



CONSTITUTIONAL COURT OF SOUTH AFRICA

Director of Public Prosecutions, Western Cape v Lee Nigel Tucker

CCT 85/20

Date of Hearing: 3 November 2020

Date of Judgment: 6 September 2021

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On 6 September 2021 at 10h00, the Constitutional Court handed down judgment in an application for leave to appeal part of the order of the High Court of South Africa, Western Cape Division, Cape Town (High Court). The application concerned the extradition of the respondent, Mr Lee Nigel Tucker, a British foreign national, on request of the United Kingdom (UK).

Mr Tucker was part of a group of adult males who had allegedly been sexually exploiting vulnerable boys in the UK. They were reported to the police in 1997. A major investigation into the allegations culminated in the conviction of 10 men for serious sexual offences committed against adolescent boys. Mr Tucker was tried and convicted, *in absentia* (in his absence), in the UK. He absconded on the last day of his trial and fled to South Africa. Despite being on the run, he was able to successfully appeal his conviction, which was overturned on 29 May 2002 by the Court of Appeal. A re-trial of Mr Tucker was ordered and further investigations conducted by the police into his offences resulted in him being charged with a total of 42 sexual offences committed against eight complainants.

Upon learning of Mr Tucker's whereabouts 16 years after his disappearance, the UK government requested his provisional arrest by the South African authorities. On 4 March 2016, the Pretoria Magistrates' Court issued a warrant for Mr Tucker's arrest under section 5(1)(b) of the Extradition Act 67 of 1962. He was subsequently arrested on 18 March 2016 in Cape Town, and an official request for his extradition was made on

19 April 2016. This was followed by the requisite certificate issued in terms of section 10(2) of the Act. Subsequent to his arrest, Mr Tucker was brought before the Cape Town Magistrates' Court for an enquiry in terms of section 9 and a determination in terms of section 10(1) of the Act on his liability to be surrendered to the UK, and his committal to prison awaiting a final decision by the Minister to surrender him. Before the Magistrates' Court, the Director of Public Prosecutions, Western Cape (DPP) submitted that both jurisdictional facts in section 10(1) had been established to warrant Mr Tucker's committal to prison. These jurisdictional facts were, firstly, whether Mr Tucker was liable to be surrendered, and secondly, whether there was sufficient evidence to warrant a prosecution for the offences in the UK. Mr Tucker accepted that the second jurisdictional fact had been established through the issuance of the section 10(2) certificate, however, he did challenge the establishment of the first jurisdictional fact on three grounds. The first was that he could not be charged with offences contained in the extradition request, as section 7(2) of the UK's Criminal Appeal Act 1968, prohibited the re-trial of offences for which the accused was not convicted at the original trial. Secondly, he submitted that he could not be extradited to face punishment inconsistent with the Constitution. On this point, he submitted that his right to equality would be infringed should he be made to stand trial in the UK, as he would be discriminated against on the basis of sexual orientation. His claim was based on allegedly discriminatory criminal laws in respect of heterosexual and homosexual sexual offences. Thirdly, he contended that he would not receive a fair trial because of the negative media attention that his case had attracted in the UK. Mr Tucker thus submitted that such negative publicity would influence the pool of laypersons from which the jury would be drawn, and consequently infringe on his right to a fair trial.

The Magistrates' Court refused to allow Mr Tucker to adduce expert evidence on British criminal law demonstrating that it discriminated unfairly against homosexuals, as well as furnish extracts of media reports showing the negative media attention that he had received in the UK. The Court found that Mr Tucker was a person liable to be surrendered to the UK, and made an order committing him to prison awaiting the Minister's decision to surrender him.

Aggrieved by the decision, Mr Tucker approached the High Court to appeal the judgment and order of the Magistrates' Court, and to review and set aside the proceedings before that Court, on the grounds that they were manifestly and grossly irregular, and in breach of his constitutional rights. The High Court disagreed with the Magistrates' Court's interpretation of the magistrate's role in an extradition enquiry. Relying on the Supreme Court of Appeal's decision in *Garrido v Director of Public Prosecutions, Witwatersrand Local Division* [2006] ZASCA 169, it held that a magistrate was obliged to receive any evidence that could have a bearing on the exercise of the Minister's decision to extradite. Despite this conclusion, it held further that it could not be said that the irregularities were of such a nature as to vitiate the proceedings before the magistrate. The High Court therefore dismissed the review and the appeal, and confirmed the order of the Magistrates' Court. It, however, simultaneously ordered the re-opening of the proceedings of the extradition enquiry. The re-opening was intended to allow Mr Tucker the opportunity to put before a magistrate an affidavit by an expert on UK law, and any

documentary evidence pertaining to the unfair media coverage received, for purposes of the magistrate's report to the Minister, in terms of section 10(4) of the Act.

Dissatisfied with the decision, Mr Tucker applied for special leave to appeal to the Supreme Court of Appeal. His application was dismissed. He subsequently petitioned the President of the Supreme Court of Appeal, and his petition was also dismissed. The DPP simultaneously sought leave to appeal paragraph 3 of the High Court's order which provided for the re-opening of the extradition proceedings to allow Mr Tucker the opportunity to file evidence for purposes of the section 10(4) report to the Minister. This application was also refused. Thereafter, the DPP proceeded to lodge an application for leave to appeal with this Court.

Before this Court, the DPP submitted that the central question was whether the fair trial rights issues in the country requesting extradition may be considered by a magistrate conducting an extradition enquiry in terms of section 10, or if that may only be considered by the Minister. The DPP raised two grounds of appeal, namely: that the High Court exceeded the scope of its powers, as it failed to consider itself, and the Magistrates' Court, bound by this Court's decision in *Director of Public Prosecutions, Cape of Good Hope v Robinson* [2004] ZACC 22 (*Robinson II*); and that the High Court failed to consider *Robinson v Minister of Justice and Constitutional Development* 2006 (2) SACR 503 (C), which was decided before the same High Court. The DPP further submitted that the High Court's understanding and application of *Garrido* was incorrect. Mr Tucker contended that *Geuking v President of the Republic of South Africa* [2002] ZACC 29, a decision of the Constitutional Court, and *Garrido*, authoritatively state that magistrates holding a section 10 extradition enquiry are under a duty to admit evidence relating to the Minister's decision to extradite. He further submitted that this Court in *Robinson II* did not pronounce on whether evidence could be led at a section 10 enquiry which is relevant to the Minister's decision to extradite; but only held that a magistrate should not discharge a person liable to be surrendered for reasons envisaged in section 11 of the Act. Therefore, Mr Tucker concluded, *Robinson II* and *Geuking* are compatible.

The first judgment, penned by Mathopo AJ (Mogoeng CJ concurring), upheld the application for leave to appeal with no order as to costs, holding that the role of a magistrate is limited to determining whether it is in the interests of justice to surrender a person, and that issues relating to fair trial rights are irrelevant during the magistrate's enquiry. It held further that *Geuking* permitted a sought person to adduce evidence before the magistrate relevant to the jurisdictional facts under section 10, and not the Minister's decision to extradite under section 11. *Geuking*, the first judgment held, cannot be removed from the circumstances under which it was decided. Similarly, the Court in *Garrido* dealt with a narrow issue relevant to section 10, namely whether the sought person was entitled to lead evidence before the magistrate to show that the request to extradite made by the United States, was not made in good faith. Neither *Geuking* nor *Garrido* dealt with evidence relevant only to the Minister's decision to extradite under section 11. Both parties acknowledged that it is an established practice that a sought person may make representations to the Minister concerning their fair trial rights. Therefore, the first judgment held that a magistrate may not consider or receive evidence relating to the

Minister's section 11 considerations, including evidence pertaining to a sought person's fair trial rights. The first judgment held in conclusion that it would have set aside the High Court's order re-opening the committal proceedings, and ordered that Mr Tucker remain in prison pending the decision of the Minister.

The second judgment, penned by Theron J (Khampepe J, Madlanga J, Mhlantla J, Tshiqi J and Victor AJ concurring), disagreed with the order proposed by the first judgment. After considering the trio of decisions in *Robinson II*, *Geuking* and *Garrido*, as well as the interplay between sections 9 and 10 of the Act, the second judgment concluded that a magistrate is obliged to admit evidence relating to the Minister's surrender decision during committal proceedings, notwithstanding the fact that the magistrate's decision is solely concerned with the committal of the sought person.

As a starting point, the second judgment observed that in *Robinson II* this Court did not conclude that a magistrate is precluded from *receiving* evidence relating to surrender. It held that it was beyond the power of a magistrate to discharge a sought person who is liable for extradition for reasons envisaged in section 11, which are relevant to the surrender decision. Far from disposing of Mr Tucker's case, the *ratio decidendi* (reason or rationale for the judgment) in *Robinson II* dealt with a question that simply did not arise in this matter. Mr Tucker did not suggest that once evidence relating to the surrender decision is received by the magistrate, the magistrate ought to act on that evidence and refuse to order his committal in terms of section 10. His case was simply that the magistrate was obliged to receive that evidence.

The second judgment's reading of the Constitutional Court's decision in *Geuking* was that it was premised on the assumption that a sought person "is entitled to give and adduce evidence at the [committal] enquiry which would have a bearing not only on the magistrate's decision under section 10, but could have a bearing on the exercise by the Minister of the discretion under section 11". The second judgment noted that the Court in *Geuking* did not specify that the evidence led by the sought person must be relevant both to committal and surrender. The Court referred to "evidence" generally. The second judgment likewise interpreted the Supreme Court of Appeal's decision in *Garrido* as confirming that a magistrate has a duty, in the context of a committal enquiry, to receive any evidence relating to surrender, even evidence which is not relevant to the section 10(2) certificate.

The second judgment held further that, apart from cohering with *Geuking* and *Garrido*, allowing the sought person to lead evidence relating to surrender accords with the scheme of the Act and settled jurisprudence on statutory interpretation. Section 9(1) of the Act requires a magistrate to hold the committal enquiry "with a view to surrender" and section 9(2) anticipates that *any* deposition, statement or affirmation may be received at the enquiry. Section 10(4) of the Act, which makes provision for the record of proceedings to be forwarded to the Minister, together with such report as may be necessary, also creates a "bridge" between the section 10 committal enquiry and the Minister's surrender decision in terms of section 11. This led the second judgment to conclude that the procedural regime put in place by sections 9 and 10 points toward a more expansive right to adduce evidence

in the context of a section 10 enquiry and noted that this interpretation of the Act is the one which best promotes the spirit, purport and objects of the Bill of Rights and conforms to the general principle that courts ought to interpret legislation *in favorem libertatis* (in favour of freedom or liberty).

On the question of remedy, the second judgment rejected the argument that, because the committal order had not been set aside, the proceedings before the magistrate could not be re-opened in order to allow Mr Tucker an opportunity to adduce evidence relating to surrender. This finding flowed from a proper interpretation of sections 9 and 10, which envisages a *sui generis* enquiry that may serve a dual purpose; the first aimed at a committal decision and the second to inform the Minister's surrender decision under section 11. Thus, the extradition enquiry is about more than the magistrate's committal decision alone. It follows that a magistrate can be directed to receive evidence relating to surrender even though the committal aspect of the enquiry has concluded.

The second judgment dismissed the appeal and preserved paragraph 3 of the High Court's order.

The third judgment, penned by Jafta J, agreed with the second judgment that a magistrate who conducts an inquiry in terms of section 10 of the Extradition Act is obliged to receive evidence relevant not only to the issues determined by the magistrate but also to the issues to be decided by the Minister. The third judgment however disagreed with the remedies proposed in the first judgment. In this regard, the third judgment reasoned that because the respective decisions taken by the Minister and magistrate are separate, with the magistrate's decision being limited to whether the person concerned is liable to be surrendered to a foreign state, and also whether there is sufficient evidence to warrant prosecution of the offence that the person is accused of, an irregularity pertaining to one decision cannot vitiate the other. Accordingly, the third judgment held that the failure of a magistrate to receive evidence relevant to the making of a decision by the Minister cannot vitiate the magistrate's decision regarding committal. The third judgment held that a just and equitable order is an order directed at correcting the defect in the section 10 proceedings as was ordered by the High Court. Consequently, the third judgment concurred in the second judgment's order.