Sneller Verbatim/lks

IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

JOHANNESBURG CASE NO: 0046/04

2005-01-24

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES ~~YES~~/NO
(3) REVISED

DATE 2/2/2005 SIGNATURE

In the matter between

GARRIDO, NELSON YESTER PABLO Applicant

and

THE DIRECTOR OF PUBLIC PROSECUTIONS WITWATERSRAND LOCAL DIVISION AND OTHERS Respondents

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J U D G M E N T

WILLIS, J: The learned magistrate made the following order on 2 April 2003:

> "The court therefore submits (sic) that the requirements of section 10(1) of the Extradition Act have been positively established and that the respondent may be taken into custody pending the decision of the Minister of Justice."

The use of the word "submits" in the aforesaid quotation, presumably was used *per incuriam* and the correct word should have been "finds".

Be that as it may, after the learned magistrate had given this order, there followed a debate between counsel acting for the applicants and herself, to which I shall refer later in a little more detail. At the end of that debate, the learned magistrate said the following:-

"Mr Garrido kindly rise, sir. The court's finding therefore is as follows:

1. That Pablo Nelson Yester Garrido is a person wanted by the American authorities;
2. Pablo Nelson Yester Garrido is liable to be surrendered to the United States of America;
3. There is sufficient evidence to warrant a prosecution of Pablo Nelson Yester Garrido in the United States of America on the eight offences set out in the extradition request.

Therefore the court orders that the respondent, that is Pablo Nelson Yester Garrido be committed to a prison to await the decision of the Minister of Justice with regard to his surrender to the United States of America; that Pablo Nelson Yester Garrido be surrendered to any person authorised by the American authorities to receive him if authorised by the Minister of Justice. Thank you, you may be seated."

The proceedings before the learned magistrate were in terms of section 9, read together with sections 10 and 11, of the Extradition Act No. 67 of 1962 as amended ("the Act").

The applicant has now brought an application to review these order by the learned magistrate in terms of Rule 53 of the Rules of this Court. In essence, therefore, the applicant seeks a decision to review that of the learned magistrate to commit the applicant to prison to await the decision of the Minister as to whether or not to surrender the applicant to the United States of America for trial.

At the outset of these proceedings I confirmed with counsel acting for both the applicant and the first respondent, that they would have no objection to my hearing these review proceedings acting as a single Judge. They both did so confirm and, if I understood them correctly, they were anxious that the matter be disposed of expeditiously. There is, moreover, no provision in any other statute or any other rule of law of which I am aware, requiring that review proceedings be presided over by more than one Judge.

The first respondent, in addition to opposing the merits of this application, has submitted that the review application has not been brought within a reasonable time. The application was filed some 18 months after the decision by the learned magistrate.

The applicant was represented by Mr L Hodes, an advocate, during the course of the proceedings in the court *a quo*. It would appear from the record that the applicant is a Cuban national in his mid 40's. It would also appear from the record that he has some 28 different aliases and a lengthy criminal record. It would appear that he fled from Cuba to the United States of America and at some stage in the early 1999's false represented himself as an American citizen. He is wanted by the authorities in the United States of America to

stand trial on trafficking in narcotics as well as being part of an enterprise which had as one of its objectives the trafficking in narcotics in the United States. These offences are what we more commonly refer to in South Africa as "drug dealing offences".

Section 10 of the Act reads as follows:-

"ENQUIRY WHERE OFFENCE COMMITTED IN FOREIGN STATES

(i) If upon a consideration of the evidence adduced at the enquiry referred to in section 9(4)(a)(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.

(ii) For purposes of satisfying himself or herself that there is sufficient evidence to warrant a prosecution in the foreign state the magistrate shall accept as conclusive proof a certificate which appears to him or her to be issued by an appropriate authority in charge of the prosecution in the foreign state concerned, stating that it has sufficient evidence at its disposal to warrant a prosecution of the person concerned.

(iii) If the magistrate finds that the evidence does not warrant the issue of an order of committal or that the required evidence is not forthcoming within a reasonable time, he shall discharge the person brought before him.

(iv) The magistrate issuing the order of committal shall forthwith forward to the Minister a copy of the record of the proceeding together with such report as he may deem necessary."

As was correctly observed by the learned magistrate, there are essentially two issues that need to be determined in the enquiry provided for in section 10 read together with section 9 of the Act:-

(i) Whether the person is liable to be surrendered to the foreign state concerned; and

(ii) whether there is sufficient evidence to warrant a prosecution for the offence in the foreign state concerned.

At the commencement of the enquiry the applicant who, as I have already noted before was represented by counsel, raised a number of so-called points "*in limine*". The most important was an attack on the constitutionality of the provisions of section 10(2) of the Act. As was correctly noted by the learned magistrate, she had no power to pronounce upon the constitutionality of a provision in a statute. Be that as it may, the Constitutional Court has recently pronounced on this very issue in the case of *Geuking v President of the Republic of South Africa and Others* 2003 (1) SACR 404 (CC). At paragraph [49] of that judgment, Goldstone J, giving the unanimous judgment of the Constitutional Court, said as follows:-

"Finally, the appellant claims that the conclusive nature of the section 10(2) certificate constitutes an invasion of the independence of the judiciary and is thus inconsistent with the provisions section 165 of the Constitution. The submission is that the magistrate is required by section 10 of the Act to conduct a judicial enquiry which affects the freedom of the person concerned. The Legislature or a foreign prosecutor should not be allowed to dictate the manner in which the magistrate must make this decision ..."

At paragraph [50] Goldstone J continued as follows:-

"In my opinion, both Heher J and counsel for the appellant failed to distinguish between ordinary domestic proceedings and extradition proceedings. They also conflated a legislative provision of the kind now under consideration with regard to foreign law with one dealing with domestic law. As already mentioned, the certificate is conclusive solely with regard to a question of foreign law. The enquiry by the magistrate does not constitute a trial in which guilt or innocence has to be determined. As pointed out by *Bassiouni*, extradition proceedings are *sui generis* and the Act in essence regulates the exercise of a sovereign state's power. Viewed in this context, the provisions of section 10(2) do not interfere in any way with the independence of the judiciary by rendering conclusive the opinion on foreign law by an appropriate foreign official from the country seeking the extradition. In my opinion, the provisions of section 10(2) in no way interfere with or detract

from the independence of the judiciary or violate the separation of power."

At paragraph [51] the following statement is made with clear resolution:-

"It follows that the attacks on the constitutionality of section 10(2) of the Act must be dismissed."

All other points of objection raised in the notice of objection which was presented as an "*in limine*" objection are irrelevant for the purposes of this review. It is common cause that this review turns solely on the question of whether the learned magistrate should have allowed the applicant to lead further evidence.

With regard to the question of the liability of the applicant to be surrendered to a foreign state, it is not in dispute that there is indeed an Extradition Treaty in existence between South Africa and the United States of America. It appears from the record that there was a complex process of authentication which indicates not merely the nature of the offences upon which it was sought to try the applicant in the United States of America but also that he was indeed the person who they sought to have extradited. There were documents authenticated by Mathilda Cameron of the South African Embassy in Washington DC. These documents clearly show that Diana Fernandes is an Assistant United States Attorney and that her certificate and affidavit together with annexures are true and authentic. There is furthermore a certificate issued by Lystere Blake, an Associate Director in the office of the National Criminal Affairs in the Department of Justice. The United States Attorney, General John Ashcroft,

authenticated the designation and signature of Lystere Blake. The certificate of John Ashcroft is presented under the seal of the United States Department of Justice. Colin Powell, United States Secretary of State at the time authenticated the certificate of John Ashcroft issued under the seal of the United States Department of Justice. Joan Hanson, the Assistant Authentication Officer of the United States Department of State authenticates the signature of Colin Powell. The signature and designation of Joan Hanson is properly recorded at the South African Embassy in Washington and is authenticated by Mathilda Cameron. In other words, by a somewhat complex process of authentication the two issues to which the learned magistrate had to apply her mind, were resolved.

There is now (and presumably in the light of the Constitutional Court's decision in the case of *Geuking v President of the Republic of South Africa and Others*) no dispute that the requirements in section 10 as to the fact that "there is sufficient evidence to warrant a prosecution for the offence in the foreign state concerned have been satisfied". This much, in any event, is abundantly clear from the provisions of section 10(2) which provide that the magistrate "shall accept as conclusive proof a certificate which appears to him or her to be issued by an appropriate authority in charge of the prosecution in the foreign state concerned stating that it has sufficient evidence at its disposal to warrant the prosecution of an offence". At the risk of being repetitive, it is also clear that the constitutional challenge to the conclusive nature of this proof raised by the applicant's counsel in the notice of objection taken "*in limine*" has no merit whatsoever.

Before the learned magistrate gave her judgment, the following appears in the record:-

"COURT: Any further argument?

MR HODES: I stand by my argument. There is no definition to predicate ... (intervenes)

COURT: Is that all the arguments?

MR HODES: Yes.

COURT: Shall we then postpone it for address on judgment and judgment then because you (inaudible) past 15:30 at this stage and I still have some work to do for the A Court roll.

MR HODES: Your worship, I understand this was the address on the judgment.

COURT: Is that it then? You have no further address?

MR HODES: Yes, on the preliminary points. On the points *in limine* no.

COURT: Is that it?

MR HODES: If it is found against me then I will enter into the merits of the case, your worship, at the next stage.

COURT: Fine, okay, nothing further to state."

After she had given her judgment, as I have already indicated, there was an exchange of words between Mr Hodes and her. Immediately after the learned magistrate had given the directive that the requirements of section 10 of the Act had been positively established and that the respondent (applicant in these proceedings) be taken into custody pending the decision of the Minister of Justice, Mr Hodes stood up and said the following:-

"As pointed out in the heads of argument and the notice of objection there seems to be some misunderstanding. These were points raised *in limine*, they were not to deal with the merits and it is the intention of the respondent to delve into the merits of the matter and answer the allegations for the court to make a determination in terms of section 10 of the Act ...

The intention was thereafter to answer the allegations with a view to ascertaining the determination in terms of section 10(2)." (my emphasis)

Mr Hodes concluded his address by saying the following:-

"It is therefore my submission, with respect, that the matter ought to be postponed for the respondent to be given the opportunity to answer the papers and thereafter for the court to make a determination in terms of the provisions of the Extradition Act."

In the judgment of *Geuking v President of the Republic of South Africa and Others* (*supra*) Goldstone J said the following at paragraph [41]:-

"The question of fact dealt with by way of a section 10(2) certificate is whether the evidence adduced before the magistrate would also warrant the prosecution of the person concerned under the law of the foreign state. It is one of a number of factual issues which are required to be considered by the magistrate and is the only one that does not depend on evidence readily available in South Africa. Furthermore, it is a question which would not normally be within the knowledge of expertise of South African lawyers or judicial officers."

He continues at paragraph [42] to say the following:-

"In considering the constitutionality of section 10(2) it must be borne in mind that:-

(a) ...

(It is common cause that what was said by the learned Judge in paragraph (a) to (d) are not relevant to this particular matter before me).

(e) The person concerned is entitled to give and adduce evidence at the 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 a discretion under section 11."

Nowhere either in the proceedings in the court *a quo* or in the founding affidavit in this application, is there any indication that the applicant is not the person who the prosecuting authorities in the United States of America wish to prosecute in respect of offences relating to dealing in narcotics.

As was said in the case of *Geuking v President of the Republic of South Africa and Others* at paragraph [47]:-

"The appellant also relies on the fair trial provisions enshrined in section 35(3) of the Constitution. What must be stressed here is that the fact that the enquiry envisaged in section 9(2) must proceed in a manner in which a preparatory examination is held, does not transform the enquiry into a trial. The person facing extradition is not an accused person for the purposes of the protection afforded by section 35(3) of the Constitution. As

pointed out earlier, the enquiry does not result in a conviction or sentence. This does not mean, however that the person concerned is not entitled to procedural fairness at all stages of the extradition proceedings. It follows that the provisions of section 35(3) of the Constitution are not relevant to it. Reliance on it by the appellant is therefore misplaced." (my emphasis)

In paragraph 31 of his founding affidavit in these review proceedings, the applicant says as follows:-

"The collective understanding of my counsel, my attorney and I was that if the points in the objection were not upheld by the third respondent (i.e. the learned magistrate) I would be afforded the benefit of presenting evidence."

This was not disputed by the respondent. In paragraph 34 the applicant says the following:-

"I respectfully state that my concern about my procedural rights is not solely of academic interest in that there are a number of factual averments some of which have been alluded to hereinbefore contained in the motivation, which are in dispute and in respect of which I would have, had I been afforded the opportunity to do so, presented evidence in rebuttal. The evidence I intend to present in rebuttal, subject to the advice of my attorney and counsel will bring the validity and accuracy of important factual averments contained in the motivation into question." (my emphasis)

In paragraph 36 the following appears from the applicant:-

"What I might present in rebuttal, namely what I would have been entitled to present had the third respondent not dismissed the points *in limine* and immediately granted an extradition order without affording me the opportunity of rebutting the merits of the evidence, even if not sufficient to satisfy a magistrate that an order for committal is inappropriate, would have been of relevance and may in future be of relevance to the Minister who has the ultimate discretion to determine whether or not to grant an application for extradition by a foreign state. (my emphasis)

The learned magistrate, in my opinion, correctly referred with approval to the case of *Bell v The State* [1997] 2 All SA 692 (E) at 698E-G, to hold that a person who is subject to an enquiry as provided for in the Act, cannot lead evidence with regard to the actual merits of the substantive case against him or her. In other words, a person cannot lead evidence as to whether or not he or she is in fact guilty of the offence which he or she has been alleged to have committed. This very obviously would be a most unsatisfactory state of affairs. No person should be tried twice in respect of the same offence. Furthermore, very obviously relevant witnesses would not be available or easily available in this country to determine the merits of the substantive case against a person who is subject to such an enquiry.

The repeated reference to the words "the merits" in both the founding affidavit in these review proceedings and the enquiry before the learned magistrate therefore seem to me to have been misplaced.

Mr McKelvey referred me to the case of *Harksen v Minister of*

Justice and Constitutional Development and Others 2003 (1) SACR 489 (C) at paragraph [29] where the learned Judge said:-

> "It was certainly not incumbent upon him (first respondent) to invite the applicant to make representations prior to his making such an order. In any event, the applicant was free to make representations at any time before the granting of the order, should he have wished to do so".

The learned Judge continues at paragraph [30]:-

> "The fact that certain other persons or parties were allowed to make representations to the first respondent prior to his issue of the order is, in my view quite irrelevant. It was never suggested that the applicant had been prejudiced or otherwise unfavourably affected thereby in any way. Should he have experienced any prejudice or discomfort nothing stopped him from approaching the first respondent and requesting a hearing. At no stage was he refused the right to make representations. He certainly chose not to do so."

The first respondent in that case was the Minister. Mr McKelvey submitted that if these observations apply to the Minister *a fortiori* they applied in the enquiry in the court *a quo*, especially in the light of the fact that the Constitutional Court has clearly stated that the enquiry is NOT a trial. I agree. Besides, the record shows that Mr Hodes appearing for the applicant clearly intended to confine himself to the proceedings in the court *a quo* to leading evidence with regard to the provisions of section 10(2) of the Act. As I have already indicated, section 10(2) of the Act makes it clear that the magistrate

shall accept as "conclusive proof", "a certificate which appears to him or her to be issued by an appropriate authority in charge of the prosecution in the foreign state concerned stating that it has sufficient evidence at its disposal to warrant a prosecution of the person concerned". As has already been noted, the challenge to the constitutionality of this subsection, as raised in the notice of objection by Mr Hodes on behalf of the applicant, has no merit. Had there been an application on behalf of the applicant to lead evidence relevant to the issues to which the Constitutional Court refers in the *Geuking v President of the Republic of South Africa and Others* case, and had this been refused, the result may well have been very different. Nevertheless, in my view, the record speaks for itself. The issues upon which the applicant sought to lead further evidence in the court *a quo* were not permitted. Furthermore, I cannot see how the applicant has been prejudiced in any way. I can see no reviewable irregularity which has been committed by the learned magistrate.

The following order is made:

The application to review the decision of the learned magistrate 2 April 2003 is dismissed with costs.

ON BEHALF OF APPLICANT: MR F SAINT

Instructed by: Biccari Bolo & Mariano Inc.

ON BEHALF OF THE 1ST RESPONDENT: MR C T H McKelvey

DATE OF HEARING: 2005-01-24

DATE OF JUDGMENT: 2005-01-24