

## CAROLISSEN v DIRECTOR OF PUBLIC PROSECUTIONS 2016 (2) SACR 171 (WCC)

KEY CONCEPTS	
Extradition for child pornography	Online child pornography
Distributing child pornography	Manufacturing child pornography
Reasons for extradition	

This case involves an appeal, under s10(1) of the Extradition Act 67 of 1962, against the finding of the Magistrates' Court that the appellant is liable to be extradited to the United States of America to stand trial in the Federal Court in Maine on charges relating to the production and dissemination of child pornography.

### Facts of the case

The appellant was arrested as a result of a request from the US government and on 22 January the US formally requested the extradition of the appellant. When the matter came before court on the 24 March 2015, the appellant raised the issue of his mental health, alleging that he had an earlier referral to Stikland Hospital, and the lower court sent the appellant for observation in terms of s78(2) of the Criminal Procedure Act 51 of 1977 (CPA). A full panel of mental health professionals (4 psychiatrists and 1 clinical psychologist) issued a report in terms of 179 and found that the appellant was not mentally ill and was fit to stand trial as he was able to appreciate the wrongfulness of the alleged offences and to act accordingly.

The appellant was 40 years old, had been married for 9 years and had 2 young children. He had been employed for a number of years by the City of Cape Town as a data capturer. In 2010 the appellant sought assistance from Stikland Hospital for habitually engaging with internet pornography. 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.

An investigation by US Department of Homeland Security revealed that in 2010 and 2012, the appellant sexually abused a young girl in South Africa and produced images of the abuse. In 2014 the appellant sent these images as well as other child pornography images depicting additional minors engaged in sexually explicit conduct to undercover HIS agents in Maine via the Internet. An agent involved in the investigation of child pornography and exploitation accessed a chatroom undercover and received a chat invitation from the appellant, who used the alias 'Danielle Dickens,' to participate in an Internet discussion. During the chat 'Danielle Dicken' informed the agent that he had many hardcore pornographic videos to trade and private stuff depicting a 12 year old girl with whom he had 'played' since she was 8. 'Danielle Dickens' sent 2 pornographic images depicting the molestation of a child between the ages of 6 and 8 and claimed that they were pictures of a

child known to him and that he was the molester in question. `Danielle Dickens' sent the agent a further 10 emails to which a variety of child pornography images and videos were attached. Fourteen of the videos depicted children under the age of 18 engaged in sexual activity. The agent was invited to participate in the exchange of further similar material.

The agent then obtained a search warrant to access the details of the email account used by `Danielle Dickens' and was able to establish when the account was created and the South African cell phone number furnished via the designated Internet Protocol (IP) address. The contents of the email account were reviewed and they contained approximately 120 000 emails, almost all of which pertained to child pornography. In one of the videos an adult male is seen penetrating a young female child with both his hand and his penis, which positively shows the appellant involved in an act of intercourse with the young victim, who was referred to above.

HIS agents then contacted the South African police and, with their assistance were able to establish that the cell phone associated with the email account of `Danielle Dickens' was registered in the name of the appellant. The appellant was tracked down to the Western cape via his Facebook account and the IP address was found to be on the computer used by the appellant at his place of employment. The US authorities obtained a warrant for the appellant's arrest and this was sent to the South African police, who arrested the appellant. The appellant was interrogated by the South African Police and made a series of damaging admissions during his interview which implicate him in the transmission of a variety of pornographic images over the Internet and suggest that he committed a number of acts of sexual assault and/or penetration of minors.

A docket was opened in South Africa in which the appellant is being investigated for offences relating to sexual offences and child pornography. Two victims were identified in the local investigation and SAPS was closely monitoring the extradition process. If the extradition process did not succeed, immediate steps would be taken to arrest the appellant and to prosecute him here.

### **Issue before court**

The appellant argued that the alleged offences, although committed via cybercrime, were initiated in Cape Town and that this was where the appellant should be indicted to stand trial. The magistrate conducted a preparatory examination in terms of s20 of the CPA and was required to determine the following:

- whether the offence was an extraditable offence;
- whether the appellant was liable to be surrendered to the foreign state concerned;  
and
- whether there was sufficient evidence to warrant a prosecution for that offence in the foreign state.

An extraditable offence in terms of the Act is defined as: "Any offence 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 6 months or more, but excluding any offence under military law which is not an offence under the ordinary criminal law of the Republic and of such foreign State.”

Section (2) of the Extradition Act provides for a certificate to be 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. Having received the certificate and satisfied that it was issued by an appropriate authority in charge of the prosecution in the foreign state, the magistrate ordered the appellant to prison to await the Minister’s decision with regard to his surrender to the US.

### **Proceedings before the High Court**

The primary issue to be determined by the court involved the question whether the offences with which the appellant is accused were committed within the jurisdiction of the US:

- on what basis does the US have jurisdiction over the 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 US and SA similar with regard to extraterritorial jurisdiction and, if not, what are the implications of the differences?

The US relies upon the extradition treaty concluded between South Africa and the US. The grand jury sitting in Portland, Maine, issued a criminal indictment charging the appellant with sexual exploitation of a minor (3 counts) and transportation of child pornography (5 counts). The former charge is punishable with imprisonment of not less than 15 years and the latter not less than 5 years.

The High Court was concerned about the following issues:

- whether the District Court for the District of Maine in Portland has the jurisdiction to prosecute the appellant;
- the prosecutor in the US asserts that the agent was present in Maine when he received the photographic material from the appellant;
- in the agent’s affidavit he simply says that he resides in Maine, but does not state where he was when he received the pornographic material;
- given the portability of Internet communication, the agent could have been anywhere in the world when he received the pornographic material;
- the appellant’s minor victims were sexually exploited in South Africa, where the pornographic material was produced and subsequently uploaded onto the Internet;
- the US has based its exercise of jurisdiction upon conduct that occurred outside its sovereign territory, but which had a potentially harmful effect within its territory;
- in terms of US law, the offences with which the US wishes to charge the appellant are federal offences, which means that all that the US must establish is that the images were received in the US as legislation gave the US courts extraterritorial jurisdiction;

- provided the US can show the necessary nexus to its territorial jurisdiction, it will be entitled to request the extradition of the appellant;
- territorial jurisdiction is, therefore, contained in the assertion by the US prosecution that the agent was present in Maine when he chatted with the appellant and received the pornographic material which had been manufactured or sourced elsewhere;
- despite not having confirmation from the agent, there is confirmation from the US prosecution that the appellant has been found by a grand jury to be indictable in Maine; and
- this suggests that the grand jury was satisfied as to the territorial jurisdiction.

The High Court found that they were satisfied that the US had made out a prima facie case and their concerns in this regard had been adequately addressed. The High Court found further that they were 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 USA and that there is sufficient evidence to warrant his prosecution for the alleged offences, are correct.”

Where a foreign state, like the US, requests extradition, the Extradition Act envisages a 3-stage approach:

- administrative phase: the foreign state requests extradition which the Minister considers before authorising a magistrate to conduct an enquiry;
- judicial phase: the magistrate considers the factors set out in s10 of the Extradition Act and either issues an order committing the person to await the Minister’s decision or discharges the person;
- executive phase: the discretion whether the appellant, as a matter of fact, is to be extradited to the US is exercised by the Minister.

Because of the constitutionally entrenched principle of the separation of powers, the court cannot prevent the extradition of the appellant because it is of the opinion that it believes he should be prosecuted in South Africa. However, the Minister has the power to order that a person not be surrendered, before the expiration of a period fixed by the Minister, if it is in the interests of justice not to do so.

The High Court noted, however, that this application came from the US, which is a foreign state. Had it come from an associated state (essentially states in Africa), the power to order extradition would lie with the magistrate hearing the application and, by implication, any appeal court. If the court had been dealing with such an application by an associated state, the court would seriously have considered delaying the extradition of the appellant in a case like this. This is based on the fact that the evidence demonstrates prima facie that the appellant is liable to be charged with the commission of a number of serious crimes in South Africa, including sexual penetration of a minor which could result in a sentence of life imprisonment if convicted.

“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 the 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.”

The most damaging effect of the appellant’s alleged conduct was felt here in South Africa where the victims and their families have not been offered any redress for the appellant’s conduct.

The appellant’s appeal under s10 of the Extradition Act 67 of 1962 was dismissed.