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

Case No: A437/17

In the matter between

LEE NIGEL TUCKER APPELLANT

And

THE STATE RESPONDENT

CORAM: DOLAMO J; THULARE AJ
DATE: 07 MARCH 2018

JUDGMENT

THULARE AJ

[1] This is an appeal against the decision of the lower court of Cape Town to refuse to grant applicant bail pending his appeal against its decision in an enquiry in terms of section 10 of the Extradition Act 67 of 1962 (the Act).

[2] The Republic of South Africa (RSA) received a request for extradition of applicant to the United Kingdom, to which a certificate in terms of section 10(2) of the Act was attached. Accompanying the request is also an affidavit by Detective Constable Alison Elizabeth Mildren stationed at Avon and Somerset Police Force in the United Kingdom who is familiar with the case of applicant. Her affidavit shows that the applicant was arrested, interviewed and charged on 24 November 1999 with sexual offences involving minor boy children. Applicant was put on trial together with two others on 19 November 2000. One of his co-accused pleaded guilty at the commencement of the trial. Applicant and his co-accused were convicted of a total of nine offences against two minor boy children following the trial.

[3] Applicant had been present at his trial until the final day when he absconded. He had been unlawfully at large ever since then. The trial judge issued a warrant for his arrest on 2 October 2000. Applicant was sentenced in his absence to a total of 8 years imprisonment. Whilst unlawfully at large, he appealed his conviction, focusing on the inadequacy of the trial judge's summing up. His co-accused also appealed. On 29 May 2002 the Court of Appeal ordered that the 18 convictions be quashed and ordered a retrial.

[4] The prosecution preferred an indictment on 30 may 2002 in preparation for the second trial of both appellant and his co-accused. The offences contained in the indictment were the same as those at the first trial, except for one offence which was no longer pursued. Applicant remained at large and a warrant for his arrest was issued on 19 July 2002. The warrant for his arrest was renewed and re-

issued on 19 March 2003. In the meantime his co-accused stood trial alone and was convicted in the retrial. He was sentenced to a 6 year custodial sentence, and subsequently died in prison.

[5] Information emerged recently of applicant's whereabouts and the police and prosecutors prepared for his retrial. In the fresh investigations alleged further abuse and new victims have also come forward and provided evidence to the police. Applicant is now wanted for the original offences, new offences alleged against the same victims and new offences in respect of new victims that have now come forward. He was arrested on a warrant which led to his appearance in the lower court of Cape Town. He was released on bail pending the enquiry, and following the enquiry, the magistrate ordered his committal to prison to await the decision of the Minister of Justice (the Minister) in terms of section 10 (1) of the Act.

[6] In his bail application, applicant testified that he was 53 years of age, born on 12 December 1963 in Sponge in Wales in the UK where he grew up and matriculated. He does not dispute the circumstances under which he came to RSA at the end of 2000 as set out in the request for his extradition. He did not plan it. It was a spur of the moment, panic decision to abscond, after it became clear that he was going to be convicted of something that according to him did not happen. Apart from occasional trips to other countries for a few weeks at a time he has been in RSA ever since.

[7]Since he arrived in RSA he had an IT business, did a bit of photography and runs a property management and letting company on a small scale with few clients that he knew personally. During the period in RSA he worked as a helicopter pilot including for the government of RSA. He did the voyage of the old SA Agulhas to Marion Island near Antarctica, managed by the Department of Environmental Affairs on a five week trip. His bail conditions pending the enquiry prohibited him from working as a pilot.

[8] He does not have children but is involved in a life partnership with another gentleman. His only other family is his 82-year old father who is in the UK and visits him twice a year. He resided at 1A Cheviot Place, Green Point, Cape Town which property he purchased around 2002. He owns the property together with his father and the outstanding amount to the bank on the property is about R530 000-00. The value of the property is R5.8 million. He has a chronic illness for the past 23 years and there had been problems with receiving medication whilst in prison. He saw RSA as his home and will use the laws of this country to fight his extradition to the highest level.

[9] Although he would love for the allegations to be over and done with, he is under no illusion that that can be done quickly. He had direct experience of the UK criminal justice system and in his view it is grossly unfair and allowed miscarriages of justice. He faced the prospect of extradition back to the UK, and although he recognizes it as a distinct possibility, he would maximize his chances of not only using the protections afforded by the Constitution of this country, but would also point out the injustices done in the UK. His view is that the law in the

UK has been undermined by many factors, resulting in unfair trials and many people being convicted on accusations, which are in the UK as good as a conviction with no corroboration necessary. He was convicted but in his view did not have a fair trial. He believed he will be found guilty because of the grossly unfair system, even if he is innocent. The presumption of innocence is still in theory applicable in the UK, but is almost non - existent in sexual matters. Moreover, according to him, the criminal injuries compensation scheme in the UK entices people to be attracted by large sums of money it pays out to lay false charges.

[10] He had instructed a very experienced attorney in matters of this nature in the UK who is reasonably optimistic, given the circumstances and after examination of his case. However, his view is that the attorney is a little bit naïve, because even if he were to walk out of a court in the UK, his name would never be cleared once you are smeared like that in the press. Even if you are cleared by a court, nobody accepts that you are not guilty. The public perception is that you got away with it. His desire is to clear his name in court as that would remove a huge weight off his shoulders. It will remove a legal threat to him, but would clear his name.

[11] He elected to come to RSA because it affords protection against discrimination on the grounds of sexual orientation. Although recently the European Council ruled that European Law should apply against discrimination on the basis of sexual orientation and that it should be read into their laws, it was never explicitly mentioned, it was not the ruling then, and the UK does not have a

written Constitution. Although the UK has a rule of law from which RSA law descended, it is not infallible. Had it not been for the application of European law, he would not have had an appeal against his earlier conviction, in which he was successful.

[12] There is a difference in how boy and girl children who are alleged victims of sexual abuse are treated in the UK, and the defences available to accused persons, which includes time bars. These are matters that are easier to raise in a Constitutional Court in RSA, than it is in a UK court prior to trial. In his view, he is effectively being charged for being homosexual in the UK.

[13] He knew towards October 2015 that his co-pilots were visiting sites with web pages referring to charges he had faced 15 years earlier and that the Civil Aviation Authority, the South African Police Service and Interpol had been asking his employers questions about him. He could since then not fly without the permission of his employer. It was clear that him flying for them was an embarrassment. He however did not flee until his arrest in March 2016, as he decided to sit round and wait, for RSA is his home. Fleeing to other countries may also have meant him not seeing his father again. He had no desire to ever see the UK again. The British can keep their place, and at the earliest possibility he will renounce his citizenship.

[14] He had used a different residential address, 25 Avenue, Alexandra when renewing his British passport because that is where he lived temporarily at the time. Whilst on bail pending the enquiry, he had an electronic tracking device on

him which was monitored by the Department of Correctional Services (DCS). He admits that the device was tampered with during that period, but disputed the report of DCS that the tampering was deliberate and not accidental.

[15] The only issue raised by the applicant was that he was not a person liable to be surrendered to the UK. The reasons behind this view according to applicant are that:

(a) He is being sought by the UK for a retrial and he cannot be tried on new charges in terms of section 7(2) of the UK Criminal Appeal Act, and the charges he is sought to be extradited are new charges. He submits that he cannot be extradited for offences that are not offences punishable under the laws of the requesting party.

(b) He cannot be extradited to face punishment which is inconsistent with the Constitution of the Republic of South Africa, 1996 (the Constitution). He submits that equality is a founding value of our Constitution, and that the right to equality includes the right not to be discriminated against on the basis of sexual orientation. In the UK, so the argument goes, conduct between two males compared to the same conduct between male and female, carries different (more severe) penalties, comes from different statues, are called different names and the ages for which a person is criminally liable are different. He alleges that there are defences not available to him as he is not accused of sexual intercourse with a girl under the age of 16 but over the age of 13, but with boy children. He submits that to extradite him to a country where the laws clearly discriminate on the basis of sexual orientation would be inconsistent with the Constitution and case law.

(c) He cannot face a fair trial in the UK due to the widespread and unfair treatment he has received at the hands of the UK media. He emphasised that the UK justice system is based upon juries and accordingly, where the pool of laypersons from which a jury will be drawn is exposed to persistent, one-sided and negative information about a case, the jury cannot be expected to be impartial. He alleges that even the UK Court of Appeal expressed concern and made an order but that that order had been ignored.

[16] The applicable provisions of section 10 of the Act reads as follows:

"10 Enquiry where offence committed in foreign state

(1) If upon consideration of the evidence adduced at the enquiry referred to in section 9(4)(a) and (b)(i) the magistrate finds that the person brought before him or her is liable to be surrendered to the foreign State concerned and, in the case where such person is accused of an offence, that there is sufficient evidence to warrant a prosecution for the offence in the foreign State concerned, the magistrate shall issue an order committing such person to prison to await the Minister's decision with regard to his or her surrender, at the same time informing such person that he or she may within 15 days appeal against such order to the Supreme Court."

[17] The purpose of the enquiry is for the magistrate to determine, upon a consideration of the evidence, whether:

(a) the person is liable to be surrendered to the foreign State concerned; and

(b) in the case where such person is accused of an offence, there is sufficient evidence to warrant a prosecution for the offence in the foreign State [*Geuking v*

President of the Republic of South Africa and Others 2003(3) SA 34 (CC) at para 15).

[18] The applicant conceded, at the extradition enquiry and throughout the extradition process, that the purpose of the enquiry before the magistrate as set out in (b) above had been fulfilled. In this respect he conceded that the magistrate was correct by accepting as conclusive proof a certificate which appeared to the magistrate to be issued by an appropriate authority in charge of the prosecution in the United Kingdom (UK), in which the letter stated that it had sufficient evidence at its disposal to warrant appellant's prosecution.

[19] In an earlier ruling in this matter, this court has already found that bail proceedings arising out of extradition proceedings are criminal in nature and that the provisions of the Criminal Procedure Act 51 of 1977 (the CPA) are applicable. It follows that the applicant should enjoy the equal protection afforded by the law regulating appeals against decisions to refuse bail pending an appeal in criminal matters, which laws embody a strong element of individual protection.

[20] Section 65(4) of the CPA provides as follows on appeal to superior court with regard to bail:

"(4) The court or judge hearing the appeal shall not set aside the decision against which the appeal is brought, unless such court or judge is satisfied that the decision was wrong, in which event the court or judge shall give the decision which in its or his opinion the lower court should have given."

[21] In *Masoanganye and Another v S* 2012 (1) SACR 292 (SCA) at para 15 the Supreme Court of Appeal set out the principles in an application for bail pending appeal after conviction in criminal matters as follows:

"[15] It is important to bear in mind that the decision whether or not to grant bail is one entrusted to the trial judge because that is the person best equipped to deal with the issue having been steeped in the atmosphere of the case. … But there is a limit to what this court may do. It has to defer to the exercise of the trial court's decision unless that court failed to bring an unbiased judgment to bear on the issue, did not act for substantial reasons, exercised its discretion capriciously or upon a wrong principle."

The same principle was set out in the following terms by the same court in *Beetge v S* (925/12) [2013] ZASCA 1 (11 February 2013) at paragraph 4:

"[4] A court sitting on appeal does not readily interfere with the decision of the trial court because the latter court is best equipped to consider the question of bail by reason of its intimate involvement with the matter. Thus, a trial court's refusal of bail will be reversed only where the court failed to bring an unbiased judgment to bear on the issue, did not act for substantial reasons or exercised its discretion capriciously or upon a wrong principle."

In *Masoanganye, supra,* at para 14, the court said:

"[14] … What is of more importance is the seriousness of the crime, the risk of flight, real prospects of success on conviction, and real prospects that a non-custodial sentence might be imposed."

[22] Sufficient detail of the offence alleged against applicant was placed before the magistrate to decide whether the evidence was sufficient to warrant prosecution in the UK. The section 10(2) certificate by Barry Hughes, Chief Crown Prosecutor, South West Area of the Crown Prosecution Service constituted sufficient proof thereof -[*Patel v NDPP* (838/2015) [2016] ZASCA 191 (01 December 2016) para 16; *Geuking, supra* para 46].

[23] The question as to whether the further charges discovered after the order of retrial against the applicant warrants prosecution in the UK, is a question which would not normally be within the knowledge or expertise of South African magistrates – *Patel, supra* at para 44. It is a question between the applicant and the UK prosecution authorities, and would be well placed within the courts of the UK. In *Geuking, supra*, at para 44 it is said:

"[44] In dealing with this argument it is important to have regard to the nature of extradition proceedings and the limited function of the hearing before the magistrate. Extradition proceedings do not determine the innocence or guilt of the person concerned. They are aimed at determining whether or not there is reason to remove a person to a foreign State in order to be put on trial there. The hearing before the magistrate is but a step in those proceedings and is focused on determining whether the person concerned is or is not extraditable. Thereafter it is for the Minister to decide whether there is indeed to be extradition. What is fair in the hearing of the magistrate must be determined by these considerations."

At para 45 the court continued:

"… If the alleged conduct in the foreign State does constitute criminal conduct in this country, the magistrate is then required to rely on the certificate with regard to the narrow issue as to whether the conduct also warrants prosecution in the foreign country. It is not inappropriate or unfair for the Legislature to relieve the magistrate of the invidious task of deciding this narrow issue unrelated to South Africa law. As already mentioned, it is a question in respect of which South African lawyers and judicial officers will usually have no knowledge or expertise."

[24] The order to surrender is not within the power of the magistrate holding the enquiry. It is not a judicial function. Section 11(b)(iv) provides as follows:

"11 Minister may order or refuse surrender to foreign State

The Minister may -

(b) order that a person shall not be surrendered –

(iv) if he or she is satisfied that the person concerned will be prosecuted or punished or prejudiced at his or her trial in the foreign State by reason of his or gender, race, religion, nationality or political opinion."

[25] There are important issues of legality and policy involved which the Minister considers, which do not resort under the judicial power of a magistrate. I accept that there is no exception to the enjoyment of the benefits derived from the founding values of human dignity, the achievement of equality and the advancement of human rights and freedoms as provided for in section 1(a) of the Constitution of the Republic of South Africa, 1996.

[26] In *Mohamed and Another v President of the RSA and Others* 2001 (3) SA 893 (CC) at para 68, the Constitutional Court said the following:

" … South Africa is a young democracy still finding its way to full compliance with the values and ideals enshrined in the Constitution. It is therefore important that the State lead by example. This principle cannot be put better than in the celebrated words of Justice Brandeis in Olmstead et al v United States:

'In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously … Government is the potent, omnipotent teacher. For good or for ill, it teaches the whole people by its example … If the government becomes a lawbreaker, it breeds contempt for the law; it invites every man to become a law unto himself; it invites anarchy.'

The warning was given in a distant era but remains as cogent as ever … The legitimacy of the constitutional order is undermined rather than reinforced when the State acts unlawfully. Here South African government agents acted inconsistently with the Constitution in handing over Mohamed ***without an assurance that he would not be executed …****"* (the bold and underlining is my own emphasis).

[27] The Constitutional Court in *Minister of Home Affairs v Tsebe* 2012 (5) SA 467 (CC) at para 25 further said:

"[25] The approach taken by this court in Mohamed was that, when South African authorities hand someone over to another country to stand trial on a charge which, to the knowledge of the South African authorities, could lead to the imposition and execution of the death penalty on such person if he is found guilty, they facilitate the imposition of the death penalty and that is a breach of their obligations contained in s 7(2) of the Constitution. In Mohamed this court held that the conduct of the South African authorities in handing over Mr Mohamed over to the authorities of the United States of America (US) to stand trial in that country in the full knowledge that, if convicted, he could be sentenced to death, ***without obtaining the requisite assurance from the US government, violated Mr Mohamed's constitutional right to life, right to human dignity and right not to be treated or punished in a cruel, inhuman or degrading way."*** (the bold and underlining are my own emphasis).

[28] At para 42 and 43 of *Tsebe, supra,* the court said:

"[42] In Mohamed this court stated that under the our Constitution there are no exceptions to the protection of the right to life, the right to human dignity and the right not to be treated or punished in a cruel, inhuman or degrading way. However, the court said that it must be remembered that, like all the other rights in the Bill of Rights, these rights are subject to limitation as provided for in section 36 of the Constitution. This court also said:

'Where the removal of a person to another country is effected by the State in circumstances that threaten the life or human dignity of such person, ss 10 and 11 of the Bill of Rights are implicated.'

The court went on to say in the next sentence that there was no doubt that 'the removal of Mohamed to the United States of America posed such a threat'. It found that '(t)he fact that Mohamed is now facing the possibility of a death sentence is the direct result of the failure by

the South African authorities to secure' an undertaking from the US that the death penalty would not be imposed or, if imposed, would not e executed.

[43] The question that arises is: what is the principle that Mohamed established. The principle is that the government has no power to extradite or deport or in any way remove from South Africa to a retentionist state any person who, to its knowledge, if deported or extradited to such a state, will face the real risk of the imposition and execution of the death penalty. ***This court's decision in Mohamed means that if any official in the employ of the State, without the requisite assurance, hands over anyone from within South Africa, or under the control of South African officials, to another country to stand trial, knowing that such person runs the real risk of a violation of his right to life, right to human dignity and right not to be treated or punished in a cruel, inhuman or degrading way in that country, he or she acts in breach of the duty provided for in s 7(2) of the Constitution."*** (bold and underlining is my own emphasis).

[29] Even if it was found that the applicant faced infringement of his right to equality, more specifically his right not to be discriminated against on the basis of his sexual orientation, and there was a real risk that he could face punishment which is inconsistent with the provisions of the Constitution if he was to be extradited, this right is not absolute. The Minister might still request the UK to provide the necessary assurances. The real risk of infringement, even if it was found to exist, was no bar for the magistrate to order his committal to prison to await the Minister's decision with regard to his surrender.

[30] The applicant is not entitled to some higher protection that would elevate his position to jurisdictional limitations in the sense of him enjoying what would amount to an extension of humanitarian asylum which protects him as a fugitive

from seizure by his own state in order to have his day in court and if needs be to pay his dues simply because RSA where he fled to is founded on the values of achievement of equality. Our values and the Bill of Rights were never intended for RSA to be a safe haven for those alleged to be the worst in their countries to evade justice to.

[31] The evidence before the magistrate showed that the applicant was sought for extraditable offences. The applicant is charged for offences relating to sexual involvement with children, and not his homosexuality. He absconded towards the conclusion of his trial when it was clear that he faced imprisonment. He knew what the outcome of his appeal was, as according to his own testimony his lawyers communicated the outcome in writing, and as such was aware that a retrial was ordered. His version that he did not read that part of the order and that his parents, who were at court when the pronouncement was made, did not understand that part of the order is simply opportunistic.

[32] He avoided the UK since he fled. He did not attend at the funeral of his mother and was not visiting his old father who had to travel to RSA in order to see him. He consulted with his attorneys by e-mail and telephone but they failed to disclose his whereabouts. When he applied for renewal of his British passport, he did not use his residential address, but another address. When granted bail and was tagged with an electronic monitoring device, he interfered with it. He does not intend to stand trial in the UK. He expects the impossible from the courts in the UK, which is to be cleared of the institutional memory of the British in the

court of public opinion, as if that memory is on some memory stick which can simply be removed from the nation. In my view, the magistrate was correct, for all intents and purposes, to find that the offences for which the applicant was sought were extraditable offences and that the applicant was liable for extradition. The applicant does not intend to stand his trial and will not voluntarily return to the UK.

[33] Having considered the evidence of the applicant, it is very clear that this is going to be a protracted matter, as he had already indicated that his plan was to use all the avenues available to him to ward off his extradition. The State has already raised alarm about the fast pace with which he pursues actions calculated to secure his freedom, in contrast to the pace with which he pursues actions in furtherance of a final decision on this matter. It is a concern which is reasonable and should receive the attention of this court.

For these reasons, I am not satisfied that the magistrate was wrong in his decision, and I would make the following order:

1. The appeal against the decision of the magistrate to refuse to grant the applicant to bail pending appeal is dismissed.

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DM THULARE
ACTING JUDGE OF THE HIGH COURT

I agree and it is so ordered.

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MJ DOLAMO
JUDGE OF THE HIGH COURT

Counsel
Appellant: Advocate J van der Berg
Respondent: Advocate C Burke

Instructing Attorneys
Appellant: Mathewson Gess Inc. Attorneys
Respondent: Director of Public Prosecutions
JUDGMENT READ AND DAY(S) IN COURT: 07 March 2018