THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION)

JUDGMENT

In the appeal matter of A181/2020

DIRECTOR OF PUBLIC PROSECUTIONS, WESTERN CAPE **APPELLANT**

and

AUGUSTINUS PETRUS MARIA KOUWENHOVEN **RESPONDENT**

And in the review matter of 181/2020

AUGUSTINUS PETRUS MARIA KOUWENHOVEN **APPLICANT**

and

DIRECTOR OF PUBLIC PROSECUTIONS, WESTERN CAPE **FIRST RESPONDENT**

THE STATE **SECOND RESPONDENT**

THE MINISTER OF JUSTICE AND CORRECTIONAL SERVICES **THIRD RESPONDENT**

THE ADDITIONAL MAGISTRATE, MAGISTRATES' COURT FOR THE DISTRICT COURT OF CAPE TOWN **FOURTH RESPONDENT**

Coram: Rogers and Sher JJ

Heard: 1 December 2020

Delivered: 23 December 2020

JUDGMENT

Rogers J (Sher J concurring):

Introduction

[1] These two matters were heard together. The first is an appeal by the Director of Public, Western Cape ('DPP'), against a decision of the Cape Town Magistrate's Court ('CTMC') discharging the respondent in the appeal, Mr Augustinus Petrus Maria Kouwenhoven ('Mr Kouwenhoven'), in terms of s 10(3) of the Extradition Act 67 of 1962 ('Extradition Act'). The appeal purports to be brought in terms of s 310 of the Criminal Procedure Act 51 of 1977 ('CPA'). On the footing that s 310 was applicable, the CTMC at the DPP's request stated a case on three questions of law for consideration by this court.

[2] The second matter is an application by Mr Kouwenhoven to review (a) the decisions of the DPP to deliver a notice of appeal and a notice of intention to prosecute the appeal and (b) the decision of the CTMC to state a case. Mr Kouwenhoven seeks related declaratory orders that these actions are inconsistent with the Constitution and that s 310 of the CPA has no application to orders of discharge under s 10(3) of the Extradition Act. In the alternative, Mr Kouwenhoven seeks a declaratory order that a person discharged under s 10(3) has a right to be heard before a magistrate states a case in terms of s 310, and he seeks the review of the stated case on the basis that he was not afforded this right. Mr Kouwenhoven also sought the review of the CTMC's decision to receive certain documents into evidence during the course of the extradition enquiry, but he does not persist with this relief in the present proceedings. The DPP is the first respondent in the review. The second, third and fourth respondents are the State,

the Minister of Justice and Correctional Services and the Additional Magistrate, CTMC.

[3] Mr Katz SC, leading Messrs Cooke and Bishop, appeared for Mr Kouwenhoven in both matters. Mr Burke appeared for the DPP in the appeal. Mr Breitenbach SC, leading Ms Christians, appeared for the first to third respondents in the review. The magistrate abided.

Procedural background

[4] In April 2017 Mr Kouwenhoven, who is a Dutch national, was convicted by a Dutch court of the illegal supply of weapons to the regime of Charles Taylor in Liberia and Guinea and of participating in war crimes in those countries. The crimes of which he was convicted were not committed within the territory of the Netherlands. They were, though, crimes in respect of which the Netherlands under its law exercised extraterritorial jurisdiction. Mr Kouwenhoven continues to maintain his innocence and complains that the proceedings pursuant to which he was convicted were unfair. We are not concerned with that.

[5] Although Mr Kouwenhoven was present for most of the proceedings against him in the Netherlands, he was in Cape Town by the time he was convicted and sentenced. The circumstances in which he came to be here are not now relevant. In December 2017 Mr Kouwenhoven was arrested in Cape Town on a warrant issued by a magistrate in Pretoria in terms of s 5(1)(*b*) of the Extradition Act. The extradition enquiry was held in abeyance pending certain other proceedings brought by Mr Kouwenhoven.

[6] The extradition hearing before the CTMC got underway in November 2019. The DPP was represented by Mr C L Burke. Mr Kouwenhoven raised three defences to his extradition: (a) that the DPP had not proved that South Africa and the Netherlands were party to an extradition treaty (‘the treaty question’); (b) that

the requirements for receiving into evidence various documents, including the Dutch judgment and its translation, had not been satisfied and that there was thus no evidence of his conviction and sentence ('the documents question'); (c) that he was not liable to be extradited because the crimes he was alleged to have committed and for which he had been convicted and sentenced were not committed within the territory of the Netherlands ('the jurisdiction question').

[7] On 14 January 2020 the CTMC ruled on the documents question, holding that the Dutch judgment and its translation were duly receivable into evidence (the magistrate held otherwise in relation to certain other documents). On 21 February 2020 the CTMC ruled on the other two questions. The magistrate found against Mr Kouwenhoven on the treaty question but upheld his argument on the jurisdiction question. The CTMC thus discharged Mr Kouwenhoven in terms of s 10(3).

[8] On 5 March 2020 the DPP, through Mr Burke, requested the CTMC to state a case in terms of s 310 of the CPA for consideration by this court. The request identified three questions of law. The magistrate asked for a transcript of the proceedings, which caused some delay. On 9 July 2020 the magistrate sent Mr Burke a draft of her stated case, explaining why she had only included only two of the three questions. Mr Burke replied, pointing to passages in the transcript where he had raised the third question. The magistrate evidently accepted Mr Burke's submission, because on the following day she issued a stated case setting out the three questions of law initially requested. Mr Kouwenhoven's legal representatives were not notified of the DPP's request for a stated case and were not copied on the correspondence between Mr Burke and the magistrate.

[9] The three questions are formulated thus in para 4 of the stated case:

> '4.1 Is a judicial officer conducting an extradition enquiry empowered to consider the question of the jurisdiction of the requesting state or is this a question for consideration by the executive, specifically the Minister of Justice and Constitutional Development?
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> 4.2 Is jurisdiction a relevant consideration in an extradition enquiry where the requested person has already been convicted by the requesting state?
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> 4.3 Is the reference to jurisdiction in the Extradition Act confined to the territorial jurisdiction of the requesting state only or does it include extraterritorial jurisdiction?

The issues for our decision

[10] In response to a pre-hearing note from the court, Mr Kouwenhoven's counsel accepted that a review application was not necessary in order to pursue the argument that s 310 of the CPA does not apply to an extradition discharge. The point could have been taken at the commencement of the appeal as an *in limine* objection to the court's jurisdiction to entertain the matter. All sides accepted, however, that if s 310 in principle applied to an extradition discharge, the contention that Mr Kouwenhoven should have been heard before the magistrate stated a case was a proper matter for review, since if he should have been heard, the fact that he was not did not appear from the record.

[11] Mr Kouwenhoven's counsel informed the court that he would not be pursuing, in the present proceedings, a review of the magistrate's decision on the documents question. If the DPP's appeal were to fail, either for procedural or substantive reasons, Mr Kouwenhoven's discharge would stand, and his partial failure on the documents issue would be academic. If the DPP's appeal were to succeed (resulting in a reversal of the magistrate's decision on the jurisdiction question), the matter would be remitted to the CTMC to finalise. Since there are no outstanding defences, this would inevitably result in a committal order in terms of s 10(1) of the Extradition Act. In this event, Mr Kouwenhoven would have a

right of appeal in terms of s 13 of the Extradition Act. In that appeal he could argue that the magistrate erred on the treaty and documents questions. At any rate, if a review was thought necessary, that would be the time to bring it.

[12] There are thus three issues to be decided:

(a) whether s 310 of the CPA applies to an extradition discharge (we treat this as an *in limine* objection to the court's jurisdiction to entertain the DPP's appeal);

(b) if so, whether Mr Kouwenhoven was entitled to be heard (ie to have the benefit of the *audi alteram partem* principle) before the magistrate stated a case (if the answer to this question is yes, it is common cause that *audi* was not observed and that the review should succeed);

(c) if the two preceding questions are decided in favour of the DPP, whether the magistrate was right on the jurisdiction question (if she was wrong, the appeal would succeed and the matter would be remitted to the CTMC to be finalised).

The two s 310 issues

[13] I have read and agree with the judgment of my colleague Sher J on the first and second of the above questions. I turn to the third question.

The jurisdiction question

The European Convention on Extradition

[14] In May 2003 South Africa acceded to the European Convention on Extradition ('Convention') and to the additional and second additional protocols thereto.[1] The Netherlands is one of the signatories to the Convention. This is the extradition agreement which the CTMC found to exist between South Africa and

[1] Article 30 of the Convention permits the Committee of Ministers of the Council of Europe to invite non-member States to accede to the Convention.

the Netherlands. In the present case, the Netherlands was the requesting party and South Africa was the requested party.

[15] In terms of article 1 of the Convention, the parties *inter alia* undertake to surrender to each other any person who is wanted by a competent authority for the carrying out of a sentence. By article 7(1) of the Convention, the requested party may refuse to extradite a person 'for an offence which is regarded by its law as having been committed in whole or in part in its territory or in a place treated as its territory'. Article 7(2) reads thus:

> 'When the offence for which extradition is requested has been committed outside the territory of the requesting Party, extradition may only be refused if the law of the requested Party does not allow prosecution for the same category of offence when committed outside the latter Party's territory or does not allow extradition for the offence concerned.'

[16] Despite the contrary argument by Mr Kouwenhoven's counsel, I am satisfied that the concluding phrase in article 7(2) ('or does not allow extradition for the offence concerned') does not envisage a general prohibition, by the law of the requested party, against extradition of persons parties charged or convicted under the requesting party's extraterritorial jurisdiction. If that had been the intention, the concluding words would have been 'or does not allow extradition for offences committed outside the territory of the requesting Party'.

[17] The Convention proceeds on the basis that the parties thereto exercise extraterritorial jurisdiction over certain types of offences and that, in the ordinary course, they will reciprocally recognise each other's extraterritorial jurisdiction, provided it accords with an extraterritorial jurisdiction which the requested party itself exercises. Articles 8[2] and 9[3] envisage cases in which both the requesting

[2] Article 8 permits the requested party to refuse extradition if its authorities are proceeding against him in respect of the same offence.

[33] Article 9 precludes extradition if the authorities of the requested party have passed a final judgment in respect of the same offence. The requested party may refuse extradition if its authorities have decided not to institute, or to

party and the requested party could exercise jurisdiction over the same offence, thereby implicitly recognising extraterritorial jurisdiction. The additional protocol specifies crimes which are extraditable despite their potentially political character, *viz* crimes against humanity and war crimes. These are crimes over which civilised States typically exercise extraterritorial jurisdiction.

[18] In the circumstances, the concluding words in article 7(2) ('the offence concerned') envisage some exclusion relating to the particular offence charged rather than extraterritorial offences in general. Exclusion under article 2(3) is probably what the framers of the Convention had in mind.[4]

[19] I have dealt with the Convention by way of introduction, not because the Convention is an instrument with reference to which the Extradition Act should be interpreted, but in order to make the point that if the Extradition Act were interpreted to preclude extradition for crimes committed outside the territory of the requesting party, the South African government would be prevented from concluding, or fully honouring, the terms of international treaties such as the Convention, despite the fact that the extraterritorial jurisdiction exercised by the requesting State accords with an extraterritorial jurisdiction which South Africa itself enjoys. And in this regard I may mention that Mr Kouwenhoven did not raise, as one of his defences in the extradition enquiry, that South Africa would not enjoy extraterritorial jurisdiction in respect of the offences for which he was charged and convicted in the Netherlands.

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terminate, proceedings in respect of the same offence. This provision was amplified by article 2 of the additional protocol.

[4] Article 2(1) defines extraditable offences in general (offences punishable under the laws of both the requesting and requested parties for a maximum period of detention of at least one year). Article 2(3) reads: 'Any Contracting Party whose law does not allow extradition for certain of the offences referred to in paragraph 1 of this article may, in so far as it is concerned, exclude such offences from the application of this Convention.'

The Extradition Act

[20] Turning to the Extradition Act, the definition of 'extraditable offence' in s 1 does not incorporate an element of jurisdiction or territory. Section 2 makes provision for the President to conclude extradition agreements providing for the surrender on a reciprocal basis of persons accused or convicted of committing extraditable offences.

[21] Section 3, which is central in the present case and is headed 'Persons liable to be extradited', deals, in its three sub-sections, with the liability of persons to be extradited to foreign States (a) with whom we have extradition agreements; or (b) with whom we do not have extradition agreements; or (c) which are 'designated States' as defined. We are dealing here with the first category, in regard to which s 3(1) provides as follows:

> 'Any person accused or convicted of an offence included in an extradition agreement and committed within the jurisdiction of a foreign State a party to such agreement, shall, subject to the provisions of this Act, be liable to be surrendered to such a State in accordance with the terms of such agreement, whether or not the offence was committed before or after the commencement of this Act or before or after the date upon which the agreement comes into operation and whether or not a court in the Republic has jurisdiction to try such person for such offence.'

Sub-sections (2) and (3) repeat the phraseology, 'committed with in the jurisdiction of' the requesting State.

[22] Section 9 requires that a person arrested on an extradition warrant be brought before a magistrate for the holding of an enquiry with a view to the surrender of such person to the foreign State. The matters of which the magistrate must satisfy him- or herself at the enquiry depend on whether or not the foreign State is an 'associated State'. An 'associated State' is defined in s 1 as a foreign State in respect of which s 6 applies. Section 6 deals with extradition agreements between South Africa and African States where the extradition agreement in

question provides for the endorsement for execution of warrants of arrest on a reciprocal basis. Section 9(4) reads thus:

> '(4) At any enquiry relating to a person alleged to have committed an offence –
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> (a) in a foreign State other than an associated State, the provisions of section 10 shall apply;
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> (b) in an associated State –
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> (i) the provisions of section 10 shall apply in the case of request for extradition contemplated in section 4(1); and
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> (ii) the provisions of section 12 shall apply in any other case.'

[23] Section 10, which the magistrate applied in the present case, is headed 'Enquiry where offence committed in a foreign State'. Sub-section (1) reads thus:

> 'If upon consideration of the evidence adduced at the enquiry … 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, the magistrate shall issue an order committing such person to prison to await the Minister's decision with regard to his or her surrender…'.

[24] Section 12, which applies to associated States, is headed 'Enquiry where offence committed in associated State'. In terms of sub-section (1), the only thing of which the magistrate need be satisfied is that the person brought before him or her 'is liable to be surrendered to the associated State concerned'.

[25] The 'liability to be surrendered' to a foreign State is regulated by s 3. Where we have an extradition agreement with the requesting State, the only requirement, for liability to be surrendered, is that the person should be accused or have been convicted of an offence included in the agreement and committed within the jurisdiction of the foreign State. Where we have an extradition agreement with an African State which provides for the endorsement of warrants,

this is, by virtue of s 12(1), the only thing that need be established at the extradition enquiry. In other cases, and by virtue of s 10(1), the magistrate must (unless the person has already been convicted in the foreign State) also be satisfied that there is sufficient evidence to warrant prosecution in the foreign State.

The nature of jurisdiction

[26] Mr Kouwenhoven's argument is that 'committed within the jurisdiction of a foreign State' in s 3(1) means 'committed within the territory of a foreign State' or more simply 'committed in a foreign State'. Although the verb 'committed' may lend some colour to this argument, the fact that rewording is needed to bring out the narrow meaning for which Mr Kouwenhoven contends suggests that the proposed interpretation does not accord with the ordinary meaning of the phrase, particularly the word 'jurisdiction'. 'Jurisdiction' most naturally connotes the power of a State, and particularly its courts, to deal with or entertain a matter.

[27] Judicial jurisdiction has a territorial component, but that is not because 'jurisdiction' and 'territory' are synonymous but because the substantive rules determining a court's jurisdiction often require some territorial link in order for the court to have jurisdiction over a matter. The court's territorial area thus needs to be defined for jurisdictional rules based on the place of residence of a plaintiff or defendant, the place where something happened (eg the conclusion of a contract or the commission of a delict or crime) or was meant to happen (eg the performance of a contract), the place where property is located or where a child or other person is present, and so forth. In South Africa, when a court exercises civil jurisdiction based on the place of residence of a defendant, it is not necessary that any of the acts giving rise to the claim should have been committed within the court's territory.

[28] In the criminal sphere, the commission of a crime within a court's territory has always been, and remains, the most common jurisdictional requirement. Some countries, however, claim the right to try their own nationals for crimes in foreign lands. Many countries have long recognised jurisdiction to prosecute piracy and other crimes against the law of nations, wheresoever and by whomsoever committed (*R v Holm; R v Pienaar* 1948 (1) SA 925 (A) at 930, in which it was held that a South African subject may be tried in South Africa for high treason committed abroad; see also *S v Basson* 2007 (3) SA 582 (CC) paras 223-225). Universal jurisdiction in respect of crimes against humanity, such as slavery, piracy, war crimes, genocide and torture, is well-recognised, and indeed countries may be required, by international treaties or by international law, to investigate and prosecute such crimes on the basis of universal jurisdiction (*National Commissioner of Police v Southern African Human Rights Litigation Centre & another* [2014] ZACC 30; 2015 (1) SA 315 (CC) paras 25-42).

[29] There is, within s 3(1) itself, an implicit recognition that extradition to countries exercising extraterritorial jurisdiction is sanctioned. The concluding portion of the section states that the person shall be liable to be surrendered 'whether or not a court in the Republic has jurisdiction to try such person for such offence'. This means that the lawmaker envisaged extradition cases in which both the foreign State and South Africa might have jurisdiction. And 'jurisdiction' in the concluding part of s 3(1) undoubtedly means jurisdiction in the broad or usual sense.

Interpretation to be consistent with international law

[30] South African legislation must be interpreted as far as possible to comply with international law (*Glenister v President of the Republic of South Africa & others* [2011] ZACC 6; 2011 (3) SA 347 (CC) para 97; *National Commissioner of Police supra* para 22). In my view, a broad interpretation of 'jurisdiction' in the

Extradition Act would be more consistent with international law, since it would facilitate the extradition of persons charged with or convicted of crimes against humanity where the requesting State is exercising a universal jurisdiction consistent with international law.

[31] Mr Kouwenhoven's counsel argued that in cases such as the present the alleged criminal could, on the narrow interpretation, still be prosecuted. Either South Africa could prosecute (based on its universal jurisdiction), or the person could be extradited to the country in which his misdeeds were actually committed. While this may be theoretically true where the person has not yet been convicted by a court of competent jurisdiction, it is unworkable where extradition is (as here) sought in respect of the person who has indeed been so convicted.

[32] The question whether a person can raise double jeopardy where a country seeks to prosecute him for a crime of which he has already been convicted in another country has received different answers in different countries. In South Africa, *S v Pokela* 1968 (4) SA 702 (E) is authority for the proposition that an acquittal or conviction in a foreign court of competent jurisdiction may found a plea in this country of double jeopardy, a view which is supported by the authors of our leading criminal procedure textbooks.[5] This is also the law in England and Scotland,[6] and there is support for it in Canada as well.[7] Accordingly, there is a distinct danger, in conviction cases, that prosecution in this country would be foreclosed by double jeopardy, now entrenched in s 35(3)(*m*) of the Constitution.

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[5] Du Toit *et al Commentary on the Criminal Procedure Act* at 15-36A; Kruger *Hiemstra's Criminal Procedure* at 15-12 (both commenting on s 106 of the CPA).

[6] *R v Aughet* (1919) 13 Cr App R 101; *Treacy v Director of Public Prosecutions* [1971] AC 537 (HL); *R v Thomas* [1984] 3 All ER 34 (CA) at 36j-37c; The Law Commission (Law Com No 267) *Double Jeopardy and Prosecution Appeals* [2001] EWLC 276 paras 6.9-6.21.

[7] *R v Stratton* 1978 CanLII 1644 (ON CA); 3 CR (3d) 289 at 298 ; *Libman v R* 1985 CanLII 51 (SCC); [1985] 2 S.C.R. 178 at 212, though the question was left open in *R v Van Rassel* 1990 CanLII 124 (SCC); [1990] 1 SCR 225.

Prosecution might also be foreclosed by the law on double jeopardy in the country were the offence was committed.

[33] But even if a second prosecution were permissible, one must view the matter realistically. Generally, a second prosecution of this kind would be regarded as unfair or oppressive. The second country may have no will to undertake a prosecution or desire to subject the accused to a second trial. A country should not be forced to do so (which could be lengthy, expensive and impractical) by a rule prohibiting extradition to the country which has already properly convicted the person for the same crime, exercising an extraterritorial jurisdiction which we ourselves enjoy.

[34] Even where the person has not yet been convicted in any country (ie in accusation cases), I regard as cynical the argument that justice will be served by leaving the prosecution either to South Africa or to the country in which the crimes were committed. Crimes attracting universal jurisdiction are not infrequently perpetrated in countries which, even if they are not failed states or corrupt, lack resources to prosecute international fugitives. The government of the country might be one which the alleged criminal has assisted. That country cannot be compelled to make an extradition request. South Africa has its own financial constraints. Comparative resources, the presence and availability of witnesses, and the nationality of the accused, may often make it preferable for the prosecution to be conducted elsewhere than in South Africa or in the country where the crimes were committed. (The present case illustrates the arduous process of prosecuting such crimes. The Dutch conviction and sentence were entered 12 years after Mr Kouwenhoven’s arrest.)

[35] Of course, if in a given case South Africa were intent on prosecuting the person for the same crime, the relevant extradition agreement would typically

entitle South Africa to decline to extradite (article 8 of the Convention is such a provision), and s 11(*b*)(i) of the Extradition Act confers this power on the Minister of Justice. In most cases, however, the narrow argument for which Mr Kouwenhoven contends would simply allow the fugitive to have refuge in this country with impunity. Mr Kouwenhoven does not realistically expect that he will be prosecuted afresh either here or in Liberia. As Goldstone J remarked in *Geuking v President of the Republic of South Africa & others* 2003 (3) SA 34 (CC), one of the reasons why governments accede to extradition requests is that they 'do not wish their own countries to be, or to be perceived as safe havens for the criminals of the world' (para 2).

Exorbitant jurisdiction?

[36] Mr Kouwenhoven's counsel argued that if 'jurisdiction' were interpreted broadly, it would permit a person to be extradited to a foreign State exercising what we would regard as an inappropriately wide extraterritorial jurisdiction or, as it is put, an 'exorbitant jurisdiction'. There are several answers to this contention:

(a) The nature of the jurisdiction exercised by the foreign State is something which the South African government will take into account when deciding whether to conclude, or remain a party to, an extradition agreement with that State, and in negotiating the terms of the agreement.

(b) To take the Convention as an example, article 7(2), which I have already quoted, is illustrative of a term guarding against exorbitant jurisdiction – where the requesting State seeks extradition based on its extraterritorial jurisdiction, the requested State is not obliged to surrender the person unless its own law permits prosecution for the same offence on the basis of extraterritorial jurisdiction. As to the right to withdraw, article 31 permits termination (denunciation) on six months' notice.

(c) Accordingly, where South Africa has an extradition agreement with the requesting State, the broad interpretation of 'jurisdiction' in s 3(1) should not be a concern. On the contrary, the broad interpretation allows the South African government to conclude treaties which appropriately recognise extraterritorial jurisdiction while excluding by negotiation instances of exorbitant jurisdiction. The narrow interpretation, by contrast, is a blunt instrument which precludes recognition of all extraterritorial jurisdiction, however appropriate it may be.

(d) Furthermore, the final decision to extradite lies with the Minister of Justice exercising his or her powers under s 11 of the Extradition Act. This will be relevant particularly in s 3(2) cases, ie where extradition is sought by a State with whom we do not have an extradition agreement. Section 11(*b*)(iii) empowers the Minister to refuse to surrender the person where it would not be in the interests of justice to do so or where, having regard to all the circumstances of the case, it would be unjust or unreasonable to do so.

(e) Since extradition is ultimately a matter of international relations, it is right that these matters should be in the hands of the executive.

Delving into foreign law?

[37] Another argument for Mr Kouwenhoven is that the broad interpretation requires magistrates to determine questions of foreign law rather than purely factual questions as to where crimes were committed. Mr Kouwenhoven's counsel argued that the certificate for which s 10(2) makes provision does not extend to the question whether the foreign State has jurisdiction in law to try the person. I am by no means convinced by that submission, but am willing to assume it to be correct.[8] On that assumption, I do not accept that an enquiry into foreign law is

[8] The s10(2) certificate is one from an appropriate authority in the foreign State stating that it 'has sufficient evidence at its disposal to warrant the prosecution of the person concerned'. In terms of *Geuking*, the s 10(2) certificate relates *inter alia* to whether the facts available to the foreign authority disclose an offence under the law of the foreign State (paras 41-46). This is concerned with the actual state of affairs, not a hypothetical exercise. If the actual conduct was committed extraterritorially, the question whether the conduct discloses an offence under the law of the foreign State would depend on whether that country's law criminalises conduct of such conduct

necessarily or even generally more difficult or complex than an enquiry into the question where the acts constituting the crime were committed.

[38] In a conviction case, the foreign court's decision will itself be powerful evidence that the foreign State had jurisdiction to try the case. In any event, the question whether a country permits a prosecution for a particular crime committed outside its territory is unlikely to be complex, and could readily be proved by an affidavit from a foreign lawyer.

Presumptions in interpretation

[39] Mr Kouwenhoven's counsel relied on several aids or presumptions in statutory interpretation. One is that where a statute is reasonably capable of more than one meaning, a court will give it the meaning which least interferes with the right of liberty. However, extradition serves a goal of great importance, and the broadest (universal) jurisdiction is reserved for cases which involve the most egregious violation of human rights. I reject the notion that our Extradition Act must be interpreted so as to make it as difficult as reasonably possible for South Africa to extradite persons charged with or convicted of crime in foreign countries (cf *President of the Republic of South Africa & others v Quagliani and two similar cases* [2009] ZACC 1; 2009 (2) SA 466 (CC) paras 39-41). The requirements of the Act and of extradition treaties, and the residual powers of the executive to decline to extradite, afford sufficient safeguards to persons apprehended on extradition warrants.

[40] Another presumption called in aid is that statute law is presumed to have no extraterritorial effect. I do not regard this presumption as being engaged in the present case. Our Extradition Act regulates how courts and the executive in this

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committed extraterritorially, ie renders such person liable to criminal prosecution in the foreign State. If not, the foreign State's evidence would not warrant the prosecution of the person.

country must deal in this country with persons apprehended in this country. By its nature, of course, extradition will involve surrender to a foreign State, but that is not because our Extradition Act is operating extraterritorially. An enquiry in this country into whether another country has jurisdiction to try an offender is not an exercise in extraterritorial power. South African courts frequently have to investigate things which happened abroad. And both competing interpretations of the phrase 'committed within the jurisdiction of' a foreign State admittedly require a South African court to determine events which occurred, or a state of affairs prevailing, outside of South Africa's territory.

The Carolissen case

[41] Mr Kouwenhoven's counsel sought to persuade us that the issue arising in the present case was determined in their favour by *Carolissen v Director of Public Prosecutions* [2016] 3 All SA 56 (WCC), a judgment of Gamble J and Donen AJ. I disagree. On the contrary, *Al-Fawwaz* was cited with apparent approval (see paras 37-39), and there is nothing in *Carolissen* to suggest that the court favoured a narrow interpretation of the words 'within the jurisdiction of'. The court's concern was not whether the acts constituting the alleged crimes were committed in the territory of the requesting State (the United States, and more particularly the State of Maine, where the prosecuting authorities wished to prosecute Carolissen in a federal court), but whether the State of Maine had jurisdiction to try Carolissen.

[42] The charges against Carolissen concerned the production and dissemination of child pornography. According to the American federal law in question, the United States could prosecute a person for the production of child pornography outside of the United States provided the person intended to transport, or in fact transported, the images to the United States by any means.[9]

[9] The relevant statutory provision is quoted in para 55 of *Carolissen*.

The crime in question was thus not subject to universal jurisdiction in the broad sense, since there still had to be some connection (effect or intended effect) with the territory of the United States in order for the American court to have jurisdiction to try Carolissen.

[43] The ultimate concern of the court in *Carolissen* was whether the link with the United States required by the proviso had been satisfactorily proved, because on this depended the jurisdiction of the court in Maine to try Carolissen. Although the American prosecutor had stated in an affidavit that Carolissen had sent the pornographic images to a federal agent in Maine via the internet, the agent in his supporting affidavit did not explicitly confirm that he was in Maine when he received the images. However, despite this deficiency in the evidence, the court in *Carolissen* was swayed by the fact that an American grand jury had found Carolissen to be indictable in Maine and must thus have been satisfied as to the presence of the territorial link. It is in this context that the court's reference to 'territorial jurisdiction' must be understood. The court was not using 'jurisdiction' in a narrow sense. Since *Al-Fawwaz* was quoted with approval, a great deal more would have been said in *Carolissen* if the judges had disagreed with the House of Lords' conclusion.

South African extradition law prior to 1962 Act

[44] Mr Kouwenhoven's counsel referred to other provisions of the Extradition Act where the word 'jurisdiction' is used, arguing that these other instances supported the territorial interpretation of the word. Before dealing with these submissions, I shall refer to a case strongly relied upon by the DPP's counsel, *Re Al-Fawwaz: Re Eiderous & another* [2001] UKHL 69; [2002] 1 All ER 545 (HL). And my discussion of *Al-Fawwaz* is conveniently preceded by a brief reference to our extradition law before the Extradition Act came into force.

[45] The Extradition Act, which came into force on 20 June 1962, was passed because South Africa had recently severed her ties with Britain and become an independent republic. Prior to 1962 our extradition legislation comprised the British Extradition Act of 1870 as amended up to 1906 ('BEA')[10] and the British Fugitive Offenders Act of 1881 ('FOA'). The BEA dealt with extradition between the United Kingdom and her colonies and possessions on the one hand, and foreign States on the other. The FOA regulated extradition between the United Kingdom and her colonies and possessions *inter se.*

[46] The BEA was legislation which the monarch could, by order-in-council, make applicable to a foreign State if an agreement existed between the United Kingdom and such State with respect to the surrender of 'fugitive criminals'. Section 6 of the BEA dealt with the liability of a person to be surrendered. It was the forerunner of s 3(1) of our Extradition Act. Although it did not itself use the word 'jurisdiction', it referred to the liability of a 'fugitive criminal' to be extradited. The term 'fugitive criminal' was defined[11] as meaning

> 'any person accused or convicted of an extradition crime committed within the jurisdiction of any foreign state who is in or is suspected of being in some part of Her Majesty's dominions; and the term "fugitive criminal of a foreign state" means a fugitive criminal accused or convicted of an extradition crime committed within the jurisdiction of that state'.

[47] 'Extradition crime' was defined as meaning

> 'a crime which, if committed in England or within English jurisdiction, would be one of the crimes described in the first schedule to this Act'.

The crimes listed in the first schedule included piracy by the law of nations, sinking or destroying vessels at sea, assaults on board a ship on the high seas and mutiny on the high seas.

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[10] The BEA was amended by Extradition Acts passed in 1873, 1895 and 1906. None of these amendments is relevant to the provisions discussed in this judgment.
[11] In s 26.

[48] Section 6 read thus:

> 'Where this Act applies in the case of any foreign state *[ie where there is an extradition agreement between the United Kingdom and the foreign State and the BEA has thus been made applicable in respect of that state by order-in-council]*, every fugitive criminal of that state *[ie 'a person accused or convicted of an extradition crime committed within the jurisdiction of that state']* who is in or suspected of being in any part of Her Majesty's dominions … shall be liable to be apprehended and surrendered in the manner provided by this Act, whether the crime in respect of which the surrender is sought was committed before or after the date of the order, and whether there is or is not any concurrent jurisdiction in any court of Her Majesty's dominions over that crime.'

[49] The FOA, unlike the BEA, did not use the language of 'committed within the jurisdiction' (of a foreign State). Instead, and by s 2, it provided for extradition where a person accused of having committed an offence in one part of Her Majesty's dominions had left that part and was found in another part. At the enquiry before the magistrate, evidence had to be produced which raised 'a strong or probable presumption' that the fugitive had committed the alleged offence.[12]

[50] However, and in what was clearly the inspiration for the provisions in our Extradition Act relating to 'associated States', Part II of the FOA empowered the monarch, by order-in-council, to make Part II applicable to a group of British possessions where it was convenient to do so by virtue of their contiguity or otherwise. In the case of a Part II group, a warrant issued in the requesting possession could be endorsed by a magistrate in the requested possession. Once the fugitive was brought before the magistrate, the latter only needed to be satisfied of the formalities; he was not required to hear evidence on the merits of the charge.

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[12] Section 34 made the provisions of the Act applicable *mutatis mutandis* to persons at large after having been convicted and sentenced.

[51] Section 33 of the FOA, headed ‘Application of Act to offences at sea or triable in several parts of Her Majesty’s dominions’, provided as follows:

> ‘Where a person accused of an offence can, by reason of the nature of the offence, or of the place in which it was committed, or otherwise, be, under this Act or otherwise, tried for or in respect of the offence in more than one part of Her Majesty’s dominions, a warrant for the apprehension of such person may be issued in any part of Her Majesty’s dominions in which he can, if he happens to be there, be tried; and each part of this Act shall apply as if the offence had been committed in the part of Her Majesty’s dominions where such warrant is issued, and such person may be apprehended and returned in pursuance of this Act, notwithstanding that in the place in which he is apprehended a court has jurisdiction to try him.’

[52] The effect of s 33, so it seems to me, was to extend the liability to extradition (defined territorially in s 2) to cases within the jurisdiction of a particular part of the United Kingdom and its dominions, even though the offence may not have been committed in that part. One such instance was where ‘the nature of the offence’ was such that jurisdiction existed. Since the heading of the section referred to ‘offences at sea’, it is reasonable to infer that offences such as piracy and mutiny were among those in view.

[53] Prior to the creation of the Union of South Africa in 1910, the various British colonies, protectorates and territories in southern Africa were, by orders-in-council, declared to form a ‘group’ for purposes of Part II of the FOA. In March 1913, a further order-in-council declared that the ‘group’ would henceforth constitute the Union of South Africa together with those other protectorates and territories. This allowed South Africa and these other protectorates and territories to extradite fugitives *inter se* on a simplified basis.

The Al-Fawwaz case

[54] In *Al-Fawwaz* three people were arrested in the United Kingdom for extradition to the United States to face charges of conspiring to murder

Americans, including American officials and diplomats, and other internationally protected persons and soldiers in the United Nations Peacekeeping Forces. Section 1(3) of the British Extradition Act of 1989 provided that where an order-in-council was in force under s 2 of the BEA (the 1870 Act), the provisions in schedule 1 of the 1989 Act would apply in relation to that foreign State. Schedule 1 contained provisions deriving from or incorporating the 1870 BEA. Schedule 1 applied to extradition between the United Kingdom and the United States.

[55] The result was that the definitions of 'fugitive criminal' and 'extradition crime' in the BEA, to which I have already made reference, were applicable. Article 1 of the extradition treaty between the United Kingdom and United States contained reciprocal undertakings to extradite persons who were accused or had been convicted of any relevant offence 'committed within the jurisdiction of' the other party. This phraseology echoed the definition of 'fugitive offender' in s 26 of the BEA.

[56] In the Divisional Court, Buxton LJ and Elias J held that extradition was only permissible if the crimes were committed within the territory of the United States. This decision was overruled in the House of Lords. All five of the law lords delivered speeches, and all of them concluded that 'offence committed within the jurisdiction of' the requesting State should be interpreted as meaning that the offence was one which was within the jurisdiction of the requesting State to try, including any jurisdiction which the requesting State exercised over crimes committed extraterritorially.

[57] There is considerable overlap in the reasoning contained in the various speeches. I mention the following aspects:

(a) The lords considered that their interpretation was consistent with the ordinary meaning of 'jurisdiction' in this context (para 37 *per* Lord Slynn;

paras 57 *per* Lord Hutton; para 102 *per* Lord Millett; para 117 *per* Lord Scott; para 137 *per* Lord Rodger).

(b) The fact that the BEA included piracy against the law of nations and certain other crimes committed on the high seas showed that the lawmaker could not have intended 'committed within the jurisdiction of' to have meant 'committed within the territory of', since by definition piracy on the high seas was not committed within the territory of any State (para 38 *per* Lord Slynn; para 65 *per* Lord Hutton; paras 105-106 *per* Lord Millett; paras 138-142 *per* Lord Rodger).

(c) The definition of 'extradition crime' (which referred to a crime 'committed in England or within English jurisdiction') indicated that 'jurisdiction' meant something different from 'territory' (paras 28-30 *per* Lord Slynn; para 65 *per* Lord Hutton; para 105 *per* Lord Millett; para 140 *per* Lord Rodger).

(d) The concluding part of s 6 of the BEA ('whether there is or is not concurrent jurisdiction in any court of Her Majesty's dominions over that crime') envisaged that, in respect of an extradition crime, both the foreign State and a British court might have jurisdiction. There was thus implicit recognition of extraterritorial jurisdiction (para 65 per Lord Hatton).

(e) It was desirable for States to be able to extradite fugitives to face justice in countries exercising extraterritorial jurisdiction, particularly where the extraditing country itself would exercise extraterritorial jurisdiction in similar circumstances. Such a power was necessary to combat international terrorism and crimes against humanity. If at all possible, an interpretation of the BEA which precluded such extradition, or which precluded the conclusion of treaties making provision for such extradition, should be avoided (para 37 *per* Lord

Slynn; paras 52-53 and 64 *per* Lord Hutton; paras 102 and 105 *per* Lord Millett; para 117 *per* Lord Scott; para 136 *per* Lord Rodger).[13]

(f) As to concerns about exorbitant jurisdiction exercised by requesting States, there were two levels of protection for the United Kingdom: first, it could decline to conclude an extradition agreement with such a country or could regulate extraterritorial jurisdiction in the treaty; and second, once a magistrate has concluded that the requirements for extradition have been met, it is still within the power of the executive (the Secretary of State) to decline to extradite (paras 39-40 *per* Lord Slynn; para 121 *per* Lord Scott; paras 147-150 *per* Lord Rodger).

(g) Although the appellants argued that the broad (or ordinary) interpretation of 'jurisdiction' was inconsistent with other provisions in the BEA and in schedule 1 to the 1989 Act, 'jurisdiction' did not necessarily mean the same thing throughout the legislation (para 144 *per* Lord Rodger), and in some instances the supposed inconsistency was illusory. For example:

(i) Para 8(3) of the schedule provided for an authority to convey the apprehended person 'within the jurisdiction' of the foreign State. Even if in this context 'jurisdiction' meant 'territory', it was a special provision which did not govern the meaning of the word elsewhere (para 35 *per* Lord Slynn).

(ii) Para 15 of the schedule provided that certain offences, wherever committed (offences under the Internationally Protected Persons Act of 1978, the Taking of Hostages Act of 1982, torture and various other offences) were to be deemed to have been committed within the jurisdiction

[13] See also *United States of America v Cotroni; United States of America v El Zein* 1989 CanLII 106 (SCC); [1989] 1 SCR 1469 *per* La Forest J writing for the majority: 'The investigation, prosecution and suppression of crime for the protection of the citizen and the maintenance of peace and public order is an important goal of all organized societies. The pursuit of that goal cannot realistically be confined within national boundaries. That has long been the case, but it is increasingly evident today. Modern communications have shrunk the world and made McLuhan's global village a reality. The only respect paid by the international criminal community to national boundaries is when these can serve as a means to frustrate the efforts of law enforcement and judicial authorities. The trafficking in drugs, with which we are here concerned, is an international enterprise and requires effective tools of international cooperation for its investigation, prosecution and suppression.'

of the requesting State. Since these were crimes in respect of which extraterritorial jurisdiction would typically be exercised, the argument was that the deeming provision would have been unnecessary if 'jurisdiction' had the broader meaning. The argument was rejected, on the basis that the purpose of para 15 was merely to simplify the magistrate's task and relieve him or her of the need to decide whether the requesting State in law enjoyed extraterritorial jurisdiction (paras 69 and 78 *per* Lord Hutton; see also para 145 *per* Lord Rodger, whose explanation I find more difficult to follow).

[58] Lord Millett raised an interesting additional consideration for rejecting an interpretation which equated 'jurisdiction' with 'territory', one that he regarded as conclusive (paras 100-103). He said that 'jurisdiction' in the definition of 'fugitive offender' had to be able to accommodate both accusation and conviction cases. In an accusation case, the British magistrate could look at the allegations made against the accused by the requesting State. In a conviction case, however, one might be dealing with a conviction brought in by a jury (as would be the case with extradition requests emanating from the United States, the United Kingdom and various other countries in the Commonwealth).

[59] He supposed a case where the prosecution in the requesting State had alleged the perpetration of some acts within its territory and other acts outside it but where in any event the requesting State exercised an unobjectionable extraterritorial jurisdiction. One would not know, by looking at the conviction, whether the jury had accepted the perpetration of any acts within the territory of the requesting State, since proof of them may not have been necessary for jurisdiction or for a conviction on the merits. One would know only that the jury had found the crime, which was admittedly within the jurisdiction of the requesting State to try, to have been proved beyond reasonable doubt.

[60] *Al-Fawwaz* is powerfully persuasive in favour of the broader interpretation. The case concerned the very same phrase with which we are concerned and in the very same context. Furthermore, the court was analysing the British legislation which was in force in South Africa for many years up to the time our Extradition Act was enacted. The lawmaker in 1962 chose to use the same phraseology in framing our Extradition Act. If *Al-Fawwaz* correctly interprets the phraseology in the antecedent legislation, we should not readily find that the lawmaker intended to use the same phraseology with a different meaning in 1962.

Other textual considerations in the Extradition Act

[61] The phraseology in s 3(1) must, of course, be interpreted in the context of the Act as a whole. I thus turn to consider the other parts of the Act on which Mr Kouwenhoven's counsel relied to buttress their case for a narrower interpretation.

[62] First: Mr Kouwenhoven's counsel referred us to s 2(1)(*a*) which empowers the President to conclude extradition agreements

> 'providing for the surrender on a reciprocal basis of persons accused or convicted of the commission within the jurisdiction of the Republic or such State or any territory under the sovereignty or protection of such State, of an extraditable offence…'

The argument was that if 'jurisdiction' had the broader meaning it would have been unnecessary to mention, separately, a territory under the sovereignty or protection of the foreign State, since the latter's sovereignty would cause acts committed in such territory to be within the jurisdiction of the foreign State.

[63] I disagree with this argument. The phrase 'the commission within the jurisdiction of' in s 2(1)(*a*) applies, in my view, to each of 'the Republic', 'such State' and 'any territory under the sovereignty or protection of such State'. Depending on the constitutional arrangements between a State and one of its

territories, the jurisdiction to try crimes committed in or by residents of the territory may lie exclusively with the territory. For example, an extradition agreement between South Africa and the United Kingdom in respect of offences committed within their respective jurisdictions (in the broad sense) would not necessarily include crimes committed in or by residents of, say, Bermuda. Section 2(1)(*a*) ensures that a treaty with a foreign State can be extended to include a territory which the latter has exclusive jurisdiction to try. It also makes possible the conclusion of an extradition treaty which relates only to crimes committed within the respective jurisdictions of South Africa and the territory concerned (for example, an extradition agreement between South Africa and the United Kingdom relating exclusively to crimes committed within the respective jurisdictions of South Africa and Bermuda).[14]

[64] Second: A related argument was urged with reference to the definition of 'foreign State' as including 'any foreign territory'. Counsel inserted this definition into s 3(1) as follows:

> 'Any person accused or convicted of an offence included in an extradition agreement and committed within the jurisdiction of a foreign State [, including a foreign territory,] a party to such agreement, shall…'

Counsel submitted, first, that a territory cannot itself exercise proscriptive jurisdiction in international law; a matter can only be within the jurisdiction of a territory if it was committed in the territory. And second, 'foreign territory' would have been redundant if 'jurisdiction' had the wider meaning, since the

[14] Section 25 of the BEA provided that for purposes of the Act 'every colony, dependency, and constituent part of a foreign state, and every vessel of that state, shall (except where expressly mentioned as distinct in this Act) be deemed to be within the jurisdiction of and to be part of such foreign State.' This section was not mentioned in the *Al-Fawwaz* case. As Lord Millett observed, the meaning of 'jurisdiction' may be 'controlled by its context' (para 102). Where a 'colony' is said to be 'within the jurisdiction of and to be part of' the mother State, the controlling context is different from the case where a 'crime' is said to be 'within the jurisdiction of' a State. The former more naturally connotes territoriality. But even then, if 'jurisdiction' in s 25 meant 'within the territory of' it would have been unnecessary to add 'and to be part of'.

mother State 'would almost certainly have other bases on which it has exercised jurisdiction over its territories'.

[65] As to the first leg of the submission, I do not know that it is true to say that the territory of a foreign State can never exercise criminal jurisdiction over acts performed outside its jurisdiction. For example, when the Cape was a British colony, it might well have been able to exercise jurisdiction in respect of piracy committed on the high seas, provided the pirate was apprehended in the Cape. Section 33 of the FOA seems to have recognised the potential extraterritorial jurisdiction of British possessions.

[66] In any event, and even if a territory's criminal jurisdiction were limited to criminal acts performed within its territory, that would only mean that jurisdiction in the ordinary sense would, in relation to that territory, require that the crime should have been committed in its area. This does not mean that 'jurisdiction' is being used differently from its ordinary legal sense; it means only that the substantive rules of jurisdiction applicable in that territory required a territorial link in the form of the commission of the crime within its area. *Non constat* that the substantive rules of jurisdiction applicable to the mother State are similarly limited. As we know, there is a growing number of crimes where States do not require a link in this form, though in South Africa we would at least require that the accused person should be present in the court's area, since we do not permit criminal trials *in absentia*.

[67] Third: Mr Kouwenhoven's counsel argued that in ss 3(1) and 3(3) the word 'jurisdiction' in the concluding phrase 'whether or not a court in the Republic has jurisdiction to try such person for such offence' must mean territorial jurisdiction. The argument proceeded thus. There are two elements to a South African court's jurisdiction: substantive jurisdiction (jurisdiction over the

substance of a matter or the cause of action) and territorial jurisdiction. 'Jurisdiction' in the phrase under consideration cannot mean substantive jurisdiction because in order for an offence to be an 'extraditable offence' it has to be an offence under South African law. There would thus have been no need to use 'jurisdiction' in its substantive sense, since such jurisdiction is inherent in any extradition case. To ensure that 'jurisdiction' is not otiose, one must thus understand it to mean territorial jurisdiction.

[68] I reject this argument as spurious sophistry. It starts from a wrong premise. The argument presupposes that 'territorial jurisdiction', which is merely a convenient tag, is to be equated with the commission of an offence within the courts territory. Self-evidently that is not the law, since for various offences over which South African courts have substantive jurisdiction they may entertain prosecutions even though the crimes were committed outside of South Africa's territory. If there is a territorial link in such cases, it is afforded by the sole fact that the accused is physically present in the court's territory and is thus able to be tried. 'Jurisdiction' in the phrase now under consideration plainly connotes the power of a court in South Africa to try the case.

[69] Fourth: The next provision to which Mr Kouwenhoven's counsel referred us was s 5(1)(*b*) which empowers a magistrate to issue a warrant for the arrest of a person

> 'upon such information of his or her being a person accused or convicted of an extraditable offence committed within the jurisdiction of a foreign State, as would in the opinion of the magistrate justify the issue of a warrant for the arrest of such person, had it been alleged that he or she committed an offence in the Republic.'

I have replicated the underlining in Mr Kouwenhoven's counsel's heads of argument, with reference to which they mounted the following argument. The magistrate is required to hypothesise that the offence was committed in the

Republic, even though it was not. Since the section is dealing with crimes which were not committed within the Republic, the 'jurisdiction' of the foreign State cannot include its extraterritorial jurisdiction, since such extraterritorial jurisdiction might include offences committed in South Africa.

[70] This argument has more ingenuity than merit. Those concerned with the primary task of paying regard to the words used by the lawmaker would respond to the argument with the obvious question: 'If the lawmaker intended "an extraditable offence committed within the jurisdiction of a foreign State" to mean "an extraditable offence committed in the foreign State", why did it not say so, as it did only a couple of lines later when it required the magistrate to suppose that the apprehended person is alleged to have "committed an offence in the Republic"?'

[71] The explanation for the different expressions used in s 5(1)(*b*) is similar to the one Lord Hutton gave for para 15 of schedule 1 to the British Extradition Act of 1989. The magistrate's task, in the hypothetical transposition, is simplified by requiring him to suppose that the offence was committed in his court's territorial area. In this way the magistrate can focus on the information supporting the merits of the charge, without concerning himself further with jurisdiction. This hypothetical transposition does not exclude the possibility (though it would be a remote one in practice) that the offence was in fact committed within the magistrate's territory and that the foreign State was exercising an extraterritorial jurisdiction in relation to that offence.

[72] Fifth: Counsel advanced a similar argument with reference to s 7(2). What I have said in relation to the fourth argument is equally applicable.

[73] Sixth: Section 9(1) requires an arrested person to be brought before a magistrate 'in whose area of jurisdiction he has been arrested'. Plainly this refers

to territory, but that is because of the word ‘area’, a word which does not feature in s 3.

[74] Seventh: Section 13(1) grants to a person committed for extradition a right to appeal ‘to the provincial or local division of the Supreme Court having jurisdiction’. Mr Kouwenhoven’s counsel submitted that this must refer to territorial jurisdiction because the High Court has substantive jurisdiction to hear almost all cases, including appeals from magistrates’ courts.

[75] Once again, the argument proceeds from a false notion of ‘territorial jurisdiction’. ‘Jurisdiction’ here is used, as it is in s 3, in its ordinary sense of the power of a court to entertain a matter. ‘Territorial jurisdiction’ is an inexact phrase referring to the link, if any, which must exist with the court’s territorial area in order for the court to entertain a matter. In the case of appeals from the magistrates’ courts, the relevant link is the location of the magistrate’s court’s territorial area within the broader territory of the relevant division of the High Court. That this is the nature of the link for appellate jurisdiction says nothing about the nature of the link needed for criminal trial jurisdiction, in regard to which the commission of an offence within the court’s territory is not in all cases a requirement.

[76] Eighth: I have left until last the argument based on s 9(4) and the headings of ss 10 and 12, all of which I quoted earlier. Section 9(4) is the strongest argument in Mr Kouwenhoven’s favour since it refers to offences ‘committed … in’ the foreign State. It seemingly covers the whole field of extradition cases, channelling them either into s 10 or s 12. An extradition case must fall within one class or the other. And those classes appear to depend on whether the crime is alleged to have been committed in an associated State or in some other foreign State. The headings of ss 10 and 12 also reflect this.

[77] The question is whether s 9(4) compels one to interpret 'jurisdiction' in s 3 in a narrow way. I think the answer is no. Section 3 is the main substantive provision in the Act. It identifies the persons who are liable to be extradited. Section 9(4) is purely procedural – it determines which of two section shall apply to the extradition enquiry. Had it not been for the phenomenon of the 'associated State' and the legislative desire to provide for a simplified extradition process in respect of such States (but only when s 6 applies), s 9(4) would have been unnecessary; there would have been a uniform process of enquiry applicable to all extradition cases.

[78] In the circumstances, I do not think that the interpretation of the substantively central s 3 should be unattractively narrowed to accommodate the literal meaning of the procedural provision in s 9(4). Because jurisdiction in the ordinary sense does, for most crimes, depend on commission within the territory of the requesting State, one can understand why the lawmaker, carelessly so I think, adopted the shorthand expression of "committed in' rather than 'committed within the jurisdiction of' in distinguishing between the two classes of cases in s 9(4).

[79] I have mentioned previously that Chapter II of the FOA was the inspiration for the provisions in our Extradition Act dealing with 'associated States'. It is possible that our lawmaker's carelessness extended to the process of borrowing partially from the BEA and partially from the FOA. Whereas s 2 of the FOA spoke of crimes 'committed in' one part of Her Majesty's dominions, s 6 of the BEA as read with the definition of 'fugitive criminal' used the phrase 'committed within the jurisdiction of'. The latter phraseology found its way into the central s 3 of our Extradition Act while the former terminology was borrowed with a view to carving out preferential procedural treatment for 'associated States'.

[80] In my opinion, the considerations in favour of giving 'jurisdiction' a broad meaning in s 3 are so powerful that s 9(4) must yield to the former and be interpreted consistently with it. There are two ways in which this might be done:

(a) One possibility is to interpret s 9(4) literally as applying to offences actually committed in the territory of the foreign State or associated State. On this interpretation, crimes within the jurisdiction of the foreign or associated State but which were not committed within the territory of the State (ie cases based on extraterritorial jurisdiction) are not expressly regulated. Since such cases nevertheless fall within s 3, and since the apprehended person must in terms of s 9(1) be brought before a magistrate for the holding of an enquiry, it is necessary to imply a term regulating the process of enquiry in such cases. The implication would be either that the more exacting form of enquiry, namely s 10, applies to all such cases (whether the foreign State is or is not an associated State) or that s 10 or s 12 applies depending on whether the crime was committed within the jurisdiction of an associated State or of another foreign State.

(b) The other possibility, very similar to the second of the above implied terms, is to interpret the phrase 'committed … in' in s 9(4) as meaning 'committed within the jurisdiction of'.

[81] There is an English case which supports approach (b), *R v Governor of HM Prison Brixton, ex parte Minervini* [1958] 3 All ER 318. In the extradition agreement between the United Kingdom and Norway, which came into force in 1873, extradition applied to crimes 'committed within the territory of' of the requesting State. Norway sought the extradition of an Italian seaman alleged to have murdered a fellow seaman on a Norwegian vessel. The vessel was not shown to have been within Norwegian territorial waters at the time of the alleged offence. It was argued for the extraditee that in ordinary usage 'territory' and

'jurisdiction" were two completely separate notions and that a murder on the high seas could not be said to have been committed in the 'territory' of Norway, even though it was within Norway's jurisdiction to try the crime.

[82] Parker CJ, with whom to other judges concurred, after noting that one of the crimes included in the treaty was piracy on the high seas, continued (at 320H-I):

> 'This treaty is not treating "territory" in its strict sense but in a sense which is equivalent to jurisdiction, and it is only in that way that one can make sense of the treaty. Indeed, it is to be observed, though it may be said to be an argument the other way, that in many of these treaties reference is made not to territory but to jurisdiction, but in my view in this treaty territory is equivalent to jurisdiction.'

[83] Another argument for the extraditee in *Minervini* was that even if 'territory' were given a wider meaning than its ordinary meaning, it would be impossible to say that it applied to a ship within the territorial waters of another country, because this would be a 'gross breach of international comity'. Parker CJ rejected the argument, stating that if he was right that 'territory' was to be construed as equivalent to 'jurisdiction', then assuming that the ship were at the time of the alleged crime within the territory of a foreign power, 'it would be only a matter of competing jurisdiction and no one suggests that it is wrong to legislate to provide for competing or concurrent jurisdiction' (321E-F).[15]

[84] It follows that the CTMC erred in law in finding that in terms of s 3(1) of the Extradition Act Mr Kouwenhoven was only liable to be surrendered for extradition if the crimes for which he was convicted by the Dutch court were committed within the territory of the Netherlands.

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[15] *Minervini* was approved and followed by the Supreme Court of Barbados in *Scantlebury et al v Attorney-General* [2009] BBSC 9 para 152.

[85] Against this background, I turn to answer the three questions posed in the stated case. Mr Kouwenhoven's counsel criticised the formulation of the third question, since as framed it refers to 'jurisdiction' in the Extradition Act generally. It is perfectly clear that the question was posed with reference to the phrase 'committed within the jurisdiction of' in s 3(1) and I shall answer it on that basis. This is not a case where a court should decline to entertain the appeal because of a serious or material defect in the stated case (cf *S v Petro Louise Enterprises (Pty) Ltd & others* 1978 (1) SA 271 (T) at 276F-H).

[86] Question 1:

(a) Since it was not in dispute in the court *a quo* that the Dutch court exercised a legitimate extraterritorial jurisdiction and that the crimes were not committed within the territory of the Netherlands, this question does not strictly call for an answer.

(b) Insofar as an answer may be necessary, it is that the judicial officer must consider the jurisdiction of the requesting State, in the sense that such officer must determine whether the person is accused, or has been convicted, of an offence committed 'within the jurisdiction of' the requesting State. This flows from the fact that in terms of s 10(1) of the Extradition Act the judicial officer must determine whether or not the person is 'liable to be surrendered to the foreign State' and that in terms of s 3(1) the commission of the offence 'within the jurisdiction of' the foreign State is an element of liability to surrender.

(c) If the judicial officer determines that the crime is one 'committed within the jurisdiction of' the requesting State and commits the person for extradition in terms of s 10(1), the Minister of Justice may, in the case of an extraterritorial jurisdiction regarded as exorbitant, be entitled to refuse extradition in accordance with the terms of the relevant extradition agreement or in terms of s 11(*b*)(iii).

[87] Question 2:

(a) For similar reasons, an answer to this question is not strictly required.

(b) Insofar as an answer may be necessary, it is that jurisdiction is a relevant consideration even where the requested person has already been convicted by the requesting State. The reasons are those given in relation to question 1.

(c) However, the fact that a court in the requesting State has convicted the person is evidence, which may depending on the circumstances be decisive, that the crime was, for purposes of s 3(1) of the Extradition Act, 'committed within the jurisdiction of' the requesting State.

[88] Question 3:

This is the important question of law in this appeal. The answer is that the requirement in s 3(1) of the Extradition Act that the offence should have been committed 'within the jurisdiction of' the requesting State is a requirement that the requesting State should have jurisdiction to try the person in question for the offence, including where applicable the jurisdiction to try such person for an offence committed outside the territory of the requesting State.

[89] In regard to costs, the s 310 appeal is a criminal appeal so no question of costs arises. In the review, the first to third respondents do not seek costs.

[90] I make the following order:

In the appeal:

(a) The three questions of law posed in the stated case are answered as are set out in paras 86-88 of this judgment.

(b) Because of the answer given to the third question, the appeal succeeds. The order of the court *a quo* discharging the respondent in the appeal, Mr Augustinus Petrus Maria Kouwenhoven, in terms of s 10(3) of the Extradition

Act 67 of 1962 is set aside, and the matter is remitted to the court *a quo* to finalise in accordance with the answers given to the questions posed in the stated case.

In the review:

(a) No order is made on para 6 of the notice of motion.

(b) Save as aforesaid, the review application is dismissed.

Sher J (Rogers J concurring):

[91] This judgment deals with the in *limine* 's 310' questions posed by my learned brother Rogers J, in his judgment, which deals with the jurisdiction question. I respectfully concur with his judgment and the orders which are made at the end thereof, in respect of both the appeal and the review which are before us. I adopt the abbreviations used in his judgment.

[92] The DPP seeks to appeal the magistrate's decision to discharge Mr Kouwenhoven, which was rendered on the basis that he was not liable to be surrendered in terms of[16] the Extradition Act as the offences of which he was convicted by the Dutch court were offences which were not committed within the territory of the Netherlands. In this regard the magistrate held that the Act provides for extradition only in respect of offences which are committed within the territorial jurisdiction of a requesting State, and not in respect of offences which are committed extraterritorially. The appeal has been brought in terms of s 310 of the CPA.

[93] Mr Kouwenhoven in turn seeks an order reviewing and setting aside the appeal on the grounds that the State does not enjoy a right of appeal in terms of the aforesaid provision as it is only applicable to criminal proceedings, and the

[16] Section 3(1).

proceedings at an extradition enquiry do not constitute such proceedings. In the alternative, and in the event that we were to find that s 310 does afford the State a right of appeal, Mr Kouwenhoven seeks an order declaring that it is subject to a duty by the State to give prior notice of its intention to request a magistrate to state a case for appeal in terms of the provision,[17] and that the extraditee must be afforded an opportunity to make representations to the magistrate in regard to the request for a stated case, and as to whether the magistrate should accede thereto.

The nature of extradition proceedings

[94] Extradition has been defined 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 a requesting State is surrendered to its courts for trial or the imposition of punishment.[18] Extradition proceedings are therefore not about putting an extraditee on trial in the requested State, but about determining whether there is lawful cause to surrender him to the requesting State, in order that he should face justice there.[19]

[95] Extradition consists of a series of acts which are partly judicial, executive and administrative in nature. These acts are regulated on an international and a municipal level as a matter of public international and domestic law, by means of legislation and conventions or treaties which constitute binding agreements between the States which are party thereto, and which become enforceable at a municipal level after local adoption by way of ratification or accession.

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[17] The provision only provides a right of appeal in respect of a question of law. In terms of s 310(2), once the magistrate has complied with the request by stating a case which sets forth the question of law and his or her decision thereon and, if evidence has been heard, his or her findings of fact in respect thereof insofar as they may be material to the question of law, the DPP has a right to appeal the decision.

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

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

[96] In our law extradition is regulated by the Extradition Act and the terms of any applicable treaty, ie extradition agreement (in this matter the European Convention on Extradition[20]), which has been entered into with a foreign State[21] and which has been ratified or acceded to by Parliament.[22]

[97] Although extradition is not about putting an extraditee on trial or punishing them in this country (unless of course we are the requesting State), it is about handing them over to be dealt with in terms of the criminal law applicable in a foreign State, and there are a number of provisions in the Act which provide for processes or procedures to be followed which are akin to those utilised in criminal proceedings, and which impact similarly upon an extraditee's rights of liberty, freedom and security, and their dignity.

[98] Thus, persons who are sought for extradition by a foreign State are commonly arrested and detained in custody on the strength of a warrant which has been authorised by a local magistrate,[23] pursuant to a notification from the Minister of Justice that a request has been received from a foreign State for their surrender. In terms of s 5(2) the warrant for the arrest of such a person must be in the form and be executed 'as near as may be' to warrants of arrest under laws of criminal procedure.

[99] Persons so arrested must be brought before a magistrate as soon as possible in order that an 'enquiry' be held, with a view to determining whether they are liable to be surrendered to the foreign State concerned.[24]

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[20] South Africa ratified the Convention on 12 February 2003, and it came into force domestically with effect from 13 May 2003.
[21] In terms of s 2(1) of the Act.
[22] Section 2(3)(*a*).
[23] Section 5(1).
[24] Section 9(1).

[100] The Act provides[25] that the enquiry is to be held 'in the manner' in which a preparatory examination is held in the case of a person who is charged with having committed an offence in South Africa, and to this end the magistrate has the same powers of committal and of admitting to bail as a magistrate would have at a preparatory examination.[26]

[101] A preparatory examination is a species of judicial enquiry which is provided for in the CPA,[27] and is defined therein as a criminal proceeding.[28] It provides for the examination, by way of evidence, of the circumstances pertaining to the offences which a person is alleged to have committed, in order to enable the prosecution to assess the strength and cogency of the State's case so that it may decide on what charges and in which court the offender may be indicted. Prior to the passing of the CPA in 1977, superior court trials were frequently preceded by preparatory examinations[29] but they have long since been abrogated by disuse.[30]

[102] As was pointed out in *Geuking*,[31] the applicability of the statutory provisions pertaining to preparatory examinations in extradition enquiries means that they must be held in open court and (subject to the provisions of the Act and any applicable treaty which deal with the admissibility, verification and authentication of documents), take place by way of *viva voce* evidence which must be tendered on oath or affirmation and which is subject to cross-examination, with the State required to present evidence first, and the extraditee thereafter having the right to make a statement and to testify or to call witnesses.

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[25] Section 9(2).
[26] *Id*.
[27] At ss 129-140.
[28] As per s 1 of the current and the previous iteration of the CPA, Act 56 of 1955.
[29] The most notorious preparatory examination which was held in this country was that which commenced in 1956, at which 156 activists and political figures and leaders appeared following the adoption of the Freedom Charter by the Congress of People in Kliptown. It culminated in the referral of 91 persons for trial on charges of high treason- the so-called 'Treason Trial' which commenced in 1958 and ended with the acquittal of all the accused.
[30] *Inter alia* as a result of the introduction, by way of s 119 of the CPA, of a mechanism whereby an accused may, at the instance of the DPP, be called upon to plead to charges which are put to him in the lower courts, prior to a decision by the DPP as to indictment.
[31] Note 19, para 13.

At the conclusion of the presentation of the evidence in a preparatory examination the magistrate may discharge the accused if he is of the view that a 'sufficient' case has not been made out to put the accused on trial on any charge.[32] In view of the requirement in the Extradition Act that the magistrate proceed in the manner in which a preparatory examination is held, it is unsurprising that s 17 of the Act makes provision for the National Director of Public Prosecutions, his or her delegees, or public prosecutors to appear at any enquiry held under the Act.[33]

[103] Given the similarity of these features with those traditionally found in criminal proceedings and the fact that preparatory examinations are considered to be such in terms of the CPA, it is no surprise that some courts have described extradition enquiries as being in the 'nature' of criminal proceedings.[34] In fact, heavily influenced by these decisions and those of the House of Lords which also took the view that extradition enquiries were essentially proceedings in a criminal cause or matter, in *Director of Public Prosecutions, Witwatersrand v Paz & another* [35] (the decision on which the DPP in this matter seeks to rely in support of the contention that s 310 affords the State a right of appeal in extradition matters), the court (*per* Wunsh J, Meyer AJ concurring) expressed the firm view that, in substance, they *were* criminal proceedings. It further held[36] that, given the repeated references[37] in the Act to an extraditee being a person who was either 'accused' or convicted of an offence, rulings which were made against them in extradition proceedings were rulings made against an 'accused person'. By this we understand the court to have meant an accused person in criminal proceedings.

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[32] Section 135.
[33] Section 17 of the Extradition Act refers to any 'attorney-general'. In terms of s 45(*a*) of the National Prosecuting Authority Act 32 of 1998, any legislative reference to 'an attorney-general' is to be construed as a reference to the National Director of Public Prosecutions.
[34] *Minister of Justice v Bagattini & others* 1975 (4) SA 252 (T) at 267H; *S v McCarthy* 1995 (3) SA 731 (A) at 748C-E; *Harksen v President of the Republic of South Africa & others* 2000 (2) SA 825 (CC) at 836F.
[35] *Director of Public Prosecutions v Paz & another* 2000 (1) SACR 487 (W) at 480g-481b.
[36] At 481f.
[37] In ss 3(1), 5(1)(*b*), 9(3) and 10(1).

[104] On the other hand, in a number of matters the courts have pointed out that despite their similarities and commonalities, the proceedings in extradition enquiries are not the same in 'all respects' as those in criminal matters. In *Harksen*[38] this court held that where the legislature had sought to enact provisions which were specific or particular to extradition proceedings, they should not be read as being subject to provisions in the CPA which deal with criminal proceedings. In *Minister of Justice & another v Additional Magistrate*[39] this court also held that it would be 'misguided' to rely on the definition of criminal proceedings in the CPA for the proposition that an extradition enquiry is a criminal proceeding to which the provisions of the CPA which regulate the conduct of criminal trials necessarily apply.[40]

[105] After a consideration of the authorities in *Geuking*,[41] the Constitutional Court held that the fact that an extradition enquiry was to be conducted in the same manner as a preparatory examination did not transform its proceedings into a criminal trial, and they were *sui generis,*[42] and an extraditee was consequently not an 'accused' person entitled to the constitutional fair trial rights afforded to an accused in criminal proceedings in terms of s 35(3) of the Constitution. Following this, in *Robinson*[43] the Constitutional Court again confirmed that there are fundamental differences between criminal and extradition proceedings, which are *sui generis*.[44]

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[38] *Harksen v The Director of Public Prosecutions, Cape of Good Hope & another* [1999] 4 All SA(C) para 40.
[39] 2001 (2) SACR 49 (C) at 63a-g.
[40] See also *Ex parte Graham: In re USA v Graha*m 1987 (1) SA 368 (T) where it was held that a magistrate did not have the power to grant bail to a person against whom an extradition order had been made, because such person was not an accused person in terms of the CPA. This decision resulted in an amendment to the Act which was effected in 1996, which authorised a magistrate to admit an extraditee to bail.
[41] Note 19, para 47.
[42] Para 50.
[43] *Director of Public Prosecutions, Cape of Good Hope v Robinson* 2005 (4) SA 1 (CC) para 33.
[44] It accordingly held that because extradition proceedings were not criminal proceedings, there was no question of the State 'closing its case' after presenting the evidence it had in its possession.

[106] But it does not necessarily follow that the decision to which the court in *Paz* came, *viz* that s 310 of the CPA affords the State a right of appeal in extradition proceedings, was wrong. As Rumpff CJ stated in *S v Swanepoel*,[45] the CPA does not attempt to define the meaning of the expression 'criminal proceedings', and to ascertain its meaning in any given instance it is necessary to examine the nature and setting of the provision in which the expression is used and the context of that provision in the scheme of the CPA as a whole.

Does s 310 of the CPA afford a right of appeal in extradition enquiries?

[107] As was pointed out in *Paz,* at the time of the promulgation of the Act in 1962 the State enjoyed a right of appeal on points of law from the decision of a lower court in 'criminal proceedings', in terms of s 104 of the Magistrates' Courts Act.[46] 'Criminal proceedings' were not defined in the Magistrates' Courts Act but (just as in the case of the current CPA), in terms of the Criminal Procedure Act which was in force at the time[47] they included proceedings at a preparatory examination.

[108] On the face of, given this existing right of appeal, in the light of the requirement in the Act that extradition enquiries were to be conducted in the same manner as preparatory examinations, it may not have been necessary for the legislature to provide the State with an additional and similar right of appeal in the Extradition Act itself, as the one which was available to the State in terms of the Magistrates' Courts Act may have sufficed.

[109] However, although it might have been accepted that because extradition proceedings were to be conducted as if they were preparatory examinations and therefore as criminal proceedings, and an extraditee at such proceedings might

[45] 1979 (1) SA 478 (A) at 488C-D.
[46] No 32 of 1944.
[47] Act 56 of 1955.

therefore have been considered to be an 'accused' (just as a person who appears at a preparatory examination proper), an extraditee would not have enjoyed a right of appeal in terms of the Magistrates' Courts Act, which only afforded such a right to an 'accused' who had been *convicted* of an offence,[48] and an extraditee is obviously not convicted of an offence at an extradition enquiry. Consequently, the incorporation of such an express right of appeal in the Act,[49] for an extraditee, would have been both necessary and justifiable.

[110] When the CPA came into effect 15 years later in 1977, it expressly repealed[50] a number of provisions in the Magistrates' Courts Act, including s 104. But it did so simultaneously with the incorporation, in s 310 thereof, of a right of appeal for the State which was worded in near identical terms[51] to that which was previously provided for in s 104. Thus, in effect, on promulgation of the CPA in 1977 the right of appeal which the State previously enjoyed in terms of s 104 of the Magistrates' Courts Act was simply transferred to the CPA. Housing it there made sense as it was essentially a right of appeal in respect of 'criminal' matters.

[111] The question which we are required to determine is whether s 104, and thus its successor s 310, provided the State with a right of appeal in relation to the proceedings at extradition enquires, even though these were not conventional criminal proceedings, as the Constitutional Court and other courts have held.

[112] It is trite that in attempting to answer this question we must apply an interpretation which is not confined to the ordinary, literal and grammatical meaning which is to be ascribed to the phrase 'criminal proceedings', but one which is purposive and contextual, having regard for the aims which the principal

[48] In terms of s 103 of the Magistrates' Courts Act.
[49] Section 13(1).
[50] As per Schedule 4 thereof.
[51] It provided for a right of appeal from a 'lower' court on a 'question' of law, as opposed to a magistrate's court on a 'matter' of law.

legislation to which it may apply, the Extradition Act, seeks to achieve, ie to set out the legal processes which will be applicable when dealing with requests for the surrender of persons who have allegedly contravened the criminal law of a foreign State, and must be prosecuted or serve sentences there for their crimes.

[113] As I have pointed out, although extradition proceedings are *sui generis*, they have a number of features, processes and procedures which are analogous to those in criminal proceedings. These relate to issues pertaining to arrest, detention, bail and the format and manner of the presentation of evidence at an extradition enquiry.

[114] In *Belhaj*[52] the Supreme Court in the United Kingdom confirmed that even though extradition proceedings were not in themselves concerned with the prosecution, conviction or punishment of criminal offenders, inasmuch as a judicial determination made at such proceedings might indirectly result in such consequences in another State, the subject-matter of the proceedings concerned a 'criminal cause or matter' and accordingly for the purpose of the consideration of an appeal or review they were to be treated as such. In my view this is an approach which commends itself to the question we are required to determine, and is one which would be in line with the approach previously taken by this division and the Constitutional Court in two of the *Harksen*[53] matters, *viz* that for the 'present' and particular purpose the question must be approached within that context.

[115] In my view, it is inconceivable that the legislature would not have simultaneously incorporated a limited right of appeal for the State in the Act when

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[52] *Belhaj & Ano v The Director of Public Prosecutions & Ano* [2018] 4 All ER 561 paras 17-18 for the majority (Lord Sumption) and para 52 for the minority (Lord Mance).

[53] *Harksen v Attorney-General, Cape & others* 1999 (1) SA 718 (C) para 83 where this court held that just as an accused in criminal proceedings an extraditee could apply for a permanent stay of 'prosecution'; and *Harksen v President of the Republic of South Africa & others* 2000 (2) SA 825 (CC) para 30, where it was held that as in the case of criminal proceedings no costs orders should be made in extradition matters.

it was passed in 1962, a year after South Africa became a republic and was no longer under British rule, when it expressly provided one for an extraditee, had it considered that the limited right of appeal which the State enjoyed on points of law in terms of the Magistrates' Courts Act since 1944 did not extend to proceedings in extradition matters. As my learned brother has pointed out in his exposition of our extradition law prior to 1962, the legislation which applied comprised the British Extradition Act of 1870 ('BEA') as amended[54] and the British Fugitive Offenders Act of 1881. The former dealt with extradition between the United Kingdom and her colonies and possessions on the one hand, and foreign States on the other. The latter regulated extradition between the United Kingdom and her colonies and possessions. Neither of these Acts provided for rights of appeal by the State, or extraditees, who were compelled to bring writs of *habeas corpus* to review extradition committals and orders. It is in my view equally inconceivable that, had the State still not enjoyed such a right of appeal in extradition matters at the time of the passing of the CPA some 15 years later, in 1977, the legislature would not have made an attempt to enact one by means of an amendment to the Extradition Act, either at that time or thereafter.

[116] In the result I am of the view that the State enjoyed a right of appeal in extradition matters in terms of s 104 of the Magistrates' Courts Act which was subsequently incorporated in s 310 of the CPA.

[117] Given that this right was one which the State was able to exercise in relation to appeals on points of law in extradition enquiries in terms of current extradition legislation at least since 1962, the enactment of s 310 in the 1977 CPA evinced a clear intention on the part of the legislature to continue to afford the State a right of appeal, on points of law, from decisions in extradition proceedings. Thus, the enactment of s 310 did not afford the State a right of

[54] By way of amendments in 1873, 1895 and 1906. In 1936 the BEA was extended to the port of Walvis Bay, in the then South West Africa.

appeal in extradition proceedings which it never previously had, not did it seek to confer a new right on it, as Mr Kouwenhoven suggests. It merely extended a right which the State already had, at least since the time of the enactment of the current Act, in 1962.

[118] Mr Kouwenhoven contends that it would be inappropriate to 'afford' the State a right of appeal in terms of s 310 as, unlike an extraditee, it is not the bearer of any constitutional rights in relation to extraditions.

[119] In my view, this submission is unfounded. As I previously pointed out, extradition is a multilateral process which is founded on comity and treaty, and involves relationships between States at an international as well as at a domestic level. The dictates and expectations of comity and the obligations of treaty confer not only duties which must be discharged but also afford rights which may be exercised. As a party State to the European Convention on Extradition, South Africa is the bearer both of obligations in relation to honouring extradition requests from foreign States who have acceded thereto, as well as rights pertaining thereto, which may be exercised both domestically as well as internationally. And in the discharge of its contractual (treaty) and international (law) obligations to surrender fugitives to the justice of requesting States with whom it has entered into extradition agreements, South Africa must surely have the necessary legal mechanisms in place to give effect thereto. To this end a limited, corrective right of appeal by the State in relation to decisions by lower courts in regard to points of law in extradition proceedings, is both necessary and justified, and consistent with our obligations in terms of s 233 of the Constitution.

[120] This is all the more so if one considers that in terms of the decision in *Robinson*,[55] the State has a right to apply for leave to appeal directly to the

[55] Note 43, paras 21-31.

Constitutional Court[56] on a constitutional point of law, from an extradition enquiry. For obvious reasons it is not desirable, and indeed anomalous, for the Constitutional Court to be the only, and at the same time the final, court of appeal in relation to extradition matters.

[121] In *Glenister (2)*[57] the Constitutional Court pointed out that international law occupies a special place in our law. Our courts are enjoined to consider it when interpreting the rights in our Bill of Rights[58] and when interpreting domestic legislation they must do so purposively in accordance with an interpretation that is consistent with international law, over one which is not.

[122] International crimes against humanity such as genocide and 'war crimes'[59] (which include crimes of the nature of which Mr Kouwenhoven was convicted in the Netherlands) have become statutory crimes in our law by way of domestication of the Rome Statute in terms of the so-called 'ICC' Act.[60] In the preamble to this Act, South Africa declared its commitment to bringing persons who commit such crimes to justice, either in this country in terms of our domestic laws pursuant to our international obligations in terms of the Rome Statute, or in the event of our prosecuting authority being unable to do so, in a foreign State, in line with the principle of complementarity. In addition, as was pointed out in *National Commissioner, SAPS*,[61] our courts have accepted that they may exercise universal jurisdiction over such crimes.[62]

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[56] In terms of s 167(6) of the Constitution.
[57] *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC) paras 97 and 201.
[58] Section 39 (2) of the Constitution.
[59] As defined in terms of the various Geneva Conventions.
[60] In terms of s 231(4) and s 232 of the Constitution read with s 4(1) of the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 (the 'ICC Act').
[61] *National Commissioner, SAPS v SA Human Rights Litigation Centre & another* 2015 (1) SA 315 (CC).
[62] Section 4(3) thereof provides that we may exercise universal jurisdiction over such crimes in respect of South African citizens or persons who are ordinarily resident in South Africa, or persons who become resident in South Africa after commission of such crimes, or over persons who have committed such crimes against South African citizens or residents outside of South Africa.

[123] In the circumstances, for all of these reasons I am of the view that the State does enjoy a limited right of appeal on points of law, in respect of decisions made in favour of an extraditee in extradition proceedings, in terms of s 310 of the CPA. For this particular purpose the proceedings are to be equated with criminal proceedings and the extraditee is to be treated as if he or she were in the *position* of an accused person at such proceedings.

[124] Furthermore, although Wunsh J in *Paz* suggested that there might be a distinction, in relation to s 310, between an accusation and a conviction case, I do not think that this is so. The lawmaker could not have envisaged an appeal by the State on points of law in the one instance but not the other. Although the appellation 'an accused' refers most obviously to one who has not yet been convicted, it is not unnatural to continue to refer to a convicted person as 'an accused'. Our CPA uses the expressions 'person convicted' and 'the accused' interchangeably in relation to proceedings following upon conviction.[63]

Does *audi alteram partem* apply to s 310?

[125] The prayer for an order declaring that the State is subject to a duty to give prior notice of its intention to request a magistrate (who has made a decision in favour of an extraditee), to state a case for appeal in terms of s 310, and for an order that an extraditee should be afforded an opportunity to make representations in regard to the request and as to whether the magistrate should accede thereto, is based on the contention that the *audi alteram partem* principle is applicable to the provision.

[126] The *audi alteram partem* ('hear the other side') principle is a fundamental and long-established facet of our law. In its basic formulation it postulates that when a public body or official is empowered by law to make a decision which

[63] See eg, in relation to sentence and compensation (ss 274(2), 275, 286A, 297A) and in relation to reviews and appeals (s 302, 304A, heading of s 306, 309B(3), 309C(2) and (3), 310A, 316, 316B, 321, 322(1)).

would adversely affect an individual in his liberty or property, or in regard to any existing rights which he or she may have, the individual has a right to be heard by the decision-maker before the decision is taken, unless the empowering statute provides for the contrary.[64] In *Traub*[65] the ambit of the principle was extended to cover the situation where, although the individual does not have a right which might be affected, they have a so-called 'legitimate expectation' that they would be heard. Such an expectation would be constituted by any prior pattern of conduct, or a promise or undertaking which has been made. Mr Kouwenhoven does not seek to rely on the existence of any such expectation in this matter.

[127] The Constitutional Court recently confirmed in *Gavric,*[66] 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, that the maxim constitutes a fundamental principle of administrative justice, and requires that a person whose rights may be affected (in that case, the right to freedom and bodily integrity), should be given a fair and meaningful opportunity to make representations before a decision affecting such rights is made against them.

[128] In this regard, in terms of the Promotion of Administrative Justice Act ('PAJA'),[67] administrative action which materially and adversely affects an individual's rights or legitimate expectations must be procedurally fair,[68] and an individual must be given adequate notice of the nature and purpose of any proposed administrative action which may affect them, and a reasonable opportunity to make representations in regard thereto.[69]

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[64] *Administrator, Transvaal & Ors v Traub & others* 1989 (4) SA 731 (A) at 748G.
[65] *Id*.
[66] *Gavric v Refugee Status Determination Officer, Cape Town & others* 2019 (1) SA 21 (CC) para 79.
[67] Act 3 of 2000.
[68] Section 3(1).
[69] Sections 3(2)(*a*) and (*b*).

[129] Even though the exact ambit of the rights which an extraditee has in terms of our law has not yet been definitively settled, according to the Supreme Court of Appeal it includes the right to procedural fairness at all stages of the proceedings.[70] Inasmuch as the invocation of the *audi* principle pertains to a procedural right, we have consequently assumed that, for present purposes, as a general principle *audi* applies to administrative decisions which are taken in extradition matters. Although judicial decisions which are taken by a magistrate during the course of extradition proceedings do not constitute administrative action,[71] an extraditee would obviously have the right to be heard in such proceedings prior to any such judicial decisions being taken *against* them.

[130] Mr Kouwenhoven submits that inasmuch as an extraditee may be 'affected' by the stating of a case by the magistrate, at the request of the prosecutor, he has the right to be given notice thereof and an opportunity to be heard in regard thereto, in order that he might make representations with a view to influencing the magistrate not only as to the contents of the stated case, but as to whether in fact the magistrate should state one at all.

[131] In our view these submissions fail at a number of levels, and the principle does not apply to the actions which are taken by the DPP or the relevant prosecutor, in terms of s 310.

[132] The provision becomes operative after the magistrate at an extradition enquiry has already made a decision in *favour* of the extraditee, and not against him, on a point of law. At this stage the magistrate is *functus* in relation to the decision, and cannot alter or reverse it. All that the magistrate can, and indeed is obliged to do, is to set out a 'stated case' in respect of the decision, when required to do so by the prosecutor (s 310(1) provides that the prosecutor may 'require',

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[70] *Garrido v Director of Public Prosecutions, Witwatersrand Local Division & others* 2007 (1) SACR 1 (SCA).
[71] Section 1(i)(*ee*) of PAJA.

not merely ‘request’, the magistrate to state a case). In doing so the magistrate is required to set out his or her relevant findings of fact and his or her conclusion on the point of law.

[133] It is well established that in this regard the magistrate has a duty to ensure that the case is properly stated, and that it complies with the prescribed requirements as to form and content.[72] Although, as happened in this matter, when requesting a case to be stated the prosecutor may suggest the terms thereof, it is ultimately the magistrate’s function to determine what is to be included therein, and not the State’s.[73] In the event that the case is not properly stated, and an appeal is lodged, the court of appeal may direct that it be removed from the roll, in which event the magistrate may be required to restate it. And in the event that there is improper or irregular communication between the prosecutor and the magistrate during the s 310 process, which may impact either on the fairness thereof or the outcome of the extradition, there can be no doubt that a review may be brought by the extraditee.

[134] As was pointed out in *Moores*,[74] s 310 essentially provides for the magistrate to provide reasons (in the form of a mini-judgment) on the point of law. This is for the convenience of the High Court on appeal to it. The rationale for the requirement is that, unlike in the case of the High Court, magistrates’ decisions are not always reduced to writing, and not always reasoned out if they are.

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[72] *S v Saib* 1975 (3) SA 994 (N); *S v Petro Louise Enterprises (Pty) Ltd* 1978 (1) SA 271 (T) at 276C-G.
[73] *S v Kameli* [1997] 1 All SA 230 (Ck).
[74] *Attorney-General, Transvaal v Moores (S.A.) (Pty) Ltd* 1957 (1) SA 190 (A) at 195F-196A, in relation to s 104 of the Magistrates’ Courts Act of 1944.

[135] Once, and only once, the case has been stated by the magistrate, may the prosecutor exercise a right of appeal in respect of the aforesaid decision on the point of law [75] if he or she takes the view that there is merit in it.

[136] Although an extraditee certainly has an *interest* in knowing that the State has made application to the magistrate for a case to be stated on a point of law, which may result in an appeal, it surely cannot be said that they have any *right* in regard thereto. As far I can see, neither the prosecutor's act of requiring the magistrate to state a case, in respect of a decision which has been made in *favour* of an extraditee and not against him, nor the magistrate's doing so, in any way affects the extraditee in his or her liberty, property or any existing rights.

[137] This alone means that, by definition,[76] the operation of the provision cannot be subject to *audi*. In addition, I am of the view that there are strong policy grounds why it should not apply.

[138] To allow an extraditee to have the right to make representations in regard to the request by the prosecutor for a stated case, and in regard to the stating of the case by the magistrate, a process which was intended to be purely facilitative in nature and for the benefit of the court and the parties in any appeal which might subsequently eventuate, would be to open it to contestation and possible abuse, and a further adjudication by the magistrate which would be impermissible, given that the magistrate would be *functus* on the point in issue, and it could expose the extradition process to further delay by way of possible review or appeal. One must also remember that the section primarily applies to criminal proceedings, and one can only imagine what effect extending a right of *audi* in terms of the provision would do to the every-day operation and processing of appeals by the State, albeit

[75] Section 310(2).
[76] Vide *Traub* n 64.

on limited points of law, in respect of decisions in criminal matters from the magistrates' courts.

[139] As the DPP points out, if an appeal is lodged by the State on the point of law set out in the stated case, in terms of the relevant rules of court[77] a notice of appeal must be filed and a copy thereof served on the extraditee and notice of the set down of the appeal for hearing must similarly be given, following which heads of argument must be filed and served and the extraditee has the right to file heads in reply thereto, and has the right to argue his or her case fully before the court of appeal. In the circumstances there can be no question of any prejudice on the part of an extraditee, in the event that they are not able to exercise *audi* rights at the stage when s 310 is applicable.

[140] It is noteworthy that rule 67 of the Magistrates' Courts Rules, which *inter alia* governs s 310 appeals, does not require the State to notify the accused that it has requested the magistrate to state a case or to serve the request on the accused. The 'request' (in the language of rule 67(11)) is simply a request in writing to the magistrate. Similarly, rule 67(12) does not require the magistrate to furnish a copy of the stated case to the accused – the clerk of the court is simply required to transmit a copy of the stated case to the prosecutor. It is only thereafter, and only if the State decides to pursue an appeal, that the State must 'deliver' its notice of appeal. 'Deliver' as defined in the rules includes service on the accused.

[141] It is also significant that rule 67(12)(*a*) requires the magistrate to furnish the stated case within 15 days after receipt of the record from the clerk of the court. If the lawmaker had intended the accused to have a right to be heard before the case was stated, allowance would have been made for this by way of appropriate time-limits. On Mr Kouwenhoven's argument, the process of

[77] Rules 67(11)-(15) of the Magistrates' Courts rules, and rule 51 of the Uniform Rules.

notifying the accused and awaiting and considering any representations he may wish to make has to be accommodated within the 15-day period.

[142] Mr Kouwenhoven advanced an alternative argument that even if *audi* was not an inherent requirement of s 310, it was required in this particular case because the prosecutors entered into correspondence with the magistrate.

[143] On 5 March 2020, and with reference to certain case authorities, the DPP delivered a formal request to the magistrate that she state a case in regard to the following three suggested questions of law: (1) Is a magistrate who conducts an extradition enquiry empowered to consider the jurisdiction of the requesting State, or is this a matter for consideration by the executive? (2) Is jurisdiction a relevant consideration in an extradition enquiry? (3) is the reference to jurisdiction in the Extradition Act confined to the territorial jurisdiction of the requesting State or does it include extraterritorial jurisdiction?

[144] The magistrate asked to be supplied with copies of the case authorities and a precedent of a stated case. The prosecutor duly provided her with the authorities, but did not forward a precedent. Three months later, after the typed transcript of the proceedings had been received, the magistrate provided the prosecutor with a draft of the stated case, in which she indicated that she had left out the first suggested question, as in her view it was not an issue which she had considered, but she invited the prosecutor to comment on this, if minded to do so. The prosecutor requested her to include it, on the basis that it was an aspect which he had argued. The next day the magistrate duly supplied the prosecutor with a copy of the stated case, in person, as he was present in her court for another matter. It set out all three of the suggested questions which had been posed, together with the magistrate's commentary in respect thereof.

[145] It is apparent from a perusal of the stated case that it properly set out the questions on the points of law which form the subject of the appeal which is before us, and there is no suggestion that in any of the correspondence which preceded it there was any attempt by the DPP or the prosecutor to improperly influence the magistrate as to how she was to prepare it, or what it was to say. It was the product of her own assessment of what was required in lieu of the legal issues which needed to be dealt with, which were helpfully formulated by the DPP by way of suggested questions for the assistance of the magistrate, and it properly set out her reasons in respect thereof, together with the facts that she considered material thereto and the conclusions of law to which she had arrived.

[146] In the circumstances, given the peremptory requirements of s 310 which necessitated that the prosecutor should approach the presiding officer with a request that she should state a case, and given the content of their communications, there was in my view nothing in the correspondence which required that Mr Kouwenhoven be given an opportunity to make any representations in regard thereto. Aside from an inane and polite exchange of pleasantries, the correspondence and interactions between the magistrate and the prosecutor were directed at satisfying the requirements of the provision.

Conclusion on s 310

[147] In view of the conclusion to which I have arrived, it is unnecessary to consider whether, assuming s 310 to be inapplicable, the magistrate's error of law in the present case was one which rendered her decision susceptible to judicial review and, if so, whether it would have been open to us, now that the full record is before us, to exercise our review powers in the interests of justice, bearing in mind that all interested parties are before us and that the review would turn on a question of law apparent from the record. It is similarly unnecessary to consider whether, on the assumption that extradition proceedings are not 'criminal

proceedings' for purposes of s 310, the corollary is that a discharge order in extradition proceedings is a rule order having final effect made in 'any civil suit or proceeding' in a magistrate's court within the meaning of s 83(b) of the Magistrates' Courts Act, in which event the DPP might have been able to invoke our appellate jurisdiction under that provision.

[148] In the result, the two s 310 issues, as set out in paras 12(a) and (b) of my learned brother's judgment, must be decided in favour of the State.

Rogers J

Sher J

APPEARANCES

In the appeal:

Appellant	C L Burke Office of the Director Of Public Prosecutions, Western Cape Cape Town
Respondent	A Katz SC (with him D Cooke and M Bishop) Instructed by Eisenberg & Associates Suite 904, 9th Floor, Touchstone House 7 Bree Street Cape Town

In the review:

Applicant	A Katz SC (with him D Cooke and M Bishop) Instructed by Eisenberg & Associates Suite 904, 9th Floor, Touchstone House 7 Bree Street Cape Town
First to Third Respondents	A M Breitenbach SC (with him A G Christians) Instructed by The State Attorney 4th Floor, 22 Long street Cape Town