



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

[REPORTABLE]

Case nos: 19434/17; A37/18

In the matter between:

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

Applicant

and

**THE MAGISTRATE AT CAPE TOWN,
DR VP MHLANGA N.O**

First respondent

LEE NIGEL TUCKER

Second respondent

AND:

Case no:

In the matter between:

LEE NIGEL TUCKER

Applicant

and

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

Respondent

JUDGMENT DELIVERED (VIA EMAIL) ON 16 SEPTEMBER 2022

SHER, J (SAMELA J concurring):

1. There are 3 matters before us. They concern Mr Lee Nigel Tucker ('Tucker'), who is wanted for trial in the United Kingdom on 50 charges which, in the main, pertain to the alleged rape and sexual assault of children between 1983 and 1993, in England and Wales.
2. The first of the matters concerns a referral by the magistrate of Wynberg to this Court for review, in terms of the provisions of s 304(4) of the Criminal Procedure Act 51 of 1977, of the decision which he previously made on 10 November 2017, whereby he held that Tucker was liable to be extradited to the UK. The basis for the referral was that during follow-up proceedings which took place before him in November 2021 the magistrate had come to the view that there had been a failure of justice in the proceedings in 2017 and that he had erred in holding that Tucker was liable to be extradited. In response to this the Director of Public Prosecutions in turn seeks to review and set aside the magistrate's decision to refer the matter to this Court, on the basis that it was irregular and incompetent in law. Contingent on the outcome of these matters is an application by Tucker that he be released on bail.

The relevant facts

(i) The extradition enquiry in 2017

3. In the judgment which we previously handed down on 28 March 2019¹ we set out the factual background and history of events which gave rise to the extradition enquiry which took place before the magistrate in November 2017, in some detail. It is not necessary to regurgitate what was said in that regard and I will attempt to provide only a summary of the salient aspects, insofar as is necessary.
4. In 1997 the British police launched an investigation into the activities of a paedophile ring which operated in Bristol (in England) and in Cardiff, Swansea and Caerphilly (in Wales), which resulted in several men being prosecuted. Following the initial convictions, Tucker and two other males were arrested in October-November 1999 and arraigned in the Bristol Crown Court on some 31 counts which

¹ Reported *sub nom Tucker v Additional Magistrate, Cape Town & Ors* [2019] 2 All SA 852 (WCC); 2019 (2) SACR 166 (WCC).

- involved sexual offences such as ‘buggery’ (sodomy) and indecent assault. One of the accused entered a plea of guilty to some of the charges.
5. During the trial that followed the complainants testified that the appellant and his co-accused had non-consensual anal and oral sex with them at various locations in England and Wales, when they were under the age of 16 years, and often at a time when they were drugged or under the influence of alcohol. At the conclusion of the trial the jury were called upon to render a verdict on 28 of the 31 counts.
 6. On 4 October 2000 they found Tucker guilty on 9 counts and his co-accused on 10 counts. Aside from a conviction on a charge of administering a ‘stupefying’ drug, the remaining 8 charges on which Tucker was found guilty were in respect of sexual offences. Tucker was not present when the verdict was handed down as he had ‘jumped’ bail and absconded two days earlier. He was sentenced to 8 years imprisonment, in his absence.
 7. Although he was a fugitive, he nonetheless lodged an appeal against his conviction. On 29 May 2002 the Court of Appeal upheld the appeal and quashed his conviction as well as that of his co-accused, as it was of the view that the verdict could not be regarded as safe, because the trial judge’s summing-up for the jury had been inadequate. On some of the charges the necessary particularity as regards the date and place when and where the offences had been committed had been insufficient, and the trial judge had not provided the jury with the necessary directions as to the evidence which was applicable to the charges.
 8. The Court of Appeal directed that, given the seriousness of the offences, Tucker and his co-appellant should be re-tried on the selfsame charges.² A re-indictment on the 8 sexual offences was duly lodged against Tucker at Bristol Crown Court the following day, and a warrant for his arrest was issued in July 2002.
 9. Some 14 years after Tucker absconded the British police received information that he was living in South Africa. He was arrested in Cape Town in March 2016 and a formal application for his extradition was presented by the British High Commission a few weeks later. In papers which were lodged in support of the application it

² Tucker’s co-accused was subsequently re-tried and convicted on several of the offences on which he had previously stood trial and sentenced to 6 years imprisonment

appeared that apart from the original 8 offences on which Tucker was sought for retrial, his extradition was also sought in respect of several additional sexual offences. It was pertinently stated in this regard in the affidavit of police officer Detective Constable Mildren, that these were 'new' offences in respect of which Tucker had not previously been prosecuted, albeit that some of them concerned complainants who had testified against him previously, in respect of similar offences. The remaining charges emanated from additional complainants who had been traced following a further investigation.

10. Tucker appeared before the magistrate of Cape Town at an extradition enquiry,³ on 13 October 2017. At the commencement thereof the prosecutor handed up a certificate, in terms of s 10(2) of the Extradition Act, which had been supplied by the Chief Prosecutor of the Crown Prosecution Service of England and Wales, in which it was declared that the evidence which was referred to in the request for Tucker's extradition was available for trial and was sufficient under the law of England and Wales to justify his prosecution.
11. Notwithstanding that s 10(2) expressly provides that for the purposes of satisfying himself whether there is sufficient evidence to warrant a prosecution in a requesting state the magistrate at an extradition enquiry shall accept, as conclusive proof, a certificate to that effect which is issued by the competent authority in charge of the prosecution in the foreign state, Tucker's counsel contended that inasmuch as the Act required⁴ that proceedings at an extradition enquiry were to be conducted in a manner in which a preparatory examination was to be held,⁵ the prosecutor was obliged to put forward evidence *viva voce*, whereafter Tucker would be required to plead to the charges on which extradition was sought and would then have an opportunity to testify and to call witnesses in his defence.

³ In terms of s 9 of the Extradition Act, 67 of 1962.

⁴ In terms of s 9(2).

⁵ Preparatory examinations are provided for in terms of ss 129-140 of the Criminal Procedure Act, 51 of 1977. As we pointed out in paras 50-52 of our earlier judgment, preparatory examinations are a species of judicial enquiry into the circumstances of an alleged criminal offence, before a magistrate, which were previously held as a dress rehearsal for high court trials. They have long since fallen into disuse.

12. The magistrate indicated, quite correctly,⁶ that he did not understand that this was how the proceedings should be conducted. Nonetheless, Tucker's counsel reiterated his stance that the prosecutor was required to present oral evidence and contended that inasmuch as the evidence which was contained in the affidavits which had been put forward by the British police in support of the extradition was not first-hand and was largely hearsay, it was inadmissible. He also contended that sufficient particularity had not been provided in relation to several of the charges which had been preferred against Tucker.
13. Importantly, he did *not* contend that the UK authorities were impermissibly seeking to extradite Tucker to stand trial on charges on which he had previously been prosecuted and acquitted. Instead, he claimed that in view of the provisions of s 7(2) of the UK Criminal Appeals Act of 1968 Tucker could not be extradited to face trial on any charges but those on which he had previously been arraigned, and in this regard he indicated that they were in the process of obtaining a copy of an original indictment on which he had stood trial in the Swindon Crown Court, in order that they could demonstrate that the fresh indictment which was filed against him in the Bristol Crown Court in April 2016 contained 'different' charges, in breach of s 7(2). The Swindon indictment was however never produced.
14. As we pointed out in our previous judgment ⁷ the appellant's contention that s 7(2) served as a bar to him being extradited to stand trial on the additional offences which were set out in the fresh indictment, was disingenuous. The section simply provides that in the event of a successful appeal against a criminal conviction in the UK, the Court of Appeal in the UK (and not a Court of any state in which extradition is sought) may only direct that the accused be retried on the offences of which he was originally convicted,⁸ or any offence which might have been an alternative offence to that with which he was originally charged, or a competent verdict in respect thereof.⁹ In ordering that the appellant was to be re-tried in respect of the same offences for which he originally stood trial in Bristol the Court

⁶ As per *Geuking v President, Republic of South Africa & Ors* 2003 (3) SA 34 (CC).

⁷ Para 71.

⁸ Section 7(2)(a).

⁹ Sections 7(2)(b) and (c).

of Appeal thus did no more than to give effect to the provisions of s 7(2), and the trial indictment which was lodged at the Bristol Crown Court in April 2016 accorded with that directive. But that did not mean that the UK authorities could not seek Tucker's extradition on additional, fresh charges which were to be preferred against him at subsequent proceedings, in respect of fresh complaints and in fact, by virtue of the rule of speciality, which is fundamental to extradition law, unless his extradition was granted on the additional charges as well the UK authorities would not be able to prosecute him on them.¹⁰

15. After the prosecutor indicated that in light of the provisions of s 10(2) of the Act he did not intend to present any oral evidence, Tucker then proceeded to testify, at which time he denied that he had committed any of the alleged offences and averred that the media coverage to which he had been subjected subsequent to his arrest in Cape Town had occurred in violation of the injunction which the Court of Appeal had placed on reporting. Consequently, so he claimed, it was impossible for him to receive a fair trial in the UK.
16. When his evidence was concluded Tucker requested that he be allowed to place before the magistrate some of the media reports to which he took exception, together with an affidavit from an expert on British law, which he claimed would show that it discriminated unfairly against homosexuals, so that this material could be included in the record which was submitted by the magistrate to the Minister for his decision. The magistrate declined to allow him to do so, and on 10 November 2017 he handed down a judgment in which he rejected the complaint that the charges which had been preferred against Tucker lacked sufficient particularity and held that in view of the s 10(2) certificate from the Chief Prosecutor there was sufficient evidence to hand on which to prosecute him in the UK, and he was therefore liable to be extradited.¹¹ Consequently, he made an order committing Tucker to prison, whilst awaiting the Minister's decision as to his surrender.

¹⁰ *Vide* s 17 of the UK Extradition Act 2003 and ss 2(3)(c) and 3(bis) of our Extradition Act and Art 14 of the European Convention on Extradition, which provide that an extraditee shall not be prosecuted or sentenced for any offence which was committed prior to their surrender, other than that for which they are extradited. A similar provision is to be found in Art 16 of the SADC Protocol on Extradition.

¹¹ In terms of the provisions of the Extradition Act read together with the European Convention on Extradition, to which both SA and the UK are signatories.

17. The magistrate's findings and the order which he made were challenged on appeal and review to this Court, largely on the same basis as which Tucker's liability to be extradited was challenged before the magistrate. In this regard it was similarly contended that the affidavits on which the UK authorities sought to rely constituted impermissible hearsay, that the charges on which extradition was sought had not been set out with sufficient particularity, and that as Tucker had been subjected to unfair media coverage contrary to the injunction which had been granted by the Court of Appeal, if he were to be extradited it would result in the breach of his right to a fair trial in the UK.
18. In addition to these grounds, Tucker also contended that the irregular and discourteous manner in which he had been treated by the prosecutor and the magistrate had been grossly unfair. Not only had the magistrate allowed the prosecutor to subject him to cross-examination that was objectionable, but the magistrate had improperly refused to allow him to present the affidavit in regard to the allegedly discriminatory features of English law and to submit extracts of the unfair media coverage to which he had been subjected.
19. We held that, save in respect of the complaints as to the magistrate's refusal to allow the admission of the affidavit by a British expert and the submission of the media reports, there was no merit in the appeal and the review. We were of the view that in the light of decisions of the SCA and the Constitutional Court¹² the magistrate was obliged to accept this material even though it pertained to the Minister's decision as to whether Tucker should be surrendered, and not to the magistrate's determination of whether he was extraditable. In the circumstances we directed that, for this purpose, the matter should be remitted to the magistrate in order to afford Tucker an opportunity to put such material before him, so that it could be transmitted to the Minister together with the magistrate's report, as envisaged in terms of s 10(4) of the Act.
20. Tucker was dissatisfied with the ruling we made and sought to appeal it to the Supreme Court of Appeal, which was unsuccessful, as was a petition for reconsideration by the president of the SCA. One would have thought that in the

¹² *Garrido v Director of Public Prosecutions, Witwatersrand Local Division & Ors* 2007 (1) SACR 1 (SCA); *Geuking* n 6.

circumstances the DPP would have taken steps to have the matter remitted to the magistrate as a matter of urgency, with a view to finalizing the extradition process as soon as possible. Instead, the DPP allowed itself to be inveigled into making application to the Constitutional Court for leave to appeal our order for remittal. Argument was heard in the matter on 3 November 2020. Judgment was handed down some 10 months later, on 6 September 2021, at which time the application for leave to appeal was dismissed and the terms of the remittal order we made were confirmed.¹³

21. It is important to mention that the order which the magistrate made on 10 November 2017 whereby he held that Tucker was liable to be extradited to the UK (on the charges listed in the indictment which was lodged with the Bristol Crown Court on 31 March 2016 as well as for the additional offences as set out in the warrant which was issued by the North Avon magistrates' court on 26 February 2016), which was confirmed by us on appeal on 28 March 2019, was thus not affected by the outcome of the proceedings and the order of the Constitutional Court.
- (ii) The remittal proceedings in October-November 2021
22. Tucker did not comply with the terms of the remittal order. Instead of filing an affidavit by an expert on British law, he presented a 21-page affidavit which he had deposed to, on 12 October 2021, in which he sought not only to refer to a 'bundle' of press releases in the UK and SA, but also to re-challenge the decision that he be extradited (notwithstanding that the 2017 order that he be extradited was confirmed by this Court in 2019 and endorsed by the Constitutional Court in the proceedings before it in 2020-2021). Many of the grounds on which he sought to do so were a repetition of the grounds previously advanced by him in 2017. But there were also some new ones.
23. He said that he had made the affidavit for the purpose of demonstrating that 1) he was not extraditable 2) the charges on which his extradition was sought were 'invalid' and 3) the Minister was 'constitutionally barred' from agreeing to his surrender.

¹³ *Director of Public Prosecutions, Western Cape v Tucker* 2021 (12) BCLR 1345 (CC); 2022 (1) SACR 339 (CC).

24. Surprisingly, although he had never alleged this during the extradition enquiry in 2017, he now claimed that he had previously been found not guilty on 44 of the 50 charges on which he was being sought in the UK, and according to him the remaining 6 charges did not constitute criminal offences in the UK. He claimed that the UK police and prosecution services were aware of the acquittals and their pursuit of him was driven by homophobia and malicious intent.
25. He averred that he had obtained proof of the acquittals a week before he deposed to his affidavit and referred in this regard to certain court and police records which he enclosed. However, although this constituted grounds for him to seek a rescission of the order which had been made by the magistrate he did not intend to do so 'at this stage' (sic) as he did not have the necessary 'capital' to pursue such an application but might 'nonetheless attempt to do so in the future' (sic).
26. He further contended, without any apparent acknowledgement of the irony involved, that he could not be prosecuted in the UK because the prosecution had failed to take the necessary steps to have him rearraigned within 2 months of the judgment of the Court of Appeal, as it had directed. In addition, he averred, once again, that the charges he was facing were still 'obscure' even though the Court of Appeal had admonished the State to ensure that it furnished the necessary particularity. And on some of the charges (which he did not specify), he was not 'even resident' in the UK at the time.
27. He then proceeded to comment on some of the charges with reference to the complainants to whom they related. He claimed that some of these offences had already been pronounced upon by the appeal court and the order for his retrial in respect of them had 'fallen away' (presumably because he had not been re-indicted within 2 months). There was also no 'assurance' (sic) that the charges he was facing pertained to conduct 'different' to that in respect of which he had previously been prosecuted. Once again, the irony is evident: whereas he contended in 2017 that he was impermissibly being sought for retrial on charges which were *different* to those on which he had previously been tried, contrary to s 7(2) of the UK Criminal Appeals Act of 1968, he now sought to contend that he

was impermissibly being sought for trial in respect of offences which were the *same* as those on which he had previously been acquitted.

28. In this regard, he now alleged that he had previously been acquitted by the Crown Court of Cardiff (not Swindon) in October 1990 (i.e some 10 years before his trial in the Bristol Crown Court in 2000), on several of the charges he was currently facing (these seem to comprise about 18 of the 50 charges for which he is being sought¹⁴ and pertain to 4 complainants), and could therefore not be extradited to stand trial on them again.
29. He also averred that certain of the charges of ‘gross indecency’ he was facing were in respect of offences which had been found to be ‘inherently discriminatory’ and unconstitutional in the ‘language of South African law’ and amounted to the criminalization of homosexuality. According to him, these offences stemmed from consensual sex he had with other adult males, none of whom had been below the age of consent at the time.
30. Lastly, in the final paragraph of his affidavit he set out what he claimed were compelling humanitarian reasons why he should not be extradited. These included that he was 60 years old and had HIV, for which he had been receiving anti-retroviral treatment since 1995, which had affected his liver and kidney function, and he had been incarcerated for 4 years in a correctional facility in Cape Town after his earlier release on ‘house arrest’ had come to an end, when his bail had been rescinded for breaching the terms thereof.
31. On 3 November 2021 Tucker’s new counsel, Mr King SC, appeared before the magistrate, at which time he declared that the matter was before him because it had been directed by the Court that Tucker had a ‘right to present evidence that may be used for the Minister’s decision’. Of course, this was only true insofar as such evidence pertained to the allegedly discriminatory nature of British law and the media coverage to which Tucker had been subjected. The terms of the order we made did not give Tucker licence to put anything before the magistrate which went beyond that. Tucker had such a right only at the time of the original hearing in 2017.

¹⁴ According to paras 52-64 of his affidavit these charges constitute counts 25-43 of the (combined) indictment(s).

32. Despite this, Mr King nonetheless sought leave to hand up Tucker's affidavit, with the aim that the contents thereof should be included by the magistrate in the record of proceedings, for the attention of the Minister. He directed the magistrate to those portions of the affidavit in which Tucker claimed that certain of the charges he was facing had been put against him in 'blatant disregard' for the law, as he had been acquitted of them by the Crown Court of Cardiff.
33. When the magistrate rightly enquired whether these averments could properly be raised in the proceedings before him, Mr King responded that the magistrate would surely never send a person back to another country to stand trial on charges on which he had previously been acquitted. Although this was something that the Minister was going to have to decide 'as well' (sic), the issue was one which concerned extraditability, which did not fall within the Minister's authority and resorted within the magistrate's remit.
34. When the magistrate again expressed doubts as to whether it was procedurally correct to raise these aspects in the proceedings before him, Mr King responded that as the magistrate had decided the issue, if he 'realized' that a mistake had been made he should proceed in terms of 'section 304'. This was a reference to s 304 of the Criminal Procedure Act. After the section had been read out to him the magistrate again commented that from his understanding the proper way to remedy an alleged irregularity was for the matter to be taken on review, and there was nothing which had prevented Tucker from doing so.
35. Mr King then alleged that there had been further irregularities, in that the UK authorities sought to prosecute Tucker in defiance of the 'absolute bar' (sic) which had been put in place by the Court of Appeal in regard to media coverage, which had been 'ignored'. As is evident from the judgment and order that was given by the Court of Appeal and from what follows, this statement was also not correct.
36. In response to these submissions the prosecutor rightly pointed out that the court had a very limited function and was not there to entertain a rehearing of the matter, and it was clear from the judgment of the Court of Appeal (which formed part of the extradition papers) that Tucker had not been acquitted on the 8 sexual offences on which he had been convicted in the Bristol Crown Court and these had merely

been quashed on the basis of a technical irregularity, and it had been directed that he should be retried on them. He contended that it had not been disputed at the time of the original hearing in 2017 that the remaining charges on which extradition was sought concerned offences on which Tucker had not previously stood trial. As far as the allegedly unfair media coverage in violation of the Court of Appeal's injunction was concerned, he submitted that whether this prevented Tucker from having a fair trial was something for the Bristol Crown Court to deal with on his arraignment, and he reminded the magistrate that the Court of Appeal had only decreed that pending a re-trial of 'one or both' of the accused, there was to be no publication *of the proceedings in the appeal court*. In the light of the subsequent re-trial of Tucker's co-accused many years before Tucker's arrest, the injunction no longer found application and had fallen away, and the media were not barred from reporting on subsequent developments which pertained to Tucker. This too, was an aspect we dealt with in our judgment in 2019.

37. At this juncture the magistrate remarked that it had never been brought to his attention that there had been such an order by the Court of Appeal and that there was 'quite a lot' that he had not been informed about. Given that the judgment of the Court of Appeal was included in the papers which were before the magistrate at the time of the extradition hearing in 2017, the only conclusion that one can come to is not only that he failed to have regard thereto at the time, but that in November 2021 he also failed to have regard for our judgment.
38. In reply, Tucker's counsel claimed that the magistrate had been fed misleading information, be it 'maliciously, negligently or as a result of a pure oversight', which had led to him making a judgment that was 'wrong'.
39. At the conclusion of argument the prosecutor asked for an opportunity to file a response from the British prosecutors in relation to the affidavit which had been made by Tucker (as provided for in the order we made in 2019), and after some to and fro the magistrate indicated that he would be in a position to give an indication on 19 November 2021 whether he had enough information before him in order to decide whether to send the matter on review. To this end, the prosecutor undertook

to provide an answering affidavit from the State before that date, whereupon the matter was postponed *sine die*.

40. On 12 November 2021 an affidavit in response to the affidavit which had been submitted by Tucker was furnished by the UK prosecution service in the person of Mr Brendon Scott Moorhouse, an independent barrister (who serves on the Attorney-General's Rape and Serious Sexual Offences specialist panel), who has been instructed to prosecute Tucker on the charges on which he is sought in the UK.
41. He confirmed, as per the averments which had originally been made by Detective Constable Mildren in her affidavit of April 2016, that after a review and fresh investigation into Tucker's criminal activities subsequent to the decision of the Court of Appeal in 2002, a number of further charges were added in respect of offences on which he had not previously stood trial. He reiterated that although some of these charges emanated from the selfsame complainants who had previously testified against Tucker, they were fresh charges, on which he had not been prosecuted before. He also confirmed that a number of additional complainants had come forward with allegations which formed the subject of some of the added charges, on which Tucker had also not previously been prosecuted. Moorhouse stated that care had been taken by the prosecution authorities to ensure that none of the offences in respect of which Tucker's extradition was sought had been the subject of any previous prosecution, save for those which the Court of Appeal had directed that he be retried on. In this regard he dealt,¹⁵ in some detail, with all of the charges in respect of which Tucker's extradition was sought, with specific reference to each of the complainants to whom they related.
42. In response to Tucker's allegations that he had previously been acquitted on certain charges involving sexual offences in the Cardiff Crown Court, Moorhouse indicated that no mention was made of this in the extradition papers that were filed in 2016 because Tucker was not sought for retrial in respect of those offences and could not be retried on them.

¹⁵ At paragraphs 40-58 of his affidavit.

43. From the records which Tucker annexed to his affidavit, it appears that he was in fact arraigned in the Crown Court at Cardiff, on two occasions.¹⁶ On 24 May 1990 he was indicted on 10 counts of sexual offences against unidentified males under the age of 16 years: these comprised 7 charges of gross indecency, 2 of indecent assault and 1 of buggery, which had allegedly been committed on specified dates between 18 March and 1 October 1989.¹⁷ However it appears he stood trial on 3 of these charges only: 2 counts of gross indecency and 1 count of buggery, of which he was acquitted on 11 October 1990, after the prosecution offered no evidence.¹⁸ It is not apparent whether these charges pertained to more than one complainant.
44. In September 1999 he was again committed for trial in Cardiff¹⁹ on 10 counts, which included 6 charges of supplying Class A controlled drugs²⁰ and 2 charges each of indecent assault and buggery of unidentified males, who were under the age of 16 at the time, which had allegedly been committed between 1984-1985 and in January 1988, respectively. Once again, it is not apparent how many individual complainants these charges related to. He was similarly acquitted on all the charges on 7 February 2000, as no evidence was put up by the State.²¹
45. As will be apparent from his affidavit, Tucker only alleged that he was impermissibly being extradited in respect of offences on which he had previously stood trial in 1990, and no such allegation was made in respect of the offences on which he stood trial in 1999. Strictly speaking therefore, whatever happened in 1999 was not relevant and should probably be disregarded. The difficulty however is that the records pertaining to his indictment in Cardiff in 1999 were included amongst the documents on which he sought to rely in support of his averment that

¹⁶ The court and police records were not traversed by Tucker in his affidavit or by his counsel in argument, with any degree of particularity, and it was not possible to correlate them with the contents of his affidavit without performing a careful analysis of their contents.

¹⁷ Indictment no. T19900652/691 (717/730), pp 229-232 of the review record.

¹⁸ *Id*, p 233.

¹⁹ Under indictment no. T19991451-1, pp 221-224 of the review record.

²⁰ Cocaine, heroin, amphetamines, and cannabis.

²¹ Pages 225-228 of the review record.

he was being sought for extradition in respect of offences on which he had previously been acquitted.

46. Be that as it may, given that the complainants on the offences on which he was charged in Cardiff in 1990 and 1999 are not identifiable from the court records, these records are of little assistance and do not, without more, serve to corroborate Tucker's allegations as to his previous acquittals, in respect of offences pertaining to the particular complainants which he referred to in his affidavit. As for the police records which he obtained,²² these are from the South Wales police only, and from a perusal thereof they also appear to be of little help. They consist of the records of the processing of 4 'occurrences' i.e. complaints which were reported on 7 May 1999, in respect of incidents of buggery which had taken place between 1984 and 1991. Four complainants are identified in these records. (As one of them appears to be a female²³ the entries regarding her can be ignored, given that Tucker is only being extradited on charges of having sexually abused identified male persons and her name does not appear amongst the complainants in respect of the charges for which extradition is sought).
47. In regard to the remaining 3 complainants who are identified in the police records (in order to protect their identity they will simply be referred to by their initials i.e. PC, CT and DB),²⁴ who are complainants in respect of some of the extraditable offences in respect of which Tucker has been charged, Moorhouse pointed out that the offences which concern them are new offences which were first disclosed by them in statements which they made to the police on 22 April 2015 (PC),²⁵ 7 May 2015 (DB)²⁶ and 18 August 2015 (CT).²⁷ Consequently, Tucker could not previously have been tried for these offences.
48. Moorhouse's affidavit was forwarded to the magistrate by the prosecutor via email on the evening of 18 November 2021, under cover of a detailed and

²² *Id*, pp 235-261.

²³ *Id*, p 238.

²⁴ *Id*, pp 235, 241 and 244.

²⁵ Moorhouse paras 47-49.

²⁶ *Id*, paras 50-51.

²⁷ *Id*, paras 53-54.

comprehensive memorandum in which the State sought to respond to the various submissions that had been made by Tucker in his affidavit of 12 October 2021.

49. At the outset, it was contended therein that the magistrate was bound to comply with the Order of this Court, as confirmed by the Constitutional Court, and there was no legal basis for the matter to be sent on review in terms of the Criminal Procedure Act. In this regard it was pointed out that this was not a criminal matter and Tucker was not an accused person who had been convicted and sentenced, but an extraditee, who had been legally represented.
50. The prosecutor also sought to make it clear that in seeking to respond to Tucker's allegations pertaining to his alleged prior acquittals the State was not to be understood as acceding to these submissions being received by the magistrate and sought merely to assist in order to avoid the matter being sent erroneously on review, instead of to the Minister for his decision. In regard to these allegations, it was in any event clear from Moorhouse's affidavit that Tucker was not being extradited in respect of offences on which he had previously been acquitted and this was not an issue on which our Courts were required, or at liberty, to pronounce upon and should be raised by Tucker in the UK court before which he was to stand trial. As for Tucker's contentions in relation to the allegedly unfair media coverage, it was pointed out that the injunction of the Court of Appeal was no longer in force and the offences of which he was charged had been committed more than 20 years ago, and any press coverage subsequent to his arrest was accordingly unlikely to influence a jury. In this regard the prosecutor made reference to the decision of the UK Court of Appeal in 2006 in *Hamza*²⁸ in which Lord Phillips CJ held²⁹ that English courts have not readily acceded to submissions that pre-trial publicity will render a fair trial before a jury impossible, and are of the view that proper directions from the trial judge to the jury together with the application of fair trial procedures will invariably result in the jury disregarding such publicity, and there is no reason to believe that an English jury will not be able to consider a matter which is before it objectively and impartially, on the evidence available. In *Hamza* the media had

²⁸ *R v Hamza* [2006] EWCA Crim 2918; [2007] 3 All ER 451.

²⁹ *Id*, para 90.

reported extensively³⁰ on the appellant during the course of a ‘media campaign’ which had been directed at him over a period of several years. The trial judge had accepted that the media had been hostile to the appellant and had subjected him to coverage which was couched in particularly ‘crude’ terms. In order to minimize the negative effect the coverage might have on the jury the trial judge directed that the matter should be adjourned for 6 months and once the trial commenced, took great care to apprise the jury of their duties and to advise them what they were to disregard, throughout the course of the proceedings. In the circumstances the Court of Appeal was of the view that the trial had been fair, and the jury’s verdict was upheld.

The magistrate’s ‘judgment’ of 18 November 2021

51. Instead of providing an indication to the parties as to his view of whether the matter was to be sent on review, as he had indicated he would do, the morning after receiving the DPP’s memorandum and the accompanying affidavit of Moorhouse the magistrate delivered a 17 page ‘judgment’ which was dated the day before, whereby he referred the matter to this Court for ‘special review’, in terms of s 304(4) of the Criminal Procedure Act. The ‘judgment’ made no reference whatsoever to the affidavit of Moorhouse or the memorandum from the DPP and was clearly prepared without any regard thereto. On that ground alone it was irregular and liable to be set aside, but the contents of the judgment are quite extraordinary, not only for this reason.
52. At the outset, immediately after quoting the terms of the remittal order which had been made by this Court in 2019, the magistrate stated, without any explanation, that despite the clearly defined limits thereof Tucker had been given an opportunity to present an affidavit which went beyond it. On what legal basis this was allowed, in violation of the order we made, was not revealed. The magistrate simply said that the affidavit brought to light what could be sufficient details and grounds as to why Tucker was ‘acquitted or found not guilty’ (sic) by the Court of Appeal (in 2002)

³⁰ By way of some 600 pages of newspaper reports, articles and comments which covered Hamza’s activities and inflammatory speeches which he had made in which he had exhorted the use of violence and incited persons to commit murder.

viz that the (Bristol) indictment on which he had been prosecuted (in 2000) had not given any indication as to the 'precise' allegations which gave rise to the particular offences of which he had been charged, save in the widest possible terms. Aside from the error in incorrectly stating that Tucker had been 'acquitted' by the Court of Appeal in 2002, how this justified entertaining an affidavit in 2021 which breached the terms of the remittal order of 2019 which authorized its submission, is not apparent.

53. The magistrate said that after careful consideration of all the evidence which had been presented and all the circumstances, especially Tucker's latest affidavit, he had a 'serious lack of conviction' as to whether 'sufficient details' of the offences on which Tucker was sought had been presented during the extradition hearing which had taken place before him in November 2017. He was of the view that there had been an error (on his part?) in the assessment of the information which had not only led to a failure of justice, but which demanded the court's intervention, in the interests of justice. Consequently, he was of the view that he had the authority to reconsider the order he had made in terms of which he held that Tucker was liable to be extradited. In support of this conclusion, he referred to s 165 of the Constitution, which provides that the judicial authority of the Republic is vested in its courts, whose powers must be exercised independently and impartially, without fear or favour, and whose orders bind all persons to whom they apply. On any reading of it, s 165 does not afford a magistrate the power to reconsider an order which he/she has previously made. The source of such a power can only lie in the provisions of the Magistrates' Courts Act³¹ and the rules which have been made in terms thereof, or any other statutes which confer such a power on a magistrate. The Extradition Act is not such a statute.
54. The magistrate said that the fundamental question which arose was whether the requesting State had presented 'sufficient detail' of the 'evidence' which allegedly existed against Tucker, in order for the court to determine whether he was liable to be extradited. Given that he had already made an order in 2017 that he was so liable and given that, as previously pointed out, s 10(2) of the Extradition Act

³¹ Act 32 of 1944.

provides that a certificate from the competent prosecution authority in the requesting state, which declares that it has sufficient evidence on hand to prosecute an extraditee, shall be accepted by a magistrate at an extradition enquiry as conclusive proof thereof and the magistrate accepted such a certificate in 2017, the comments which were made by him in this regard in November 2021 do not make sense.

55. The magistrate then proceeded to set out the particulars of 16 of the 50 charges which were contained in the indictments which are included in the extradition papers. After making reference to the provisions of s 35(3)(a) of our Constitution and s 84 of our Criminal Procedure Act ('CPA'), which provide that an accused person in our country who goes on trial has the right to be provided with sufficient particulars of the charges against him/her, with reference to the time and place when and where the alleged offences have been committed, he expressed the view that the lack of particularity which the Court of Appeal had complained about in 2002, still remained in relation to the charges which Tucker was now facing. Despite this finding of a lack of sufficient particularity, at the end of his judgment the magistrate held that the offences with which Tucker had been charged in the 'second' (current) indictment were 'substantially identical' to those with which he had been charged in the first i.e. those in respect of which he stood trial in Bristol in 2000. Of course, this would of necessity be true (only) in respect of the 8 offences for which he was to be retried.
56. These comments were not only unfounded, given the evidence which was before the magistrate in the affidavits of Mildren and Moorhouse, but were also improper, on several levels.
57. In terms of s 10(1) of the Extradition Act there are 2 aspects which must be determined by the magistrate at an extradition enquiry, both of which concern extraditability viz 1) whether the extraditee is liable to be 'surrendered' i.e. extradited-this is a matter of law which is to be answered by reference to the terms of the Extradition Act and any extradition treaty which has been entered into between the requesting foreign state and SA; and 2) whether there is sufficient evidence to warrant the prosecution of the extraditee in the requesting state- this

is a matter which is determined by the terms of the s 10(2) certificate which is provided by the requesting state, or in the absence thereof, the evidence which is put before the extradition enquiry.³² It is not the magistrate's function to determine contestations beyond these 2 aspects, and it is therefore not his duty to determine the cogency, veracity or (the sufficiency of) the particularity of the charges which the extraditee is to face in the requesting state. This is a function which falls on the court before whom the extraditee is to be arraigned in the foreign state.

58. The magistrate clearly failed to recognize that the presiding officer at an extradition enquiry is required only to determine the *extraditability* of an extraditee, not his or criminal *culpability*-that is a matter for the trial court in the foreign state. Because of this important distinction the Constitutional Court has confirmed that the fair trial rights which are provided for in terms of s 35 of our Constitution (which have been given effect to *inter alia* in s 84 of our CPA), do not find application in extradition enquiries.³³
59. In any event, on what grounds the magistrate came to the view that the necessary particularity had not been provided in the charges he referred to, albeit according to our standards, is not understood. In each of the charges which he referred to, detailed particulars of the period during when, and the place where the alleged offences were committed, were provided. In fact, in almost all instances not only was the town or geographical area where the offences were committed set out, but additional particularity was provided in the form of a description of the dwelling or apartment and/or the name of the road, in which the offences were committed. In the judgment which we handed down in March 2019 we held³⁴ that the contents of Mildren's affidavit, read together with the Bristol indictment and the warrant from the North Avon magistrate's court adequately set out the charges against Tucker with sufficient particularity as regards time and place for him to know what he was alleged to have done, and when, and there was no merit in the complaints raised in this regard, and any further 'niggles' which Tucker had could be raised with the

³² *S v Von Schlicht* 2000 (10 SACR 558 (C)

³³ *Director of Public Prosecution, Cape of Good Hope v Robinson* 2005 (4) SA 1 (CC).

³⁴ Note 1 para 70.

trial court in the UK. The magistrate was bound to this finding, yet it seems he was oblivious to it, and this is clearly another indication that he had no regard whatsoever for our judgment.

60. Of great concern is that the magistrate also went on a lengthy excursus in which he sought to criticize the jury system in the UK and the USA, particularly in relation to the effect which media publicity may have on trials which juries are required to adjudicate upon. Given that the requesting state in this matter is the UK, why the magistrate saw fit to express a view in relation to the application of the jury system in the USA, is beyond comprehension.
61. He commenced his discussion by claiming that long before the abolition of the jury system in SA in 1969, it was not used in our courts due to the likelihood of bias which was 'embedded' in its application, as was the case 'in most common law jurisdictions'. According to him, the majority of common law jurisdictions in Asia had abolished jury trials on the grounds that 'jurists' (sic) i.e. juries were susceptible to bias,³⁵ and the USA and UK were 2 of the 'few' common law jurisdictions which had retained them. This is not correct. There are several so-called common law, as well as civil jurisdictions which make use of juries.
62. He further claimed that it could not be disputed that the jury system had fundamental shortcomings in its workings, which could be detrimental to the right to a fair trial. What then followed³⁶ (and which he framed as if it was the product of an independent, original commentary but which was in fact a wholesale but selective copy-and-paste *ad verbatim*, save for a few words and the odd sentence here and there, without the necessary acknowledgement that it was such)- was material taken from two internet sources: archived commentary which was produced in 1994 by a Californian non-profit organization known as the

³⁵ As authority for this proposition reference was made to an entry in Wikipedia.

³⁶ At paras 22-38 of the 'judgment'.

Constitutional Rights Foundation,³⁷ and an academic article³⁸ which was published by J Brandwood in November 2000 in the New York University Law Review.³⁹

63. The material which the magistrate quoted from, selectively, to bolster his criticism of the jury system, dealt with a handful of jury trials which were held in the USA between 1807 and 1998, which were considered by commentators for the possible negative effects which the publicity which accompanied them may have had on the juries which heard them. There was not a single mention in the material the magistrate referred to, of any jury trial which was held before an English court. And importantly, the magistrate did not see fit to quote the conclusion of the authors of these sources that despite the possible negative effects which media publicity may have on jury trials, American courts have implemented a range of procedural safeguards⁴⁰ which are aimed at ensuring the integrity of their verdicts. He failed to disclose that from 1966⁴¹ and until at least 2000 (when Brandwood's article was published) not a single verdict by a jury was apparently vacated by the US Supreme Court on the basis that it was unsafe, for the reason that the jury had been influenced by pre-trial publicity or media coverage of the accused and/or the trial in which the verdict was delivered.⁴² He also failed to refer to Brandwood's extensive discussion of the English jury system,⁴³ and how it has ably dealt with the effects of media publicity on juries, and failed to point out that she concluded⁴⁴ that unlike the USA where criminal defendants may be subjected to virtually unrestrained publicity, the British legal system 'vigorously' guards their rights by means of extensive restrictions on reporting, often at the expense of freedom of speech.

³⁷ Entitled 'Is a Fair Trial Possible in the Age of Mass Media?' The Constitutional Rights Foundation *Bill of Rights in Action* Winter 1994; <https://www-crf-usa.org.za>. Paras 22-26 of the judgment were copied from this source.

³⁸ 'You say 'Fair Trial' and I say 'Fair Press': British and American Approaches to Protecting Defendants' Rights in High Profile Trials'. Paras 27-37 of the judgment are a verbatim copy of extracts from pp 1412-1415, 1417, 1422-1423 and 1427-1430 of this article.

³⁹ Vol 75: 1412-1451.

⁴⁰ Ranging from continuances, changes in venue, *voir dire*s (screening of jurors), sequestering of juries etc.

⁴¹ After the decision in *Sheppard v Maxwell* 384 U.S 333.

⁴² Brandwood n 37 p 1421.

⁴³ At pp 1430-1462 of her article.

⁴⁴ At page 1451.

64. In the circumstances, the magistrate's treatment of this aspect was also wholly unacceptable, for various reasons. It was, firstly, unacceptable because of its selective and biased copy-and-paste use of others' materials. In the second place it failed to have regard for important reported cases which were directly in point, which supported a contrary thesis, particularly the decision of the English Court of Appeal in *Hamza*,⁴⁵ which the DPP had referred him to.
65. In the third place, it was unacceptable because it is not for our courts, let alone magistrates in extradition-related proceedings, to criticize the legal systems of other countries, whatever our view of them may be. As was pointed out in our judgment of 2019, extradition is largely a process which is based on comity between foreign states, and as such it is founded on the interstate recognition of and mutual respect for, each other's legal systems, and it is accordingly not for our courts to attempt to impose our rules and standards on others. As we pointed out in our judgment in 2019 both the European Court of Human Rights⁴⁶ as well as the UK Supreme Court⁴⁷ have cautioned courts which deal with extradition matters to avoid imposing their own country's constitutional or fair trial standards (or those contained in international treaties or conventions) on states that are not party thereto.
66. The jury system is one which has been in place in many foreign jurisdictions, for many years, much longer than our judge-based system has been in place and were it not a reliable and acceptable system for dealing with criminal matters in those jurisdictions in which it is in use it would surely have been done away with by now. For a magistrate in an extradition enquiry to express an adverse view in relation to a foreign, requesting state's legal system is inappropriate and a cause of judicial and political embarrassment.
67. What makes the magistrate's conduct even more perplexing is that the workings of the English jury system were never called into question by Tucker, either during the proceedings in 2017, or in 2021. There was accordingly no cause or need for

⁴⁵ Note 28.

⁴⁶ *Al-Skeini v UK* (2011) 53 EHRR 18, para [141].

⁴⁷ *Lord Advocate (representing the Taiwanese Judicial Authorities) v Dean (Scotland)* [2018] 1 All ER 995; [2017] UKSC 44, para [45].

the magistrate to express any view thereon, let alone in respect of the American jury system.

The referral in terms of s 304(4)

68. Much of what needed to be said in relation to the magistrate's 'judgment', which formed the basis for his referral of the matter for review to this Court, has already been dealt with in the preceding section. As I have pointed out, and by way of summary, the various 'findings' which the magistrate arrived at in relation to the alleged lack of particularity in the charges for which Tucker is to be extradited and his conclusion that they were substantially identical to those he has previously been acquitted on and the supposed insufficiency of the evidence available to prove them, as well as his negative criticism of the English jury system, were inappropriate and fundamentally flawed. On that basis alone his 'judgment' was arbitrary and vitiated by gross misdirection and it cannot stand, and the referral to this Court, which is based thereon, must collapse.
69. But there are also other, fundamental reasons why, as a matter of law, the entire exercise which the magistrate engaged in was irregular and the referral was incompetent. As was previously pointed out the magistrate had no power, either inherently at common law or statutorily (in terms of the provision in the Constitution on which he sought to rely or in terms of the Magistrates' Courts Act and its rules or the Extradition Act), to reconsider the decision which he had arrived at in 2017, or to admit material into the extradition record which went beyond the terms of the remittal order which gave him the power to do so.
70. After deciding the issues required of him in terms of s 10(1) of the Extradition Act, at the extradition enquiry which was held before him in 2017 viz whether Tucker was extraditable and whether there was sufficient evidence in the UK to prosecute him on the offences on which his extradition was sought, the magistrate had exhausted his powers and was *functus officio*. He was therefore no longer at liberty to revisit those aspects and to pronounce on them again.
71. The only power which the magistrate could subsequently exercise, was the one given to him in terms of the remittal order which we made on 28 March 2019. That power was strictly limited to him receiving 1) an affidavit from an expert on British

law as to the supposed discriminatory features thereof in relation to homosexual offenders and 2) documentary evidence pertaining to media coverage which Tucker had been exposed to; with a view to him forwarding this material to the Minister together with the record, in terms of s 10(4) of the Extradition Act. That was the sole legislative objective he was still enjoined to give effect to. As was pointed out by Wallis JA in *Kouwenhoven*⁴⁸ (albeit in the context of an order by the High Court on appeal to it in relation to the outcome of an extradition enquiry), the remittal did not amount to an invitation to re-open issues on which the magistrate had already made a decision, nor did it authorize the magistrate to deal with any new issues which had not previously been before him.

72. In the circumstances, when the affidavit which Tucker had deposed to on 12 October 2021 was presented to him, he should have pointed out that save for those portions of it which dealt with the issue of the media coverage which Tucker had been exposed to, the rest of it was inadmissible, as it did not fall within the terms of the remittal order. He should have requested that Tucker's counsel consequently provide him with a revised affidavit in which only material which was admissible in terms of the remittal order was included, failing which the remaining portions of the affidavit would be struck, or treated as *pro non scripto*.
73. He had no power or right to deliver a 'judgment', either on the aspects he had previously decided, or on the material which was to be presented to him in terms of the remittal order. The only, residual power which he had in regard to such material was the power to report on it for the Minister, as provided for in s 10(4) of the Extradition Act. In doing what he did the magistrate acted outside of his powers and breached the constitutional principle of legality.
74. As for the purported referral of the matter to this Court for 'special' review in terms of s 304(4) of the Criminal Procedure Act, the provision is clearly not one which finds application in extradition proceedings. It provides that if in any criminal 'case' in which a magistrate has imposed a sentence which is not subject to review in the

⁴⁸ *Kouwenhoven v Director of Public Prosecutions, Western Cape* [2021] 4 All SA 619 (SCA); 2022 (1) SACR 115 (SCA), para 84.

ordinary course⁴⁹ it is brought to the notice of the provincial or local division which has jurisdiction or any judge thereof, that the proceedings in which such sentence was imposed were not in accordance with justice, such court or judge shall have the same powers in respect of such proceedings as if the record had been laid before them, in terms of s 303, or the section itself.⁵⁰

75. Although extradition proceedings have often been said to be proceedings which are essentially criminal in *nature*,⁵¹ as they are aimed at delivering up an extraditee for criminal prosecution or the imposition of a penal sanction in a foreign state, and this has often resulted in our courts holding that certain provisions of the CPA are applicable to them⁵² this does not mean that they constitute criminal *trial proceedings*,⁵³ or that they are to be treated as such, or that all the provisions in the CPA are applicable to them. Once again, the reason for this is that they are precursor proceedings to an intended criminal trial and to this end are concerned with the extraditability of the subject thereof i.e whether he/she should be surrendered to stand trial and not their culpability or punishment.⁵⁴ The person who is the subject of such proceedings is not subjected to a criminal trial and is not convicted or sentenced by the magistrate who presides over them. The magistrate simply determines whether he/she is to stand trial in a foreign court.
76. In the circumstances the magistrate who presides over an extradition enquiry cannot refer it to the High Court for review, in terms of the provisions of s 304(4)

⁴⁹ In terms of s 302, sentences which are subject to review in the ordinary course are those which exceed the imposition of a specified period of imprisonment or a fine exceeding a prescribed amount, in matters where an accused was legally unrepresented (these start at terms of imprisonment in excess of more than 3 months and fines in excess of R 6000, depending on the length of service of the magistrate who presided in the matter concerned).

⁵⁰ In terms of s 304(2)(c)(i)-(iv) these powers include the power to confirm, alter or quash a conviction or sentence or any order imposed by a magistrate's court, and to give any judgment or to make any order or impose any sentence which such court ought to have given or imposed.

⁵¹ *Kouwenhoven* n 48 para 38, in which references are provided to various earlier decisions of the SCA and the CC on the point.

⁵² In *Director of Public Prosecutions, Western Cape v Kouwenhoven; Kouwenhoven v Director of Public Prosecutions, Western Cape and Others* [2021] 1 All SA 843 (WCC); 2021 (1) SACR 579 (WCC) we held that s 310 of the CPA, which provides the State with a right of appeal on a point of law in criminal proceedings from a magistrate's court, is a provision which applies to extradition proceedings, a finding which was upheld by the SCA.

⁵³ Although they are similar in nature they differ from criminal trials and, when compared to them, are considered *sui generis* vide *Kouwenhoven* n 48 paras 29-30, with reference to the decision in *Robinson* n 33 para 33.

⁵⁴ *Geuking* n 6 paras 2 and 44; *Kouwenhoven* paras 2,12 and 35.

of the CPA. As the magistrate correctly sought to point out, before he was wrongly persuaded otherwise, in the event that an extraditee is subject to an irregularity in the course of extradition proceedings the remedy which is available to him is to take them on appeal or review, as Tucker did in 2017.

Towards a conclusion

77. In the result the decision by the magistrate to refer the matter to this Court for review in terms of the aforesaid provision was incompetent and falls to be set aside, as it breaches the principle of legality. Although the DPP did not expressly seek such an order in terms of its notice of motion, in my view in the exercise of our ancillary powers under the rubric of further relief we are similarly required to set aside the magistrate's 'judgment', which formed the basis of the referral, in its entirety, for the sake of good order and so that there can be no confusion as to what can be considered by the Minister when the matter comes before him for determination, in terms of s 11 of the Extradition Act.
78. Emboldened by the magistrate's decision to refer the matter to this Court for review, immediately after the 'judgment' was handed down Tucker sought to make application to be released on bail. The magistrate initially queried whether he had jurisdiction to entertain it, but subsequently inclined to the view that he did and indicated that he would hear it on 7 December 2021. Although the DPP made it clear that it intended to lodge a review of the magistrate's referral and requested that the application should be stayed pending the outcome thereof, Tucker nonetheless wished to press ahead with it. This necessitated the DPP having to make application to this Court as a matter of urgency on 3 December 2021, for an order interdicting the hearing of the bail application by the magistrate, pending the outcome of its review application, which was launched simultaneously therewith. That in turn prompted Tucker to launch a separate, urgent application for bail, in this Court, which came before me on 10 December 2021, at which time after hearing argument I directed that the application be postponed for hearing together with the magistrate's review in terms of s 304(4) and the DPP's review thereof, and that costs should stand over for later determination.

79. During argument before us Mr King indicated that, in the event that we were to rule in favour of the DPP, Tucker did not intend to proceed with his bail application. That was a sensible attitude to adopt. By his own admission, Tucker is a fugitive from justice who absconded from his trial in England in 2000 when it became clear to him that he was going to be convicted.⁵⁵ After coming to SA he purchased a property in Greenpoint, Cape Town and took up employment as a helicopter pilot.⁵⁶ He served as a pilot for the helicopter on the SAS Agulhas, on its voyage to Marion Island. A person with such skills obviously has an advantage regarding their ability to leave the country and thereby to evade the long arm of the law. In the time that he was living in SA before application was made for his extradition he travelled to a number of African countries. Save for an elderly father (who is currently 86-years old) it appears he has no family of note, and no strong bond or connection with any relatives, in the UK.
80. Following his arrest in March 2016 he made application to be released on bail, which succeeded on the basis that he was to be confined to his home and was to wear an electronic monitoring and tracking device, a privilege not afforded to ordinary arrestees. He breached his bail conditions by ‘tampering’ with the device, rendering it inoperative, although he claimed this occurred accidentally.⁵⁷
81. On determining on 10 November 2017 that he was liable to be extradited, the magistrate ordered that he should be committed to prison pending the Minister’s decision as to his surrender to the UK. An application for bail pending the outcome of the Minister’s decision, was unsuccessful, on the basis that he was a fugitive and a flight risk. He lodged an appeal to this Court against the refusal. In his papers he indicated unequivocally that he did not intend to return voluntarily to the UK to stand trial and intended to do everything legally possible to avoid being extradited.⁵⁸ The appeal failed on the basis that it had not been shown that the magistrate had been wrong and there was a real likelihood that he would abscond

⁵⁵ *Tucker v S* [2018] 2 All SA 566 (WCC), para 6.

⁵⁶ *Id*, para 7.

⁵⁷ *Id*, para 14.

⁵⁸ *Id*, paras 32-33.

again were bail to be granted. An application to appeal the decision was refused, as was a petition to the SCA.

82. In my view, considering his circumstances, the nature and gravity of the offences he is to be extradited for to the United Kingdom and the likely punishment he will receive in the event that he is found guilty thereof (a conviction is very likely at least in respect of the 8 sexual offences on which he was previously tried and sentenced to 8 years imprisonment), and that he previously absconded in order to avoid facing justice, and given further the decision which this Court has come to in this matter, there is an increased and very real likelihood that, in the event that he were to be released on bail now, pending the outcome of the Minister's decision, he will abscond again. As was pointed out by Thring J in *S v Myers*⁵⁹ the fact that a person who seeks bail has previously absconded is a major factor which militates against the grant of bail. Given the porosity of our borders and ineffective border control the likelihood of him being able to flee the country without being apprehended, thereby avoiding facing justice in the UK, is great.
83. In *Ex parte Graham*⁶⁰ Harms J (as he then was) held that the power to grant bail in extradition matters, post a committal order in terms of s 10(1), should be exercised sparingly, and given the direction in the subsection that in the event that a magistrate finds at the conclusion of an extradition enquiry that an extraditee is extraditable he 'shall' issue an order committing him/her to prison to await the Minister's decision with regard to his or her surrender, the intention of the legislature was primarily that such an extraditee should be kept in custody, pending the Minister's decision.
84. I agree with such an interpretation. In my view, given the language used in the provision and applying a purposive and contextual interpretation thereto, an extraditee who is held to be liable to be extradited should not ordinarily be on bail, pending the Minister's decision, save in exceptional circumstances. In this regard it may be noted that the offences for which Tucker is being sought in the UK are very serious offences in our law which are listed in schedule 6 of the CPA and

⁵⁹ 1983 (1) SACR 383 (C).

⁶⁰ *Ex parte Graham: In re USA v Graham* 1987 (1) SA 368 (WLD) at 371E-F.

were he to be standing trial on such charges in this country, the onus would be on him to show that exceptional circumstances existed which, in the interests of justice, permitted his release on bail.

85. All that remains are the issue of costs and the appropriate orders which are to be made. Since the decision of the Constitutional Court in *Harksen*⁶¹ it has become common for costs orders not to be made against an unsuccessful extraditee in extradition-related appeals and reviews, on the basis that they are essentially criminal proceedings in nature and costs orders are not ordinarily made against persons who are the subject of such proceedings. Thus, in *McCarthy*⁶² Farlam AJA (as he then was) confirmed that no costs order should be made against an appellant who unsuccessfully sought to appeal the dismissal of an application for the review and setting aside of a writ of arrest which had been issued in terms of s 5 of the Extradition Act, and similarly in *Kouwenhoven*⁶³ no order for costs was granted against an extraditee who had unsuccessfully sought to appeal the findings and judgment of this Court (that the state enjoyed a right of appeal in extradition proceedings, on a point of law, in terms of s 310 of the CPA), on the basis that the appeal essentially concerned a 'criminal' proceeding.
86. However, this is not an inviolate rule or principle. In coming to the conclusion in *Harksen* that costs orders are not ordinarily to be made against unsuccessful extraditees in relation to extradition-related proceedings, Goldstone JA referred to the decision of the Constitutional Court in *Sanderson*,⁶⁴ where Kriegler J had held⁶⁵ that it would be inappropriate to make a costs order against an appellant who had sought to appeal a decision refusing an application for a permanent stay of prosecution, because the claim which he had advanced in this regard concerned a 'genuine complaint on a point of substance' viz that the State had breached his constitutional right to a fair trial. In arriving at this conclusion Kriegler J referred to

⁶¹ *Harksen v President of the Republic of South Africa & Ors* 2000 (1) SACR 300 (CC); 2000 (2) SA 825 (CC).

⁶² *McCarthy v Additional Magistrate, Johannesburg* 2000 (2) SACR 542 (SCA) para 51.

⁶³ Note 48.

⁶⁴ *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC).

⁶⁵ *Id.*, para 44.

the decision of the Constitutional Court in *Motsepe*⁶⁶ where Ackermann J held⁶⁷ that one should be cautious against awarding costs against litigants who seek to legitimately enforce their constitutional rights against the State, lest such orders serve to inhibit other, deserving litigants from seeking to do so. However, Ackermann J was also at pains to point out⁶⁸ that such an approach should not be allowed to develop into an inflexible rule which might encourage litigants into believing they are free to challenge the constitutionality of statutory provisions in the Constitutional Court, no matter how spurious their grounds for doing so, or how remote the possibility that the Court would grant them access. In *Motsepe* an adverse costs order was granted against the unsuccessful litigant, in order to disabuse other potential litigants from the notion that they could always approach the Constitutional Court without any risk, no matter how 'groundless' the merits of their application to the Court.

87. That the principle that costs orders should not ordinarily be made against unsuccessful extraditees does not amount to an inviolate rule which is always applicable, contrary to the accepted principle that the Courts have a discretion in this regard which must be exercised on the basis of the circumstances of the matters which are before them, is borne out by the costs orders which were recently made by this division and the SCA in the two related *Kouwenhoven* decisions. Thus, in the first of these,⁶⁹ which involved an unsuccessful appeal against the finding of this Court that s 310 of the CPA provides the State with a right of appeal on a point of law in respect of the proceedings in an extradition enquiry, the SCA accepted (as this Court did) that a costs order should not be made, as the matter concerned proceedings which were criminal in nature. It is apparent, if one considers the facts of the matter, that the issues which required determination concerned important, arguable points of law which required finality from the SCA, and in seeking to appeal the decision of this Court on that aspect

⁶⁶ *Motsepe v Commissioner for Inland Revenue* 1997 (2) SA 898 (CC).

⁶⁷ Per Ackermann J at para 30.

⁶⁸ *Id*, para 32.

⁶⁹ *Kouwenhoven* n 48.

the extraditee was not proceeding on spurious grounds and sought to protect his rights.

88. In contrast to that decision, in the second, related appeal to it by the selfsame extraditee⁷⁰ in which judgment was handed down on the same day, the SCA dismissed the matter with costs, including the costs of 2 counsel. That appeal was concerned with the judgment and order of this Court ⁷¹ whereby it had similarly dismissed an application for the review and setting aside of a warrant of arrest which had been issued against the extraditee, in terms of s 5 of the Extradition Act, with costs. Clearly, the SCA endorsed the view that the fact that the matter concerned an appeal in an extradition-related matter i.e. in proceedings which were essentially criminal in nature, did not serve to bar the making of a costs order against an extraditee in deserving cases, in the exercise of the Court's discretion.
89. In this matter the DPP seeks an order for costs against Tucker on the basis that what occurred before the magistrate was an unnecessary and wholesale abuse of process, the result of which compelled it to come to this Court, in order to set aside the magistrate's incompetent and defective referral of the 2017 proceedings for review. In my view the DPP's contentions are well-founded, and a costs order is both justified and necessary. In fact, Tucker can consider himself fortunate that a costs order on a punitive scale was not sought, because the circumstances merit it.
90. The exercise in which Tucker and his legal representatives engaged before the magistrate was a vexatious one. Notwithstanding that the remittal order which we had made very clearly only afforded him an opportunity to place documentary evidence pertaining to the alleged unfair media coverage to which he had been subjected before the magistrate, by way of his own, personal affidavit, he ignored this, and proceeded to place an affidavit before the magistrate in which he re-challenged his extraditability, even though this aspect had already been definitively

⁷⁰ Reported *sub nom Kouwenhoven v Minister of Police & Ors* [2021] ZASCA 119.

⁷¹ Per Cloete et Fortuin JJ in *Kouwenhoven v Minister of Police & Ors* [2021] 4 All SA 768 (WCC); 2021 (1) SACR 167 (WCC).

ruled upon and decided against him in 2017, by way of an order by the magistrate which was confirmed by us on appeal, in 2019.

91. In the circumstances, it was wholly inappropriate and improper for such an affidavit to be placed before the magistrate, and Tucker and his legal representatives took advantage of him by putting inadmissible material before him which they were not allowed to submit, which they suggested was true, which they then utilized to persuade the magistrate to send the matter on review to this Court, on the basis of a provision in the CPA which did not grant him such a power.
92. In effect, by suggesting that the magistrate send the matter on review in terms of the provisions of s 304(4), instead of himself taking the proceedings on review, Tucker managed to get the magistrate to engage in a defective and incompetent process at considerable and unnecessary expense to the State.
93. Consequently, I think that the DPP's counsel, Mr Stelzner SC, is correct when he says in his heads of argument that, without any valid basis in law for doing so, Tucker thereby managed to get the magistrate to re-enter into the merits of the extradition order he had made, on the basis of inadmissible and false or incorrect allegations in his affidavit (his averment that he was to be extradited on 44 charges on which he had previously been acquitted was clearly false and untrue if one has regard for the affidavits of Mildren and Moorhouse), and caused the magistrate to revisit several aspects that had been previously traversed and dealt with by him, as well as subsequently by this Court, on appeal to it. In the circumstances this was nothing more than a spurious and opportunistic attempt by Tucker to reverse his extradition order.
94. It has, unfortunately, become commonplace for extraditees who wish to avoid or delay being extradited from this country, to challenge extradition orders by means of ill-founded appeals and reviews which have no merit in them, on the assumption that they have nothing to lose as they will not be at risk for costs in the event that such tactics should backfire, because of the practice that costs orders are generally not made against extraditees in such matters. As is so graphically illustrated by the circumstances of this matter, the result of such a strategy is that many years go by and much unnecessary expense is incurred by the SA state, in

dealing with applications for extradition from foreign states, and this country is frequently criticized as being a haven for fugitives.

95. Consequently, in my view it is necessary that it be made clear that our Courts will not allow themselves to be misused by extraditees who merely seek to delay repatriation to their countries of origin in order that they might face justice, by means of frivolous or vexatious processes, and for those who engage in such tactics there will be a price to pay. It seems to me that unless undeserving extraditees are at risk of having costs orders made against them in the event that they abuse the process of our Courts simply in order to avoid being extradited, they will have no disincentive for doing so, and will continue playing the delay and frustrate game at the expense of the SA state.
96. As far as the costs pertaining to the abortive bail application are concerned, which application Tucker abandoned during argument once his counsel saw which way the wind was blowing, I am however prepared to accept that the ordinary principle should apply. Although this was also an opportunistic move, it was one prompted by the magistrate's irregular and defective 'judgment', in which he sought to reverse the findings and order he had previously arrived at. Consequently, in my view the fair and proper order to make on this aspect is that there should be no order as to costs.
97. Finally, the DPP has asked for an order directing that the matter should be forwarded to the Minister, for his decision, as soon as possible, given the lengthy delay which has taken place, and should not be remitted to the magistrate in order for him to do so under cover of an accompanying report to the Minister.
98. In my view, given the contradictory findings and conclusions which the magistrate arrived at in 2017 and 2021 and his delivery of an inappropriate 'judgment' (and the comments and findings which he made therein in relation to the English jury system and the charges which Tucker is facing in the United Kingdom), instead of forwarding the matter to the Minister under cover of a report in terms of s 10 (4) of the Extradition Act, as he was supposed to do, it would not be proper to provide the magistrate with another opportunity to do so. In fact, given the views expressed by him in his 'judgment', the magistrate has surely disqualified himself from

providing a reliable, unbiased and objective report to the Minister. Given that the application for Tucker's extradition was made in 2016 and an extradition order was made in 2017, and 5 years have elapsed since then without the matter yet having arrived at the Minister for his decision, I see no purpose in remitting the matter to the magistrate for him to forward it on to the Minister.

Order

99. In the result, I would make the following Order:

1. The referral by the magistrate on 18 November 2021 to this Court for review in terms of s 304(4) of the CPA, of the decision and order which he made on 10 November 2017 whereby he held that Mr Lee Nigel Tucker was liable to be extradited to the UK and that there was sufficient evidence to prosecute him (in respect of charges which have been preferred against him in terms of an indictment which was lodged with the Bristol Crown Court on 31 March 2016 as well as in respect of the offences set out in the warrant of first instance which was issued by the North Avon magistrates' court on 26 February 2016), is reviewed and set aside.
2. The 'judgment' in terms of which the magistrate made the referral which is set out in the preceding paragraph to this Court on 18 November 2021, is set aside, in its entirety.
3. The review in terms of s 304(4) of the CPA is dismissed.
4. Mr Lee Nigel Tucker shall be liable both for the costs of the review in terms of s 304(4) of the CPA and for the costs of the review by the DPP of the magistrate's referral thereof to this Court, which costs shall include the costs of counsel.
5. The Registrar shall, with the assistance of the office of the DPP, forward a copy of the complete record of the proceedings in this matter (which shall include a copy of this judgment) to the Minister of Justice and Correctional Services, within 15 days from date hereof, for his decision as to the surrender of Mr Lee Nigel Tucker to the UK, in terms of s 11 of the Extradition Act, 67 of 1962.

ML SHER
Judge of the High Court

I agree, and it is so ordered.

MI SAMELA
Judge of the High Court

Appearances

Applicant's counsel: R Stelzner SC

Applicant's attorneys: State Attorney (Cape Town)

Second respondent's counsel: W King SC, B Prinsloo

Second respondent's attorneys: Mathewson & Gess Inc (Cape Town)