REPUBLIC OF SOUTH AFRICA

HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) ~~REVISED.~~

25/8/2015.

CASE NO 2014/A262

In the matter between:

SALIU, ADODELE ABRAHAM **Appellant**

And

THE STATE **Respondent**

JUDGMENT

SUTHERLAND J (FRANCIS J CONCURRING)

1. The appellant, Adoyele Abraham Saliu, is a Nigerian citizen wanted in the United States of America on several charges of a fraud related nature. They include what is described as wire fraud, bank fraud, computer intrusion and identity theft, complicity in at least 258 internet scams involving 81 victims and misappropriation of funds to the extent of half a million US dollars.

2. On 11 December 2013, the Magistrate of the district of Kempton Park issued an order as contemplated by the provisions of section 10(1) [1]of the Extradition Act 67 of 1962, (the Extradition Act) "committing the appellant to prison pending the decision of the minister of justice and constitutional development with regard to his surrender to the United States of America.[2]"

---

[1] Section 10 provides : (1) If upon consideration of the evidence adduced at the enquiry referred to in section 9 (4) (a) and (b) (i) the magistrate finds that the person brought before him or her is liable to be surrendered to the foreign State concerned and, in the case where such person is accused of an offence, that there is sufficient evidence to warrant a prosecution for the offence in the foreign State concerned, the magistrate shall issue an order committing such person to prison to await the Minister's decision with regard to his or her surrender, at the same time informing such person that he or she may within 15 days appeal against such order to the Supreme Court.
(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.
(3) If the magistrate finds that the evidence does not warrant the issue of an order of committal or that the required evidence is not forthcoming within a reasonable time, he shall discharge the person brought before him.
(4) The magistrate issuing the order of committal shall forthwith forward to the Minister a copy of the record of the proceedings together with such report as he may deem necessary.

[2] An extradition treaty between the USA and South African was effective at the material time. See President of the Republic of South Africa & Others v Quagliani & two similar matters 2009)2) SA 466 (CC).

3. The appeal is against that order. [3]The grounds of appeal are narrow. It is alleged that the arrest of the appellant on 10 May 2013 effected by W/O Van den Heever, was unlawful because the warrant of arrest relied on was unlawfully procured, and as such, an extradition enquiry ought not to have been conducted.

4. The arrest of the appellant took place at 11h45 on 10 May 2015. It occurred moments after the appellant had walked out of the cells at the Kempton Park Magistrates Court, having been released by an order of that court, a circumstance addressed hereafter.

5. The arrest was effected in terms of warrant of arrest issued by the Magistrate of Pretoria, acting in terms of Section 5 of the Extradition Act which provides:

> "(1) Any magistrate may, irrespective of the whereabouts or suspected whereabouts of the person to be arrested, issue a warrant for the arrest of any person-
>
> (a) upon receipt of a notification from the Minister to the effect that a request for the surrender of such person to a foreign State has been received by the Minister; or
>
> (b) upon such information of his or her being a person accused or convicted of an extraditable offence committed within the jurisdiction of a foreign State, as would in the opinion of the magistrate justify the issue of a warrant for the arrest of such person, had it been alleged that he or she committed an offence in the Republic."
>
> (2) Any warrant issued under this section shall be in the form and shall be executed in the manner as near as may be as prescribed in respect of warrants of arrest in general by or under the laws of the Republic relating to criminal procedure.

6. There is no dispute that all the necessary elements to satisfy the provisions of this section, *per se*, were satisfied.

---

[3] The appeal in in fact articulated as being against a ruling given on 16 September 2013 by the magistrate to the effect that the arrest of the appellant on 10 May 2013 was unlawful. However, as an appeal can lie only against an order not a decision ancillary thereto, the better approach is to understand the appeal to be against the later order, which grounds of appeal are founded on the allegedly erroneous ruling.

7. What is in dispute is whether the magistrate who issued the warrant was not misled into issuing the warrant by a material non-disclosure. It is upon this specific point that the appeal turns.

8. W/O Van den Heever applied for the warrant. To that end he deposed to an affidavit which he presented to the magistrate. There is no quarrel about what was contained in the affidavit, nor that, on its own terms, there was justification on the part of the magistrate in issuing the warrant. The criticism is about what was omitted.

9. The magistrate was not told that at the very moment that the application for the warrant was being considered, the appellant was in police custody in the Kempton Park Magistrates court, waiting to hear the outcome on an application to set aside an earlier arrest of himself, in contemplation of extraditing him to the USA, effected on 29 May 2012, on the basis that it was unlawful. The contention upon which the appeal is founded is that the omission of that information vitiates the validity of the warrant and in turn, the lawfulness of the arrest.[4]

10. The effect of non-disclosure of facts in an application for a warrant contemplated by Section 5 of the Extradition Act has enjoyed the attention of the SCA. In McCarthy v Additional Magistrate, Johannesburg & Others [2000] All SA 561 (A), the police omitted to tell the magistrate issuing the section 5(1) warrant of a previous unsuccessful

[4] No application to set the warrant aside *per se* has been brought. Strictly speaking, in accordance with the decision in Oudekraal Estates (Pty) Ltd v City of Cape Town and Others 2004 (6) SA 222 (SCA) the warrant stands until specifically set aside by a court. However, the challenge *a quo* and on appeal should be understood to question the arrest and the validity of the warrant is ancillary thereto. The correctness of such an approach is by no means obvious, but because of the conclusions ultimately reached, this legal nicety is overlooked in this matter.

application for extradition. The court held that the omission was not material to the magistrate's decision. (per Farlam AJA at [24])[5]

11. Conscious of the need to distinguish that decision, it was argued on behalf of the appellant that two factors in the appellant's case served to do so.

12. The first factor is said to be that at the time of the issue of the warrant, the appellant had already been incarcerated for in excess of a year. In McCarthy's case, she had twice been arrested previously, but released on bail. Her matter dragged on for some five years. In my view, the distinction is not significant for the purposes of the validity of the warrant: ie that that appellant was held whilst McCarthy was on Bail. On the hypothesis that is posed: would the magistrate have hesitated to issue a warrant if he knew of the history, it must be asked: what rationale would have triggered a hesitation? Given the factors stipulated in the section, why would a failed earlier attempt at extradition or the incarceration hint at the possibility that the warrant being requested might not be appropriate? It is not a controversial proposition that a person who has been unlawfully arrested and then released, may be thereafter, lawful arrested. The effect of such release is to nullify an unlawful act, not create an immunity to a further lawful arrest.

13. If the history of this case had been disclosed there seems to be no objective reason why a magistrate would experience a concern. Perhaps, a more important question might have been – had the appellant *been arrested on a warrant* before: was the warrant, now sought, materially different from that which was imminently to be set aside? On the facts

[5] Farlam AJA dealt extensively with the arguments advanced at [18]-[26] which considered inter alia, the protracted delay.

[6]however, the initial arrest had been without a warrant in terms of the powers conferred by section 40(1)K of the Criminal Procedure Act 51 of 1977 (CPA).[7] Thus that question does not arise.

14. As to the factor of incarceration per se, for about a year, would the elapse of that time have sparked a reservation by the magistrate about issuing the warrant? In my view, it would not. McCarthy's case addressed 'systemic delays' in expediting that matter and concluded that the obvious discomfort to McCarthy, albeit regrettable, did not taint the further arrest. The account of the appellant's case from his initial arrest on 31 May 2012 until 10 May 2013 reveals no grounds to criticise the State for being derelict in expediting the matter. Between 31 May and 23 August 2012, the appellant appeared on 4 occasions whilst documentation was awaited. A date for an extradition hearing was fixed for 21 November 2012. Between 21 November and 2 May 2013, the appellant appeared three times, the adjournments being to afford his attorney documents requested, and to brief counsel of his choice. On 2 May 2013 the question of the lawfulness of the arrest was raised for the first time and the ruling thereon given on 10 May 2013. Accordingly, the first ground of criticism must fail.

15. The second factor is said to be the alleged mala fides of Van den Heever, who conceded in evidence that he had not disclosed to the magistrate the history of the matter to avoid

---

[6] The evidence of Van den Heever had wobbled when he explained what he thought authorised his initial arrest at OR Tambo airport on 31 May 2012. He appeared to suggest he acted pursuant to the American warrant, which was self-evidently impossible as the foreign warrant has no effect in South Africa. Plainly, a fair construct of his evidence is that he explained what prompted his conduct rather than an invocation of a foreign authority.

[7] Section 40(1) K of the CPA provides: A peace officer may without warrant arrest any person ....

(k) who has been concerned in or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists that he has been concerned in any act committed outside the Republic which, if committed in the Republic, would have been punishable as an offence, and for which he is, under any law relating to extradition or fugitive offenders, liable to be arrested or detained in custody in the Republic;

'any problems' about getting the warrant. The circumstances that prevailed when he applied for the warrant were that counsel for the State at the Kempton Park Magistrates Court had contacted him at his office in Pretoria to alert him to the real prospect that the magistrate presiding over the dispute concerning the lawfulness of the initial arrest was likely to uphold the point *in limine* about the lawfulness of the arrest and thereupon order the appellant's release. He was in great haste to procure the warrant. Assuming this to be as fair construct to place upon the concession given by Van den Heever, the important question to decide remains whether that knowledge would have made a difference. I have already expressed the view that it would not. Indeed, the fact that a policeman subjectively thought a disclosure would undermine the procurement of a warrant, but objectively it would not, establishes no ground to support the taint of invalidity.

16. A secondary argument to attack the validity of the warrant was advanced by alluding to the provisions of section 43(1)(b) of the CPA.[8] The critical argument advanced is that a magistrate who issues a warrant in terms of this section may do so only in respect of person who is alleged to have committed an offence within the jurisdiction of the magistrate, or if committed outside such jurisdiction, there are reasonable grounds to believe the person is within the jurisdiction. Self-evidently, to Van den Heever's certain knowledge, the appellant was not at that time in the district of Pretoria.

---

[8] Section 43(1) of the CPA provides: (1) Any magistrate or justice may issue a warrant for the arrest of any person upon the written application of an attorney-general, a public prosecutor or a commissioned officer of police-

(a) which sets out the offence alleged to have been committed;

(b) which alleges that such offence was committed within the area of jurisdiction of such magistrate or, in the case of a justice, within the area of jurisdiction of the magistrate within whose district or area application is made to the justice for such warrant, or where such offence was not committed within such area of jurisdiction, which alleges that the person in respect of whom the application is made, is known or is on reasonable grounds suspected to be within such area of jurisdiction; and

(c) which states that from information taken upon oath there is a reasonable suspicion that the person in respect of whom the warrant is applied for has committed the alleged offence.

17. This argument is stillborn as no arrest was ever effected by relying on a warrant issued under section 43 of the CPA. The initial arrest was effected under section 40(1)K of the CPA and the second and relevant arrest was, as alluded to above, effected under Section 5 of the Extradition Act, neither of which provision is encumbered by a territorial restriction.[9] Moreover, in my view it seems plain that section 43 of the CPA applies to arrests effected of persons who have allegedly committed a crime within the ordinary jurisdiction of the South African Courts, not persons who have allegedly committed a crime in another country. Section 43 of the CPA must be read together with section 40(1) K of the CPA which, in that context, must be interpreted to mean that section 40(1) K was enacted precisely to cover the instances where an arrest was to effected of a person alleged of crime in places where the South African courts have no interest and in respect of which no trial in a South African court is competent. It follows that a person in the position of the appellant could never be arrested pursuant to section 43. Contrary to the argument advanced, the provisions of Section 5(2) of the Extradition Act, inasmuch as it prescribes that the form of the warrant must conform to the requirements of domestic criminal procedural laws, does not subordinate the issuing of such warrant to the substantive provisions of such laws, and thereby reintroduce the territorial limitations on the power of a magistrate to issue a warrant set out in section 43 of the CPA which would totally emasculate the power loudly formulated in section 5(1) of the Extradition Act to issue a warrant for a person 'irrespective of the whereabouts' of such person. Accordingly, the second ground of criticism must fail.

18. Accordingly, the challenges to the lawfulness of the arrest fails, as must the appeal.

---

[9] As cited above respectively in paragraph 4 and in footnote 4.

The Order

19. The appeal is dismissed.

20. The declaration by the Magistrate on 16 September 2013 that the arrest of the appellant on 10 May 2012 was lawful is confirmed.

21. The order of the magistrate on 13 December 2013 committing the appellant to prison pending the decision of the minister of justice and constitutional development with regard to his surrender to the United States of America is confirmed.

Sutherland J

I agree.

Francis J

Hearing: 20 August 2015
Delivered: 25 August 2015

For the Appellant:
Adv JJC Swanepoel,
Instructed by Mabote & Gwede Attorneys.

For the State:
Adv D Barnard, with him, Adv A Barnard.
National Prosecuting Authority, Johannesburg