IN THE HIGH COURT OF SOUTH AFRICA
[WESTERN CAPE DIVISION, CAPE TOWN] **[REPORTABLE]**

Case nos. 19434/17; A37/18

In the matters between:

LEE NIGEL TUCKER Applicant

and

THE ADDITIONAL MAGISTRATE, CAPE TOWN First Respondent

THE DIRECTOR OF PUBLIC PROSECUTIONS, WESTERN CAPE Second Respondent

THE MINISTER OF JUSTICE AND CORRECTIONAL SERVICES Third Respondent

and

LEE NIGEL TUCKER Appellant

and

THE STATE Respondent

JUDGMENT DELIVERED ON 28 MARCH 2019

SHER, J (Samela J concurring):

1. We have before us an appeal against the judgment and Order which was handed down by the magistrate of Cape Town on 10 November 2017, in terms of which he held that the appellant was liable to be extradited to the United Kingdom to stand trial on charges pertaining to the alleged sexual assault of minors, and committed him to prison whilst awaiting the decision of the Minister of Justice in regard to his surrender.
2. In addition, we also have before us an application to review and set aside the proceedings before the magistrate on the grounds that they were manifestly and grossly irregular in numerous respects, in breach of the appellant's constitutional rights.
3. The appellant was arrested 'provisionally'[1] in Cape Town in March 2016, pursuant to a warrant which was issued by the magistrate of Pretoria[2] following notification from the Minister that he had received a request for the appellant's extradition from the UK. Formal papers in this regard were presented to the Department of International Relations and Co-operation by the British High Commission in Pretoria on 19 April 2016.

The background

4. Amongst the papers in the request for the appellant's extradition was an affidavit by Detective Constable Alison Mildren, of the Avon and Somerset police. She said that in 1997 the police received information that a paedophile ring had sexually exploited a number of vulnerable boys in the areas of Bristol, Cardiff, Swansea and Caerphilly and following the launch of a major investigation a number of men were arrested and prosecuted on a range of sexual offences. In 1999 ten men were convicted and sentenced to various terms of imprisonment.
5. In October-November 1999 two victims, who for the purposes of this judgment shall simply be referred to as DT and SW, came forward with complaints that they had been sexually abused in Caerphilly and elsewhere by the appellant and

[1] In terms of Article 16 of the European Convention on Extradition, to which the UK and South Africa are both party.
[2] In terms of s 5(1)(a) of the Extradition Act, 67 of 1962.

two other adult males, who were duly arrested and charged accordingly before the Swindon Crown Court, which sat with a jury. One of the appellant's co-accused entered a plea of guilty before the trial commenced.

6. During the trial both complainants testified, as did the appellant and his co-accused. In their evidence the complainants alleged that the appellant had non-consensual oral and anal sex with them, at a time when they were between 13 and 14 years old. On 4 October 2000 the appellant and his co-accused were convicted of a number of these offences. The appellant's conviction occurred in his absence as did his subsequent sentencing to 8 years imprisonment, for it appears that two days before judgment was handed down he 'jumped' bail and made his way to South Africa.

7. Notwithstanding that he was a fugitive from justice the appellant lodged an appeal against his conviction which was entertained by the Court of Appeal. On 29 May 2002 it quashed his conviction as well as that of his co-accused because it was of the view that the summing up by the trial court had been inadequate. In this regard the Court of Appeal found that the trial judge had not clearly and properly summed up the evidence with specific reference to each of the charges, for the jury, and in the circumstances their verdicts could not be regarded as safe. However, the Court was of the view that inasmuch as the offences were serious, public interest demanded that there should be a re-trial. It accordingly directed that a fresh indictment should be lodged at Bristol and the appellant and his co-accused should be re-arraigned as soon as possible.

8. On 30 May 2002 an indictment containing the same charges as those which had previously been preferred against the appellant and his co-accused, and on which they had been convicted, was duly filed, and in due course the appellant's co-accused was re-convicted and sentenced to 6 years imprisonment. Although a fresh warrant was issued for the appellant's arrest in March 2003 the matter lay dormant for many years until the police received information pertaining to the appellant's whereabouts in South Africa. This spurred the prosecution services to prepare for a re-trial, during the course of which new evidence of further sexual transgressions by the appellant came to light, both in relation to DT and SW as

well as in relation to a number of new victims who came forward with allegations of sexual abuse.

9. As a result, a new warrant 'at first instance' was issued by the North Avon Magistrates' Court for the arrest of the appellant in respect of these fresh allegations. According to the warrant and the affidavit of Mildren it appears the appellant is now being sought in respect of an additional 41 alleged sexual offences, for which he has as yet not been indicted, and which also concern minor boys.

10. Following his arrest in South Africa a trial indictment was lodged against the appellant at the Bristol Crown Court on 31 March 2016. Although it is described as a 'new' trial indictment it is apparent[3] that it charges the appellant with the selfsame sexual offences with which he was previously charged and convicted viz 3 counts each of the alleged contemporaneous indecent assault and 'buggery' of DT, committed in the period between January 1985 and February 1988 at Swansea and Caerphilly, and two further counts of the alleged contemporaneous indecent assault and 'buggery' of SW, which was committed in the period between January 1987 and December 1988 at Caerphilly; contrary to the relevant provisions of the Sexual Offences Act, 1956 which was the applicable legislation in force at the time.

11. According to the affidavit of Andrew Glover, a barrister and specialist extradition prosecutor with the Crown prosecution services of England and Wales (which affidavit was also included in the request for extradition), with reference to the offences in respect of which the appellant is to be extradited 'buggery' is defined in terms of the 1956 Act as unlawful sexual intercourse *per anum* with a person who has not attained the age of 18 years, and where a complainant is under the age of 16 years at the time of the offence the maximum punishment which can be imposed is life imprisonment. Similarly, in terms of the Act a boy under the age of 16 years is not legally able to consent to a sexual act which would otherwise constitute an 'indecent assault', and the maximum penalty provided for such an act, on conviction, is 10 years imprisonment.

[3] From a comparison of its contents with the judgment of the Court of Appeal.

12. Insofar as the further offences for which the appellant is sought are concerned ie the fresh offences listed on the arrest warrant from the North Avon Magistrates' Court, it is alleged that between February 1983 and June 1989 the appellant 'buggered' and indecently assaulted or committed acts of 'gross indecency' with a number of boys who were under the age of 16 years. As far as the charges of 'gross indecency' are concerned these are apparently intended to refer to other forms of sexual assault which the appellant perpetrated on his victims, contrary to common law, and in respect of which a maximum sentence of 5 years imprisonment may be imposed. In addition, the appellant is sought on 2 counts of indecent assault of adult men, committed between October 1990 and March 1991, and 2 counts of living off the earnings of child prostitution, contrary to the Sexual Offences Act of 1967, for which a maximum penalty of 7 years imprisonment may be imposed. According to Mr Glover, in terms of UK law there is no time limit for the institution of proceedings in respect of any of the offences for which the extradition of the appellant is sought.

13. It is not in dispute that all of the offences for which the appellant is sought (including those in respect of which he has been indicted) also constitute offences in terms of our law, which attract varying terms of imprisonment ranging from life imprisonment (in the absence of substantial and compelling circumstances)[4] to lengthy terms of imprisonment less than that. Since the promulgation of the Criminal Law (Sexual Offences and Related Matters) Act[5] in 2007, any person who penetrates the sexual organs, anus or mouth of another without consent is guilty of rape[6] and if a person sexually violates another by means of any act involving direct or indirect contact between the genital organs or anus of the one and any part of the body of the other, he will be guilty of sexual assault.[7] In addition, the Act further provides that any person who commits an act of 'consensual' sexual penetration with a child between the age

[4] In this regard Part 1 of Schedule 2 of the Criminal Law Amendment Act 105 of 1997 provides that where the victim of rape is a child under the age of 16 years the prescribed sentence shall, save where there are substantial and compelling circumstances, be one of life imprisonment.
[5] No. 32 of 2007.
[6] S 3.
[7] S 5.

of 12 and 16 shall be guilty of rape[8] and similarly any person who sexually violates a child of that age, even if this allegedly occurred 'consensually', will be guilty of sexual assault.[9] As far as living off the earnings of prostitution is concerned where this involves a child under the age of 16 it is punishable in our law as sexual exploitation in terms of the Criminal Law (Sexual Offences and Related Matters) Act.[10]

14. In terms of our law[11] the date when the acts for which extradition is sought are required to constitute a punishable offence, in satisfaction of the 'double' or dual criminality principle fundamental to extradition law, is the 'request date' ie the date when the request is made for extradition, which in this case was in April 2016, and not the 'conduct' date ie the date when the acts concerned were performed, which in this case would range between 1983 and 1991. But even were the conduct date to be applicable the principal acts for which the appellant is sought to be extradited constituted our common law offences of sodomy (as non-consensual sexual intercourse *per anum* between two males) and indecent assault, at that time. And pursuant to the judgment in *Frankel*[12] which was handed down on 15 June 2017 (prior to the magistrate's judgment and order on 10 November 2017), there is no prescription period applicable in our law in regard to any sexual offences, whether in terms of common law or statute.[13]

The proceedings before the magistrate

15. When the hearing commenced on 13 October 2017 the prosecutor handed up the original of a certificate which had been produced by Mr Barry Hughes, the Chief Prosecutor for the South West Area of the Crown Prosecution Service of England and Wales, in terms of s 10(2) of the Extradition Act, in which he declared that the evidence which was 'contained' in the request for the

[8] S 15(1).
[9] S 16(1).
[10] S 17.
[11] See *Patel v The National Director of Public Prosecutions* 2017 (1) SACR 456 (SCA) at para [40].
[12] *NL v Frankel* 2017 (2) SACR 257 (GJ), later confirmed by the Constitutional Court *sub nom Levenstein v Estate of the Late Sidney Lewis Frankel* 2018 (2) SACR 283 (CC).
[13] Previously, there was a 20 year period for the institution of criminal proceedings in respect of sexual offences other than rape. In *Frankel* this distinction was held to be arbitrary and unconstitutional.

extradition of the appellant was available for trial and was sufficient under the law of England and Wales to justify his prosecution, whereupon the appellant's counsel proceeded to address the court.

16. He pointed out that in terms of the Act[14] the proceedings were to be conducted in the manner in which a preparatory examination would be held in terms of the Criminal Procedure Act.[15] He contended that this meant that the prosecutor was obliged to put forward such evidence as he might have in his possession and thereafter he was required to put the charges in respect of which extradition was sought, to the appellant, who would plead thereto and would then have the right to testify and to call witnesses. The magistrate interjected and informed him that this was not how he understood the proceedings should be conducted, but it is apparent that right from the outset he did not provide any clear direction in this regard, and simply indicated that in his view the certificate in terms of s 10(2)[16] was 'sufficient'. The appellant's counsel persisted with his contention that the prosecution was required to put forward its evidence before his client could be required to testify or call any witnesses. He further submitted that as the evidence which was contained in the extradition request, particularly the affidavit by Mildren, was not first-hand and was entirely hearsay, it was inadmissible. He also contended that it was impermissibly vague in regard to the necessary particularity which was required. In this regard he pointed out that in relation to a number of the charges insufficient particularity had been provided as to the place where the alleged offences had been committed, and most of the charges were so broad in relation to the alleged period in which the offences concerned had been committed that the appellant was unable to respond sensibly thereto. Accordingly, he requested that the magistrate should make a ruling in relation to the admissibility and cogency of the evidence which had been put forward, in order that the appellant could be in a position to decide whether he, in turn, should put up any evidence in response thereto.

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[14] S 9(2).
[15] Act 51 of 1977.
[16] Of the Extradition Act, 67 of 1962.

17. One would have thought that (as per the discussion below) at this juncture the magistrate would have pointed out that inasmuch as the proceedings did not constitute a criminal trial and were simply directed at considering whether or not the appellant was extraditable, most of the objections which had been raised were irrelevant, but he became impatient instead and said he was not prepared to make piecemeal rulings and intended to make only one ruling at the end of the matter, and after remarking that there was 'something called contempt of court', at the instigation of the prosecutor he insisted that the appellant should proceed to put forward his 'defence'.

18. This prompted an adjournment for the appellant's counsel to take instructions, at which stage he requested a postponement in order that he could prepare the appellant to give evidence. He apologized for the interruption in the proceedings and said that as he had understood that the state would first put up its evidence and the court would thereafter indicate whether the evidence was of any value, before the appellant would have to decide whether he should testify, he had not anticipated that the appellant should give evidence on the first day which had been allocated for the matter to be heard and he accordingly requested that it be postponed to 10 November, being the second day which had been agreed upon between the parties.

19. The magistrate was not amenable to this request and said that he was only prepared to adjourn for a few days. He accordingly postponed the matter for a week ie to Friday, 20 October 2017 at 14h00. As anyone will appreciate, a Friday afternoon is hardly a time conducive for the completion of any proceedings before a court.

20. But, at the appointed time on 20 October 2017 the appellant's junior counsel duly appeared together with a silk, who said that he was ready to call the appellant to give evidence. He indicated, with reference to the decision in *Garrido*[17] that he

[17] *Garrido v Director of Public Prosecutions, Witwatersrand Local Division & Ors* 2007 (1) SACR 1 (SCA).

also intended placing certain material before the court with a view to it being included in the magistrate's report to the Minister.[18]

21. During the course of his evidence the appellant made reference to the provisions of s 7(2) of the UK Criminal Appeals Act[19] which provides that in the event of a successful appeal against a criminal conviction a Court of Appeal may only order that an accused be retried for the offences of which he was originally convicted,[20] or any offence which might have been an alternative offence to that with which he was originally charged, or a competent verdict in respect thereof.[21]

22. According to him this meant that he could not be extradited to stand trial on any charges but the charges on which he had originally stood trial, and as a result the attempt by the UK prosecution authorities to extradite him on the fresh offences which were set out in the warrant of arrest from North Avon, was not competent.

23. The appellant also testified that his arrest and trial had been subject to what he termed 'vile, distorted and exaggerated' media coverage, and he said that his arrest in Cape Town and subsequent bail application had also received a great deal of publicity. He averred that the media coverage was in violation of an injunction which the Court of Appeal had placed on any reporting by the media. When queried what the relevance of this was to the extradition proceedings his counsel indicated that as a result of the adverse publicity which the appellant had been subjected to they would contend that it would be impossible for him to ever receive a fair trial in the UK, and they were in the process of putting together a file containing extracts of some of the media reports the appellant had been subjected to. He said they also intended submitting an affidavit from an expert on British law which would show that it discriminated unfairly against homosexuals. In this regard the appellant testified that whereas at the time when the alleged offences were committed heterosexual underage sex with a female child was 'time-barred' after 2 years ie could not be prosecuted after more than 2 years had

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[18] S 10 (4) of the Extradition Act provides that upon issuing an order of committal pursuant to a finding that the person before him is liable to be extradited the magistrate shall forthwith forward to the Minister a copy of the record of the proceedings, together with such report as he may deem necessary.

[19] 1968.

[20] S 7(2)(a).

[21] S 7(2)(b) and (c).

gone by, homosexual sex with an underage male child was an offence which never prescribed. Finally, the appellant's counsel said that they were in the process of obtaining a copy of the original indictment on which the appellant had stood trial, in order to show that the trial indictment which had been filed against him in April 2016, contained 'different' charges.

24. Even though the appellant's counsel indicated that a postponement would only be sought after the appellant's testimony had been concluded, and to this end the prosecutor could cross-examine him, the prosecutor objected vehemently to the notion of any postponement for the purposes of obtaining the documentation referred to.

25. He said that the matter had been going on for 17 years, which was too long. In his view there was no basis for the Court to have any regard for the opinions of a British legal expert and these were irrelevant, for it was accepted as a matter of comity between states that one territorial jurisdiction would not comment on the law of another. Similarly, he objected to the relevance of any media reports.

26. He even objected to the evidence which was tendered by the appellant in relation to his HIV status and the difficulties which he had experienced in obtaining anti-retroviral medication whilst he had been in prison, before bail was granted to him. As the appellant's counsel rightly pointed out, this was something which would need to be brought to the Minister's attention, when and if he considered that the appellant should be surrendered to the UK authorities. But the prosecutor was of the view that these were all matters which could be addressed in representations which the appellant could make to the Minister, and he submitted that they had no place being raised in the extradition enquiry before the magistrate.

27. The magistrate took his cue from the prosecutor, and indicated that he was not prepared to grant a postponement in order that any of the documentation which was referred to could be obtained and that he intended to make a decision based solely on the evidence which was before him.

28. The prosecutor then proceeded to cross-examine the appellant vigorously, in a manner which at times was most unfair. Shortly after the commencement of cross-examination when the appellant sought to explain his understanding of the

Court of Appeal's judgment, in answer to a question which had been posed, the prosecutor told him that he had an answer for everything. He then admonished the appellant for supposedly interrupting him whilst he was putting his questions, when in fact he repeatedly interrupted the appellant whilst he was trying to answer the questions which had been put to him. At one point in the proceedings the prosecutor became so animated that he slammed his fist down on the table and shouted at the appellant, without cause. Instead of reining the prosecutor in, when necessary, the magistrate gave him a free hand and made little attempt to control the proceedings. The appellant's counsel repeatedly tried to get the court to intercede, in vain. On one occasion when he tried to object to the manner in which the appellant was being examined the magistrate curtly instructed him to 'take a seat' before he had even heard his objection, and one another occasion he informed him that they could not carry on with the proceedings if he 'jumped in every time' (sic). As appellant's counsel rightly tried to point out to the court, he was under a duty to intercede on behalf of his client whenever the cross-examination was unfair, but rather than to come to the appellant's assistance and restore order the magistrate simply appeared to become irritated by the objections that were being made by his counsel. Even a statement by the prosecutor that the appellant was not entitled to the rights contained in the Constitution, as he was not a citizen, was not challenged by the magistrate.

29. When the appellant had completed his testimony his counsel requested that the matter be postponed to the 10th of November 2017, the date which had previously been agreed upon between the parties, for argument. Given that the date had been pre-arranged this was clearly a sensible suggestion, but notwithstanding that he had previously agreed thereto, as on the previous occasion the prosecutor objected. He alleged that the court was being 'held to ransom' as they had lost 'half a day' on the previous occasion because the appellant's counsel had not been ready to proceed, and he insisted that the matter should continue on an earlier date. And once again, egged on by the prosecutor the magistrate agreed, without regard for the fact that the dates had been previously arranged and without regard for the parties' availability or other

court commitments. He suggested the matter should be postponed to the following Friday 27 October 2017, but when counsel pointed out that both he and his attorney had prior commitments he ruled unilaterally that it should then be heard on 3 November, even though the appellant's counsel pointed out that he was engaged in another court on that day. Given that this was merely one week before the date which had been previously agreed upon the magistrate's stance seems to have been rather pointless. There was no suggestion there would be any prejudice to any of the parties or the court, were the matter to be heard a week later, as originally agreed, nor was there any urgency present which necessitated the matter having to be heard a week earlier. Although the appellant's counsel tried to point out that he was required to appear in another court on that day and as a result his client would be severely prejudiced, the magistrate was not prepared to re-consider his decision.

30. Predictably, when the matter was called at 14h00 on Friday 3 November 2017 the appellant's previous counsel were not in attendance, but he was duly represented by alternative counsel, and his attorney was also present. Although the matter was ready to proceed the magistrate was clearly incensed and he refused to entertain it. He accordingly postponed the proceedings to Monday 6 November 2017 in order that appellant's senior counsel could show cause why he should not be held to be in contempt of court, for his failure to appear.

31. When the matter was called on 6 November 2017 the appellant was assisted by 3 counsel: the junior and senior counsel who had represented him at his prior appearance, and another senior counsel who was there to represent his unfortunate colleague. His valiant attempts to explain why his colleague was not in contempt in *facie curiae*, as he had been obliged to appear in another forum (as indicated on 20 October 2017) left the magistrate entirely unmoved, and he summarily found him to be in contempt. After rejecting a submission that a simple caution and reprimand would do, he imposed a sentence of a fine of R2000 or 4 months imprisonment,[22] and then in a twist of irony, postponed the matter for

[22] We were informed from the bar that the finding and sentence were subsequently set aside by this Court, on appeal.

argument to 10 November 2017, the very date which had previously been arranged. On the latter date he duly made an Order declaring that the appellant was liable to be extradited to the UK, and committed him to prison to await the Minister's decision in this regard.

The law

32. Extradition has been described as a process based on treaty, comity or reciprocity, which is initiated by a formal request from one sovereign state to another, by means of which a person accused or convicted of the commission of a serious criminal offence within the jurisdiction of the requesting state, is surrendered to its courts for trial or the imposition of punishment.[23]

33. As such, it is a process which consists of a series of acts, partly judicial, executive and administrative in nature. Most commonly these acts are regulated on both an international and a municipal level as a matter of public international and domestic law, by means of treaties which constitute binding agreements between the states which are party thereto and which become enforceable at a municipal level after local adoption by ratification or accession.

34. By their very nature therefore extradition proceedings are not about determining the guilt or innocence of an offender, but are aimed at determining whether there is lawful cause to surrender the offender to a foreign state, in order that he or she should face justice in such other state.[24]

35. Extradition in our law is regulated by the Extradition Act[25] ('EA') and the terms of any applicable treaty (ie extradition agreement which has been entered into with any foreign state[26] and which has been ratified or acceded to by Parliament),[27] which in this matter is the European Convention on Extradition.[28]

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[23] NJ Botha *The History, Basis and Current Status of the Right or Duty to Extradite in Public International & SA Law* (LLD thesis 1992)

[24] *Geuking v President of the Republic of South Africa & Ors* 2003 (3) SA 34 (CC) para [44].

[25] No. 67 of 1962.

[26] S 2(1) of the Act.

[27] S 2(3)(a).

[28] South Africa ratified the Convention on 12 February 2003, and it came into force domestically with effect from 13 May 2003. The Convention has been amended by a number of subsequent Protocols, the last of which is the Fourth Protocol (CETS no.212) which has been open for acceptance since 20 September 2012. South Africa has so far only adopted the Second Protocol, with effect from the date of its ratification of the Convention on 12 February 2003.

(i) The nature of extradition enquiries and rights issues

36. The EA provides that any person who has been arrested in terms of a warrant, pursuant to a request for his extradition,[29] shall be brought before the magistrate, who shall hold an 'enquiry' with a view to his/her possible surrender to the foreign state concerned.[30] Such proceedings are *sui generis*[31] ie they are neither criminal nor civil, in the traditional meaning ascribed to these terms.

37. The fact that the proceedings are to be in the form of an enquiry and not a trial, has a number of important consequences.

38. In the first place, because the person who is sought for extradition is not being tried before the magistrate and will therefore not be subject to criminal sanction, he or she is not entitled to rely on the constitutionally enshrined fair trial rights which are set out in s 35 of the Constitution, as far as the extradition proceedings are concerned.[32] Although the exact extent of the rights which are enjoyed by an extraditee in our law has not yet been comprehensively defined, the Constitutional Court has held that at the very least they include the right to procedural fairness at all stages of the proceedings.[33] At a basic level this must surely include the right we would normally associate with the *audi alteram partem* principle[34] ie the right to be heard (which in the context of an extradition enquiry would include the opportunity to put forward one's case, by way of evidence and

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[29] In terms of s 5(1)(a).

[30] S 9 (1).

[31] *Geuking* n 24 at para [50]; *Director of Public Prosecutions, Cape of Good Hope v Robinson* 2005 (1) SACR 1 (CC) at para [33].

[32] *Id, Geuking* at para [47].

[33] *Id*.

[34] In *Administrator, Transvaal, and Others v Traub and Others* 1989 (4) SA 731 (A) at 748G it was said that 'the maxim [*audi alteram partem*] expresses a principle of natural justice which is part of our law. The classic formulations of the principle state that, when a statute empowers a public official or body to give a decision prejudicially affecting an individual in his liberty or property or existing rights, the latter has a right to be heard before the decision is taken ... unless the statute expressly or by implication indicates the contrary'. In *Gavric v Refugee Status Determination Officer, Cape Town & Ors* 2019 (1) SA 21 (CC) which concerned an appeal against the decision by a Refugee Status Determination Officer to refuse an application for asylum which was made pending extradition proceedings, the Constitutional Court confirmed that the maxim constitutes a fundamental principle of administrative justice, which requires that a person whose rights (in *casu* the right to freedom and bodily integrity) may be effected, should be given a fair and meaningful opportunity to make representations before the decision affecting such rights is made, which in turn requires that he should be apprised of the substance of the case against him.

documents);[35] the right to be legally represented and the right to challenge the lawfulness and validity of the proceedings. But in addition to these 'procedural' rights, given that extraditing a person involves arrest and detention it constitutes an 'invasion'[36] of the fundamental human rights of freedom and liberty, and as such a foreigner facing extradition is also entitled to assert the selfsame constitutional rights a citizen would be able to assert. In this regard in *Tsebe*[37] the Constitutional Court held that the constitutional rights to dignity, life and freedom and security of the person[38] (which in turn includes the right not to be deprived of freedom arbitrarily and the right not to be subjected to torture or cruel, inhuman or degrading punishment) are not reserved for citizens only, but are rights enjoyed by every foreigner who enters our country, whether legally or illegally, and in proceedings for the extradition, deportation or surrender of a foreigner the State is enjoined[39] to respect and protect such rights. Consequently, it held (in line with its earlier decision in *Mohamed* [40]*)* that where there is a 'real risk' that if a person were to be extradited or deported to a foreign state he would be subjected to the death penalty, or to cruel and inhuman punishment the State cannot act in breach of his constitutional rights by surrendering him to the foreign state, and the only way it can do so lawfully is if it obtains satisfactory assurances from the foreign state that it will not proceed to implement such penalty or subject him to such punishment in the event of extradition or deportation.

39. But it seems that even in instances where it would result in the obvious breach of a fundamental 'universal' human right which is constitutionally protected in our law, or a fair trial right in the requesting state which is also constitutionally enshrined in our law, or even perhaps in the case of the breach of a common treaty right the *magistrate* ordinarily has no power to refuse a request for extradition, at least in the case of extradition enquiries emanating from non-

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[35] See *Garrido* n 17 at para [27].
[36] Per Goldstone J in *Geuking* n 24 para [1].
[37] *Minister of Home Affairs & Ors v Emmanuel Tsebe & Ors; Minister of Justice & Constitutional Development & Ano v Emmanuel Tsebe & Ors* 2012 (5) SA 467 (CC) at para [65].
[38] As per ss 10-12 of the Constitution.
[39] By virtue of the provisions of s 7(2) of the Constitution.
[40] *Mohamed v President of the Republic of South Africa (Society for the Abolition of the Death Penalty in South Africa Intervening* 2001 (3) SA 893 (CC).

associated[41] ie non-African states. In this regard the Constitutional Court held in *Robinson*[42] that the scheme of the legislative provisions[43] (which pertained to an extradition enquiry from Canada a non-associated state) was such that the question of whether or not an extraditee's rights (including the right to a fair trial, or his wider constitutional rights), might be breached were he or she to be extradited, was only something that was to be considered by the Minister[44] when making his decision as to whether or not to surrender the extraditee, after the magistrate had already found that he or she was liable to be surrendered. According to the Constitutional Court it was thus not within the magistrate's remit to take this factor into consideration when deciding whether or not the person concerned was liable to be extradited. The Constitutional Court rejected the finding of the High Court on appeal that, when considering whether a person was 'liable' to be surrendered the magistrate was required to consider whether the person was 'bound in law or equity' to be surrendered, and its consequent finding that where the extradition would result in the violation of a fair trial or constitutional right that would consequently constitute grounds for the magistrate to find that the extraditee was not liable to be surrendered.

40. As in the matter before us, in *Robinson* the extraditee had been sentenced by a foreign court in his absence, after he fled the country, and his extradition was sought in order that he could be returned to serve his sentence. The magistrate held that he was extraditable but this was set aside on appeal to the High Court, on the basis that in terms of our law an accused ordinarily had a constitutional right to be present when tried[45] and it was accordingly not constitutionally permissible to sentence him in his absence, as it would violate his constitutional rights to a fair trial were he to be extradited. It seems that the fact that the extraditee was a South African citizen was an important underlying reason for the decision. This finding was set aside by the Constitutional Court.

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[41] In terms of s1 rtw s 6 of the EA an associated state is an African state with which we have an extradition agreement, and all other foreign states are therefore non-associated states.
[42] Note 31 at para [52].
[43] S 10(1) of the EA.
[44] In terms of s11 of the EA.
[45] S 35(3)(e) of the Constitution.

41. Before commenting any further it is necessary to bring some context into the discussion. Historically, comity between nations meant that honouring state sovereignty was in the forefront in international affairs between states, and when it came to extradition law this was given effect to in terms of the doctrine of 'non-enquiry'. In this regard the traditional approach of Courts faced with an extradition request was that they would not enquire into the *bona fides* or the motives for an extradition request by another state, or the treatment that an offender might receive in such state, following extradition.[46] It was assumed that the requesting state would give the extraditee a fair trial.[47] However, due to the increasing codification of fundamental and fair trial rights in various international instruments and state constitutions there has been a shift from this approach to one which is more rights-focused. In this regard Tyler[48] points out that:

> 'The International Covenant on Civil and Political Rights requires fair trial procedure. The Convention Against Torture and Other Cruel Inhumane or Degrading Treatment or Punishment prohibits extradition where there is the possibility of the offender being subjected to torture. The International Convention Against the Taking of Hostages and the Convention Relating to the Status of Refugees also prevent extradition where human rights are violated. The United Nations Model Treaty on Extradition of 1990 discourages the extradition of an offender where his fair trial rights would not be protected. Of significant importance is Art 3(2) of the European Convention on Extradition which requires that extradition be refused in the instance where the requested state has grounds to believe that the extradition request was made to prosecute or punish a person as a result of his race, religion, nationality or political opinion.'

42. In like vein, the EA provides[49] that where extradition is sought by an 'associated' state ie an African state with whom SA has entered into an extradition agreement, the magistrate before whom the extradition hearing takes place may make an order that the extraditee shall not be surrendered where he is of the opinion that he or she will be prosecuted, punished or even prejudiced at his trial by reason of his or her gender, race, religion, nationality or political opinion, and he may also refuse to make an order for his/her surrender if he is of the opinion

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[46] See RZ Tyler *The Impact of the Bill of Rights on Extradition* (LLM thesis, 2007) at p 14 *et seq*.
[47] *Vide* the decision of the Canadian Supreme Court in *Argentina v Mellino* 1987 1 SCR 536.
[48] Note 46 at pp 12-13. See also Barrie *Human Rights & Extradition Proceedings: Changing the Traditional Landscape* 1998 TSAR 126.
[49] In s 12(2)(c)(i)-(ii).

the extradition is not being sought in good faith or that it would not be in the interests of justice or would be unjust or unreasonable.[50] Somewhat anomalously, the magistrate before whom a person from a non-associated state is sought to be extradited, does not enjoy a similar power to refuse extradition on the grounds of unfairness or breach of fundamental rights. There is no obvious legislative reason apparent for why there should be such a distinction, which seems somewhat arbitrary. It is however apparent that the Constitutional Court considered that the distinction between the statutory powers which are afforded to a magistrate who deals with an extradition enquiry from an associated state and those afforded to a magistrate who deals with an extradition enquiry from other foreign states was an important one, on which it relied substantially in arriving at its conclusions. In this regard it was of the view that it was significant that whereas in extradition enquiries from associated states it was the magistrate who had the power to make an order for the surrender of the extraditee or to refuse it on the grounds of unfairness ie that it was unjust or unreasonable, in respect of extradition enquiries from other foreign states only the Minister had that power, not the magistrate. It held that this was an important indication that the legislature did not intend that the magistrate who sits in an extradition enquiry from a non-associated state should have the power to declare that a person was not liable to be extradited, on the grounds that it would result in a breach of his constitutional rights.

43. Most extradition treaties these days, and certainly the ones to which we have recently acceded (including the SADC Protocol on Extradition of 2002[51] and the one of application in this matter ie the European Convention on Extradition)[52] have a provision in them[53] to the effect that a person shall not be extradited if

[50] Or even on the basis that the sentence to be served in the requesting state would be 'too severe' a punishment. In *S v Williams* 1988 (4) SA 49 (WLD) the Court held that the test in this regard was whether the sentence was wholly inappropriate or unconscionable.

[51] To which Angola, Botswana, the Democratic Republic of the Congo, Lesotho, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe are signatories.

[52] Article 3.2.

[53] Article 4(b) of the SADC Protocol on Extradition 2002 is in similar terms, except that it includes ethnic origin and 'status' as grounds for refusal.

there are 'substantial grounds for believing'[54] that their extradition is sought for the purpose of prosecuting or punishing them by reason of their race, gender, religion, nationality or political opinions. Some even go so far as to include other grounds such as age, disability (mental or physical), status and sexual orientation.[55] The UK Extradition Act of 2003[56] similarly bars the extradition of a person from the UK if it appears that it is sought for the purpose of prosecuting or punishing him/her by reason of their race, gender, sexual orientation, religion, nationality or political opinions.

44. It seems to me to be entirely anomalous that in an extradition enquiry emanating from an associated state the magistrate is at large to declare that an extraditee is not liable to be surrendered on the grounds that it would result in a violation of his/her fundamental rights irrespective of whether or not the underlying treaty contains a provision to this effect, whereas the magistrate in an extradition enquiry which emanates from a non-associated ie non-African state cannot make such a declaration, even where there is an underlying treaty which may be in the form of a multiparty convention such as the European Convention on Extradition, which embodies a protection against extraditions in such circumstances.

45. In my respectful view the decision of the High Court on appeal in *Robinson* was assailable for the reason that it sought to impose our constitutionally compliant fair trial standards on another country. Simply put, whereas it might offend the standards by which we measure fairness in our criminal trials, for an accused to be convicted and sentenced in his absence, this does not mean that it is necessarily unfair if this is the case in another legal system, especially where the

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[54] Also commonly postulated in terms of the phrase 'substantial grounds for believing there is a real risk'- as adopted in a number of decisions of the European Court of Human Rights (eg *Soering v UK* (1989) 11 EHRR 439 at para [91] in *casu* a real risk of being subjected to torture, or inhuman or degrading treatment contrary to Article 3 of the European Convention on Human Rights, likewise in *Chabal v UK* (1996) 23 EHRR 413 at para [80]; and *Saadi v Italy* (2009) EHRR 30 at para [125]) and has also been adopted by the House of Lords (eg *Lord Advocate (representing the Taiwanese Judicial Authorities) v Dean (Scotland)* UKSC 44 which was decided on 28 June 2017, at para [25]) as well as by our Constitutional Court vide *Tsebe* n 37 at para [67] where the Court said that SA would not hand over a person to another country where to do so would expose him to the 'real risk' of the imposition and execution of the death penalty.

[55] *Vide* for example Article 3 of the Extradition Treaty between SA and the Argentine Republic (GN 519 in GG 40978 of 14 July 2017).

[56] S 13(a)-(b).

accused is a fugitive from justice, who has absconded instead of making use of the opportunity to exercise his rights to take part in the proceedings and to challenge the evidence which is admitted during them. Just because we have a particular 'fair trial' constitutional provision in our Bill of Rights which is not mirrored in the constitutional dispensation of a foreign state which requests the extradition of a person does not mean that if he/she were to be extradited to that state the trial or punishment they would have to face would be in breach of their constitutional rights, at least not insofar as that system is concerned. And it is before that system that they are required to account for their criminal offences, which have usually been committed in that state, and not ours. In this regard both the European Court of Human Rights[57] as well as the UK Supreme Court[58] have cautioned Courts dealing with extradition matters not to seek to impose their constitutional standards or international treaty or convention standards on states that are not party thereto, and which may have different requirements or standards pertaining to fair trial issues in criminal matters. Obviously, where the extradition of an offender might only offend a fair trial right in the requesting, as opposed to the requested, state we are not talking about imposing the standards of the latter on the former. But in keeping with the principle of comity in this regard international jurisprudence seems to suggest that the alleged denial or breach of a fair trial right, in the event of extradition in such a case, is only to be entertained exceptionally, where there is a risk of a 'flagrant denial' of fairness.[59]

46. In my view, and with due and respectful deference to the reasoning of the Constitutional Court in *Robinson,* inasmuch as the magistrate's function in an extradition enquiry is to determine whether the extraditee is 'liable' to be surrendered, save perhaps for the issue of identity this is primarily a legal question the answer to which will rest on a consideration of the relevant provisions of the law ie the EA and any applicable treaty, with particular

[57] In *Al-Skeini v UK* (2011) 53 EHRR 18 at para [141].
[58] In *Lord Advocate* n 54 at para [45].
[59] See *Soering* n 54 at para [113] where the ECHR held that 'the right to a fair trial as embodied in Article 6 [of the European Convention on Human Rights] holds a prominent place in a democratic society. The Court does not exclude that an issue might exceptionally be raised under Article 6 by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of a fair trial right in the requesting country'.

reference to whether or not the offences for which the person is sought are extraditable offences within the terms of such treaty, if any, and the EA.[60] Where the treaty provides that extradition may be refused if there are substantial grounds for believing that it is being sought for the purpose of prosecuting or punishing a person on the grounds of his/her race, gender, nationality, political opinion or sexual orientation is it not up to the magistrate to make a determination in this regard, based on the evidence before him, for if this is so the person concerned is not liable for extradition? Similarly, where it appears that what passes for due process in the foreign state would be fundamentally repulsive to basic universal notions of fundamental human rights, should the magistrate as a judicial officer not say that the person before him is not liable to be surrendered?

47. For this reason, I have some difficulty with the ambit of the decision which was arrived at by the Constitutional Court in *Robinson*. It effectively relegates the magistrate, in relation to human and constitutional rights issues in an extradition enquiry from a non-associated state, to being a mere scribe and record compiler. He cannot rule, even in the case of an obvious and flagrant breach of an extraditee's treaty or fundamental human rights, that he is not liable for extradition on the grounds that it would be grossly unjust, and must leave this to the Minister to decide in the exercise of his discretion. All the magistrate can do is to accept any evidence which the extraditee may put before him in this regard, which he may, but is not obliged to forward on to the Minister, and may include reference to it in the report which he forwards to the Minister in relation to his findings.[61] Whilst it is perfectly understandable that the ultimate decision as to whether or not a person sought by a foreign state should be extradited to it is one

[60] An extraditable offence is defined in s 1 of the EA as an offence which in terms of the law of the Republic and of the foreign state concerned is punishable with a sentence of imprisonment for a period of 6 months or more, but excludes any offence under military law which is not also a criminal offence in both the Republic and the requesting state, and at common law and in terms of most treaties so-called political offences are generally also excluded. In terms of Art 2 of the European Convention on Extradition an extraditable offence is one which in terms of the law of the foreign state concerned and of the Republic is punishable with a sentence of imprisonment for a period of at least 1 year or more, excluding political offences (Art 3) and military offences (Art 4) which are not also criminal offences in both states.

[61] *Geuking* n 24 at para [42]; *Garrido* n 17 at para [25].

which should be made by the responsible Minister in the exercise of a discretion which will have regard for political and other factors which a court would not properly have regard for in deciding whether a person is liable to be surrendered, in my view the latter decision is essentially a judicial determination which should be made by a judicial officer, having regard for the law. I note that the EA does provide that the Minister may order that a person shall not be extradited if he is satisfied that he will be prosecuted, punished or prejudiced at his trial in the foreign state by reason of his gender, race, religion, nationality or political opinion (sexual orientation and ethnic origin are not included amongst these grounds), and to this end he will clearly benefit from a prior judicial determination in this regard.

48. That then as far as the debate concerning rights issues is concerned. I will revert to this aspect later when I consider the appellant's particular complaint that to extradite him would result in a breach of his right to a fair trial in the UK.

(ii) Extradition enquiries and preparatory examinations

49. The second aspect which must be considered, in relation to the nature of the enquiry which takes place before the magistrate is that the EA provides that it must be conducted in the *manner* in which a preparatory examination would be conducted in terms of the Criminal Procedure Act. But, in my view this does not mean that it should mirror it in *form.*

50. Preparatory examinations were a species of judicial enquiry before a magistrate into the circumstances of an alleged criminal offence, which were previously held in terms of the Criminal Procedure Act.[62] They have long fallen into disuse.

51. They were aimed at testing the strength of the case for the prosecution and the degree of guilt of an alleged offender, with a view to evaluating the prospects of a possible later prosecution, almost as a 'dry run' for a subsequent trial.[63]

52. They required the evidence in possession of the state to be submitted on oath or affirmation in open court, before a magistrate, subject to the accused's right to test the cogency thereof by way of cross-examination. At the conclusion of the

[62] The provisions which deal with them are ss 129-140 of the Criminal Procedure Act, 51 of 1977.
[63] See Lansdown and Campbell *South African Criminal Law and Procedure* Vol V at p 378.

state's 'case' a charge could then be put to the accused, based on the evidence which had preceded it, to which he would be required to plead, unless the magistrate was of the view that a 'sufficient' case had not been made out to put the accused on trial for any charge, in which event he could discharge the accused summarily at the end of the state's 'case'. In the event that a charge was put the accused could, after pleading thereto, tender his own evidence or that of any witnesses that he wished to call. But even if the accused admitted his guilt in his plea or during evidence he could not be convicted and sentenced on the basis thereof as the proceedings did not constitute a trial. The magistrate was simply required to take in the evidence and transmit the record thereof to the Attorney-General[64] for his decision as to a possible later prosecution.

53. It is obvious that although the EA prescribes that the extradition enquiry before the magistrate is to be conducted in the manner in which a preparatory examination would be conducted this does not envisage a process whereby formal charges are put to an extraditee who is then required to plead thereto, and as far as I am aware extradition enquiries have never been conducted on this basis. The obvious reason for this is because extradition proceedings are merely in the nature of a preliminary enquiry designed merely to determine extraditability and are not trial proceedings, and as such it would obviously be improper and irregular for charges from a foreign state to be put by the prosecution authorities of the requested state to an extraditee, or for him to plead thereto. But in order to avoid the kind of confusion which manifested itself in this regard during the proceedings before the magistrate in this matter, when the appellant's counsel kept on insisting that he had a right to test the cogency of the evidence in possession of the state, and that the court was thereafter required to make a ruling on whether or not the evidence was sufficient to put the appellant on trial, whereafter the appellant would consider whether or should he should put up evidence in response thereto, it would perhaps be advisable for the provision in question to receive the necessary legislative attention, in order to make clear

[64] An official in charge of prosecutions and the predecessor in title to the now Director of Public Prosecutions, for the province concerned.

that which has long been simply accepted as implicit in regard to how proceedings in an extradition enquiry are to be conducted.

(iii) The standard & sufficiency of evidence at extradition enquiries

54. As has previously been pointed out the principal task of the presiding magistrate in an extradition enquiry is to determine whether the extraditee is liable to be surrendered and, in the case where such a person is accused of an offence, whether there is 'sufficient' evidence[65] to warrant a prosecution for the offences in the foreign state concerned. Where it is sought to extradite the person concerned for the purposes of serving a sentence, the Court is not required to determine the validity of the prior conviction for which the extraditee is to be sentenced, nor to interrogate or weigh up the evidence ie the proven underlying facts and circumstances which resulted in the conviction.

55. It is only where the foreign state seeks to extradite in order to prosecute the extraditee that factual issues as to the sufficiency of evidence will therefore arise for determination by the magistrate.

56. In *Harksen*[66] this court held that whether there was sufficient reason for putting an extraditee on trial in a foreign state required the court to make a finding as to whether there was a *prima facie* case against him, analogous to the standard of proof which applied in preparatory examinations. The decision must be seen in the light of the wording of s 10(1) of the EA at the time, which required the magistrate to determine not only whether the extraditee was liable to be surrendered but, in addition, whether there would be 'sufficient reason' for putting him on trial for the offences for which he was to be extradited, had they been committed in South Africa.[67]

57. In 1996 the section was amended to provide that the magistrate is required to determine whether there is sufficient evidence to warrant prosecution in the foreign state, and not in South Africa, and in this regard s 10 (3) was introduced. It provides that for the purposes of satisfying himself that there is sufficient

[65] S 10(1).

[66] *Harksen v The President of the Republic of South Africa* 1998 (2) SA 1011 (C) at para [99].

[67] S 12(5)(d) of the Namibian Extradition Act 11 of 1996 is worded in similar terms. Consequently, in *S v Bigione* 2002 (1) SACR (NM) the Namibian High Court held that for the purposes of extradition in Namibia *prima facie* evidence of the commission of an offence was required.

evidence to warrant a prosecution in the foreign state the magistrate shall accept, as conclusive proof, a certificate which appears to be issued by an appropriate authority in charge of the prosecution in that state, stating that it has sufficient evidence at its disposal to warrant the prosecution of the person concerned. In *Geuking*[68] the constitutional court held that the provision did not violate an extraditee's right of access to our courts[69] nor did it interfere with the independence of the judiciary. It is simply designed to serve as an aid for the magistrate, in the determination he is required to make as to the sufficiency of the evidence available to the foreign state, which may be a difficult matter.

58. In my view, given the amendments which were made in 1996, notwithstanding that proceedings in an extradition enquiry are to be conducted in the manner in which a preparatory examination would be held, the standard of proof which needs to be met is no longer necessarily a *prima facie* one, as would be the case in a preparatory examination.

59. Proust[70] points out that in extradition matters common law jurisdictions historically required that evidence of the alleged offences be provided in order to determine whether a sufficient case had been made out for the extradition to take place. To this end the standard of sufficiency adopted by most common law states was that of a *prima facie* case. In contrast to this, countries having a civil law tradition generally required no evidence, beyond a 'sufficient' summary of the facts, in order to satisfy the dual criminality principle.

60. Given the evidentiary burden in extraditions involving complex criminal matters the preparation of a documentary case to a *prima facie* standard is extremely time-consuming and resource intensive, and the resultant volume of evidentiary material required and the cost involved in assimilating it can become prohibitive. As a result, over the course of time many common law jurisdictions began to move away from the requirement of proof on a *prima facie* basis and increasingly moved either towards the adoption of the 'no evidence' approach

[68] Note 24 at para [44].
[69] In terms of s 34 of the Constitution.
[70] K Proust *International Co-operation: A Commonwealth Perspective* 2003 SACJ 295.

utilized by most civil law countries, or the so-called 'record of the case' approach, a hybrid standard between the two.[71]

61. In terms of the *prima facie* standard the requested state requires the submission of evidence sufficient to justify committal for trial in terms of its own domestic law, had the offence been committed there, and whilst it generally accepts affidavit evidence it must be of such a nature that it would be admissible in terms of its domestic law. In this regards the law pertaining to the admission of hearsay evidence in the domestic state would apply to the evidence submitted by the requesting state, and in in light of the hearsay rule followed in most common law countries first person affidavits would generally be required, and not third hand affidavits.

62. In terms of the 'no evidence' standard (which appears to have been adopted by the United Kingdom, most European countries, Australia and many SADC countries,[72] as well as many southern and Latin American states[73]) all that is usually required is a warrant of arrest and a summary of the alleged criminal conduct, together with an extract or statement of the relevant legal provisions applicable, in order to satisfy the requirements pertaining to dual criminality and extraditable offences.

63. In terms of the 'record of case' approach the standard of *prima facie* proof is retained but there is no requirement that the evidence must be submitted in a form which complies with domestic rules of evidence, particularly the rule that affidavits are to be in the first person. As such, hearsay evidence is permissible and a summary of the evidence in the case will usually suffice. In jurisdictions that follow this approach the ordinary protections which would follow in terms of standard evidentiary rules of admissibility are substituted by specific requirements for the authentication and certification of the evidence, in order to provide the requested state with a sufficient guarantee that it is both reliable and available. The 'record of the case' approach has been adopted in Canada.[74]

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[71] *Id* at 303.
[72] See Article 6 of the SADC Protocol on Extradition 2002.
[73] In many US states the standard of proof required is that of 'probable cause' see Proust n 68 at p 304.
[74] In terms of the Extradition Act SC 1999 C 18.

Usually, the 'record of the case' approach also requires that a judicial or prosecuting authority of the requesting state certifies that the evidence summarised or contained therein is available for trial and is sufficient under the law of that state to justify prosecution.

64. In my view, if one considers the wording of the relevant provisions of the EA and the applicable treaty in this matter the indications are that, at least insofar as extraditions which are sought by European states in terms of the European Convention on Extradition are concerned, we have adopted an approach somewhere between the 'record of the case' approach (as seems to be the case in terms of the Convention) and the 'no evidence' approach (as seems to be the case in terms of the EA) .

65. In this regard the EA 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[75] and authenticated in the prescribed manner.[76] Traditionally, at least until the passing of the Law of Evidence Amendment Act in 1988[77] 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.[78] Inasmuch as the proceedings are similar in nature to those followed in preparatory

[75] By way of an 'apostille' in terms of Schedule B of the EA rtw s 9(3)(a)(i).

[76] The EA provides for authentication (ie verification) to occur by means of the signature and seal of office of the head of any South African diplomatic or consular mission or any honorary consul-general, vice-consul or trade Commissioner or an officer at a South African diplomatic, consular or trade office (s 9(3)a)(iii)(aa)); or of any government authority of such foreign state charged with the authentication of documents in terms of the law of such state (s 9(3)a)(iii)(bb)); or of any notary public or any other duly authorised person of such foreign state (s 9(3)(a)(iii)(cc)).

[77] Act 45 of 1988.

[78] In terms of the Law of Evidence Amendment Act 45 of 1988, hearsay evidence is now defined as evidence the probative value of which is dependent upon the credibility of someone other than the deponent thereto.

examinations, it bears mention that hearsay evidence was considered to be admissible in preparatory examinations.[79]

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.[80]

67. If one has regard for the relevant provisions of the European Convention on Extradition[81] 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. However, even if I am wrong in regard to the meaning I have afforded to the provision I would come to the same

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[79] *R v Alli Ahmed* 1913 TPD 500 at 502.

[80] In *Geuking* n 24 at para [80], Goldstone J held that it was not inappropriate or unfair for the legislature to relieve the magistrate of the 'invidious task' of deciding whether the conduct warrants prosecution in the foreign state, as this was an issue in respect of which South African lawyers and judicial officers will usually have no knowledge or expertise.

[81] Article 12a-c.

conclusion in terms of the Law of Evidence Amendment Act which provides[82] 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.

69. In this regard given that the whole purpose of an extradition enquiry is simply to determine extraditability and not guilt, and the forum is therefore not required to arrive at any definitive evidentiary findings in relation to culpability, in my view hearsay evidence should be permissible at extradition enquiries in terms of Act 45 of 1988, provided the safeguards for its reception, as set out in the EA ie the requirements of authentication and certification, have been duly met.

The law applied

70. It is finally time to deal with the various grounds of review and appeal, which have been raised. In the first place, for the reasons set out in the preceding paragraphs the affidavit of Mildren, albeit largely hearsay, was admissible in the extradition enquiry and given that it is common cause that the affidavit and the other documents which were submitted in the request for extradition were those required in terms of the relevant provisions in the Convention,[83] and that they were duly and properly certified and authenticated, they were properly received into evidence by the magistrate. As I have previously indicated, apart from Mildren's affidavit included amongst these documents was the trial indictment in terms of which the appellant is to be re-tried on the selfsame, original offences[84] before the Crown Court of Bristol, as well as the warrant of arrest at first instance which was issued by the North Avon magistrate's court in terms of which the appellant is sought for an additional 41 offences, and the certificate from the Chief Prosecutor for the South West Area of the Crown Prosecution Service of England and Wales, in terms of s 10(2) of the EA, in which he declared that the evidence which was 'contained' in the request for the extradition of the appellant

[82] S 3(1)(a)(i)-(vii).
[83] As per Article 12.
[84] Save for the offence of administering a 'stupefying' drug to one of his victims, which the state is no longer pursuing, in line with the Court of Appeal's comments in this regard.

was available for trial and was sufficient under the law of England and Wales to justify his prosecution. In my view the contents of Mildren's affidavit, read together with the Bristol indictment and the warrant from North Avon adequately set out the charges against the appellant with sufficient particularity as regards time and place for the appellant to know what he was alleged to have done, and when, and there is no merit in the complaints raised in this regard. Any further niggles can surely be raised with the trial court in the UK.

71. Secondly, the appellant's contention that s 7(2) of the UK Criminal Appeals Act of 1968 is a bar to him being extradited to stand trial on the additional offences which are set out in the North Avon warrant, is mischievous. The section simply provides that in the event of a successful appeal against a criminal conviction in the UK, a Court of Appeal in the UK (and not a Court of any state in which extradition is sought, such as South Africa) may only order that the accused be retried for the offences of which he was originally convicted,[85] or any offence which might have been an alternative offence to that with which he was originally charged, or a competent verdict in respect thereof. [86] In ordering that the appellant was to be re-tried in respect of the same offences for which he originally stood trial the Court of Appeal thus did no more than to give effect to the provisions of s 7(2), and the trial indictment which was lodged at the Bristol Crown Court in April 2016 was in accordance with that directive. But that does not mean that the UK authorities cannot seek the appellant's extradition on additional, fresh charges which will presumably be preferred against him in separate trial proceedings, and in fact, by virtue of the rule of speciality, which is fundamental to extradition law, unless his extradition is granted by South Africa on the additional charges the UK authorities will not be able to prosecute him for them. In this regard Article 14 of the European Convention on Extradition provides that a person who has been extradited shall not be 'proceeded' against, or sentenced or detained for any offence committed prior to his surrender other

[85] S 7(2)(a).
[86] S 7(2)(b) and (c).

than that for which he was extradited.[87] A similar provision is to be found in the EA[88] and the UK Extradition Act 2003[89] (as also in the SADC Protocol on Extradition[90]).

72. Thirdly, for the reasons set out above, although the EA stipulates that an extradition enquiry before a magistrate is to be conducted in the manner that a preparatory examination would be held, this does not mean that any charges must be put to the extraditee or that he is required to plead thereto, nor is the magistrate empowered to consider whether he should be discharged, once the state has concluded putting forward the evidence which it has against him, before he considers whether or not to put up any evidence. All that is envisaged is that the evidence contained in the request for extradition is to be formally put before the magistrate together with the s 10(2) certificate, for his consideration as to whether or not the formal requirements of the EA and the treaty concerned have been met in regard to proof of an extraditable offence, and the requirements of dual criminality and speciality. If this has been established the extraditee has the right to put before the magistrate such evidence as may be relevant to the extradition request and the legalities required, which may be in the form of testimony from himself and/or witnesses, together with such documentary evidence or submissions as may be relevant to these issues, or to the exercise by the Minister of his discretion in regard to the extraditee's surrender. In the circumstances, the complaint that the magistrate erred in not following the exact format as that which would have been followed in a preparatory examination and that the proceedings were irregular in this respect, is similarly without merit.

73. Given the decision of the Constitutional Court in *Robinson*, the magistrate was correct in adopting the attitude that it was not within his remit to consider whether or not either the appellant's fundamental human rights or his rights to a fair trial before an English court would be breached, were he to be extradited, and that this was something which the Minister needed to determine. But that does not

[87] Unless the requested state consents.
[88] S 2(3)(c) and 3(*bis*).
[89] S 17.
[90] Article 16.

mean that the magistrate could simply refuse to accept any evidence which the appellant wished to tender, which might have reflected upon these aspects. In fact, somewhat anomalously, although the magistrate was unable (as a result of the decision in *Robinson),* to pronounce on these issues and whether or not any breach of a constitutional, fair trial, or fundamental human right would possibly take place were the appellant to be extradited, he was nonetheless obliged in terms of the decision of the Supreme Court of Appeal in *Garrido*[91] to receive any evidence which the appellant wished to adduce, pertaining to these aspects, inasmuch as these could have a bearing on the exercise of the Minister's discretion as to whether or not he should order that the appellant be surrendered, and to any report which the magistrate might deem necessary to submit to the Minister.

74. At the conclusion of proceedings on the afternoon of 20 October 2017 the magistrate refused to grant a postponement 'for God knows how long' (sic) in order to 'track down some media in the UK' and to obtain a report from a British expert on allegedly discriminatory aspects of the UK law pertaining to sexual offences committed by homosexuals. But as we know, due to time constraints and the fact that the matter was not ready to be argued, it was postponed to 3 November and then again to 10 November 2017, at which time detailed argument was presented and the magistrate thereafter made his order, with reasons to follow.

75. During argument before us the appellant's counsel conceded that, notwithstanding the magistrate's ruling on 20 October 2017, there was nothing which prevented the appellant from obtaining the necessary affidavits which he wished to submit in the 3 week period between 20 October and 10 November 2017, and there is no indication from the record that any attempts were made to do so. However, it was contended that the reason why these affidavits were not submitted to the magistrate is because he had made it abundantly clear during proceedings on 20 October 2017 that he was not going to entertain them, as he did not consider them to be relevant. Having considered the transcript of

[91] Note 17 at para [22].

proceedings I think there is some substance in the appellant's submission. At the very least I accept that the magistrate's attitude might well have given rise to the impression, in the mind of the appellant's legal representatives, that he was not at all disposed to receiving any such evidence, and this may have led them to believe that there was no point in trying to obtain the affidavits or media extracts or trying to put them before the magistrate. On the face of it therefore I accept that the magistrate's refusal to entertain such evidence constituted an irregularity, in that it breached the appellant's procedural rights and the *audi alteram partem* principle.

76. The prosecutor submits that when one considers what the affidavits were supposed to say, we should find that there was in fact no real breach of the appellant's rights. In this regard he points out that the appellant is to be prosecuted in the UK not for his sexual orientation as a homosexual, but for his paedophiliac molestation and rape of children, and he submits that the discriminatory features of UK law which the appellant eluded to, such as the allegedly unfairly discriminatory distinction between the prescription period for heterosexual underage sex with female minors vis-à-vis that applicable to homosexual underage sex with male minors, and certain evidentiary presumptions and different penalties which allegedly apply in the case of the former and not the latter etc are therefore irrelevant. He also points out that, given the decision in *Robinson* and given the nature of extradition proceedings it was not open to the magistrate (nor is it within this Court's powers) to comment on the constitutionality or fairness of the law in the UK, and this is something which can, and should only, be taken up by the appellant in the UK Court where he is tried.

77. In like vein, as far as the media reports which the appellant wished to submit are concerned it may equally be said that these are irrelevant. In the first place, neither in this country nor, I venture to suggest, in the UK can it be said that a person accused of heinous sexual offences against children has a right to bar the media from covering the proceedings, nor does such a person enjoy the right to prevent a prosecution from taking place because of any complaint they may have

about the exposure they have received in the media. They may perhaps be able to lodge a complaint with any regulatory body that deals with the media, but sexual offences against vulnerable children are serious offences which need to be exposed and reported on by the media and they have a duty to inform the public in this regard, and members of the public equally have a right to know about such matters and who the perpetrators are, so that they may take steps to protect themselves and their children. I note that the appellant claims that the media's coverage of this matter subsequent to the judgment of the Court of Appeal is wrongful in that it occurred despite an injunction barring any publicity. This is not correct. The Court of Appeal only decreed that pending a re-trial of one or both of the accused, there was to be no publication of the proceedings before that Court. In the light of the subsequent re-trial of the appellant's co-accused many years before the appellant's arrest, that injunction no longer finds application.

78. In the circumstances one wonders what the relevance would be of the evidence which the appellant wished to put before the magistrate, and how it would be capable of impacting, in any meaningful sense, on the exercise which the Minister is required to undertake, in terms of s 11 of the EA. But the fact of the matter is that insofar as such evidence might have a bearing on the Minister's decision the appellant was entitled to demand that the magistrate receive it, and in this regard as I have previously indicated, the proceedings were irregular.

79. On top of this, there is no doubt that the appellant was badly treated both by the prosecutor, as well as by the magistrate, who was driven by impatience and intemperate haste to conclude the proceedings as quickly as he was able to without having due regard for the appellant's procedural rights. The unfortunate impression which one gets from the transcript is that the magistrate saw the proceedings as nothing more than a mere formality, and anything that got in the way of the speedy disposal thereof was an unwelcome distraction. Not only did the appellant have a right to put before the magistrate the relevant evidence he wished to, but both the appellant and his legal representatives were entitled to be treated with the same dignity, courtesy and respect afforded to any person who

appears in our courts, no matter what they may have done, or what they may be accused of, and both the prosecutor and the magistrate failed in this respect. The prosecutor was allowed to have free rein in his cross-examination and the magistrate failed to control him and to ensure that the proceedings were accompanied by the necessary decorum. But, that said, it is also clear from the transcript that the appellant was not intimidated by the prosecutor and gave him as good as he got, and there is no suggestion that the appellant was in any way unable to put before the court what he wanted to by way of his own evidence. In this regard he gave detailed evidence as to why he believed the UK authorities were not at liberty to seek his extradition on the new offences set out in the North Avon warrant and why the law in the UK was discriminatory and he indicated that, other than to deny that he had molested or raped any of the children concerned, and to allege that the police had manipulated the witnesses to say that the offences had allegedly been committed when they were under the age of 16, he did not wish to say anything about the offences, and relied on his right to silence.

80. In the circumstances I am satisfied that the appellant had a reasonable opportunity, during his testimony, to put before the court such evidence as he wanted to, and it cannot be said that the irregularities which occurred were of such a nature as to vitiate the proceedings as a whole nor such that it can be said that there was a fundamental failure of justice. Given that the formalities required in terms of the EA and the Convention were otherwise complied with and the appellant was thus clearly extraditable I am consequently of the view that there is no cause to set aside the proceedings, and in relation to the failure to allow appellant to put forward the affidavits and other evidence referred to I propose this be remedied by returning the matter to the magistrate and affording the appellant such an opportunity, before the matter is then referred to the Minister, by the magistrate, together with any such report as the magistrate may deem necessary in this regard.

81. Insofar as costs are concerned, both parties may claim a measure of success. Although the state was successful in warding off an order in the review

application that the proceedings be set aside in their entirety, the appellant equally was successful in obtaining an order allowing him to put forward certain evidence which the magistrate was not prepared to receive, for his consideration and submission to the Minister. And both in the appeal and the review the appellant raised important matters of law in relation to extradition proceedings. In the circumstances, as in the matter of *Harksen*[92] inasmuch as the appellant sought to rely on the alleged non-compliance with fair trial and constitutional requirements pertaining to an international agreement and domestic law, I am of the view that each party should be liable for their own costs, in respect of both matters.

82. In the result, I make the following Order:

82.1 The review (in the matter under case no 19434/17) and the appeal (in the matter under case no. A 37/18) are dismissed.

82.2 The order made by the magistrate of Cape Town on 10 November 2017 declaring that the appellant/applicant is liable to be extradited to the UK, in respect of charges which have been preferred against him in terms of an indictment which was lodged with the Bristol Crown Court on 31 March 2016 as well as in respect of the offences set out in the warrant of first instance which was issued by the North Avon magistrates' court on 26 February 2016, is confirmed.

82.3 The proceedings of the extradition enquiry which was held before the magistrate of Cape Town shall be re-opened, in order to allow the appellant an opportunity, if he so wishes, to put before the magistrate (for his consideration and report to the Minister in terms of s 10(4) of the Extradition Act, 62 of 1967, if he deems it fit) within 15 days from date hereof an affidavit by an expert on UK law, in relation to the alleged discriminatory features thereof pertaining to the sexual offences for which the appellant is sought for extradition to the UK, and any documentary evidence pertaining to the alleged unfair media coverage which the appellant has received.

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[92] *Harksen v The President of the Republic of South Africa & Ors* 2000 (2) SA 825 (CC) at para [30].

82.4 The Director of Public Prosecutions shall have the right to file (a) further affidavit(s) and/or submissions in response to any affidavit and/or documentary evidence which the appellant files in terms of the preceding sub-paragraph, within 15 days thereof, whereafter the magistrate shall consider the further evidence, if any, which has been submitted by the parties and shall thereafter submit the record of the proceedings together with such further evidence and any report as he may deem necessary in respect thereof, as well as a copy of this judgment, to the Minister, as soon as possible, for his decision in terms of s 11 of the Extradition Act, 62 of 1967.

82.5 There shall be no order as to costs.

ML SHER
Judge of the High Court

I agree.

MI SAMELA
Judge of the High Court

Attendances:

Appellant's/applicant's counsel: Adv J Van Der Berg

Appellant's/applicant's attorneys: Mathewson & Gess Inc (Cape Town)

Respondent's counsel: Adv LJ Badenhorst

(Office of the Director of Public Prosecutions, Cape Town)