



**Republic of South Africa**

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

Case No. A330/2018

Before: The Hon. Ms Justice T Ndita  
And The Hon. Ms Acting Justice Mangcu-Lockwood  
Date of hearing: 22 November 2019  
Date of judgment: 28 November 2019

In the matter between:

**MICHAEL ROCHE-KELLY**

Appellant(s)

and

**THE STATE**

Respondent(s)

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**JUDGMENT**

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**MANGCU-LOCKWOOD AJ,**

**Introduction**

1. This is an appeal arising from an extradition enquiry which was held in terms of sections 9 and 10 of the Extradition Act 67 of 1962 (Extradition Act) before a magistrate in the Wynberg Magistrate's Court. The appellant had been

arrested pursuant to a warrant of arrest issued in terms of section 5(1)(a) of the Extradition Act, and granted bail. When he appeared before the Magistrate, his legal representative applied for postponement of the proceedings pending the outcome of the Constitutional Court decision in *Levenstein and Others v Estate of the Late Sidney Lewis Frankel and Others*<sup>1</sup>. After the postponement was refused, he raised three points *in limine*, which are the subject of this appeal. The Magistrate dismissed the points *in limine*, after which the appellant led evidence to oppose his extradition. After hearing evidence, the Magistrate held that the appellant was liable to be surrendered to the Republic of Ireland in terms of the Extradition Act. Although the appellant initially sought an appeal against the main decision holding him liable for extradition, he has since abandoned that aspect of his appeal, and only challenges the dismissal of the points *in limine*.

2. The points *in limine*, which are the grounds for appeal, seek to challenge the admissibility of an affidavit of Raymond Briscoe (Briscoe) and a statement of offences, both of which were included in the request for the appellant's extradition, on the following grounds:
  - a. Briscoe's affidavit does not constitute a certificate in terms of section 10(2) of the Extradition Act;

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<sup>1</sup>*Levenstein and Others v Estate of the Late Sidney Lewis Frankel and Others* 2018 (2) SACR 283 (CC).

- b. Briscoe's affidavit is based on hearsay evidence, because the information contained in it is based on a file handed to him and not on the basis of his own knowledge;
- c. The statement of offences is not an affidavit; is not initialled or signed; does not appear on a letterhead; and is not related in any way to Briscoe's affidavit or the appendixes thereto.

### **Factual background**

- 3. The appellant is an 81-year old male citizen of the Republic of Ireland. On 19 August 2010, he was charged in Ireland with fifteen counts relating to his daughter, namely eleven counts of indecent assault, three counts of rape, and one count of attempted rape which occurred between 1977 and 1981 (the alleged offences). The trial was due to commence in Ireland on 18 June 2012. However, the appellant failed to appear on the set down date of trial in contravention of his bail conditions, and a warrant of arrest was issued against him.
- 4. On 21 May 2015 the Republic of Ireland delivered a request for the appellant's extradition from South Africa so that he could be prosecuted for the alleged offences. The request for extradition was made pursuant to the European Convention on Extradition of 13 December 1957 (the Convention), to which South Africa and the Republic of Ireland are parties. The South African Minister of Justice and Constitutional Development (Minister) issued a notification in terms of section 5(1)(a) of the Extradition Act to the effect that he had received a request for the surrender of the appellant to the Republic of

Ireland. On 1 November 2016 a magistrate in the Wynberg Magistrate's Court issued a warrant of arrest for the appellant in terms of section 5(1)(a) of the Extradition Act, on the strength of which the appellant was arrested and appeared in the Magistrate's Court for the extradition enquiry.

5. The request for extradition from Ireland enclosed an affidavit of Briscoe, headed '*Affidavit provided in accordance with the South African Extradition Act in 1962 and in accordance with Article 22 of the European Convention on Extradition (Paris, 13<sup>th</sup> of December 1957)*'. For the determination of this appeal, it is worth setting out the contents of the affidavit in full:

**"REQUEST BY IRELAND FOR THE EXTRADITION FROM SOUTH AFRICA OF MR MICHAEL ROCHE-KELLY DOB 25<sup>TH</sup> OF OCTOBER 1938, AN IRISH CITIZEN.**

1. I Raymond Briscoe of 90 North King Street, Smithfield, Dublin 7, Ireland aged eighteen years and upwards make oath and say as follows:
2. I am a Senior Prosecution Solicitor in the Office of the Director of Public Prosecutions in Ireland. The Director of Public Prosecutions enforces the criminal law in the Irish Courts on behalf of the People of Ireland. As a professional officer appointed pursuant to the Prosecution of Offences Act 1974, I am authorised by the Director of Public Prosecutions to act on her behalf in relation to criminal cases.
3. I say and believe that the Office of the Director of Public Prosecutions received an investigation file from An Garda Siochana relating to Michael Roche-Kelly (date of birth 25<sup>th</sup> October 1938) in relation to a number of allegations of sexual misconduct made by Ms. A[...] R[...] -K[...] (date of birth 11<sup>th</sup> May 1971). It is alleged that fifteen sexual offences were committed by Michael Roche-Kelly against his daughter Ms. A[...] R[...] -K[...] when she was a child. The offences were allegedly committed on various dates from the years 1978 to 1985.
4. The file forwarded contained a large number of statements together with various documents and information pertinent to the investigation.
5. Following a full independent consideration of the information on file, on the 19<sup>th</sup> August 2010 directions issued from the Office of the Director of Public Prosecutions to charge Michael Roche-Kelly with the following fifteen offences:
  - a. Ten offences of Indecent Assault, offences contrary to Common Law as provided for by sections 6 of the Criminal Law Amendment Act 1935. A person convicted of this offence is liable to a maximum sentence of two years imprisonment. These are offences numbered 1-9 and offence number 14 in the Extradition Request.
  - b. One additional offence of Indecent Assault, an offence contrary to Common Law and as provided for by Section 10 of the Criminal Law (Rape) Amendment Act 1981. A person convicted of this offence is liable

to a maximum sentence of ten years imprisonment. This is offence number 15 in the Extradition Request.

- c. Three offences of Rape, offences contrary to Section 48 of the Offences against the Person Act 1861. Offences 11, 12 and 13 in this Extradition Request. A person convicted of these offences is liable to a maximum sentence of life imprisonment.
  - d. One offence of Attempted Rape, an offence contrary to Common Law. Offence number 10 in this Extradition Request. A person convicted of this offence is liable to a maximum sentence of life imprisonment.
  - e. One warrant to arrest the requested person, Michael Roche-Kelly was issued by a Judge of the Central Criminal Court in Dublin on 18<sup>th</sup> of June 2012. This domestic warrant refers to all fifteen outstanding offences as against Michael Roche-Kelly in this jurisdiction (offences 1-15 in the Extradition Request).
6. The requested person was charged with the criminal offences as set out above and his trial was due to commence on 18 June 2012 in the Central Criminal Court sitting in Dublin.
  7. On this date the requested person, Michael Roche-Kelly failed to appear at court in contravention of his bail conditions and a domestic warrant issued for his arrest.
  8. The requested person was fully aware of his trial date fixed for the 18<sup>th</sup> June 2012 having been present in court on a previous date when the trial date was specifically fixed. He was present in court together with his legal representatives. The requested person, Michael Roche-Kelly was legally represented at all times during proceedings.
  9. I say and believe that based on the file averred to in this Affidavit that there are reasonable grounds for believing that the charges as directed were committed by Michael Roche-Kelly and that there is sufficient evidence for Michael Roche-Kelly to stand trial on the charges as directed.
  10. An Garda Siochana (Irish Police Service) has confirmed that the required prosecution witnesses are available and are prepared to give evidence in any such prosecution.
  11. I say and believe that it will be necessary for the purposes of prosecuting Michael Roche-Kelly with charges (offences 1 – 15) as directed to seek his extradition. Michael Roche-Kelly is presently residing in Cape Town, South Africa.
  12. In accordance with Article 2 of the European Convention on Extradition - Extraditable Offences. The Extradition of Michael Kelly is sought by the Irish Authorities for the offences as specifically set out in the attached Extradition Request (contained at Appendix One).
  13. In support of the Extradition Request I refer to Appendix Two which contains an authenticated copy of the warrant of arrest issued in Ireland and to Appendix Three containing a copy of the relevant enactments/a statement of the relevant law and a description of the person claimed together with other information which will help to establish his identity and nationality.'

6. The affidavit concludes thus: *‘Sworn the 30<sup>th</sup> April 2015 the said Raymond Briscoe at two Brunswick Court in the County of the City of Dublin before me a practising solicitor and I know the Deponent’*. The signature of Briscoe is thereafter affixed next to the word *‘Deponent’*, together with the date of the signature. Thereafter, the stamp of a practising solicitor is affixed to the document.

## **Legal Framework**

7. The extradition enquiry before the Magistrate’s Court was held in terms of sections 9 and 10 of the Extradition Act, which provide as follows:

**“Section 9 Persons detained under warrant to be brought before magistrate for holding of an enquiry**

- (1) 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.
- (2) Subject to the provisions of this Act the magistrate holding the enquiry shall proceed in the manner in which a preparatory examination is to be held in the case of a person charged with having committed an offence in the Republic and shall, for the purposes of holding such enquiry, have the same powers, including the power of committing any person for further examination and of admitting to bail any person detained, as he has at a preparatory examination so held.
- (3) Any deposition, statement on oath or affirmation taken, whether or not taken in the presence of the accused person, or any record of any conviction or any warrant issued in a foreign State, or any copy or sworn translation thereof, may be received in evidence at any such enquiry if such document is-
  - (a) (i) accompanied by a certificate according to the example set out in Schedule B;
  - (ii) authenticated in the manner provided for in the extradition agreement concerned; or
  - (iii) authenticated by the signature and seal of office-

- (aa) of the head of a South African diplomatic or consular mission or a person in the administrative or professional division of the public service serving at a South African diplomatic, consular or trade office in a foreign State or a South African foreign service officer grade VII or an honorary South African consul-general, vice-consul or trade commissioner;
  - (bb) of any government authority of such foreign State charged with the authentication of documents in terms of the law of that foreign State;
  - (cc) of any notary public or other person in such foreign State who shall be shown by a certificate of any person referred to in item (aa) or (bb) or of any diplomatic or consular officer of such foreign State in the Republic to be duly authorized to authenticate such document in terms of the law of that foreign State; or
- (4) At any enquiry relating to a person alleged to have committed an offence- (a) in a foreign State other than an associated State, the provisions of section 10 shall apply;

#### **10 Enquiry where offence committed in foreign State**

- (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.'

8. The context in which sections 9 and 10 operate was set out as follows by the Constitutional Court in *Geuking v President of the Republic of South Africa and Others* 2003 (3) SA 34(CC).

- [13] After the process of extradition has been initiated by the issue of a warrant of arrest by a magistrate under section 5(1)(a), section 9(1) requires that the arrested person be brought before him or her as soon as possible for the purpose of holding “an enquiry with a view to the surrender of such person to the foreign State concerned.” Under section 9(2) the inquiry “shall proceed in the manner in which a preparatory examination is to be held”, i.e. a preparatory examination held in terms of Chapter 20 of the Criminal Procedure Act (the CPA). This means that the enquiry must be held in open court (section 152 of the CPA), subject to the provisions of section 9(3) of the Act; the evidence must be led on oath or affirmation (sections 162 and 163 of the CPA); and oral evidence is subject to cross-examination and re-examination (section 166 of the CPA). The State first leads evidence and thereafter the person has the opportunity of making a statement, testifying or calling witnesses (sections 128, 133 and 134 of the CPA).
- [14] Under section 9(3) of the Act, the magistrate may receive any deposition, statement on oath or affirmation (irrespective of whether it was taken in the presence of the person whose extradition is sought), any record of conviction, or any warrant issued by a foreign state, or any copy or sworn translation thereof. Provision is made in section 9(3) of the Act for the authentication of such documents.
- [15] The purpose of the enquiry is to be found in section 10(1) of the Act. It is for the magistrate to determine, upon a consideration of the evidence, whether: (a) the person is liable to be surrendered to the foreign state concerned; and (b) in the case where such person is accused of an offence, there is sufficient evidence to warrant a prosecution for the offence in the foreign state. If so satisfied, the magistrate is required to issue an order committing such person to prison and there to await the decision of the Minister with regard to surrender. At the same time the magistrate is obliged to inform the person that he or she may within 15 days appeal against such order to the High Court.’ (footnotes omitted)

9. With this legal context in mind, the appellant’s grounds of appeal are now considered.

### **Section 10(2) Certificate**



10. The appellant's complaint against the affidavit of Briscoe is that it does not state that it is a certificate in terms of section 10(2) of the Extradition Act. It does not refer to a certificate, or to section 10(2) of the Extradition Act. Instead, it is an affidavit seeking to place evidence before the court for decision.
  
11. This raises the question of whether an affidavit such as Briscoe's can be construed as a certificate within the contemplation of section 10(2). The Supreme Court of Appeal in *Natal Joint Municipal Pension Fund v Endumeni Municipality* (2012 (4) SA 593 (SCA)), set out the law regarding the interpretation of documents, including statutes, as follows:

'Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.'

12. The Extradition Act does not prescribe what format a certificate in terms of section 10(2) should take. The Concise Oxford English dictionary 10<sup>th</sup> edition, describes a certificate as *'an official document attesting or recording a particular fact or event, a level of achievement, the fulfilment of a legal requirement'*. What is apparent from this definition is that a certificate can be of an attesting nature, and not merely be recording information. In applying this definition, there is no doubt that Briscoe's affidavit is an official document attesting to facts or events and to the fulfilment of a legal requirement. The deponent states that he is a professional officer who is appointed pursuant to the Prosecution of Offences Act 1974, and is authorised by the Director of Public Prosecutions to act on her behalf in relation to criminal cases, including the case of the appellant. The remainder of the contents of Briscoe's affidavit attest to facts relating to the appellant's prosecution in Ireland, including a description of the alleged offences against the appellant; the dates on which the alleged offences were committed; the details of the complainant; the fact that a warrant of arrest was issued in respect of the appellant in Ireland; the fact that the appellant was charged with the alleged offences; the fact that the appellant was made aware of the trial date and the date of the trial date; that there are reasonable grounds for believing that the alleged offences were committed by the appellant, and that there is sufficient evidence for him to stand trial. The legal requirement being fulfilled in the affidavit is set out in its heading as follows: *'Affidavit provided in accordance with the South African Extradition Act in 1962 and in accordance with Article 22 of the European Convention on Extradition (Paris, 13<sup>th</sup> of December 1957)'*.

13. It appears to this court that the thrust of the appellant's challenge is based on a belief that a certificate should merely record information, indicated in his assertion that a certificate *'is usually a short, one-page document that simply certifies that there is sufficient evidence'*. Furthermore, it is argued on behalf of the appellant that a certificate issued for purposes of section 10(2) should refer to section 10(2) of the Extradition Act and use the word *'certificate'*. However, there is no legal or statutory basis for these assertions. In the same vein, during argument, the appellant's counsel placed much emphasis on what he regards as the norm with regards to the format of a section 10(2) certificate, referring to previous cases in which documents called *'certificates'* and/or referring to section 10(2) were part of the record. In some of those instances, certificates were submitted together with affidavits. However, the fact is that the statute does not specify such requirements.
14. The absence of a prescribed format of the certificate in terms of section 10(2) is in contrast to the certificate referred to in section 9(3)(a)(i) of the Extradition Act, which may accompany a deposition, statement on oath or affirmation, or record of any conviction or any warrant issued in a foreign State, or any copy or sworn translation thereof received in evidence at an extradition enquiry. In this regard, section 9(3)(a)(i) prescribes that such a certificate must be in accordance with the example set out in Schedule B of the Extradition Act. In turn, Schedule B is headed *'Apostille (Convention de la Haye du 5 Octobre 1961)'* a reference to the *Hague Convention of 5 October 1961: Abolishing the Requirement of Legalisation for Foreign Public Documents (Hague Convention)*, an indication that Schedule B is adopted from the Hague Convention. Unlike the certificate mentioned in section 9(3)(a)(i), the format of

the certificate mentioned in section 10(2) is not prescribed, and is also not a requirement of the European Convention. Had the legislature wanted to prescribe the format of the section 10(2) it would have similarly done so.

15. Instead, the express requirement in section 10(2) is that a certificate must appear to the magistrate to be issued by an appropriate authority in charge of the prosecution in the foreign State concerned, and must state that the appropriate authority has sufficient evidence at its disposal to warrant the prosecution of the person concerned. As pointed out above, it is clear from the affidavit that, in deposing thereto, Briscoe is authorised by the Director of Public Prosecutions (DPP). Furthermore, it is stated in paragraph 9 of his affidavit that there is sufficient evidence for the appellant to stand trial based on the alleged offences.
16. In my view, the content of the affidavit meets the requirement of section 10(2). The question is whether it should be rejected because of its form. In the case of *S v Von Schlicht* 2000 (1) SACR 558 (C), Blignaut J held (in para 13) that the question regarding whether or not a certificate complies with section 10(2) is to be judged by the magistrate by referring to the nature and content of the document produced at the enquiry. In my view, this is authority for the proposition that the form of the document should not be the determining factor of whether or not a document is a certificate in terms of section 10(2). What is required, as pointed out in *Endumeni*, is a sensible approach, not an overly-technical one that undermines the apparent purpose of the statutory regime. The legislative intention in inserting section 10(2) into the Extradition Act by means of the Extradition Amendment Act 77 of 1996 (Amendment Act), was

to simplify the procedure of determining extradition. It could not have been the intention of the legislature for the format of such document to be an impediment to the process of an extradition enquiry.

17. The appellant's counsel raised a concern that, if this approach is followed, then every document could potentially be admitted as meeting the requirements of a certificate in terms of section 10(2). The answer is that, provided the certificate meets the express requirements of section 10(2), namely to appear to the magistrate to be issued by an appropriate authority in charge of the prosecution in the foreign State concerned, and to state that the appropriate authority has sufficient evidence at its disposal to warrant the prosecution of the person concerned, it should suffice. The legislature's intention was to simplify the process, specifically because, as the Constitutional Court stated in *Geuking* the questions involved would not normally be within the knowledge or expertise of South African lawyers or judicial officers. In addition to this, that would not be the end of the process. The Constitutional Court stated as follows in *Geuking*:

[44] ....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 there. The hearing before the magistrate is but a step in those proceedings and is focused on determining whether the person concerned is or is not extraditable. Thereafter it is for the Minister to decide whether there is indeed to be extradition. What is fair in the hearing before the magistrate must be determined by these considerations.

[45] From the earlier analysis of what the magistrate is required to consider, it is clear that he has to be satisfied that the conduct alleged by the foreign state constitutes criminal conduct in this country. In order to make that determination the magistrate has

to be furnished with sufficient detail of the alleged conduct. If the magistrate considers that the evidence does not disclose criminal conduct under South African law that would be an end of the matter and the person would have to be discharged. If the alleged conduct in the foreign state does constitute criminal conduct in this country, the magistrate is then required to rely on the certificate with regard to the narrow issue as to whether the conduct also warrants prosecution in the foreign country. It is not inappropriate or unfair for the legislature to relieve the magistrate of the invidious task of deciding this narrow issue unrelated to South African law. As already mentioned, it is a question in respect of which South African lawyers and judicial officers will usually have no knowledge or expertise.

- [47] The certificate from the appropriate authority in the foreign state to the effect that the conduct in question warrants prosecution in that state is sufficient for the purpose of extradition. Its conclusiveness is binding on the magistrate only in relation to his consideration of the question whether the person concerned is extraditable. If the person concerned is extradited the foreign court will have to determine the issue covered by the certificate. Furthermore, in the exercise of his discretion under section 11 of the Act, the Minister might well be obliged to consider an attack made in good faith against the conclusion of the foreign authority contained in the certificate.'

18. Lastly on this issue, the appellant complains that, by setting out detailed factual averments, Briscoe's affidavit seeks to convince a court so that it may draw conclusions thereon. This argument brings into focus the intention of the section 10(2) certificate, which was set out as follows by the Constitutional Court in *Geuking*:

*'[t]he question of fact dealt with by way of a section 10(2) certificate is whether the evidence adduced before the magistrate would also 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 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 within the knowledge or expertise of South African lawyers or judicial officers.'*

19. The Constitutional Court in *Geuking* continued in paragraphs [48] and [50] that the role of the section 10(2) certificate is a narrow one, related only to the question of whether the alleged conduct is sufficient to give rise to an offence in the foreign jurisdiction. Thus, all that is required from a section 10(2) is information from the appropriate authority in the foreign state that the conduct in question warrants prosecution in that state. Its conclusiveness is binding on the magistrate only in relation to his consideration of the question whether the person concerned is extraditable. The extent to which the magistrate must be satisfied is with regard to the question of foreign law.
20. To summarise this aspect, there is no doubt that the content of Briscoe's affidavit meets the requirements of section 10(2), and is therefore admissible. Following this approach, the Magistrate cannot be faulted for construing the document as she did, and focusing on the content, not in a technical, piecemeal fashion.
21. During argument, the appellant's counsel clarified that the determination of the first point *in limine* would dispose of the matter. However, the parties urged us to nevertheless pronounce on the remaining issues.

### **Hearsay evidence of Briscoe**

22. The appellant complains that the information given by Briscoe in his affidavit is not from his own personal knowledge. It is based on a file forwarded to him. There is no explanation as to why the information is not given by a person who has first-hand knowledge. In the heads of argument of the appellant, it

was stated that *‘what is required is that the investigating officer give evidence, so that his or her testimony can be tried in the court’*. However, this last assertion was toned down during argument, with the appellant’s counsel clarifying that the appellant is not insisting that *viva voce* evidence be given. What the appellant’s counsel emphasised, however is that the investigator dealing with the matter should have deposed to the affidavit or confirmed its contents. In this regard, we were referred to the case of *Patel v National Director of Public Prosecutions: Johannesburg 2017 (1) SACR 456 (SCA)* in which the case agent responsible for the investigation of the applicant deposed to an affidavit that was in the extradition request.

23. The hearsay nature of Briscoe’s affidavit is raised by the appellant in the context of the liability determination in the extradition enquiry. It will be remembered that, in terms of section 10(1) of the Extradition Act, the magistrate is to determine, upon a consideration of the evidence whether the person is liable to be surrendered to the foreign state concerned.
24. In terms of section 9(3) *‘[a]ny deposition, statement on oath or affirmation taken, whether or not taken in the presence of the accused person, or any record of any conviction or any warrant issued in a foreign State, or any copy or sworn translation thereof’*, may be received in evidence at any such enquiry if such document is accompanied by a certificate according to the example set out in Schedule B and authenticated in the prescribed manner. The Act does not prescribe who the author or deponent of a deposition, statement or affirmation submitted in terms of the provision should be. The only prescribed requirement is that such a document should be certified and authenticated.



Given the context of the proceedings, this is insightful. The extradition proceedings are a precursor to main proceedings in the foreign State where a variety of evidence may be led against the requested person for the determination of his guilt. In those circumstances, one might have expected the legislature to require more precise and specified evidence to be led at the stage of the extradition proceedings, including a requirement that the deposition, statement or affirmation should emanate from a person with first-hand knowledge of the alleged offence, or that if such a person is not available, an explanation should be rendered. Yet the legislature opted to settle for 'any deposition, statement on oath or affirmation. In my view, this includes the affidavit of Briscoe. The European Convention similarly has no such requirement.

25. To the extent that the affidavit of Briscoe is hearsay, it should, in any event, be admitted in terms of the Law of Evidence Amendment Act 45 of 1988 which provides that hearsay evidence may be admissible depending on the nature and purpose of the proceedings and of the evidence which is sought to be tendered, the reason why the evidence is not submitted first hand by the source thereof, its probative value and the absence of any prejudice attendant upon the admission thereof. It is important to emphasise the fact that, in deposing to his affidavit, Briscoe states that he is authorised to act on behalf of the DPP whose office is seized with the prosecution of the appellant. Briscoe is therefore acting in an official capacity, representing the DPP. This aspect of his affidavit is not challenged. It must be remembered that the proceedings stem from a diplomatic request, made by an authority of the foreign State to another foreign State. It should be expected that a person in a

position of such authority will be the deponent. Furthermore, as the Constitutional Court stated in *Geuking*, the purpose of the extradition proceedings is to determine extraditability and not the guilt of the requested person, and the forum is therefore not required to arrive at any definitive evidentiary findings in relation to culpability.

26. Furthermore, the evidence of an investigating officer would similarly be hit by the problem raised by the appellant since it would also not be first-hand evidence. In order to meet the complaint of the appellant, only the evidence of the complainant would meet the evidentiary requirement. This is not a requirement of either the Extradition Act or the European Convention. It is too high a standard in the context of extradition requests. The purpose is to simplify the extradition of requested persons.
  
27. Lastly on this issue, in a recent case from this Division, *Tucker v Additional Magistrate, Cape Town and Others* 2019 (2) SACR 166 (WCC), this court held that hearsay evidence is pertinently admissible in extradition enquiries, and it is not peremptory for any affidavits which are submitted by the requesting state to be in the first person. Sher J expounded as follows at paras 65 – 69:
  - '65. [T]he EA [Extradition Act] provides that any deposition, statement on oath or affirmation taken in a foreign state, *whether or not it was taken in the presence* of the accused or any record of any conviction or any warrant issued in a foreign state, as well as any copy thereof, may be received in evidence at an extradition enquiry if the document is certified and authenticated in the prescribed manner. Traditionally, at least until the passing of the Law of Evidence Amendment Act in 1988 hearsay was defined in our law as a statement made by a third party otherwise than in the presence of an accused. In the

circumstances, the reference to statements which are not taken in the presence of an accused person being admissible at extradition enquiries appears to be intended to be a reference to hearsay evidence being admissible. Inasmuch as the proceedings are similar in nature to those followed in preparatory examinations, it bears mention that hearsay evidence was considered to be admissible in preparatory examinations.

66. That very little in the way of any hard, real, evidence is required in extradition enquiries in terms of our law is further reinforced by the provision in the EA that a mere certificate from the authority in charge of the prosecution in the foreign state, declaring that it has 'sufficient' evidence at its disposal to warrant prosecution will constitute conclusive proof.
67. If one has regard for the relevant provisions of the European Convention on Extradition it seems that a request for extradition shall be supported by a 'record of case' consisting of:
  - 67.1 the original or an authenticated copy of the conviction and sentence or detention order immediately enforceable, or the warrant of arrest or other order having the same effect (issued in accordance with the procedure laid down in the law of the requesting state); and
  - 67.2 a statement of the offences for which extradition is sought (which shall include the time and place of their alleged commission), their legal descriptions and as accurate as possible a reference to the relevant legal provisions applicable; and
  - 67.3 a copy of the relevant enactments, or where this is not possible, a statement of the relevant law and
  - 67.4 as accurate a description of the person sought as possible, together with any information which will help to establish his identity and nationality.
68. In the circumstances, given in particular the wording adopted by s 9(3) of the EA I am of the view that hearsay evidence is pertinently admissible in extradition enquiries, and it is not peremptory for any affidavits which are submitted by the requesting state to be in the first person.

28. For all the above reasons, the affidavit of Briscoe is admissible.

## **Statement of offences**

29. The appellant's appeal against the statement of offences document is that it does not have an author or identification; is not signed at the end; is not initialled; it is not given under oath; it is not referred to in Briscoe's affidavit; is not in anyway linked to the rest of the documents; and was therefore not admissible.
30. The statement of offences appears amongst a number of documents which were part of the extradition request from Ireland. The heading of the statement of offences indicates that its inclusion amongst the documents was in compliance with Article 12.2 of the Convention. It states as follows: *'Article 12.2(b). A statement of the offences for which extradition is requested. The time and place of their commission, their legal descriptions and a reference to the relevant legal provisions shall be set out as accurately as possible.'* In terms of Article 12.2 of the European Convention, a request for extradition must be accompanied by the following:
  - a. The original or an authenticated copy of the conviction and sentence or detention order immediately enforceable or of the warrant of arrest or other order having the same effect and issued in accordance with the procedure laid down in the law of the requesting Party;
  - b. A statement of the offences for which extradition is requested. The time and place of their commission, their legal descriptions and a reference to the relevant legal provisions shall be set out as accurately as possible; and

- c. A copy of the relevant enactments or, where this is not possible, a statement of the relevant law and as accurate a description as possible of the person claimed, together with any other information which will help to establish his identity and nationality.’
31. It is clear from the manner in which the appendixes are arranged that the inclusion of the warrant of arrest is meant to comply with Article 12.2(a) of the Convention; the inclusion of the statement of the offences in compliance with Article 12.2(b); and the inclusion of copies of the applicable Irish and South African statutes and identity documents of the appellant, is in compliance with Article 12.2(c).
32. The statement of offences is furthermore part of a series of numbered pages attached to a document signed by Briscoe and a commissioning solicitor, entitled *‘Appendixes One, Two & Three’*, which states as follows: *‘This is the Exhibit marked Appendixes One, Two and Three as referred to in the affidavit of Raymond Briscoe sworn this 30<sup>th</sup> day of April 2015’* (the contents page). The contents page is commissioned, and refers to itself as *‘the Exhibit marked Appendixes One, Two and Three’*, indicating that it is considered by the author to be one composite document or series of documents. That this is so is supported by the page numbering which follows sequentially after the contents page from ‘1’ to ‘18’, punctuated by two warrants of arrest, which are discussed below. The contents page furthermore clearly states *‘Appendixes One, Two and Three’* in its heading. It will be remembered that the affidavit of Briscoe, at paragraphs 12 and 13 referred to Appendixes One, Two and Three as follows:

‘12. In accordance with Article 2 of the European Convention on Extradition - Extraditable Offences. The Extradition of Michael Kelly is sought by the Irish Authorities for the offences as specifically set out in the attached Extradition Request (contained at Appendix One).

13. In support of the Extradition Request I refer to Appendix Two which contains an authenticated copy of the warrant of arrest issued in Ireland and to Appendix Three containing a copy of the relevant enactments/a statement of the relevant law and a description of the person claimed together with other information which will help to establish his identity and nationality.’

33. The appellant complains that, unlike the warrant of arrest which is referred to in paragraph 13 of Briscoe’s affidavit and does indeed appear after a document headed “Appendix Two’ amongst the documents, the statement of offences is not similarly foreshadowed in the affidavit as part of Appendix Two. Furthermore, it is pointed out that the document headed ‘Appendix Two’ describes the attached Appendix Two as ‘*an authenticated copy of the Warrant of Arrest*’, and there is no similar reference for the statement of offences.
34. It is correct that Briscoe’s affidavit does not specifically refer to the statement of the offences. Neither does the contents page nor the ‘Appendix Two’ document. However, the context for its inclusion is clear, namely the requirements of Article 12.2(b) of the European Convention. Further, its page numbering is part of the sequence of documents foreshadowed by the contents page, indicating that it is part of the appendixes named in the contents page. For these reasons, it can therefore be considered to be incorporated by reference.

35. In the circumstances, the appeal in respect of the inclusion of the statement of offences is dismissed as well.

### **Conclusion**

36. In the result, the following order is made:
- a. The appellant's appeal is dismissed with costs.

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**N. MANGCU-LOCKWOOD**  
**Acting Judge of the High Court**

I agree and it is so ordered.

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**T NDITA**  
**Judge of the High Court**

Appearances:

For the Appellant:

Adv D. Simonsz

Instructed by:

Liddell Weeber & Van Der Merwe

For the Respondent:

Adv. C. Burgh

Instructed by:

National Prosecuting Authority