20 of the CPA, which relate to preparatory examinations.

[7.] It then fell to the magistrate to apply sections 1, 2, 3 and 10 of the Act and to determine the following questions after consideration of all the evidence, namely:

[7.1.] whether the offence in respect of which appellant was sought by the foreign state was an extraditable offence;

[7.2.] whether the appellant was "liable" to be surrendered to the foreign State concerned; and,

[7.3.] finally, whether there was sufficient evidence to warrant a prosecution for that offence in the foreign State.[1]

[8.] An "extraditable offence", in terms of section 1 of the Act, means "*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.*"

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[1] Geuking v President of the Republic of South Africa and Others 2003(3) SA 34 (CC) at [15] and [37]

[9.] Liability to be surrendered is subject to section 3(1) of the Act which provides as follows:

"*3(1) Persons liable to be extradited. – (1) 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 commencement of this Act or before or after the date upon which the agreement comes into operation and whether or not a court in the Republic has jurisdiction to try such person for such offence.*" (Emphasis added)

[10.] Determining what constitutes "*an offence included in an extradition agreement*" necessitates an assessment of the Extradition Treaty between the Republic of South Africa and the United Sate of America.

[11.] As we demonstrate hereunder, section 10(2) of the Act provides for a certificate issued by the appropriate prosecution authority in the foreign State to serve as conclusive proof that there is sufficient evidence to warrant a prosecution in the State concerned. If such a certificate is

relied upon the magistrate must be satisfied that it was in fact issued by an appropriate authority in charge of the prosecution in the foreign State.

[12.] Having satisfied himself on the aforementioned questions the magistrate delivered a considered judgment and issued an order committing the appellant to prison to await the decision of the Minister of Justice and Constitutional Development ("the Minister") with regard to his surrender to the USA. Having been informed thereof by the magistrate, the appellant exercised his right to appeal to this court under sec 10(1) of the Act.

PROCEEDINGS BEFORE THE HIGH COURT

[13.] In our view the primary issue raised in this matter involves the question of whether the offences with which the appellant is accused were committed within the jurisdiction of the USA.

[14.] When the matter was first called before this court on Friday 12th February 2016 we indicated to counsel for the appellant and the respondent that, in addition to the arguments advanced in their heads, we wished to be addressed on three particular issues. We also indicated to counsel that, in light of the fact that there are certain advocates at the Cape Bar who are known for their expertise in the area of extradition law, we would welcome the appointment of an *amicus curiae* to assist the court in this regard. Neither counsel had any objection to this proposal and ultimately

Adv. D Simonsz was appointed. We are indebted to Mr Simonsz for accepting the appointment in the best traditions of the Bar, and we wish to commend all three counsel for their most helpful written arguments and comprehensive bundles of authorities.

[15.] The issues on which we asked counsel to address us are the following-

- On what basis does the USA have jurisdiction over the alleged crimes of the appellant?

- How does the State of Maine in particular have jurisdiction to try the appellant in this matter?

- Are the relevant laws of the USA and South Africa similar with regard to extra-territorial jurisdiction, and if not, what are the implications of the differences?

THE FACTS UPON WHICH THE USA RELIES FOR EXTRADITION

[16.] The application for the removal of the appellant to the State of Maine is founded on the extradition treaty concluded between the USA and South Africa on 16 September 1999, ratified by Parliament in November 2000 and published in Government Gazette No 22430 on 29 June 2001 (‘the Treaty”). The Treaty in turn is sourced in the provisions of the Act. The application for extradition is presented in the customary form comprising

the salutation of the USA Secretary of State[2] to the Government of South Africa, the confirmation by the USA Attorney General[3] that Mr Jeffrey M. Olsen is an Associate Director of the Department of Justice's Office of International Affairs (Criminal Division), and a certification by Mr Olsen that Mr Craig M. Wolff is an Assistant United States Attorney[4] for the District of Maine who has made a duly attested affidavit.

[17.] Mr Wolff's affidavit is a detailed document which supports the request for extradition. The following paragraphs are relevant at this stage:

> *"3. As an Assistant US Attorney for the District of Maine, I am responsible for the preparation and prosecution of criminal cases. In the course of my duties I have become familiar with the charges and the evidence in the case of United States v Denver Carolissen a/k/a Danielle Dickens, case number 2:14-cr-00127-NT*.
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> *4. An investigation by the US Department of Homeland Security, Homeland Security Investigations (HSI) revealed that in 2010 and 2012, Denver Carolissen sexually abused a young girl in South Africa and produced images of the abuse. In September and October 2014, Carolissen sent these images, as well as other*

[2]The Foreign Minister

[3]The Minister of Justice

[4]A state prosecutor

child pornography images depicting additional minors engaged in sexually explicit conduct, to undercover HSI agents in Maine via the internet. The offences for which Carolissen is charged, and for which the United States seeks his extradition under the Treaty, all carry a maximum penalty of more than one year in prison."

[18.] Mr Wolff's affidavit encloses, *inter alia*, an affidavit by an agent employed by HSI, Mr David Fife, who explains that he is involved in the investigation of computer-based crime and in particular child pornography and child exploitation. Mr Fife says that on September 9, 2014, after using an undercover internet address and accessing a so-called "*chat room",*[5] he received a "chat" invitation from the appellant masquerading under the internet pseudonym "*Danielle Dickens*", to participate in an internet discussion.

[19.] During the chat Dickens informed Fife that he had many hardcore pornographic videos to "trade", and "private stuff" depicting a twelve year old girl with whom he had "played" since she was eight. "Dickens" sent two pornographic images depicting the sexual molestation of a child estimated to be between 6 and 8 years of age, claiming that these were pictures of a child known to him and that he was the molester in question.

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[5] This is understood to be an online computer facility whereby parties subscribing thereto are able to exchange views and discuss issues over the Internet.

[20.] On September 10, 2014 “Dickens” sent Fife a further 10 emails, to most of which a variety of child pornography images and videos were attached. Fourteen such videos depicted children, said to be less than eighteen years old, engaged in sexual activity. Mr Fife’s colleague, a certain Mr Martin Conley, also corresponded with “Dickens” to similar effect. It is alleged by Mr Fife that the appellant acknowledged responsibility for the production of certain of these images and that he invited Mr Fife to participate in the exchange of further similar material.

[21.] Mr Fife says that in September 2014 he obtained a search warrant from the US District Court for the District of Maine to enable him to access details of the email account used by “*Danielle Dickens*”. Through this information he was able to establish that the account was created in March 2013 using a designated Internet Protocol (“IP”) address and that it was set up by a person who furnished a South African cellphone number. Evidently, each computer machine (whether a laptop, desktop or tablet) has its own unique IP address.

[22.] Mr Fife says that he reviewed the contents of this account which he says contained approximately 120,000 emails, almost all of which pertained to child pornography. One of these emails had been sent to several recipients in August 2014. Attached thereto was a video depicting an adult male penetrating a young female child with both his hand and penis. The lewd title to the video positively asserts that the appellant was

involved in an act of intercourse with the young victim, who appeared to be the victim referred to above.

[23.] In October 2014 the HSI agents contacted South African law enforcement officials and with their assistance were able to establish that the cellphone number associated with the "*Danielle Dickens"* email account was registered in the name of the appellant. Follow-up investigations using, *inter alia*, the Facebook social media platform revealed that the user of the "*Danielle Dickens*" address lived in the Western Cape, was employed by the City of Cape Town and was married with at least one young girl. Through the records duly subpoenaed in America from Facebook, Mr Fife was further able to establish a connection between the "*Danielle Dickens*" email address and the one that the appellant used on his Facebook page. He also discovered extensive email contact between the two email addresses in which adult pornographic images were transferred. The appellant's personal email address was also linked to the same IP address referred to above. This IP address was found to be on a computer used by the appellant at his place of employment. All of this suggests, at least on a *prima facie* basis, that *"Danielle Dickens"* is the internet pseudonym of the appellant.

[24.] The USA authorities procured an arrest warrant from the relevant court for the District of Maine for the arrest of the appellant at his home in Kuils River outside Cape Town. The basis for the warrant was that the appellant was to be indicted in Maine on three statutory counts of

"*Sexual Exploitation of a Minor*" and five statutory counts of "*Transportation of Child Pornography*" into the USA. This warrant was transmitted to the South African law enforcement authorities who then acted on it and took the appellant into custody at his home on 25 November 2014.

INVESTIGATIONS BY THE SOUTH AFRICAN AUTHORITIES

[25.] After his arrest the appellant was evidently interrogated by members of the South African Police Services ("SAPS"), including a certain Lt. Col. Heila Niemand. According to Mr Fife (and there is no confirmatory affidavit by Ms Niemand) the appellant made a series of damaging admissions during his interview with Ms Niemand. These admissions, *prima facie*, implicate the appellant in the transmission of a variety of pornographic images over the internet. Furthermore, they suggest that, in generating such images, the appellant committed a number of acts of sexual assault and/or sexual penetration as contemplated in the Criminal Law (Sexual Offences and Related Matters Amendment Act 32 of 2007 ("SORMA"). A person liable to be convicted of these offences faces long sentences of imprisonment and, in the case of sexual penetration of a minor, a minimum sentence of life imprisonment.

[26.] When we postponed the matter on 12 February 2016 we asked the respondent to provide us with an affidavit from the SAPS as to the state of any criminal investigation being conducted in this country relating to

the appellant's alleged criminal activities here. Ms Niemand deposed to an affidavit in Johannesburg on 29 February 2016 in which she informed the court that she is the commander of the Provincial Family Violence, Child Protection and Sexual Offences Unit in Gauteng.

[27.] According to Ms Niemand a case docket has been opened in South Africa in which the appellant is being investigated by a certain W/O Kriel for "*sexual offences*" and other offences "*relating to the possession/distribution and manufacturing of child pornography*". She confirms that the local investigation of the appellant is *"in its final stages*", but that he has not been arrested or prosecuted in South Africa for the offences set out in the extradition application. Ms Niemand says that two victims were identified in the local investigation and that if a criminal trial were to proceed in South Africa three potential witnesses from the USA would be required to testify. Finally, she says that the SAPS are monitoring the extradition process closely, and if it does not succeed immediate steps will be taken *"for the criminal legal process to run its course*" in South Africa. In argument Mr Badenhorst confirmed that the police had been ready to arrest the appellant should the extradition application have failed on 12 February 2016. We were given to understand that the intention of the SAPS has not changed.

PROCEDURAL STEPS TAKEN IN THE USA

[28.] In his affidavit Mr Wolff gives full details of the procedural history of the case in the USA. He explains that the prosecution of the appellant has passed the "grand jury" phase.

"*6. Under the laws of the United States, a criminal prosecution is commenced when a grand jury returns and files an indictment with the Clerk of the United States District Court. Although the grand jury is part of the judicial branch of the United States Government, it is an independent body composed of private citizens. A grand jury is composed of at least sixteen (16) people whom the United States District Court selects at random from the residents of the judicial district in which the court resides, in this case, the District of Maine.*

7. The purpose of the grand jury is to view the evidence of crimes presented to it by the United States law enforcement authorities. After independently viewing this evidence, each member of the grand jury must determine if there is probable cause to believe that a crime has been committed, and that the particular defendant committed the crime. A grand jury returns an indictment when at least twelve (12) grand jurors have voted in favour of an indictment. An indictment is a formal document that charges the defendant with a crime or crimes, describes the specific laws that the defendant is accused of violating, and describes the acts of

the defendant that are alleged to be violations of the law. After an indictment is returned, the court will normally issue a warrant for the arrest of the defendant."

[29.] In the instant case, says Mr. Wolff, the grand jury sitting in Portland, Maine, issued a criminal indictment on 4 November 2014 charging the appellant with three counts of *"Sexual Exploitation of a Minor*", in violation of Title 18, United States Code, Sections 2251(c) and (e), and also five counts of *"Transportation of Child Pornography"* in violation of Title 18, United States Code, Sections 2252A(a)(1) and (b)(1), and 2256(A)(8). Evidently contraventions of the former section are punishable with imprisonment of not less than 15 years and not more than 30 years, while contraventions of the latter section attract prison sentences of not less than 5 years and not more than 20 years imprisonment. In addition, fines of up to US$ 250,000 may be imposed in each case.

[30.] Mr Wolff points out that the indictment was issued by the Clerk of the Court in Maine and a copy thereof is attached to his affidavit. Also attached to his affidavit are extracts from the relevant sections of Title 18 of the United States Code under which the appellant is charged in the USA. It is apparent that the violation of these statutes constitutes a felony under USA law. Sections 2251(c) and 2252A (a)(1) were duly enacted law of the USA at the times when the offences were committed and the indictment filed, and when Mr Wolff deposed to his affidavit. In

light of the foregoing it seems to us that the requisite procedural steps as required by the law of the USA have been taken and that there is nothing at this stage to gainsay the allegation that the warrant of arrest for the appellant was lawfully issued in the State of Maine.

[31.] Sec 10(2) of the Act makes provision for the foreign state requesting extradition to provide a certificate to the court considering the extradition application attesting to the fact that the requesting state has at its disposal evidence that would sustain a prima facie case against someone in the position of the appellant. That section reads as follows –

"*10(2) 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.*"

[32.] Such a certificate is indeed annexed to the extradition application and was placed before the magistrate. The material part thereof reads as follows:

> "*In relation to the request, I, Craig M. Wolff, certify that:*
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> *I am employed by the United States Department of Justice as an Assistant United States Attorney for the District of Maine. I am in*

charge of the prosecution of Denver Carolissen before the United States District Court for the District of Maine in Portland, Maine; and,

The evidence summarised or contained in the extradition documents is available for trial and is sufficient under the laws of the United States of America to justify the prosecution of Denver Carolissen."

[33.] The procedure before a magistrate requires the court to determine whether the offence in question is an "*extraditable offence*". The role of a section 10(2) certificate, in reaching such conclusion is a narrow one and is related only to the question of whether the alleged conduct is sufficient to give rise to the offence in the foreign jurisdiction.[6]

[34.] Notwithstanding the contents of the certificate, we were concerned about the fact as to whether the District Court for the District of Maine in Portland has the jurisdiction to prosecute the appellant. Our concerns in this regard were based on the fact that the affidavit of Mr Wolff positively asserts that Mr Fife was present in Maine when he received the pornographic material disseminated by the appellant on his computer –

"*He sent the images to the agents in Maine on September 12, 2014…."*

[6] Geuking at [48]

[35.] It is clear however that this allegation is based upon the affidavit of Mr Fife which is attached to Mr Wolff's affidavit. In his affidavit Mr Fife says no more than that he *"resides*" in the State of Maine. He makes no mention of where he actually was when he received the material, and given the portability of Internet communication these days, he might just as well have been in London or Pretoria when he received the images. The question of foreign jurisdiction therefore persists.

JURISDICTION OF THE USA COURT

[36.] From the statements of Mr Wolff and Mr Fife described above it would appear that appellant's minor victims were sexually exploited in South Africa, where the pornographic material was produced and subsequently uploaded onto the Internet, and that the USA has predicated an exercise of jurisdiction upon conduct that occurred outside its sovereign territory, but which had a potentially harmful effect within its territory. In light of the omission in the affidavit of Mr Fife regarding his whereabouts when he received the material in question, Mr Calitz asked us to find that the respondent had failed to establish that the court in question in the United States had jurisdiction to hear this matter. Counsel for the respondent, on the other hand, pointed out that such jurisdiction was to be inferred from the application as a whole. The *amicus curiae* in turn pointed out that since the offences with which the USA wishes to charge the appellant are federal offences, all that the USA requires to establish is that the images were received in the USA. He noted that the legislation in question (Title

18 Section 2251) gave the USA courts extra-territorial jurisdiction and the fact that the images had been produced in, and transmitted from, for example, Cape Town did not deprive the USA court of jurisdiction. The essence of the charges against the appellant, it was said, is that he engaged in sexually explicit conduct outside of the USA for the purposes of producing a visual depiction of such conduct, and that he later transported such visual depiction to the USA via the Internet.

[37.] In regard to the question of the USA's extra-territorial jurisdiction, it is established law that it is open to a sovereign state to enact legislation permitting it to prosecute within its own jurisdiction suspects who have committed crimes elsewhere in the world, where those crimes might ultimately have a deleterious effect in the territorial jurisdiction of the requesting state. There are numerous examples of this in recent jurisprudence, including the decision of the House of Lords in the matter of *Re Al-Fawwaz*[7]. That matter involved the arrest in the United Kingdom of a person wanted in a court in New York City for conspiring outside of the USA with a certain Mr Osama Bin Laden and others belonging to the Al Qaeda organization to murder American citizens both in the USA and

elsewhere, including the Middle East and Africa[8].

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[7][2002] 1 All ER 545 (HL)

[8]See also Mohamed and Another v President of the Republic of South Africa and Others 2001(3) SA 893 (CC) in which the activities of the Al Qaeda organization are discussed in detail.

[38.] The House of Lords[9] considered first

"*the question of principle and whether the extradition crime ruled on must be alleged to have been* ***committed*** *in the United States or whether it is sufficient that it is within the United States' jurisdiction in the sense that it is* ***triable*** *in the United States"* (Emphasis added)

After considering the express wording of the extradition agreement in question in the context of a number of earlier decisions of the House of Lords and the Court of Appeal in relation thereto, the learned judge concluded as follows:

"31 The question is thus whether the conduct complained of will be triable in the United States and if that conduct were transposed to England, would be triable in England. The question is not whether the acts done in the United States (if any) regardless of other acts necessary to found jurisdiction committed elsewhere, if transposed to England, would be triable in England. It is still necessary to decide whether all acts relied on or only those acts done in the United States are transposed to England."

[39.] The learned judge proceeded to consider the issue of jurisdiction for purposes of extradition on the basis of interpretation of the relevant statutory regime which was applicable to the matter then before the

[9]Per Lord Slynn of Hadley para 7

House of Lords, against the background of the various treaties between the two countries over the years. He ultimately concluded as follows:

> *"37. When the 1870 Act was passed crimes were no doubt largely committed in the territory of the state trying the alleged criminal but that fact does not, and should not, mean that the reference to the jurisdiction is to be so limited. It does not as a matter of the ordinary meaning of the words used. It should not because in present conditions it would make it impossible to extradite for some of the most serious crimes now committed globally or at any rate across frontiers. Drug smuggling, money laundering, the abduction of children, acts of terrorism, would to a considerable extent be excluded from the extradition process. It is essential that that process should be available to them. To ignore modern methods of communication and travel as aids to criminal activities is unreal. It is no less unreal to ignore the fact that there are now many crimes where states assert extra-territorial jurisdiction, often as a result of international conventions."*

[40.] In coming to this conclusion the House of Lords referred to its earlier judgment in ***Liangsiriprasert***[10] in which the pervasiveness of international crime was discussed.

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[10] Liangsiriprasert v Government of the United States of America [1991] 1 AC 225 at 251 per Lord Griffiths

"*Unfortunately in this century crime has ceased to be largely local in origin and effect. Crime is now established on an international scale and the common law must face this new reality. Their Lordships can find nothing in precedent, comity or good sense that should inhibit the common law from regarding as justiciable in England inchoate crimes committed abroad which are intended to result in the commission of criminal offences in England. Accordingly a conspiracy entered into in Thailand with the intention of committing the criminal offence of trafficking in drugs in Hong Kong is justiciable in Hong Kong even if no overt act pursuant to the conspiracy has yet occurred in Hong Kong. This then is a sufficient reason to justify the magistrate's order...[to grant extradition]*"

[41.] In a decision of the Canadian Supreme Court which has a degree of resonance with the present matter[11] the court was called upon to examine the constitutionality of an extradition application brought by the USA in Canada in circumstances where a Canadian citizen had manufactured heroin in Canada and then distributed the drug in America. In opposing extradition to the USA the accused in question asserted a constitutional right to remain in his home country. In delivering the judgement for the majority of the court, La Forest J emphasised the following:

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[11] United States of America v Cotroni; United States of America v El Zein [1989] 1 SCR 1469

"….(I)nvestigation, prosecution and suppression of crime for the protection of the citizen and the maintenance of peace and public order is an important goal of all organised societies. The pursuit of that goal cannot realistically be confined within national boundaries. That has long been the case, but it is increasingly evident today."

[42.] The transnational mobility of crime was also touched upon by the Constitutional Court in *Quagliani*[12] where Sachs J remarked as follows in para's 40 – 41:

"Yet, important though individual rights are, extradition proceedings cannot be looked at purely from the point of view of protecting individuals facing extradition. Transnational mobility of people, goods and services, as well as new technological means, have contributed to increased mobility of criminals. La Forest states that- [the extradition process] strengthens the law enforcement agencies within the state requesting the surrender by reducing the possibility of its criminals escaping. And it is to the advantage of the state to which a criminal has escaped, for no country desires to become a haven for malefactors.

The Act furthers the criminal justice objectives of ensuring the people accused of crime are brought to trial and that those who have been convicted are duly punished. The need for effective extradition

[12] President of the Republic of South Africa v Quagliani and Two Similar Cases 2009(2) SA 466 (CC)

procedures becomes particularly acute as the ability of those accused or convicted of national crimes increases."

[43.] To the extent that we are dealing here with what has come to be known as "*cybercrime*", Mr Badenhorst referred us to an instructive article by Brenner and Koops in the Journal of High Technology Law[13] in which the authors consider the challenges in indicting persons or entities for a variety of cybercrimes committed across jurisdictions, noting that "*Cybercrime has a pronounced tendency to cross national borders and digital evidence is by nature evanescent".*[14]

[44.] After a detailed discussion of legislative provisions in a number of diverse jurisdictions[15] the authors note that cybercrime is essentially "*a-territorial"* and conclude as follows:

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[13]Susan W.Brenner and Bert-Jaap Koops, "Approaches to Cybercrime Jurisdiction" , 4 J.High Tech. L.1 (2004) at 44

[14]In their introduction to the article the authors pose the following conundrum:

> *"A Web site in Germany caters for the adult market, and has done so happily for three years.*
>
> *Then out of the blue, it finds itself indicted in Singapore because of spreading pornographic material in Singapore, even though the company has never done business with someone from Singapore. To make things worse, the Web site owners are ordered to appear in court in Belgium, because some of the adult pictures are considered to be of 17-year old minors, constituting the crime of child pornography (which, in Belgium, entails persons under 18 years of age; in Germany, the age limit is 14). The business is perfectly legal in Germany, but since it uses the Internet to conduct its business, it finds itself confronted with the criminal laws of all countries connected to the Internet – that is, all countries of the world."*

[15]Including Belgium, Germany, the Netherlands, Malaysia, Singapore, Australia and the USA.

"*Our survey of several jurisdictional provisions relating to cybercrime indicates that the traditional basis for jurisdiction, such as those listed in the Restatement (Third) of the Foreign Relations Law of the United States, can well be and in fact are applied to cybercrime. Perhaps surprisingly, territoriality is still a prime factor, despite the nonphysical nature of the bits and bytes that usually constitute a cybercrime, and despite the alleged a-territorial nature of the Internet. The* ***location*** *of the act itself or of* ***its effect,*** *as well as the location of computers or persons can establish a sufficient connection to a country or state to claim jurisdiction; some states even use the location of anything remotely connected to the crime to claim jurisdiction…..*

Therefore, other than traditional, physical crime, cybercrime may sooner look at ***the location of the effect*** *or the* ***location of the perpetrator and victim****."* [Emphasis added]

[45.] The USA authorities procured an arrest warrant from the relevant court for the District of Maine for the arrest of the appellant at his home in Kuils River outside Cape Town. It is said that the basis for the warrant was that the appellant was to be indicted in Maine on three statutory counts of "*Sexual Exploitation of a Minor*" and five statutory counts of "*Transportation of Child Pornography*" into the USA. This warrant was transmitted to the South African law enforcement authorities who then acted on it and took the appellant into custody at his home on 25 November 2014.

[46.] As Mr Simonsz pointed out, there are a number of statutes in our domestic legislation which have created extra-territorial jurisdiction for our courts in relation to offences other than cybercrime. For instance, sec 35(1) of the Prevention and Combatting of Corrupt Activities Act, 12 of 2004 ("POCA") gives a local court jurisdiction to hear a matter involving an offence which *"occurred outside of the Republic….regardless of whether or not the act constitutes an offence at the place of its commission..".* The accused facing such a charge must, inter alia, be a citizen of the Republic, or be ordinarily resident here, or have been arrested in the Republic at the time the offence was committed. Further examples are to be found in sec 9 of the Regulation of Foreign Military Assistance Act, 15 of 1998, sec 61 of SORMA and sec 30A of the Films and Publications Act 65 of 1996.

[47.] In our view, the offences with which the appellant stands to be charged in the USA have two distinct components to them. Firstly, there is the manufacture of child pornography by the appellant which evidently took place in South Africa, and then there is the dissemination of that material over the Internet from South Africa to, *inter alia*, Mr Fife in the USA. And, we are obliged to mention, in light of the alleged admissions made by the appellant to Ms Niemand, he is also liable to be charged in South Africa for contraventions of SORMA. We shall return to this aspect later.

[48.] The USA lawmakers have deemed it appropriate to criminalise in their jurisdiction both of the components referred to[16] – that is their sovereign prerogative. Provided the USA can show the necessary *nexus* to its territorial jurisdiction, in the manner alluded to by Brenner and Koops, it is in our view entitled to request the extradition of the appellant. In his case territorial jurisdiction is contained in the assertion by Mr Wolff that Mr Fife was present in Maine when he "*chatted"* with the appellant and subsequently received the pornographic images which had been manufactured (or possibly sourced elsewhere) by the appellant.

[49.] Notwithstanding the failure by Mr Fife to expressly confirm that he was present in Maine when he received the appellant's communications and accompanying material, we have the confirmation from Mr Wolff that the appellant has been found by a grand jury to be indictable in Maine. This suggests that this body, as an integral part of the USA judicial process, was satisfied as to territorial jurisdiction. In addition we have been furnished with the certificate put up by Mr Wolff under sec 10(2) of the Act in which jurisdiction in the USA is positively asserted. In our view, it important to note what the Constitutional Court held in Geuking as to the import of such a certificate:

"*[41] The question of fact dealt with by way of a s 10 (2) certificate is whether the evidence adduced before the magistrate would also*

[16]Sexual exploitation during the manufacturing phase and subsequent transportation of the offending matter into the USA.

warrant the prosecution of the person concerned under the law of the foreign State. It is one of a number of factual issues which are required to be considered by the magistrate and it is the only one that does not depend on evidence readily available in South Africa. Furthermore, it is a question which would not normally be with in the knowledge or expertise of South African lawyers or judicial officers."

[50.] Finally, Mr Badenhorst argued that if the appellant wishes to challenge the jurisdiction of the USA to indict him the correct place to issue that challenge is before the court in which he is ultimately arraigned. Mr Simonsz made a similar submission. We agree with those submissions as a general proposition, subject only to the qualification that an applicant for extradition must make out a *prima facie* case for its territorial jurisdiction, regardless as to whether the offence relates to cybercrime or otherwise. In light of the findings set out above, we are satisfied that the USA has made out such a *prima facie* case and our concerns regarding jurisdiction have been adequately addressed.

THE DOUBLE CRIMINALITY REQUIREMENT

[51.] The notion of double criminality in extradition matters is described thus by Prof Dugard[17] -

[17] John Dugard SC International Law: A South African Perspective (4th ed) at 219

"The principle of double criminality requires that the conduct claimed to constitute an extraditable crime should constitute a crime in both the requesting and the requested state. It is not necessary that the offence should have the same name in both states, provided that it is substantially similar."

[52.] This approach was supported by the Constitutional Court in Geuking where the following was said by Goldstone J:

"[40] The magistrate would then have to consider whether the evidence which has thus been produced would constitute an offence under South African law. The name of the offence would not be determinative. The question for consideration is whether the ***conduct*** *which the evidence discloses constitutes an offence in our law which would be punishable with a sentence of imprisonment for a period of six months or more. It must also be established that the offence is not one under military law and is not also an offence under the ordinary criminal law of the Republic."* [Emphasis added]

[53.] Turning to the Treaty itself, the following provisions of Article 2 are relevant to this point:

"(3). For the purposes of this Article, an offence shall be an extraditable offence whether or not the:

(a) *laws in the Requesting and Requested States place the offence within the same category of offences or describe the offence by the same terminology; or*

(b) *offence is one for which United States federal law requires the showing of such matters as interstate transportation or use of the mails or other facilities affecting interstate or foreign commerce, such matters being merely for the purpose of establishing jurisdiction in a United States Federal Court.*

(4) If an offence has been committed outside the territory of the Requesting State, extradition shall be granted where the laws in the Requested State provide for the punishment of an offence committed outside its territory in ***similar circumstances****. Where the laws in the Requested State do not so provide, the executive authority of the Requested State may, in its discretion, grant extradition."* (Emphasis added)

[54.] The terminology employed by the parties in the Treaty follows the trend ordinarily applied by the USA in its extradition treaties. As Abbell[18] notes,

[18] Michael Abbell Extradition to and from the United States (2010) at 215

"…since the early 1970's United States extradition treaties generally have included a provision requiring the courts to disregard the terminology used by the requesting country and the United States in defining the requested offense under their respective laws, as well as their respective categorisation of the offense. Such a provision effectively requires United States extradition magistrates to base their dual criminality determinations on the criminality of the "act" that is the basis of the requested offense, rather than on the denomination of the offense under the laws of the respective countries. However, while dual criminality does not require the provisions of the statutes of the United States and the requesting country to be identical, they must be 'substantially analogous' or directed at 'functionally identical conduct' ".

[55.] The offences under which the USA seeks to indict the appellant are described in Title 18, United States Code, Sections 2251 and 2252A as follows:

[55.1.] *"2251. Sexual exploitation of children*

(a)…

(b)….

(c) *(1) Any person who, in a circumstance described in paragraph (2), employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor*

assist any other person to engage in, any sexually explicit conduct outside of the United States, its territories or possessions, for the purpose of producing any visual depiction of such conduct, shall be punished as provided under subsection (e).

(2) *The circumstance referred to in paragraph (1) is that -*

(A) *the person intends such visual depiction to be transported to the United States, its territories or possessions, by any means, including by using any means or facility interstate or foreign commerce or email; or*

(B) *the person transports such visual depiction to the United States, its territories or possessions, by any means, including by using any means or facility of interstate or foreign commerce or mail.*

(d)…….

(e) Any individual who violates, or attempts or conspires to violate, this section shall be fined under this title

and imprisonment not less than 15 years no more than 30 years…."

[55.2.] "*2252A* *<u>Certain activities relating to material constituting or containing child pornography</u>*

(a) *any person who –*

knowingly mails, or transports or ships using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer, any child pornography;

shall be punished as provided in subsection (b).

(b)(1) Whoever violates, or attempts or conspires to violate, paragraph (1)… of subsection (a) shall be… imprisoned for not less than 5 years and not more than 20 years…"

[56.] The definition[19] of "*sexually explicit conduct*" as contemplated in the offence of sexual violation under sec 2251 is very wide and includes "*actual or simulated…sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same*

[19]Title18, United States Code, Section 2256

or opposite sex… [as also]… lascivious exhibition of the genitals or pubic area of any person."

[57.] Mr Badenhorst argued that this proscribed conduct should be compared with sections 20(1) and (2) of SORMA , which are to the following effect -

20. "Using children for or benefitting from child pornography

(1) *A person (" A") who unlawfully and intentionally uses a child complainant ("B"), with or without the consent of B, whether for financial or other reward, favour or compensation to B or to a third person ("C") or not-*

(a) *for purposes of creating, making or producing;*

(b) *by creating, making or producing; or*

(c) *in any manner assisting to create, make or produce,*

any image, publication, depiction, description or sequence in any manner whatsoever of child pornography, is guilty of the offence of using a child for child pornography.

(2) Any person who knowingly and intentionally in any manner whatsoever gains financially from, or receives any favour,

benefit, reward, compensation or any other advantage, as the result of the commission of any act contemplated in subsection (1), is guilty of the offence of benefiting from child pornography."

[58.] We agree with counsel for the respondent that this section of SORMA in particular criminalises similar conduct to that with which the appellant is charged in the USA, save of course that the contravention of the latter's legislation specifically targets extra-territorial activity. However, if regard is had to sec 61(1) of SORMA, one finds that the legislature seeks to give extra-territorial jurisdiction to contraventions of that Act in a wide range of instances –

*"**61. Extra-territorial jurisdiction***

(1) *Even if the act alleged to constitute a sexual offence or other offence under this act occurred outside the Republic, a court of the Republic, whether or not the act constitutes an offence at the place of its commission, has, subject to subsections (4) and (5), jurisdiction in respect of that offence if the person to be charged-*

(a) *is a citizen of the Republic;*

(b) *is ordinarily resident in the Republic;*

(c) *was arrested in the territory of the Republic, or in its territorial waters or on board a ship or aircraft registered or required to be registered in the Republic at the time the offence was committed* ;

(d) *is a company, incorporated or registered as such under any law, in the Republic; or*

(e) *any body of persons, corporate or unincorporated, in the Republic*.

(2) *Subject to subsections (4) and (5), any act alleged to constitute a sexual offence or other offence under this Act and which is committed outside the Republic by a person, other than a person contemplated in subsection (1), is, whether or not the act constitutes an offence at the place of its commission, deemed to have been committed in the Republic if that-*

(a) *act was committed against a person referred to in paragraphs (a) or (b) of subsection (1);*

(b) *person is found in the Republic; and*

(c) *person is, for any reason, not extradited by the Republic or if there is no application to extradite that person."*

[59.] But the ambit of SORMA is in fact much wider than just the offences contemplated in sec 20. Chapter 3 of SORMA covers a range of proscribed activities involving children: from sexual exploitation and grooming to exposure to, and the use of children in the manufacture of, pornography. These offences are in addition to the various sexual offences described in Chapter 2 which include rape and sexual assault.

[60.] The rights of children in South Africa are specifically addressed and protected in sec 28 of the Constitution[20]. Moreover, there is a plethora of legislation (including SORMA) which has been introduced in the constitutional era to give content to the protection afforded to children in the Bill of Rights. Our courts, too, have consistently sought to advance the "*paramountcy*" or "*best interests*" principle embodied in sec 28(2) of the Constitution in all matters concerning children. For instance, in Du Toit[21] the Supreme Court of Appeal recently reiterated the importance of that approach in a case concerning a prosecution for possession of child pornography. In that matter the court cited extensively from the decision of the United States Supreme Court in Ferber[22] in stressing the immense

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[20]The Constitution of the Republic of South Africa, 1996

[21]Du Toit v Ntshingila [2016] ZASCA 15 (11 March 2016)

[22]New York v Ferber 458 US 747 (1982)

harm which such matter causes to children when they are forced to be the subjects of such offences.

[61.] In the circumstances, adopting the mandated approach which enjoins the court to consider the substance of the proscribed conduct, we are satisfied that the double criminality requirement has been met in respect of counts 1-3 for which the appellant is to be indicted in Portland, Maine

[62.] Mr Badenhorst also referred the court to sec 24B(1)(d) of the Films and Publications Act, 65 of 1996 in relation to the double criminality requirement for the contravention of sec 2252A of the US Code –

*"**24B. Prohibition, offences and penalties on possession of films, games and publications.***

Any person who –

(a)…

(b)…

(c)…

(d) *knowingly makes available, exports, broadcasts or in any way distributes or causes to be made available, exported, broadcast or distributed or assists in making available, exporting, broadcasting or distributing, any film, game or publication which contains depictions, descriptions or scenes of child pornography or which*

advocates, advertises, encourages or promotes child pornography or the sexual exploitation of children,

shall be guilty of an offence."

[63.] That Act, too, makes provision for the extra-territorial operation of any offence committed under it –

"30A. Extra-territorial jurisdiction.

(a) *Any citizen or permanent resident of the Republic who commits any act outside the Republic which would have constituted an offence under this Act had it been committed within the Republic, shall be guilty of the offence which would have been so constituted and liable to the penalty prescribed for such offence in this Act."*

[64.] We are further satisfied that these contraventions under the Films and Publications Act are similar in substance to the offences under which the USA seeks to indict the appellant on counts 4 and 5 in the court in Portland, Maine.

[65.] However, before the appellant may be found to be extraditable, Article 2(1) of the Treaty requires that the offence(s) concerned must attract punishment of at least one year's imprisonment. Mr Badenhorst correctly

pointed out that the contravention of secs 17 and 20 of SORMA (read with secs 55 and 61 thereof) do not carry penal provisions. In such event, he observed, the provisions of sec 276 of the CPA[23] are applicable. He referred the court to the judgment of the Supreme Court of Appeal in Prins[24] where the issue was addressed pertinently –

"[38] For all those reasons the argument that s 276 (1) must be construed as being a provision empowering courts to impose sentences in relation only to common law powers must be rejected. In my opinion it is a general empowering provision authorising courts to impose sentences in all cases, whether at common law or under statute, and no other provision governs the imposition of sentence. I reject the argument that..[SORMA].., in creating the offences set out in chapters 2, 3 and 4 thereof, infringed the principle of legality by not prescribing penalties to be imposed for those offences. I also reject the contention, not supported by authority, that a statutory offence can only be created by Parliament if it includes a penalty in the enacting legislation. That may be a requirement in countries where the criminal law is codified, but that is not the position in South Africa."

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[23] *S 276(1) Subject to the provisions of this Act and any other law and of the common law, the following sentences may be passed upon a person convicted of an offence…*

[24] Director of Public Prosecutions, Western Cape v Prins and Others 2012(2) SACR 183 (SCA) at [38]

[66.] The effect of the judgment in Prins is that in respect of those offences under SORMA with which a person is charged in the High Court, the maximum sentence which can be imposed is life imprisonment and, if charged in the Regional Court, the maximum sentence is 15 years imprisonment. In the result, we are satisfied that the minimum penalty requirements of Art 2(1) of the Treaty are met.

CONCLUSION AS TO EXTRADITABILITY

[67.] In the result we are satisfied that the magistrate correctly applied the relevant legal principles and the Treaty. His findings, that the appellant is liable to be extradited to stand trial in Portland, Maine in the United States of America and that there is sufficient evidence to warrant his prosecution for the offences alleged, are correct.

MINISTERIAL DISCRETION

[68.] Ultimately section 11 of the Act vests the Minister with the decision to surrender to a foreign State a person who has been committed by a magistrate. The Minister has a discretion to refuse to surrender a person on the grounds set out in section 11(b).

[69.] Where a foreign state such as the USA requests extradition a three stage process is envisaged by the Act. In the first (administrative phase) the foreign state submits a request for extradition which the Minister considers before authorizing a magistrate to conduct an enquiry. In the second (judicial phase) the magistrate considers the factors set out in section 10 of the Act and either issues an order committing the person to await decision by the Minister or discharges the person. The appeal process to this court is part of that judicial phase. The third phase is an executive phase. In this phase the discretion, as to whether the appellant is, as a matter of fact, to be extradited to the USA, is exercised by the Minister: the exercise of that discretion is an executive act given that extradition is a matter of foreign policy, which falls within the exclusive competence of the executive state power.[25]

[70.] Pursuant to the constitutionally entrenched principle of the separation of powers it is not open to this court to prevent the extradition of the appellant because it considers it desirable that he be prosecuted in South Africa. It is worth emphasing, however, that the Minister is expressly vested with the power to order that a person not be surrendered before the expiration of a period fixed by the Minister if he is satisfied by reason of the surrender not being required in the interests of justice[26]. Our concluding remarks are made in the light thereof.

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[25]See Geuking at 496E-497B

[26]See section 11(b)(iii) of the Extradition Act.

[71.] As counsel for the respondent has correctly observed the request for extradition comes from a foreign State, and not from an associated State, as defined in the Act. In the latter case (essentially States in Africa), the power to order extradition would lie with the magistrate hearing the application, and by implication, a court hearing an appeal in such circumstances would enjoy similar powers.

THE APPELLANT'S LIABILITY TO BE CHARGED LOCALLY

[72.] Were we dealing with such an application by an associated State, we would have seriously considered delaying the extradition of the suspect in a matter such as this. Our reasoning in this regard is based on the fact that the evidence before us demonstrates, *prima facie,* that the appellant is liable to be charged with the commission of a number of serious crimes in South Africa. Not only does the record before us suggest that the appellant collected and possessed large quantities of child pornography on his office computer in Cape Town (for which he can be charged under the relevant legislation), but there is a persuasive case made out in the extradition application (in particular the alleged admissions made to Ms Niemand) that the appellant is liable to be charged with sexual penetration and/or sexual violation of a minor under SORMA. Given the wide interpretation of rape under SORMA, it is possible that the appellant might be advised that he faces a minimum sentence of life imprisonment if so charged. But whatever the nature of

the charges he may face in South Africa, if convicted the appellant could face a lengthy period of imprisonment in this country.

[73.] If the allegations against him are true, the appellant has sexually molested, and subjected to the manufacture of pornography, children who were intimately known to him, as well as homeless children whom he lured off the streets of the Northern Suburbs of the Cape Peninsula with promises of sweets and money. The families and communities close to, or associated with, such victims have every right to know about the damage that the appellant might have caused to them in order that the children concerned might be rendered the appropriate care and assistance.

[74.] In De Reuck[27] the Constitutional Court reminded us that –

"*Child pornography is universally condemned for good reason. It strikes at the dignity of children, it is harmful to children who are used in its production, and it is potentially harmful because of the attitude to child sex that it fosters and the use to which it can be put in grooming children to engage in sexual conduct."*

[75.] In Du Toit Ponnan JA went further :

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[27]De Reuck v Director of Public Prosecutions (Witwatersrand Local Division) and Others 2004(1) SA 406 (CC) at [61]

"[14]….. A child compromised by a pornographer's camera has to go through life knowing that the image is probably circulating within the mass distribution network for child pornography. Because the child's actions are reduced to a recorded image, the pornography may haunt him or her long after the original recording. Citing a wealth of evidence, the Ferber court found that the distribution of child pornography abused children by creating a permanent record of the child's participation. This record, in turn permitted the harm to the child to be exacerbated each time the material was circulated and led to the creation of distribution networks that fostered further exploitation. (US v Mathews 209 F3d 338 (4th Cir 2000)). De Reuk (para 64) emphasised that: 'The psychological harm to the child who was photographed is exacerbated if he or she knows that the photograph continues to circulate among viewers who use it to derive sexual satisfaction.' It follows that the distribution network for child pornography must be closed if the production of material which requires the sexual exploitation of children is to be effectively controlled (New York v Ferber)."

[76.] Indeed, there can be little doubt that the most damaging effect of the appellant's alleged conduct has been felt right here in South Africa where the hapless victims and their families have been offered no redress for the conduct of the appellant. And, it is here where the appellant's name, if he is convicted, falls to be entered into the National Register of Child Offenders under SORMA for the protection of future victims. There can be little doubt that the appellant could have been charged in South Africa

as soon as the allegations of his criminal ways came to the attention of the SAPS. And, as Mr Badenhorst informed the court, they are ready to pounce and arrest the appellant should this appeal fail.

[77.] Frankly put, we are astounded by the failure of the SAPS to charge the appellant in this matter. After all, they are bound to do so under sec 205(3) of the Constitution which describes the objects of the police service as the prevention, combating and investigation of crime for the maintenance of public order and the protection and security of the inhabitants of the Republic. And, while every effort must be made to address a request for extradition in view of our international obligations and commitment to comity, in a matter such as this there was no reason to hold-off and play a "wait and see" game while the extradition proceedings followed their course. The appellant has been in custody since November 2014. He has a right under the Constitution to a speedy trial and his victims and their families have a correlative right to social justice.

CONCLUSION

[78.] In the circumstances we make the following order :

1. **THE APPELLANT'S APPEAL UNDER SECTION 10 OF THE EXTRADITION ACT, 67 0F 1962 IS DISMISSED.**

2. **THE REGISTRAR OF THIS COURT IS DIRECTED TO IMMEDIATELY FORWARD A COPY OF THIS JUDGMENT TO THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT.**

GAMBLE J

DONEN AJ