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

REPORTABLE
CASE NO: 4979/2021
& A226/2021

In the matter between:

IAIN GEORGE DALLAS WARES	Applicant
And	
THE ADDITIONAL MAGISTRATE, SIMONSTOWN, CAPE TOWN	First Respondent
THE MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Second Respondent
THE DIRECTOR OF PUBLIC PROSECUTIONS, WESTERN CAPE	Third Respondent

Bench: P.A.L. Gamble & R.C.A. Henney, JJ.

Heard 27 October & 14 November 2023

Delivered: 8 August 2024

This judgment was handed down electronically by circulation to the parties' representatives via email and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on Thursday 8 August 2024.

JUDGMENT

GAMBLE & HENNEY, JJ

INTRODUCTION

1. The appellant is an 84-year-old man who resides in the Cape Peninsula. He is a self-confessed paedophile who is sought by the prosecuting authorities in Scotland to stand trial on various counts relating to what our law defines as a "sexual offence"[1] perpetrated on teenage boys at elite schools in the Edinburgh area during the 1970's.

2. In submissions made to the second respondent (the Minister) in circumstances described more fully hereunder, the appellant explains that after he graduated from a local university with a degree in psychology in 1962 he took up teaching posts at various boys' schools, notwithstanding the fact that he did not have a formal qualification as an educator. He describes how, over time, his urges to sexually molest learners overtook him to the extent that he could not control himself and his conduct became habitual.

3. The appellant says that in 1967 he consulted a local mental health practitioner who recommended certain therapeutic interventions. When these ultimately proved ineffective, it was suggested to the appellant that he should seek further help in Scotland from a therapist who specialized in the treatment of his condition and so he relocated to Scotland for that purpose in 1967. While there for treatment, the appellant qualified as a teacher and took up employment at exclusive boys-only

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[1] See s1 and Ch 2 – 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007 ("SORMA").

schools where he once again committed various sexual offences. He says he also turned to drink over time.

4. After being found out when a learner complained to the principal about being sexually molested, the appellant lost his work in 1979 and decided to return to South Africa accompanied by his wife whom he had met and married in Scotland. He says that he disclosed his past to his wife at that time and since his return home has not indulged in any further sexual offences.

5. In circumstances which are not entirely clear to us (but which are of no legal consequence), the appellant's identity and whereabouts came to the attention of certain of his alleged victims who pressed charges against him in Scotland. The eventual result of this was that in September 2018 the High Commissioner for the United Kingdom in South Africa requested the authorities to extradite the appellant under the Extradition Act 67 of 1962 (the Act) to stand trial in Edinburgh on 6 charges of what are described in Scottish law as "lewd, indecent and libidinous practices and behaviour" and a single charge of so-called "indecent assault". The application for the appellant's extradition under the Act is founded upon the provisions of the European Convention on Extradition (the Convention) to which both South Africa and the United Kingdom (the UK) are parties.

6. A warrant of arrest for his extradition was executed by members of the South African Police Services on the appellant at his home on 22 May 2019 and he thereafter appeared before the first respondent (the Magistrate) the following day. The appellant was released on bail immediately in terms of s9(2) of the Act and on 12 July 2019 the extradition proceedings proper commenced before the Magistrate. The appellant was then represented by an experienced advocate from the Cape Bar instructed by a leading firm of attorneys in the city and, acting on the advice of his legal representatives, he made certain admissions before the Magistrate which were duly recorded, purportedly in terms of s220 of the Criminal Procedure Act, 51 of 1977 (the CPA).

7. The Magistrate indicated that he required time to consider the request for extradition and the admissions made by the appellant in response thereto and to that

end he postponed the proceedings to 23 August 2019. On that day, the Magistrate determined that, on the strength of his admissions, the appellant was liable to be extradited to Scotland in terms of the Act and he ordered accordingly. The Magistrate extended the appellant's bail pending the decision of the Minister to order his removal to the UK.

8. In September 2019 the Appellant exercised his right under s11 of the Act and made detailed representations to the Minister requesting him[2] not to order his extradition, saying that it would not be in the interests of justice to do so and that the effect of such an order would be "too severe a punishment" on the appellant who is in poor health. In his submissions to the Minister the appellant purported to make a clean breast of things and, as alluded to above, admitted his crimes in considerable detail. The Minister was not persuaded by the appellant's entreaties and on 19 February 2020 he decided that he should be surrendered to the UK to stand trial on the aforementioned seven counts. This decision came to the attention of the appellant only in July 2020.

9. In the meanwhile, and at the suggestion of his erstwhile attorneys who said that they were not specialists in criminal law, the appellant switched legal teams in May 2020 at the height of the Covid-19 pandemic and instructed a firm well-versed in criminal law and procedure. As a consequence thereof a new strategy was embarked upon.

10. The appellant then sought to appeal the decision of the Magistrate under s13 of the Act and also brought a legality review against the Magistrate's decision. Simultaneously, and in March 2021, the appellant also launched a review under s22 of the Superior Courts Act, 10 of 2013 of the Minister's decision to surrender him to the United Kingdom under s11 of the Act. Later, in his replying affidavit in the review, the appellant attacked the constitutionality of s10 of the Act on the basis that it did not permit his release on bail while awaiting the Minister's decision under s11 of the Act. The latter point was not contested by the Minister who filed a counter-application in that regard.

[2] The present Minister of Justice is female.

11. Both matters were heard by this Court in November 2023. For the sake of convenience, we shall continue to refer to the extraditee as the appellant, notwithstanding the fact that he is also an applicant before us for review. Where appropriate we will refer to the Minister as such or to the Minister and the third respondent (the DPP) collectively as "the respondents". The Magistrate abides the decision of the Court in respect of the review of his decision while the Minister and the DPP oppose both the appeal and the review against the decisions to extradite the appellant.

12. The appellant was represented before us by Advs. W. King SC and B. Prinsloo while the respondents were represented by Advs. F. Petersen and C. de Villiers. We are indebted to both sets of counsel for their detailed heads of argument, supplementary notes and bundles of authorities which have facilitated the preparation of this judgment.

ISSUES FOR DETERMINATION BY THIS COURT

13. The appeal before us is founded, firstly, on the contention that the Magistrate erred in recording the appellant's admissions before him as falling within the ambit of s220 of the CPA: it was submitted that the proceedings under the Act did not constitute criminal proceedings. Secondly, there is the issue of dual criminality, as that phrase is understood in extradition law and the contention that the Magistrate erred in holding that the appellant was extraditable on this score. Finally, there is the question as to whether any of the contemplated charges in Scotland have prescribed[3].

14. The review, on the other hand, is based on the assertion that the Minister erred in making an order for the appellant's extradition in circumstances where the Magistrate had failed to commit the appellant to prison under s10(1) while awaiting the Minister's decision to surrender him to. The argument advanced was that before

[3] The parties have used the term "prescription" in the context in which it appears in the heading to section 18 of the CPA. In the body of section there is also reference to the lapsing of the power to prosecute and we shall thus use the terms interchangeably in this judgment.

the Minister could exercise his discretion to extradite, the appellant had to be physically in custody awaiting extradition. The fact that the Minister exercised his discretion while the appellant was out on bail (and *ergo* not "committed") was said to be a reviewable error. This point is now common cause between the parties.

15. The consequence of this reviewable error, say the parties, is that the Act is unconstitutional in that it deprives extraditees of the right to freedom guaranteed under s12 of the Constitution of the Republic of Africa, 1996 (the Constitution) while awaiting extradition. The argument in favour of a constitutionally sanctioned amendment is buttressed by a long-established practice in our courts in terms whereof, in appropriate cases, extraditees are granted bail initially in the proceedings before a magistrate, which bail is thereafter systematically extended until the Minister has finally made a decision on the extradition, one way or the other.

16. Lastly, the issues of dual criminality and prescription were also incorporated into the review.

ISSUES WHICH ARE COMMON CAUSE

17. In addressing these issues, it is useful to record what is common cause between the parties for, as will be seen hereunder, at the end of the day there is not that much in dispute with the matter turning rather on issues of law and interpretation.

PRESCRIPTION

18. Firstly, the parties informed the Court at the outset that it was common cause that counts 1 – 4 upon which the appellant is sought to be indicted in Scotland had become prescribed. This is so, it was said, because s18 of the CPA provides for the prescription of offences older than 20 years. The parties contended that this local statutory provision falls to be considered in the context of Arts 2(1) and 10 of the Convention which proscribes the extradition of a person who has "according to the law of either the requesting state (i.e. the UK) or the requested Party (i.e. South Africa), become immune by reason of lapse of time from prosecution or punishment."

19. During the course of preparation of this judgment, we were concerned, on our prima facie reading of the law and the decided cases, that the parties may have agreed on the prescription of counts 1 – 4 in error of the law. Mindful of our duty under CUSA[4], we addressed a note to the parties on 30 April 2024 in which we said the following:

"re: SECTION 18(1)(f) OF THE CRIMINAL PROCEDURE ACT, 1977

1. As we understand the position, there is no statute of limitations in relation to the charges on which the applicant is required to stand trial in Scotland. In the circumstances the Scottish prosecuting authorities seek to indict the applicant on the seven charges set forth in the petition of Andrew Richardson Esq (Record Bundle 2 p 59 *et seq*).

- Charge 1 alleges offences committed between 2 May 1969 and 1 May 1972;
- Charge 2 alleges offences committed between 2 May 1972 and 31 August 1973;
- Charge 3 alleges offences committed between 27 February 1969 and 26 February 1972;
- Charge 4 alleges offences committed between 10 June 1971 and 31 August 1973;
- Charge 5 alleges offences committed between 1 September 1974 and 15 July 1976;
- Charge 6 alleges offences committed between 1 September 1974 and 30 June 1976; and
- Charge 7 alleges offences committed between 1 September 1974 and 31 December 1976.

[4] CUSA v Tao Ying Metal Industries and others 2009 2) SA 204 (CC) at [68]:
"Where a point of law is apparent on the papers, but the common approach of the parties proceeds on a wrong perception of what the law is, a court is not only entitled, but is in fact also obliged *mero motu*, to raise the point of law and require the parties to deal therewith. Otherwise, the result would be a decision premised on an incorrect application of the law. That would infringe the principle of legality."

2. If indicted in Scotland, the applicant will be required to face all seven counts and he cannot plead “prescription” to these seven charges. He may have other objections regarding undue delay and prejudice but those are issues he will have to raise before the trial court.

3. Regardless of the argument regarding the correct test for dual criminality, the applicant may only be extradited to stand trial in Scotland on charges which the State would be entitled to prefer against him in South Africa.

4. In the founding affidavit the applicant has contended that he is not liable to be extradited to face the charges contemplated in counts 1 – 4 because he says these have become “prescribed”. By that the applicant intends to convey that in South African law he cannot face charges which predate 27 April 1994 because of the provisions of s18(1)(f) of the Criminal Procedure Act, 1977 (CPA) as it stood on that day. At that stage he would only have been liable to face a charge of rape.

5. The applicant contends that the amendment to sec 18(1)(f) was effected in 2022, after his arrest on these charges, and that he is thus entitled to raise “prescription” on charges 1 – 4. The respondents agree with this contention.

6. We consider that the use of the term “prescription” is potentially misleading. Sec 18 provides that the **right to institute** prosecution lapses after 20 years save for the enumerated categories. Those categories now include the full spectrum of sexual offences under SORMA.

7. The question that now arises is whether, if an accused is alleged to have committed a sexual offence as defined in SORMA other than rape in South Africa in, say, 1971, the State would not have the **right to institute a prosecution** today?

8. The applicant was arrested on 22 May 2019 and appeared before the Magistrate for the first time on 23 May 2019. At that time, the provisions of sec

18(1)(f) of the CPA had been declared unconstitutional by Zondi AJ in Frankel (2018 (2) SACR 283 (CC)) on 14 June 2018. The declaration of unconstitutionality was made retrospective to 27 April 1994 and Zondi AJ then ordered that the words "*all other sexual offences whether in terms of common law or statute*" be read in to sec 18(1)(f) while Parliament was given 24 months to amend the section.

9. The order further provided that should Parliament fail to amend the section within the said 24-month period, the interim reading-in remedy would become final. Thus, on 14 June 2020 the words were considered to have been finally read in. The section was eventually amended in December 2020 to read "*any sexual offence in terms of the common law or statute*".

10. As we read the section in question, there is now no time-bar in South Africa precluding the State from exercising its right to institute a prosecution against the applicant under the common law (or SORMA) for crimes committed as early as May 1969. That appears to have been the position in June 2018 when Frankel was handed down and it further appears to have been the position when the applicant was arrested in May 2019.

11. In Frankel the sexual offences in question were allegedly committed between 1970 and 1989. The date of those alleged offences, said Zondi AJ at [65], did not preclude Mr Frankel from being prosecuted for the common law offence of indecent assault which was a crime at the time it was committed.

12. Based on the aforegoing, we consider that the State's right to prosecute a person in the position of the applicant in our courts has not lapsed and we do not understand why it is common cause that the applicant does not stand to be arraigned on counts 1 – 4 in Scotland

13. We thus invite the parties to address us further on the point.

CONSTITUTIONALITY - THE BAIL ISSUE

14. The parties did not refer in argument to sub-secs 13 (3) and (4) of the Extradition Act (the Act) which govern the fixing of bail by a magistrate for extraditees pending the exercising of their right of appeal to the High Court. The section does not cover the situation where the person seeks to review a decision of a magistrate before the High Court, rather than exercise the right of appeal available under sec 13(1) of the Act. Further, sec 13 (4) of the Act has detailed provisions with reference to the CPA for the granting and consideration of bail pending a High Court appeal.

15. We invite the parties to consider the constitutionality of sec 13 in addition to the arguments already advanced in respect of the sec 9 point.

16. Further, are the provisions of sec 13(4) of any assistance to the Court in respect of the reading-in which the parties suggest in respect of sec 10(5) of the Act, pending the confirmation of the declaration of unconstitutionality?"

20. The parties undertook to revert on our query after they had discussed the matter *inter se.* Subsequently, counsel for the appellant filed a supplementary note on 5 June 2024 and counsel for the respondents did likewise on 19 June 2024. We asked the appellant's counsel if they wished to reply to any of the issues raised by the respondents in their post-hearing note and were informed that save for a comment on one of the cases under consideration[5], the appellant had nothing further to say. Having taken time to consider the import of the parties' replies to our post-hearing note, we have decided to approach the matter as follows.

21. In their response to the Court's note in respect of this issue the respondents made it clear that they are in agreement with the appellant that the retrospective effect of the judgment in Frankel in fact operated prospectively from the 27 April 1994. Furthermore, the respondents contend that as at the date of the extradition request, counts 1 to 4 had prescribed because the 20-year period referred to in section 18(f) of the CPA had already run its course by 27 April 1994.

[5] The decision of the SCA in Patel, to which we refer more fully hereunder.

22. One further aspect arising from Frankel to which the appellant did not expressly refer was that section 18 of the CPA was eventually substituted in terms of the Prescription in Civil and Criminal Matters (Sexual Offences) Amendment Act, 15 of 2020 ("the 2020 Act"), with effect from 23 December 2020. The 2020 Act was enacted to ensure that the prosecution of any sexual offence, whether in terms of the common law or statute, would not be subject to the 20-year lapsing provision to which we have already referred. As we read it, in adopting the 2020 Act Parliament went further than the limitations imposed by Frankel and expressly provided for the revival of the right to prosecute all sexual offences which had lapsed before 27 April 1994.

23. The question arising from this legislative enactment is what the relevant date is in terms of the extradition process in order to determine whether the appellant is extraditable on counts 1 to 4 or not. It seems to us that the lapsing of the right[6] to institute a prosecution in respect of counts 1 to 4 falls to be decided on the question whether the provisions of the 2020 Act are applicable to the prosecution of the offences for which extradition is sought in this matter.

24. In terms of the interim reading in remedy granted in Frankel, section 18 (f) of the CPA was to be read as if the words "*and all other sexual offences whether in terms of the common law or statute*" appeared in that section. In other words, the 20-year limitation period did not apply to rape, compelled rape and all other sexual offences whether in terms of the common law or statute. The declaration of invalidity was suspended for a period of 24 months to afford Parliament an opportunity to pass the necessary remedial legislation. It further ordered that should Parliament fail to enact such remedial legislation during the period of suspension, the reading in remedy would become final. That is in fact what happened: Parliament did not enact remedial legislation within the period of suspension, which lapsed on 14 June 2020, and the reading in provision then became final.

25. In making the order in Frankel the Constitutional Court directed that the declaration of invalidity was to operate retrospectively to 27 April 1994. The parties

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[6] We use the phrase in preference to the term "prescription" because that is the phrase Parliament uses in section 3(2) of the 2020 Act.

interpret that order, firstly, to mean that the right to prosecute sexual offences other than rape or compelled rape was restricted to the aforesaid 20-year period, that this right had lapsed prior to 27 April 1994, and a prosecution could thus not be instituted in respect of those offences; secondly, that the right to prosecute such offences which had been committed after 27 April 1994 had not lapsed. Thus, the parties contended that in terms of Frankel the right to prosecute counts 1 to 4 had lapsed by 27 April 1994 because they were allegedly committed before 27 April 1974.

26. The legal position which applied pursuant to Frankel remained fixed until the 2020 Act came into operation on 23 December 2020. The change brought about by that enactment was an amendment to section 18(2) of the CPA by providing that the right to institute a prosecution in respect of any offence referred to in subsections (1)(eA) and (f) thereof (and which had lapsed before the commencement of the 2020 Act), was thereby revived ("the revival provision"). The revival provision has the effect that the right to institute a prosecution for any sexual offence no longer lapses. The question to consider then is whether the revival provision is applicable to counts 1 to 4 in this matter.

27. In deciding this question, and as was pointed out in Patel[7], the relevant date in considering whether an offence is extraditable or not is the date on which the request for extradition was lodged by the requesting state: in this matter that date was during September 2018, which is 2 months after the order in Frankel. Thus, when the request for extradition was lodged, Frankel applied and any limitation on the right of the State to prosecute for sexual offences such as those which the appellant faces, was effective from 27 April 1994. Accordingly, the state of our law was that when the application for extradition was lodged the appellant could not be indicted for any offence committed more than 20 years before 27 April 1994, hence the common position adopted by the parties that the right to prosecute the appellant on counts 1 – 4 had "prescribed", as they put it.

28. The only other question is whether the legal position in this case was affected by the passage of the revival provision. Having considered the wording of the

[7] Patel v National Director of Public Prosecutions 2017(1) SACR 456 (SCA) at 466c.

relevant section[8], and for the reasons articulated above, we hold the view that in the circumstances of the matter the 2020 Act does not operate retrospectively. We are therefore in agreement with the parties that the amendment to section 18(2) of the CPA does not change the position. In our law, as it applied in September 2018, the right to prosecute the appellant under counts 1 to 4 has lapsed.

29. Further, we are of the view that if the revival position were to find application in this case, it would be grossly unfair to the appellant, given that at the time when the extradition request was made (and for that matter, also at the time when the order was made by the Magistrate) the right to prosecute him under counts 1 to 4 had lapsed. It would be inequitable and contrary to the interests of justice to permit the lapsed right to prosecute to be revived midway through the extradition proceedings simply because Parliament had passed the 2020 Act.

CONCLUDING REMARKS ON PRESCRIPTION

30. The issue of the prescription of charges 1 to 4 which the appellant faces in Scotland was not addressed at all before either the Magistrate or the Minister. To the extent that it is now common cause that those offences allegedly committed in Scotland have indeed prescribed under our law, and given that our concerns expressed in our post-hearing note have now been satisfactorily addressed, we are satisfied that the decisions of both the Magistrate and the Minister that the appellant was extraditable on these counts are reviewable to that extent only. Counsel for the respondents requested this Court to confirm the extradition of the appellant only on counts 5 - 7 in the event that we were satisfied that the extradition was otherwise warranted and so we turn to discuss those further issues.

PROCEDURAL ISSUES

[8] "(2) The right to institute a prosecution that, in respect of any offence referred to in subsection (1)*(eA)* and *(f)*, has lapsed before the commencement
of the Prescription in Civil and Criminal Matters (Sexual Offences) Amendment Act, 2020, is hereby revived."

31. The parties are further in agreement that the Magistrate erred in finding that the President had consented to the appellant's extradition in terms of section 3(2) of the Act. As we see it, in the greater scheme of things, that error is of no great moment in that the case falls to be decided on other more material grounds.

32. The parties also agreed that the late lodging of the appeal and the review by the appellant and the counter-review by the Minister on the constitutional point should be condoned. We are in agreement with this approach due regard being had to the inevitable delays that the Covid-19 pandemic occasioned on legal life and, further, the importance of the constitutional argument.

33. Ultimately, the issues for determination turn on the section 220 point, the question of dual criminality and the constitutionality of section 10 of the Act in relation to the fact that there was no provision in the Act for the extension of the appellant's bail after his committal by the Magistrate. Lastly, there is the question of an appropriate order to be made in light of the concessions made by the Minister with regard to the constitutional point.

<u>THE ADMISSIONS MADE BY THE APPELLANT BEFORE THE MAGISTRATE</u>

34. When proceedings commenced before the Magistrate on 12 July 2019, the appellant's erstwhile counsel asked for the matter to stand down in order that the question of admissions could be considered in conjunction with the representative of the DPP then present at court. Ultimately, counsel (who to our knowledge is well-versed in criminal law and procedure and has served as an Acting Judge in this Division) prepared a document entitled "*Admissions in terms of Section 220 of Act 51 of 1977*[9] *in the Extradition Enquiry*". The document was signed by the appellant and confirmed by counsel before the Magistrate.

35. The list of admissions made by the appellant is as follows:

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[9] That section in the CPA reads -
"***220***. *An accused or his or her legal adviser or the prosecutor may in criminal proceedings admit any fact placed in issue at such proceedings and any such admissions shall be sufficient proof of such fact.*"

“1. The United Kingdom of Great Britain and Northern Ireland (United Kingdom) has requested my extradition from the Republic of South Africa (South Africa).

2. I was arrested on 21 May 2019 in the jurisdiction of this Court and on the same day I was brought before this court for an inquiry in terms of s 9(1) of the *Extradition Act no 67 of 1962 (Extradition Act).*

3. Both South Africa and the United Kingdom are parties to a multilateral convention which makes provision for extradition between the countries, to wit the *European Convention on Extradition.*

4. I have no objection to the admission of the original Extradition Request into the record and I admit that the contents thereof are true and correct. Attached as “**A**”.

5. I have been advised that the counts are set out in the certificate of authentication dated for July 2018 on page… (sic) of the Extradition request as:

1. Lewd, indecent and libidinous practices and behaviour
2. Lewd, indecent and libidinous practices and behaviour
3. Lewd, indecent and libidinous practices and behaviour
4. Lewd, indecent and libidinous practices and behaviour
5. Indecent assault
6. Lewd, indecent and libidinous practices and behaviour
7. Lewd, indecent and libidinous practices and behaviour.

6. The criminal conduct of which I have been charged with (sic) in the United Kingdom also constitutes the following South African offences which are substantially similar to the offences in the United Kingdom;

1. Contravention of section 5 (1) of the Criminal Amendment Act (Sexual Offences and Related Matters) 32 of 2007- sexual assault

2. Contravention of section 5 (1) of the Criminal Amendment Act (Sexual Offences and Related Matters) 32 of 2007- sexual assault

3. Contravention of section 5 (1) of the Criminal Amendment Act (Sexual Offences and Related Matters) 32 of 2007- sexual assault

4. Contravention of section 5 (1) of the Criminal Amendment Act (Sexual Offences and Related Matters) 32 of 2007- sexual assault

5. Contravention of section 3 of the Criminal Amendment Act (Sexual Offences and Related Matters) 32 of 2007 – rape

6. Contravention of section 5 (1) of the Criminal Amendment Act (Sexual Offences and Related Matters) 32 of 2007- sexual assault

7. Contravention of section 5 (1) of the Criminal Amendment Act (Sexual Offences and Related Matters) 32 of 2007- sexual assault

7. Copy of the relevant sections of the Criminal Amendment Act (Sexual Offences and Related Matters) 32 of 2007 attached as "**B**".

8. The offences are punishable in both countries with a sentence of imprisonment for a period of one year or more as required by article 2(1) of the *European Convention on Extradition*.

9. The offences are not offences under military law.

> 10. I consent to my extradition to the United Kingdom in this inquiry for purposes of the finding in section 10 (1) of the Extradition Act 67 of 1962.
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> 11. I waive my right to appeal in terms of section 10(1) of the Extradition Act 67 of 1962, in order to expedite the extradition process."

36. As to the nature of the proceedings before the Magistrate, counsel for the appellant referred us to the decision in this Division in Minister of Justice v Additional Magistrate Cape Town[10] where the Full Court held as follows:

> "Section 9(2) of the Extradition Act provides that an extradition inquiry shall proceed in the same manner in which a preparatory examination is to be held and that the magistrate holding such an inquiry shall have similar powers. That the Legislature superimposed the procedures applicable to preparatory examinations upon extradition enquiries and clothed magistrates conducting them with the powers, exercised in relation thereto, does not mean that such inquiries are the equivalent of preparatory examinations. Accordingly, it is misguided to rely on the definition of 'criminal proceedings' in section 1 of [the CPA] which by definition includes 'a Preparatory examination under Chapter 20' for the proposition that an extradition inquiry is a criminal proceeding to which the provisions of the Criminal Procedure Act which regulate the conduct of criminal trials apply. Unlike in the case of criminal trials, extradition inquiries are not directed at a finding of guilty or not guilty."

37. We consider that it is correct, purely from a technical point of view, that the submission by counsel for the appellant is sound in relation to the binding effect under the CPA of admissions made under section 220 for the purposes of criminal proceedings. But during argument counsel readily accepted that at such a preparatory examination an accused person is entitled to make admissions in an endeavour to, for example, limit the duration of the proceedings. So, in say an enquiry relating to the killing of a person, an accused person would be entitled to make admissions in relation to the so-called chain of evidence linking the

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[10] 2001 (2) SACR 49 (C) at 62j-63c.

transportation of the deceased's body from the scene of the crime to the mortuary where an autopsy was undertaken. Those admissions could be contained in a written document and entered into the record, thereby becoming admissible evidence before the preparatory examination.

38. When pressed by the Court on the point that there was no particular magic in the use of the description of the appellant's admissions as having purportedly been made under section 220, counsel accepted that the admissions made by the appellant might stand as admissions *per se* in a preparatory examination type enquiry.

39. In Geuking[11] in which a number of constitutional challenges were raised by the extraditee as to, inter alia, the fairness of the procedure, Goldstone J dealt at length with nature of an extradition enquiry, citing with approval the following extract from Bassiouni [12]

> "[26]…According to Bassiouni, a leading authority on extradition law:
>
> "…*extradition is deemed a sovereign act, its legal proceedings are deemed sui generis, and its purpose is not to adjudicate guilt or innocence but to determine whether a person should properly stand trial where accused or be returned to serve a sentence properly imposed by another state."*

40. Goldstone J went on to observe that in South Africa the legislature has determined that an extradition enquiry is conducted in a procedure akin to a preparatory examination and stressed the following:

> "[38] As mentioned earlier, the enquiry must be held in open court in the manner in which a preparatory examination is held. In particular, the person concerned is entitled to testify and adduce evidence. The identity of the person before the magistrate – as being the person named in the request – has to be

[11] Geuking v President of the Republic of South Africa 2003 (3) SA 34 (CC)
[12] International Extradition: United States Law and Practice 4 ed (Oceana Publications, New York 2002) at 66

established and can be challenged or contradicted by documentary or oral evidence."

41. In this matter the appellant did not give evidence, but his counsel handed up to the Magistrate a list of admissions which might just as well have been adduced through the presentation of *viva voce* evidence by the appellant. In the circumstances we consider that it was not irregular for the Magistrate to have regard to the admissions made by the appellant in the course of the enquiry and, save perhaps for the admission that he acknowledged that he was liable to be extradited, which is arguably a conclusion of law ultimately to be arrived at by the Magistrate, the admissions should stand. In the result we consider that there is no merit in the section 220 point and that the appellant is bound by the admissions made therein.

DUAL CRIMINALITY

42. The dual or double criminality principle is central to a finding in determining whether an offence on which a person is sought by a foreign state is an extraditable offence. In Patel[13] Schippers AJA discussed the concept in some detail with reference to the leading international authorities:

> "[7] The purpose of extradition is to secure the return for trial or punishment, persons accused or convicted of crimes. Extradition is essentially a process of intergovernmental legal assistance. Generally, the legal basis for extradition is treaty, reciprocity or comity. Comity is irrelevant for present purposes. Reciprocity in extradition occurs when the request for surrender is accompanied by assurances of reciprocal extradition in comparable circumstances.
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> [8] The principle of double (or dual) criminality is internationally recognised as central to extradition law. The principle requires that an alleged crime for which extradition is sought is a crime in both the requested and requesting States. In other words, the crime for which extradition is sought must be one for which the

[13] Patel v National Director of Public Prosecutions *supra.*

requested State would in turn be able to demand extradition. Oppenheim puts it succinctly:

'*No person may be extradited whose deed is not a crime according to the criminal law of the State which is asked to extradite as well as the State which demands extradition'.*[14]

[9] Double criminality, a substantive requirement for extradition, is predicated on the premise of reciprocity in the sense of equivalent mutual treatment deriving from mutuality of legal obligations. Shearer states that the double criminality rule is based on reciprocity:

'The validity of the double criminality rule has never seriously been contested, resting as it does in part on the basic principle of reciprocity, which underlies the whole structure of extradition, and in part on the maxim of nulla poena sine lege. For the double criminality rule serves the most important function of ensuring that a person's liberty is not restricted as a consequence of offences not recognised as criminal by the requested State. The social conscience of a State is also not embarrassed by an obligation to extradite a person who would not, according to its own standards, be guilty of acts deserving punishment. So far as the reciprocity principle is concerned, the rule ensures that a State is not required to extradite categories of offenders for which it, in return, would never have occasion to make demand. The point is by no means an academic one even in these days of growing uniformity of standards; in Western Europe alone sharp variations are found among the criminal laws relating to such matters as abortion, adultery, euthanasia, homosexual behaviour, and suicide.'[15]"

43. The appellant contends that the elements of dual criminality have not been met in this case. His counsel submitted that the Court was required to have regard to the two generally accepted approaches to dual criminality in defining an extraditable offence. These are, firstly, the enumerative method which applies where specific offences are listed in a schedule or similar document as extraditable offences under

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[14] L Oppenheim International Law 8 ed (1955) at 70.
[15] I A Shearer Extradition in International Law (1971) at 137-138.

a particular treaty and, secondly, the eliminative method, where a threshold is applied, and offences are not listed specifically. The latter approach, it was correctly submitted, is adopted by the Convention and the Act: there is no *numerus clausus* of extraditable offences appended to either document.

44. The eliminative method has two diverse approaches recognised in international law. On the one hand, there is the approach which focuses on the elements of the respective offences ("the elements-based approach") and, on the other hand, there is the approach which looks to the factual basis/conduct implicit in the respective offences ("the conduct-based approach").

45. The appellant takes issue with the respondents' submission that at a section 10 enquiry, a magistrate has to be satisfied that the conduct (in other words, the facts) alleged by the foreign state constitutes criminal conduct in South Africa. The appellant contends that the approach followed by the Convention - the elements-based approach - is applicable in our law. Counsel for the appellant further submitted that for the purposes of considering the dual criminality ground of review and appeal in this matter, there are accordingly two questions that require resolution.

46. Firstly, is the extraditability of the offence determined according to consideration of the conduct (or facts) constituting the offence, or are the elements of the offence in question the determining factor? Secondly, do counts 5 to 7, upon which the appellant is required to stand trial in Scotland, satisfy the requirements of dual criminality?

47. In regard to the first question, the Court was referred by counsel for the appellant to two of our foremost writers on criminal law, Profs.J Burchell,[16] and CR Snyman[17]. It was pointed out that both authors, in dealing with the general requirements of criminal liability, consider that an offender's conduct must comply with the definitional elements of a crime in order to attract criminal liability.

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[16] J Burchell Principles of Criminal Law, 4th ed (2015) at 47.
[17] CR Snyman Criminal Law 5th ed (2008) at 30.

48. Developing this argument, it was submitted that if regard be had to the definitional elements, one might observe how one type of crime differs from another. In this regard it was submitted that when a comparison is made between the elements of the South African offences and the offences for which extradition to is sought to the UK, such elements were required to be substantially similar before the applicant was liable to be extradited.

49. Counsel for the appellant referred us to a decision of the Irish Supreme Court in State (Furlong) v Kelly[18] as well as various other writers on international law, the extradition treaty between South Africa and the United States of America and the Convention itself, all of which were said to favour an elements-based approach.

50. Counsel further submitted that because this matter involves an extradition under a treaty, section 3(1) and not section 3(2) of the Act is applicable. There can be no argument with that submission. Then it was said that, in determining what approach to dual criminality should be applied in this matter, an interpretation of the Convention rather than the Act itself was necessary.

51. In that regard it was pointed out that the Convention has its own definition of an extraditable offence. Counsel referred us to Art 14(3) of the Convention which reads as follows:

> "A person who has been extradited shall not be proceeded against, sentenced or detained with a view to the carrying out of a sentence or detention order for any offence committed prior to his surrender other than that for which he was extradited, nor shall he be for any other reason restricted in his personal freedom, except in the following cases:
>
> ….
>
> 3. When the description of the offence charged is altered in the course of proceedings, the extradited person shall only be proceeded against or sentenced in so far as the offence under its new description is shown by its

[18] 1971 1 IR 132.

constituent elements to be an offence which would allow extradition." (Emphasis added by counsel)

The appellant relies on the underlined section for his contention that in terms of the Convention an offence is only extraditable if the elements of the offence in the requesting state are similar to that of the elements of the offence in the requested state.

52. The respondents submit that the contention that the determination for dual criminality is based on the elements-based approach is wrong. They argue that the modern approach is that the conduct in question must be punishable in both the requested and requesting states. They rely, inter alia, on certain writers in international extradition law.[19]

53. The respondents refer in particular to the following extract from the journal article by Harris and Griffiths:

"Application of the requirement may depend on the extent to which the alleged criminal acts of the accused are described by the requesting state. That is, the requested country's authorities, in determining whether the crime with which a person has been charged corresponds with the crime under local law, may want to know not simply whether the abstract legal elements of the offense corresponds to an offense under domestic law, but also whether the particular factual conduct alleged, including the mental state, would be punishable if committed in the requested state. The corresponding domestic offence may not be immediately recognisable from the relevant statutory provision of the requesting state, and it may be necessary to look at the alleged conduct to determine whether there is an applicable domestic offence. An inadequate description of the acts of the accused may not enable a requested country to

[19] Fey–Constance Blaas "Double Criminality in International Extradition Law", University of Stellenbosch, Masters Thesis December 2003 (http://scholar.sun.ac.za).
Gavan Griffith Q.C and Claire Harris; "Recent Developments in International Law", Melbourne Journal of International Law [Vol 6] 2005 (http://law.unimelb.edu.ac) .

determine whether the conduct is in fact punishable under the laws of that country." (Emphasis added)

54. We agree with the respondents that our law currently does not recognise that the determination of dual criminality is based on the elements-based approach, but rather that the conduct (or factual) approach should be applied in determining dual criminality. We say so for the reasons that follow.

55. Firstly, we consider that the appellant's reliance on Art 14(3) of the Convention to show that a person is only extraditable if the elements of the offence of the requesting state are similar to that of the requested state, is misplaced: this is not what the article seeks to regulate. In our view, the article in question goes no further that to provide that where, during the course of extradition proceedings, the description of the offence on which the extraditee is liable to be extradited, is altered, it is a requirement that the offence under its new description is shown by its constituent elements to be an offence which would sanction extradition. By way of example, this would be akin to an amendment of a charge-sheet and is different from stating that the elements of the offence on which extradition is sought from the requesting state, should be similar to the elements of the offence in the requesting state.

56. A further example which springs to mind is the promulgation of SORMA – the very legislation with we are concerned in this matter. Prior to SORMA, an adult male who sexually molested a young boy might have been charged with the common law offence of indecent assault. The legislature then considered it necessary to codify that offence (as well as various other offences including rape) and give it an extended meaning beyond the more restricted common law offence. So, if there was an extradition request pending under the Convention at the time that SORMA was promulgated, and the offence for which extradition had been sought spanned a common law offence and a contravention of SORMA, Art 14(3) would conceivably come into play and the extraditing court would be required to consider whether the elements of the statutory offence were similar to the common law crime.

57. It follows, in our view, that upon a proper interpretation, Art 14(3) means no more than that after an alteration or amendment of the offence has been effected, the constituent elements of the amended or altered offence should be similar to that offence under which the extraditee was originally sought. And, further, such an alteration must not have the effect that it would not be an extraditable offence. This seems to be a common sense and logical provision in order to limit an abuse of process or prejudice to an extraditee, where the description of an offence is changed midway through the extradition proceedings by the requesting state, and there is concern that the substance of the offence has changed.

58. It is clear from the authorities referred to by both parties that the consistent approach that our courts have followed in the determination of whether the offence is an extraditable offence is whether a consideration of the evidence produced by the foreign state would constitute an offence under the laws of the Republic.

59. Thus, in Geuking, Goldstone J observed:

> "[40] In the determination of whether the offence is an extraditable offence the magistrate would have to consider whether the evidence produced by the foreign state would constitute an offence under the law of the Republic. Sufficient detail of the offence alleged against the person concerned would thus have to be placed before the magistrate in order for that determination to be made. Under section 9(3) of the Act, the evidence may take the form of a deposition, statement on oath or affirmation, whether taken in the presence of the person concerned or not and must be duly authenticated in the manner provided in section 9(3)(a)(iii) of the Act. The magistrate would have to be satisfied that these requirements are satisfied. The magistrate would then have to consider whether the evidence which has thus been produced would constitute an offence under South African law. The name of the offence would not be determinative. The question for consideration is whether the conduct which the evidence discloses constitutes an offence in our law which would be punishable with a sentence of imprisonment for a period of six months or more. It must also be established that the offence is not one under military law and is

> not also an offence under the ordinary criminal law of the Republic." (Emphasis added)

We consider that the Constitutional Court was thus advocating a conduct-based approach to dual criminality.

60. We consider that this approach was reaffirmed further in a later passage in Geuking where Goldstone J stated the following:

> "[45] 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 before the magistrate must be determined by these considerations. From the earlier analysis of what the magistrate is required to consider, it is clear that he has to be satisfied that the conduct alleged by the foreign state constitutes criminal conduct in this country. In order to make that determination the magistrate has to be furnished with sufficient detail of the alleged conduct. If the magistrate considers that the evidence does not disclose criminal conduct under South African law that would be an end of the matter and the person would have to be discharged. 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 African 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." (Emphasis added)

61. This approach was confirmed by the Full Court in this Division in Carolissen[20]. In our view therefore the conduct- or facts-based approach is be followed in determining dual criminality in our law.

DO COUNTS 5-7 IN SCOTLAND MEET THE DUAL CRIMINALITY TEST?

62. Earlier in this judgment we found that the admissions purportedly made under section 220 before the Magistrate were admissible and constituted evidence before him. It follows then that the appellant admitted before the Magistrate that the criminal conduct of which he has been accused in the UK is similar to the offences known to South Africa law under sections 3 and 5 of SORMA. That should then be the end of the matter in respect of whether the dual criminality requirement has been satisfied in this case or not. However, in the event that we are wrong in our approach, and if it be considered that the elements-based approach is preferable, we propose to deal with the case on that approach and show that in any event we consider that the appellant is extraditable.

63. In the extradition request the background facts in support of the offence in respect of which the appellant was sought on the formulation of the charges under Scottish law are set out. In this regard, a certain Ms. Ann Mc Bride, an official described in a deposition filed before the Magistrate as the "Principal Procurator Fiscal Dispute"[21] states that Scotland does not have a penal code and all offences are derived from the common law.

64. In respect of the crime known in Scotland as "lewd, indecent and libidinous practices and behaviour" (which form the basis of counts 6 and 7 in Edinburgh and to which we will conveniently hereinafter refer as "lewd behaviour"), Ms. Mc Bride says that –

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[20] Carolissen v Director of Public Prosecutions 2016 (2) SACR 171 (WCC).

[21] It appears that Ms McBride is a functionary in the "Procurator Fiscal's Office" in Edinburgh. This is the name given to Scotland's prosecution service (see www.copfs.gov.uk). She deposed to a deposition in Edinburgh on 28 March 2018 for purposes of securing the appellant's extradition.

a) the crime has long been recognised and punished by the criminal courts under the common law of Scotland;

b) it is an offence at common law to engage in indecent practices and behaviour with children below the age of puberty with or without their consent;

c) the aim is to protect these young children from sexual abuse;

d) central to this crime is the occurrence of indecent conduct;

e) whether the conduct is indecent is to be judged by the social standards that would be applied by the average person in contemporary society;

f) such conduct can be practised on the child directly or in the child's presence. This form of sexual abuse can take many forms such as indecent physical contact with the child; showing indecent photographs of, or to, the child; indecent conduct in the presence of the child and indecent conversation with a child directly by telephone or electronically;

g) whether the conduct is of an indecent character is something that is judged objectively; and

h) the prosecution does not need to prove what the accused's intention or motive was.

65. In these proceedings the appellant's principal attack is that, applying the elements-based approach, the requirements of dual criminality have not been met on counts 6 and 7 in respect of the crime of lewd behaviour because, on the face of the record, it appears that intention is not an element of such offence. The respondents on the other hand submit that it is not correct that intention is not an element of these offences.

66. In respect of the Scottish crime of indecent assault (which is the basis for the charges brought in the UK under count 5) Ms McBride states that "*evil intention*" is

essential to prove such an assault as it "*cannot be committed accidently, recklessly or negligently*". Indecent assault is essentially regarded as an assault aggravated by indecency in the manner of its commission.

67. During argument counsel for the appellant seized upon a passage in Ms. McBride's deposition to suggest that it was apparent that in Scotland lewd behaviour did not require proof of *mens rea* whereas in our law this was a requirement under SORMA. The passage in question in the deposition reads as follows:

> "*The Crown doesn't need to prove what were the accused's intention or motive.*"

68. We note immediately that this argument is at odds, firstly, with the version of the appellant before the Magistrate as set out in his list of admissions, and secondly, with the representations he made to the Minister. In both instances the appellant unequivocally confessed that his conduct was intentional.

69. Be that as it may, in the answering affidavit the respondents dispute that intention was not an element of that crime, pointing out that Ms McBride specifically stated in her deposition that the Crown does not need to prove what the accused's motives or intentions were. It was highlighted that this meant that the Crown need not prove the offender's motive in committing the crime of lewd behaviour and that this was not the same as not having to prove that the appellant did not have the intention (or *mens rea* as we know it) to commit the crime.

70. In his replying affidavit the appellant persisted with this contention, stating that under the law of the requesting state a prosecutor does not have to prove the subjective element of intention in respect of the offence on which his extradition is being sought. In response to this argument raised in reply, the respondents filed a supplementary answering affidavit and in so doing drew a substantive dispute as to what the respective elements of the Scottish offences are.

71. The respondents pointed out that even if their argument regarding intention as being an element on counts 6 and 7 was wrong, the position in respect of count 5

was indisputable. There the allegation is made that on various occasions the appellant penetrated the victim's anus digitally and the respondents argue that under the extended definition of rape under SORMA such conduct amounts to rape in our law. It was said that on the basis of this offence alone the appellant was liable to be extradited to the UK.

72. In a further replying affidavit the appellant persisted with the contention that, under the law of the requesting state, the prosecutor does not have to prove the element of subjective fault in the form of intention in order to establish guilt, but that under the laws of South Africa, intention (*mens rea*) is an essential element of the crime. He furthermore disputed that he had the requisite intention in respect of the offences he allegedly committed.

73. As a result of this stance adopted by the appellant, the respondents filed a further deposition by a certain Ms. Clare Kennedy, another functionary in the office of the Procurator Fiscal Depute, wherein an attempt is made to clarify the issue of intention in relation to the offence of lewd behaviour. In this deposition dated 16 March 2023, Ms. Kennedy seeks to clarify what was said in Ms. McBride's deposition regarding intention as an element of the crime of lewd behaviour.

74. Ms. Kennedy states that it is necessary in Scottish law for the Crown to prove that an accused intended to obtain sexual gratification from the particular act or to corrupt the innocence of the child involved. She pointed out that what had been stated by Ms. McBride in her deposition of 2018 was no more than a reference to the intended outcome, or motive, behind the criminal act and not the intention to commit the act itself. She further stated that to constitute a crime in Scottish law, the act of lewd behaviour has to be committed intentionally (or deliberately) and cannot be committed negligently. Ms Kennedy further stated that the Crown did not need to prove why the accused acted in a certain way, but had to prove that the actions of the accused were intentional. The position in Scotland was thus clarified – intention (or *mens rea*) is without doubt an element of the offence with which the appellant is charged under counts 6 and 7.

75. In their heads of argument, counsel for the appellant contend that in the course of filing the further answering affidavit the respondents had effectively conceded the applicability of the elements-based approach in engaging in the substantive dispute as to what the respective elements of the Scottish offences are.

76. We do not agree with this submission. Firstly, the argument is inconsistent with the settled law in this country that the conduct-based approach should be followed in determining dual criminality. An exercise therefore to show that the absence of one of the elements of a crime (such as intention) is misplaced in light of the conduct-based approach which is followed in South Africa with regard to establishing dual criminality. It is therefore irrelevant, in our view, to engage in a debate whether the elements of the offences on which the appellant is being sought in Scotland are similar to the elements of the offences in South Africa. The elements-based approach is simply not that which has been mandated by our Courts. To this we would add that the appellant's reliance on the elements-based approach, citing Art 14(3) of the Convention, is wrong for the reasons already set out above.

77. Secondly, and in any event, it seems that this was a non-issue from the outset. Ms. McBride pertinently states in para 6 of her deposition that "evil intention" is essential to prove indecent assault which cannot be committed accidentally, recklessly, or negligently, and that indecent assault is essentially an assault aggravated by indecency in the manner of its commission.

78. As we understand the position, Ms. Mc Bride's use of the phrase *"the Crown does not need to prove what were accused's intention or motive"*, was employed in a different context. It was not intended to state that intention is not an element of the offences on which the appellant is sought by the requesting state. Rather the phrase refers to the reasons why the offence was committed, and it is said that these are regarded as irrelevant to prove criminal liability. This too is the case in South Africa where motive is irrelevant to the determination of criminal liability[22]. There is therefore no uncertainty or ambiguity in respect of this issue.

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[22] Burchell op.cit. 4th ed. At 353.

79. Thirdly, and as stated earlier, we are of the view that the admissions made by the appellant before the Magistrate formed part of the evidential material before him and underpinned the lower court's conclusion that the appellant is liable to be surrendered to the Scottish authorities. At the risk of repeating our view, this was evidence placed before the Magistrate by the appellant himself to facilitate the determination of the question of extraditability without more. As we have said, the fact that such evidence was clothed in the form of so-called section 220 admissions is neither here nor there because it was not evidence directed at finding whether the appellant was guilty or not. Rather, the enquiry was to establish whether the appellant's alleged conduct in Scotland was similar to conduct which is proscribed in our law.

80. As we have already noted, the appellant readily admitted before the Magistrate that the criminal conduct with which he is to be charged in the UK constitutes the following offences in our criminal law:

(i) In respect of counts 6 and 7 (lewd behaviour) it is admitted that these constitute a contravention of section 5 (1) of SORMA (also referred to as sexual assault); and

(ii) In respect of count 5 (indecent assault) it is admitted that this constitutes a contravention of section 3 of SORMA (also referred to as rape).

81. Lastly, in his representations to the Minister, the appellant again made all the necessary admissions to render himself liable to be extradited to Scotland under section 10 of the Act. In this regard we point out that he made, inter alia, the following admissions of fact to the Minister:

(i) In 1968 he was appointed as a primary school teacher at Edinburgh Academy in Scotland;

(ii) While he was teaching at Edinburgh Academy he again experienced urges to touch learners inappropriately and on occasion he did so by placing his hand inside a boy's trousers to touch his private parts in the class room and

on another occasion in a school change room;

(iii) In 1973 he was appointed as a primary school teacher at Fettes Junior College in Edinburgh.

(iv) There his said inappropriate behaviour continued until 1979 when a student complained that the appellant had touched his private parts.

(v) The appellant admitted this aberrant behaviour and agreed to leave the college at the end of the term;

(vi) He then returned to South Africa, well aware that he could not continue with this inappropriate behaviour and that it had to stop.

82. For all of these reasons we are satisfied the requirements of dual criminality in respect of counts 5 to 7 have been satisfied and that the appellant is liable to be extradited the UK to face those charges.

THE COUNTER-REVIEW APPLICATION: SETTING ASIDE THE MAGISTRATE'S DECISION TO GRANT BAIL PENDING THE MINISTER'S DECISION UNDER SECTION 11 OF THE ACT

83. The respondents have instituted a counter-review application in terms of section 22 (1) (c) of the Superior Courts Act of 2013, on the basis that the Magistrate committed a gross irregularity on 23 August 2019 by granting the applicant bail pending the Minister's decision. The respondents say that it is apparent from the provisions of section 10 (1) of the Act that once the Magistrate had found that the appellant was liable to be surrendered to the UK, he was obliged to issue an order committing him to prison awaiting the Minister's decision with regard to his surrender (or not) to the UK. In other words, a section 10 enquiry and a consequent committal order is a prerequisite for the Minister to exercise his powers under section 11 (a) of the Act to facilitate the surrender of the appellant to the UK. The appellant does not oppose the counter-review.

84. The position regarding bail in extradition cases has been regarded as controversial as appears from certain earlier decisions in England[23] as well as our courts[24]. However, more recently in Graham[25], Harms J had occasion to deal with the issue in a case where the magistrate had found that the extraditee was liable to be extradited to the United States of America in terms of section 10(1) of the Act and had issued an order committing him to prison pending the decision of the Minister. The extraditee approached the court for an urgent review of that decision.

85. Harms J considered the relevant authorities and found that the power of a magistrate to grant bail in an extradition case was limited, in terms of section 9(2), to the duration of the enquiry in the lower court. Harms J further considered that the wording of the statute was clear – that the person had to be in custody when the Minister considered whether to confirm the extradition under section 10 and that a magistrate thus had no power to grant bail at that stage.

86. But the court was clearly concerned about the further detention of the extraditee while the Minister considered the case and, after setting out the position both locally and abroad, Harms J referred to the following anomalous issues:

> "Does all this mean that a person in the shoes of the applicant has no right to apply for bail? If that were so, grave injustice could result especially where there are delays caused by appeals or administratively. It would also have the strange result that, had the applicant been charged in the Republic of South Africa, he would have received bail and, as far as I know, once he reaches the United States, he is entitled to bail. Furthermore, the potential sentence can be smaller than the time spent in prison awaiting extradition."

87. The court in Graham found, however, that even though the magistrate's court had no jurisdiction to grant bail in extradition cases, a superior court retained the inherent jurisdiction that permitted such courts, both here and in England, to grant bail in such circumstances. The learned Judge held further that the provisions of the

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[23] R v Spilsbury [1898] 2 QB 615.
[24] Ex Parte Reckling 1920 CPD 567; R v Blumenthal 1924 TPD 358.
[25] Ex Parte Graham: in re United States of America v Graham1987(1) SA 368 (T) at 372 D-E.

Act did not in any way amend or take away such inherent power of the superior court. In Veenendal[26], Mahomed J came to a similar conclusion.

88. Both parties before us are in agreement that the provisions of section 10(1) of the Act as it stands are unconstitutional to the extent that they do not permit a court, and in particular a magistrates' court, the power to grant bail in circumstances where a person liable to be extradited is awaiting the decision of the Minister, or where that person may wish to exercise the right to review a magistrate's decision or that of the Minister.

89. The respondents submitted that the decision of the Constitutional Court in Robinson[27] changed the common law as expounded in Graham and Veenendal: that the High Court had the inherent jurisdiction to grant bail pending the decision of the Minister. They also relied on the decision this Division in Freedendal [28] for this proposition. Our understanding of the Robinson and Freedendal judgments is that they did not change or take away the High Court's inherent jurisdiction to grant bail to an extraditee pending the decision of the Minister. Rather, it seems to us that they deal with the review of the powers of the Minister to surrender the extraditee where there was no appeal or review of the decision of the magistrate not to release the extraditee on bail pending the decision of the Minister.

90. We are therefore in agreement with the appellant that in terms of the common law the High Court retains its inherent jurisdiction to grant bail in the circumstances considered in Graham and Veenendal. What is, however, clear from Robinson and Freedendal is that, after making an order that a person is liable to be extradited, a magistrate has no power to grant bail pending the decision of the Minister. The only remedy available to an extraditee in such circumstances is a direct approach to the High Court asking it to exercise its inherent jurisdiction to grant bail. That of course takes time and costs money, and it would thus be preferable for the magistrate who has heard the extradition application, and is familiar with the case, to make the decision to grant bail there and then.

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[26] Veenendal v Minister of Justice 1993 (1) SACR 154 (T).
[27] Director of Public Prosecutions, Cape Town v Robinson 2005 (4) SA 1 (CC).
[28] Freedendal v Minister of Justice and Correctional Services 2021 (1) SACR 634 (WCC).

91. We will thus deal with the question relating to the unconstitutionality of section 10(1) on this basis. We further agree with the appellant that, even if the High Court retains its inherent jurisdiction to grant bail to a person in cases like these, that power does not render the provision constitutionally compliant.

92. In Robinson, Yacoob J explained the appropriate procedure as follows:

> "[5] Section 10 of the Act requires the magistrate to determine whether the person is liable to be surrendered to the foreign State concerned and, in the case where the person is accused of the commission of an offence, whether there is sufficient evidence to warrant a prosecution in the foreign State. A magistrate who makes a positive finding in relation to these matters must make an order committing that person to prison "*to await the Minister's decision with regard to his or her surrender*". 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 she must discharge that person. A magistrate issuing a warrant for committal to prison is obliged to forward a copy of the record of the proceedings together with a report deemed by the magistrate to be necessary to the Minister immediately. The magistrate does not in a section 10 enquiry make an order for the surrender of the person sought to be extradited. A person may not be extradited consequent upon the magistrate's decision. She may be committed to prison only."

93. The learned Justice then summarised the procedure as follows:

> "[7] In summary therefore, a person whose extradition is requested by a foreign State in terms of section 4(1) must be brought before an extradition magistrate who determines whether the person is liable to be surrendered in terms of section 10 of the Act. The Minister cannot make an order for the extradition of any person unless a magistrate has committed that person to prison after a section 10 enquiry. An order of committal by a magistrate is a prerequisite to the Minister's decision to surrender. The extradition magistrate and the Minister both play a role in the extradition if there is a section 10 enquiry."

94. It is thus clear that Constitutional Court regards the committal of a person to prison by a magistrate as a jurisdictional requirement that has to be complied with before that person can be extradited. Absent that, no extradition can take place because it would not be possible for the Minister to exercise his executive function without the person being held in custody pending such decision. The practice which has developed over the years of extending bail of a person found liable to be extradited, will therefore render it impossible for the Minister to exercise his powers to ultimately effect the extradition.

95. It is common cause that the appellant was not committed to prison by the Magistrate under section 10 of the Act after the completion of the enquiry in which he found that the appellant was liable to be surrendered to the UK. Accordingly, the jurisdictional prerequisite for the exercise of the Minister's power to surrender the appellant was lacking and his decision in that regard is *ultra vires* and unlawful. It therefore falls to be reviewed and set aside under the principle of legality as the respondents contend in the counter-application. As we have said, this is common cause.

96. Further, and as Robinson makes plain, the Magistrate could not have extended the appellant's bail pending the Minister's decision. He was obliged under the Act to order the appellant to be held in custody in order that the Minister could lawfully exercise his powers under section 11. The decision to extend the appellant's bail is similarly *ultra vires* and it is liable to be reviewed as a gross irregularity by the Magistrate under section 22(1)(c) of the Superior Courts Act. It follows that that part of the Magistrate's order which purports to extend the appellant's bail falls to be set aside and the appellant must be committed to prison, awaiting a fresh decision by the Minister.

THE APPELLANT'S CONSTITUTIONAL ATTACK ON SECTION 10

97. As we have already observed, the concession on behalf of the appellant to the counter-review application is met with a collateral challenge to the constitutionality of section 10 of the Act. The attack is founded on the contention that, since the section

does not give a magistrate the power to grant bail pending the Minister's decision, it is unconstitutional. The respondents (and in particular the Minister) do not oppose the granting of such relief.

98. There is thus no dispute between the parties that section 10(1) in its current form infringes the appellant's right to freedom and security of the person under section 12 (1)(a) of the Constitution which is to the following effect:

> "Everyone has the right to freedom and security of person, which includes the right -
> (a) not to be deprived of freedom arbitrarily or without just cause."

99. The attack in the collateral challenge to the unconstitutionality of section 10(1) is two-pronged. Firstly, it was submitted by counsel that the introduction of the Constitution could, arguably, lead to an interpretation of the Act and the common law, which effectively overrules Graham and Veenendal, without necessarily declaring the Act unconstitutional. In advancing a constitutionally compliant interpretation, they accept that the magistrate's courts, being creatures of statute, lack the inherent powers enjoyed by the superior courts.

100. The appellant seeks to overcome this hurdle by advancing the argument that a magistrate has ancillary powers that can be used to ensure constitutional compliance. In this regard the appellant refers to Jones and Buckle[29] where the learned authors state the following:

> "The magistrates' courts are creatures of statute and have no jurisdiction beyond that granted by the statute creating them. Thus, for example, they have no jurisdiction in terms of the Magistrates Court Act to make declaratory orders. They have no inherent jurisdiction such as is possessed by the Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa and can claim no authority which cannot be found within the four corners of their constituent Act.

[29] Jones and Buckle: The Civil Practice of the Magistrates' Courts in South Africa, RS 25, 2022 Act – p77.

This does not mean that the magistrate's court has no powers which are not stated in so many words in the Act creating it, or that it is necessary to give those powers such a restrictive interpretation as to practically, in many cases, lead to a miscarriage of justice.

Authority may be implied as well as expressed, and when the Act gives jurisdiction to the court on the main subject in dispute, its purpose is not to be defeated because ancillary powers which are necessary to enforce a jurisdiction have not been specifically mentioned. The doctrine of implied jurisdiction can arise where the act is silent: *expressum facit cessare tacitum*. Otherwise, the express wording of the act must be adhered to; in regard to matters which the proclamation does not touch the magistrate should keep within the terms of the statute."

101. The appellant sought to illustrate the practical application of this principle with reference to Mashiya[30], where it was held that a magistrate had the power to suspend the issuing of a warrant of arrest, notwithstanding the provisions of section 67 (1) (b) of the CPA that, if an accused person who is released on bail fails to remain in attendance at the criminal trial –

"the court before which the matter is pending shall declare the bail provisionally cancelled and the bail money provisionally forfeited to the State, and issue a warrant for the arrest of the accused."

102. In Mashiya the court relied on the following principles of constitutional interpretation laid down by the Constitutional Court in Bertie Van Zyl[31]:

"[20] The Constitution requires courts deciding constitutional matters to declare any law that is inconsistent with the Constitution invalid to the extent of its inconsistency. However, the Constitution in section 39(2) also provides that:

"*When interpreting any legislation, and when developing the common law or*

[30] Sulani v Mashiya and another 2018(2) SACR 157.

[31] Bertie van Zyl (Pty) Ltd and another v Minister of Safety Security and others 2010 (2) SA 181 (CC) at paras 20 -21 and 23.

customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

This Court has interpreted this provision to mean, inter alia, that:

> "*The Constitution requires that judicial officers read legislation, where possible, in ways which give effect to its fundamental values. Consistently with this, when the constitutionality of legislation is in issue, they are under a duty to examine the objects and purport of an Act and to read the provisions of the legislation, so far as is possible, in conformity with the Constitution*."

Thus when the constitutionality of legislation is challenged, a court ought first to determine whether, through "*the application of all legitimate interpretive aids*", the impugned legislation is capable of being read in a manner that is constitutionally compliant." (Internal references omitted)

103. The appellant thus submits that if this Court were to read the provisions of section 10 (1) in such a way as to give effect to the fundamental rights of the Constitution, it would enable a magistrates' court to resort to its ancillary powers to extend the bail already granted and there would be no need to declare the provisions of section 10 (1) unconstitutional. We do not agree with the submission.

104. The Act is clear in that it does not give a magistrate the power to grant bail to a person that has been found liable to be extradited, pending the decision of the Minister. In those circumstances, a magistrate does not have any such ancillary power as contemplated in the extract referred to above in Jones and Buckle. It must be borne in mind that the granting of bail after a person has been found to be extraditable might involve wholly different considerations to those which existed while the inquiry was on-going. It could thus not be suggested that the extension of bail was ancillary in such circumstances. Accordingly, we do not consider that Mashiya assists the appellant.

105. We can understand that it might be said that a magistrate, in relation to the issuing of a warrant, may require the ancillary power to stay the enforcement or

execution of the warrant in the exercise of his/her discretion: that would be a logical interpretation of the relevant section of the CPA. But there can be no room for such an argument where the exercise of an ancillary power is ousted by an explicit provision such as one finds in section 10(1). As stated in Jones and Buckle, "*The doctrine of implied jurisdiction can only arise where the act is silent*." However, section 10(1) is not silent on the issue whether bail can be granted to an extraditee pending the Minister's decision or not.

106. On the contrary, we consider that the wording of the Act is clear: the magistrate must commit a person to prison in the event that the section 10 enquiry is successful and such an order of committal is a prerequisite to the Minister's decision to surrender the extraditee. That is the clear *ratio* in Robinson and a magistrate consequently has no option but to commit an extraditee to prison in such circumstances.

107. For these reasons we are of the view, having regard to the express provisions of section 10(1), that it is not capable of being interpreted in conformity with the Constitution. The alternative approach by the appellant then is a direct attack on the constitutionality of section 10(1). The background facts relevant to that attack are as follows.

108. In this matter, from the outset bail was granted by agreement and none of the considerations normally justifying the refusal of bail were present. The deprivation of liberty after the finding that he is extraditable under these circumstances is, according to the appellant, is entirely unwarranted. The appellant thus submits that the facts of the matter are therefore that the deprivation of his liberty pending the Minister's decision is not just unnecessary but also without just cause. The respondents take no issue with these general submissions.

109. The question to consider in such an enquiry is whether or not section 10(1) limits the extraditee's right to freedom arbitrarily or without just cause. Put differently, is the limitation imposed by section10(1) reasonable and justifiable in terms of s36 of the Constitution? This Court therefore has to assess whether the infringement of the

right to freedom under section 10(1) is reasonable and justifiable in an open and democratic society.

REASONABLE LIMITATION

110. Section 36, which deals with the limitation of rights in the Bill of rights, reads as follows:

> "(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-
>
> (a) the nature of the right;
>
> (b) the importance of the purpose of the limitation;
>
> (c) the nature and extent of the limitation;
>
> (d) the relation between the limitation and its purpose; and
>
> (e) less restrictive means to achieve the purpose.
>
> 2. Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any rights entrenched in the Bill of Rights."

111. The arrest and imprisonment of any person is indisputably the clearest case of the limitation of personal freedom. Further, the right to freedom of the person under section 12(1)(a) of the Constitution has two facets, a substantive side and procedural side. In Smit[32], incidentally an extradition application in which the constitutionality of certain sections of drug-related statutes was challenged, the judgment of Madlanga J for the majority of the Court is instructive in this regard:

[32] Smit v Minister of Justice and Correctional Services and others 2021 (3) BCLR 219 (CC).

"[101] The right not to be deprived of freedom arbitrarily or without just cause protected by section 12(1)(a) of the Constitution has two facets – i.e. substantive and procedural facets. In Boesak Langa DP said that *"[t]his Court has held that section 12(1)(a) entrenches two different aspects of the right to freedom, the substantive and the procedural*".

[102] Both facets have to be satisfied for a deprivation of freedom not to be inconsistent with section 12(1)(a). Let me start with the substantive facet. In Bernstein O'Regan J said that the substantive facet relates to the grounds for the deprivation of freedom; "*the deprivation of freedom will not be constitutional [if] the grounds upon which freedom has been curtailed are unacceptable*". In similar vein, in De Lange Ackermann J said that *"[t]he substantive aspect ensures that a deprivation of liberty cannot take place without satisfactory or adequate reasons for doing so".*

[103] Without doubt, an arrest under section 5(1)(a) constitutes a deprivation of freedom and thus implicates the right not to be deprived of freedom arbitrarily or without just cause. The question is: does this section satisfy the test for the substantive facet of the section 12(1)(a) right? Section 5(1) of the Extradition Act provides:

> *"(1) Any Magistrate may, irrespective of the whereabouts or suspected whereabouts of the person to be arrested, issue a warrant for the arrest of any person—*
>
> > *(a)upon receipt of a notification from the Minister to the effect that a request for the surrender*
> > *(b)*
> > *(c)*
> > *(d) of such person to a foreign State has been received by the Minister; or*
> > *(b) upon such information of his or her being a person accused or convicted of an extraditable offence committed within the jurisdiction of a foreign State, as would in the opinion of the Magistrate justify the issue of*

a warrant for the arrest of such person, had it been alleged that he or she committed an offence in the Republic."

[104] I think the substantive facet is satisfied. That is so because the need to arrest for purposes of extraditing in fulfilment of the Republic's international obligation to extradite (where appropriate) does provide "acceptable", "satisfactory" or "adequate reasons" for depriving the person concerned of freedom. The need to extradite stems from considerations of reciprocity and comity amongst nations. This is explained … by Goldstone J in Geuking" (Internal references otherwise omitted)

112. We pause to refer again to Geuking where Goldstone J sketched the background to extradition requests as follows:

"[1] Extraditing a person, especially a citizen, constitutes an invasion of fundamental human rights. The person will usually be subject to arrest and detention, with or without bail, pending a decision on the request from the foreign state. If surrender is ordered, the person will be taken in custody to the foreign state.

[2] The need for extradition has increased because of the ever-growing frequency with which criminals take advantage of modern technology, both to perpetrate serious crime and to evade arrest by fleeing to other lands. The government of the country where the criminal conduct is perpetrated will wish the perpetrator to stand trial before its courts and will usually offer to reciprocate in respect of persons similarly wanted by the foreign state. Apart from reciprocity, governments accede to requests for extradition from other friendly states on the basis of comity. Furthermore, governments do not wish their own countries to be, or be perceived as safe havens for the criminals of the world."

113. There is therefore no doubt, in our view, that in extradition cases there is a need to arrest persons liable to be extradited in fulfilment of South Africa's international obligation to extradite (where appropriate) and that this provides

“acceptable”, “satisfactory”, or “adequate reasons” for depriving persons concerned of their freedom. Given such justifiable reasons, the substantive facet is therefore satisfied for depriving such persons of their freedom, as the judgment of Madlanga J makes clear.

114. On the other hand, the procedural facet requires that persons should not be deprived of their physical freedom unless fair and lawful procedures have been followed. Madlanga J dealt with that facet as follows in Smit:

> “[105] The procedural facet “*requires that no-one be deprived of physical freedom unless fair and lawful procedures have been followed*”. And that is so even in instances where there is no fair procedure expressly prescribed by the Constitution on the manner of deprivation of freedom. The procedure will be fair if there is the “*interposition of an impartial entity, independent of the Executive and the Legislature to act as an arbiter between the individual and the State*”. And in Lawyers for Human Rights Jafta J said
>
> > *“[i]mplicit in the procedural aspect of the right is the role played by courts. Judicial control or oversight ensures that appropriate procedural safeguards are followed.*”
>
> This, of course, excludes instances which – although there is no involvement of the Judiciary – are reasonable and justifiable under section 36(1) of the Constitution.
>
> [106] Axiomatically, this requirement can be satisfied only if, in terms of the legislation in issue, a Judicial Officer does indeed play the role of a Judicial Officer. That is, in the sense of being able to act as an independent arbiter and to exercise the kind of oversight that guarantees procedural safeguards. Requiring a Judicial Officer to rubberstamp what a member of the Executive branch of State presents to her or him is inconsonant with this requirement.” (Internal references otherwise omitted)

115. The respondents submit, correctly in our respectful view, that since the magistrate has no discretion to consider granting an extraditee bail pending the Minister's decision to surrender, a judicial officer is excluded from acting as an independent arbitrator insofar as it relates to the issue of bail pending the Minister's decision. There is, in such circumstances, no interposition of any impartial entity, independent from the executive and the legislature to act as an impartial arbiter between the extraditee and the state.

116. For all of these reasons we are in agreement that section 10(1) of the Act does not satisfy the test for the procedural facet as contemplated in section 12 (1) of the Constitution - the right not to be deprived of freedom arbitrarily or without just cause.

117. The respondents further submit that it is a fundamental tenet of our constitutional state that imprisonment should serve a compelling public purpose and that the measures that are employed in that regard should go no further than is necessary to achieve those purposes. It seems to us that the purpose of section 10 (1) of the Act, insofar as it relates to the requirement of the committal to prison of persons pending the decision of Minister to surrender them, is the following:

a) to give effect to the state's duty to expeditiously surrender the extraditee to the requesting state;

b) to give effect to considerations of reciprocity and comity amongst nations; and

c) to ensure that the person is readily available for transfer to the requesting state when the decision to surrender has been taken.

118. We are in agreement with the submissions made by both parties, that the nature and extent of the limitation on the section 12(1) right is over-broad to the extent that section 10(1) provides for the detention of all extraditees pending the Minister's decision irrespective of whether the person is a flight risk or not, and without due regard for their personal circumstances such as age, health and/or disability. Even in circumstances where the State and the magistrate are satisfied,

given the facts of the particular case, that an extraditee who is out on bail, will surrender himself or herself once the Minister has decided to surrender that person, the magistrate’s hands are presently tied.

119. Furthermore, in circumstances where the offence in respect of which the extradition is being sought is less serious, for example, than those referred to in schedules 5 or 6 of the CPA, where bail may readily be granted, there is no room for the consideration of bail here.

120. Both parties have referred us to the position in respect of the granting of bail pending extradition in various international jurisdictions. For present purposes we will limit our discussion to the decision of the Supreme Court of Namibia (SCN) in Alexander[33]. We do so because our northern neighbour previously applied the Act, before adopting its own legislation in 2011 – the Namibian Extradition Act, 11 of 1996 (the Namibian Act) – and, further, because the judgment provides a useful summary of relevant foreign case law.

121. Section 21 of the Namibian Act had an express provision regarding bail once a person had been committed for extradition: it was described as follows by Strydom AJA in Alexander.

> “[31] Sec. 21 concerns the issue of bail and provides that once a committal is ordered by the magistrate in terms of sec. 12(5) or 15(2), no person so committed shall be entitled to be granted bail pending the Minister’s decision in terms of sec. 16, or pending an appeal noted under sec. 14, or where the return to a designated country is ordered by the Minister. Consequently, once a person was committed, and until he was rendered to such country, such person may not be granted bail.”

We pause to mention that unlike our Act, which is silent on the extension of bail pending appeal, the Namibian Act expressly proscribed the granting of bail in such circumstances.

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[33] Alexander v Minister of Justice and others 2010 NASC 2 (9 April 2010).

122. The appellant's challenge to the constitutionality of section 21 before the NSC was upheld and, in the process of a thoroughly researched and reasoned judgment, Strydom AJA referred to the position in certain international jurisdictions, including South Africa, given that our laws (including the Act) previously applied in that country. It is thus convenient to deal with some of those decisions.

123. Strydom AJA referred to the judgments in Spilsbury and Graham, to which we have already referred, and confirmed that the Namibian High Court also possessed the inherent jurisdiction to grant bail to persons liable to be extradited while awaiting the relevant ministerial decision.

124. Strydom AJA also noted the position in Ireland in Gilliland[34] where that country's Supreme Court was of the view that the test for granting bail pursuant to a request by persons committed to return to the country who had requested their extradition was no more stringent in the case of extradition than in an ordinary criminal trial before the courts of the requested state.

> "In either case the… State's duty must operate in a way that will not conflict with the fundamental right to personal liberty of a person who stands convicted of an offence under the law of the State. The right to personal liberty should not be lost save where the loss is necessary for the effectuation of the duty of the State as the guardian of the common good - in the extradition cases the duty normally being to fulfil treaty obligations and in ordinary criminal cases normally to enable the criminal process to advance to a proper trial. If in either case a court is satisfied that there is no real likelihood that the prisoner, if granted bail, would frustrate the State's duty by absconding, I do not consider the bail should be refused on the absconding test."

[34] Attorney General v Gilliland [1995] I.R. 643 at 646.

125. In advancing this line of reasoning further, Strydom AJA also referred to the position in the United States of America in Paretti[35] where the 9th Circuit Court of Appeal opined as follows.

> "The problem with the government's argument is the implicit premise that its interest in the enforcement of extradition treaties is materially different from and greater than its interest in the enforcement of our own criminal laws. In the last analysis, the purpose of extradition treaties is to strengthen our hand in enforcing our own laws through the cooperation of other countries in apprehending fugitives. Yet the government implicitly argues that the law enforcement interest served by extradition treaties is somehow different from and greater than its interest in enforcing our domestic laws. The government fails to suggest any difference, and we can fathom none. If the government's interest in avoiding all risk of flight pending an extradition hearing justified detention without bail, then it stands to reason that the same interest would also justify pre-trial detention in domestic criminal cases. Yet if Paretti had been arrested on charges of violating our own laws against business fraud, and was neither a flight risk nor a danger to the community, it would be unthinkable that he could be held without bail pending trial."

126. The NSC thus held that the provisions of section 21 of the Namibian Act were in breach of the right to liberty enshrined in Art 7 of the Namibian Constitution and it ordered the section to be struck down.

127. We find the reasoning in the Namibian, Irish and American courts persuasive and we illustrate our approach by way of the following local example. If the appellant had been arraigned before the Magistrate on charges under SORMA, he would have been entitled to apply for bail, and if the court was satisfied that he was not a flight risk, he might have been eligible for bail, perhaps with conditions attached thereto such as non-interference with witnesses and the like. Further, if the appellant had been convicted locally under SORMA and had been granted leave to appeal, the

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[35] Paretti v United States 112, F.3d I363(9th Cir 1997).

Magistrate would have been entitled to consider extending such bail on similar terms and conditions.

128. In our view the Act presently leads to the following anomalies. A person such as the appellant, who has been found liable to be extradited by the Magistrate, has the right to appeal that finding directly to the High Court under section 13 of the Act. And when he does so, the appellant has the express right to apply for bail under that section which reads as follows.

> "**13. Appeal**
>
> (1) Any person against whom an order has been issued under section 10 or 12 may within 15 days after the issue thereof, appeal against such order to the provincial or local division of the Supreme Court having jurisdiction.
>
> (2) …
>
> (3) Any person who has lodged an appeal in terms of subsection (1) may at any time before such appeal has been disposed of, apply to the magistrate who issued the order in terms of section 10 or 12 to be released on bail on condition that such person deposits with the clerk of the court, or with a member of the Department of Correctional Services, or with any police official at the place where such person is in custody, the sum of money determined by a magistrate.
>
> (4) If the magistrate orders that the applicant be released on bail in terms of subsection (3), the provisions of sections 66, 67, 68 and 307(3),(4) and (5) of the Criminal Procedure Act, 1977… shall *mutatis mutandis* apply to bail so granted, and any reference in those sections to–
>
> (a) the prosecutor who may act under those sections, shall be deemed to be a reference to such person who may appear at an inquiry held under this Act;

(b) the accused, shall be deemed to be a reference to the person released on bail subsection (3);

(c) the court, shall be deemed to be a reference to the magistrate who released such person on bail; and

(d) the trial or sentence, shall be deemed to be a reference to the magistrate's order under section 10 or 12."

129. Yet, if the appellant elects not to exercise the right of appeal under section 13 but rather to review the decision to extradite (whether such review be under section 22 of the Superior Courts Act or by way of a legality challenge), he must be held without bail. So too, if the appellant elects not to approach the High Court for competent relief, but to rely on his right to petition the Minister not to confirm the extradition, he is deprived of his liberty while waiting for this administrative function to be discharged. It is safe to assume, given the history of this matter, that such detention might be for an appreciable period of time.

130. It is clear to us that Alexander and the cases referred to therein stress the importance of the liberty of the individual and the protection against arbitrary detention in the context of extradition. The upshot of this is that the mere fact that a person is liable to be extradited does not serve as an overriding factor *per se* for the detention of the person without the possibility of bail being considered. Furthermore, where a person does not ordinarily present a flight risk or is a danger to society in circumstances where bail would ordinarily be granted in terms of the domestic laws of the requested state, there is no reason why a person who is liable to be extradited should not be treated similarly and be granted bail.

131. In the present case, it is not in dispute that the unavailability of bail in respect of a person that has been found liable to be extradited pending the decision of the Minister is unconstitutional and the respondents do not attempt to justify the constitutionality of section 10 (1). Indeed, the respondents concede that section 10 (1) infringes the right of an extraditee not to be deprived of his freedom arbitrarily,

without just cause and that the infringement is not justifiable in terms of section 36 of the Constitution. They say so for the following reasons:

(a) Section10(1) excludes the court from acting as an arbiter insofar as it relates to the issue of bail pending a decision of the Minister in that it does not grant the magistrate the discretion to release an extraditee on bail pending such decision;

(b) It deprives the High Court of its inherent jurisdiction to consider bail pending the Minister's decision;

(c) The section does not satisfy the test for the procedural facet of the invasion of the section 12(1)(a) constitutional right;

(d) The limitation is over-broad since section 10(1) provides for the detention of all extraditees pending the Minister's decision, even under circumstances where both the State and the magistrate are satisfied that an extraditee will render him-/herself to the authorities in the event of the Minister ordering extradition to the relevant requesting state.

132. We disagree with the contention made by the respondents in para (b) above. For the reasons already advanced above, the inherent jurisdiction of this Court to grant bail in circumstances such as this remain undisturbed due regard being had for the provisions of section 173 of the Constitution, which confirms the inherent power of the superior courts and which reads as follows:

"The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice ."

133. In their heads of argument, the respondents submit that bail pending the decision of the Minister should be considered on a case-by-case basis, employing as

a guide the principles as set out in sections 60(11)(a) and (b) of the CPA and propose that section 10(1) of the Act should be amended accordingly.

134. We agree with the submission of the parties that section 10(1) does not pass constitutional muster insofar as it does not provide a magistrate, who has made a committal order, the power to extend or grant bail pending the Minister's decision in terms of section 11 of the Act. As a result, we hold the view that the Act does not conform with the Bill of Rights insofar as it results in an unjustified limitation of the right against arbitrary deprivation of freedom and thus constitutes an unjustified limitation of section 12 (1) (a) of the Constitution.

REMEDY

135. Our finding of constitutional invalidity in respect of section 10(1)(a) leads to consideration of section 172 of the Constitution:

> **"172. Powers of courts in constitutional matters**
>
> 1. When deciding a constitutional matter within its power, a court –
>
> (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
>
> (b) may make any order that is just and equitable, including
>
> (i) an order limiting the retrospective effect of the declaration of invalidity; and
>
> (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.
>
> 2. (a) The Supreme Court of Appeal, the High Court of South Africa or a court of similar status may make an order concerning the constitutional validity of an

Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court.

(b) A court which makes an order of constitutional invalidity may grant a temporary interdict or other temporary relief to a party, or may adjourn the proceedings, pending a decision of the Constitutional Court on the validity of that Act or conduct."

136. The power of the court in making an appropriate order under this section is wide and unbounded. In Hoerskool Ermelo[36] Moseneke DCJ put it thus.

"[97] It is clear that section 172(1)(b) confers wide remedial powers on a competent court adjudicating a constitutional matter. The remedial power envisaged in section 172(1)(b) is not only available when a court makes an order of constitutional invalidity of a law or conduct under section 172(1)(a). A just an equitable order may be made even in instances where the outcome of a constitutional dispute does not hinge on constitutional invalidity of legislation or conduct. This ample and flexible remedial jurisdiction in constitutional disputes permits a court to forge an order that would place substance above mere form by identifying the actual underlying dispute between the parties and by requiring the parties to take steps directed at resolving the dispute in a manner consistent with constitutional requirements. In several cases, this Court has found it fair to fashion orders to facilitate a substantive resolution of the underlying dispute between the parties. Sometimes orders of this class have taken the form of structural interdicts or supervisory orders. This approach is valuable and advances constitutional justice particularly by ensuring that the parties themselves become part of the solution."

137. The parties are in agreement that the operation of such declaration of invalidity should be suspended for a period of 24 months to afford Parliament an opportunity to remedy this defect. But what to do in the interim? It seems to us that a reading-in

[36] Head of Department: Mpumalanga Department of Education and another v Hoerskool Ermelo and another 2010 (2) SA 415 (CC).

is the most appropriate route in the circumstances to ensure a just and equitable order under section 172(1)(b).

READING IN

138. While both parties agree that there should be a reading-in provision in the Act to permit the granting of bail in circumstances such as the present, they are not in agreement with the content thereof. The appellant proposes the following provision be read into section 10(5) of the Act.

> "The magistrate issuing a committal order may grant bail extended of the person brought before him, if the interests of justice permit that person to release or continued release on bail, pending the Minister's decision in terms of section 11 of this Act."

139. The respondents on the other hand submit that the relevant provision be read in at the end of section 10(1). They further submit that any interim reading-in should deal with the circumstances where an extraditee is sought for trial in the requesting state on offences which are similar to those contemplated in Schedule 6 offences of the CPA. They accordingly suggest the following:

> "In the event that such person does not intend to appeal against such order to the Supreme Court, such person may, at any time pending the Minister's decision, apply to the magistrate, who issued the committal order, to be released on bail on condition that such person deposit with the clerk of the court, or with a member of the Department of Correctional Services, or with any police official at the place where such person is in custody, the sum of money determined by the magistrate. The magistrate issuing the committal order may grant bail or extend the bail of such person, if the interests of justice permit the person's release or continued release on bail, pending the Minister's decision in terms of section 11 of this Act. However, in the event of such person being sought on an offence/s or an offence/s equivalent to those listed in Schedule 6 of the Criminal Procedure Act, the magistrate may grant bail or extend the bail of such person, if the magistrate is satisfied that exceptional circumstances

exist in the interest of justice permit his or her release."

140. The respondents proposed reading in is based on what Sher J said in Tucker 2022[37].

> "83. In *Ex parte Graham*… 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 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."

141. Based on this dictum the respondents are of the view that it is appropriate for a magistrate to grant bail only in circumstances where an extraditee adduces evidence to satisfy the court that exceptional circumstances exist to permit his or her release on bail in the interests of justice. It seems to us that in Tucker 2022, the court was called upon decide whether or not magistrate was empowered in terms of section 10(1) to grant bail pending the Minister's decision or whether bail under such circumstances could only be granted by the High Court on the basis of its inherent jurisdiction. We consider that Sher J, respectfully in our view, erroneously accepted

[37] Director of Public Prosecutions, Western Cape v Mahlanga N.O.and another; Tucker v Director of Public Prosecutions, Western Cape 2023 (1) SACR 245 (WCC) ("Tucker 2022").

that the magistrate was empowered to grant bail to an extraditee pending the decision of the Minister.

142. Further, it seems to us, that what influenced Sher J to conclude that it may be appropriate in a given case for a magistrate to grant bail, was based on the requirement that the extraditee should adduce sufficient evidence to satisfy the court that exceptional circumstances exist which in the interests of justice permit his or her release. This conclusion appears to us to have been based on the fact that the offences for which the extraditee (Tucker) was being sought in the UK are listed in schedule 6 of the CPA. Further, it appears to us that Sher J considered that it was primarily the intention of the legislature that an extraditee who had been declared liable to be extradited should not be out on bail pending the Minister's decision, save in exceptional circumstances.

143. The specific facts of the matter also seem to have influenced Sher J in expressing strong views regarding the fixing of bail for a person that had been found to be liable to be extradited. In that case Tucker had been tried and convicted for a similar offence and was sentenced to 8 years imprisonment. He was a fugitive from justice and unequivocally stated that he did not intend to return voluntarily to the UK and he clearly did everything possible to avoid being extradited.

144. Given that the constitutionality of section 10 of the Act has been expressly challenged in this matter and, importantly, that it is common cause that the section is unconstitutional to the extent that it precludes the consideration of bail pending the Minister's decision, we are of the view that Tucker 2022 is distinguishable and that we are not bound to follow it.

145. In considering the extent of the proposed reading in provision we are mindful of the separation of powers principle and that any intrusion by the Court on the powers of the legislature must be measured accordingly. The approach was set out by the Constitutional Court in National Coalition[38]. Hence, we are required to provide appropriate relief under section 38 of the Constitution, given the infringement of the

[38] National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others 2000(2) SA1 (CC) at [64] – [65].

Bill of Rights while at the same time offering the necessary deference to the legislature in accordance with the principle of the separation of powers. As the apex court pointed out, the formulation of such deference is not readily capable of formulation and will have to be determined on a case-by-case basis.

146. That having been said, the following broad principles seem to us to be relevant here:

a) In deciding whether words should be read into a statute, the court, firstly, pays careful attention to the need to ensure that the provision which results from the reading in is consistent with the Constitution and its fundamental values;

b) Secondly, the result arrived at must interfere with the laws adopted by the legislature as little as possible. As was observed in National Coalition, given our past, and where there are statutes that still contain provisions enacted by a parliament that was not concerned with the protection of human rights, the first consideration (mentioned under paragraph (a) above), often weighs more heavily than the second. It seems to us that section 10(1) is a telling example of such a statute;

c) Further, when deciding to read words into a statute, a court should also bear in mind that it will not be appropriate to read in unless the court can define with sufficient precision just how the statute ought to be extended in order to be constitutionally compliant;

d) When reading in a court should endeavour to be as faithful as possible to the legislative scheme within the constraints of the Constitution; and

e) Lastly, it should be borne in mind that whether the remedy the court grants is one of reading-in or extending the text, the choice is not final, because the legislature is able, within constitutional limits, to amend the remedy. It should therefore be left up to the legislature to fine tune the remedy.

147. In applying these guidelines, we proceed to consider the reach and extent of the reading- in relief the parties require us to adjudicate upon. The principal objection, and the basis upon which the claim of unconstitutionality is based here, is the fact that bail cannot be granted by a magistrate after it has been found that a person is to be liable to be extradited and while that finding is pending the decision of the Minister. In this regard the procedural facet of the right to freedom not to be deprived of one's liberty arbitrarily or without just cause has been infringed because of the fact that there is no judicial oversight regarding the further detention of the extraditee.

148. We are called upon to grant relief by reading in a remedy in terms of which an extraditee should be granted the right to apply for bail (or extension of bail previously granted) after such a person had been declared liable to be extradited by a magistrate, pending the decision of the Minister. The reading-in provision should therefore be consistent with the right of an extraditee not to be deprived of freedom arbitrarily or without just cause. At the same time that provision should not interfere with South Africa's duty to comply with its international law obligations to extradite persons being sought by foreign states for crimes committed in those states.

149. Our duty is to define with sufficient (and not exact) precision how the provisions of the Act should be extended to give effect to the right of an extraditee to apply for bail pending the Minister's decision to extradite in order to prevent that such a person not be deprived of the right to freedom under section 12 of the Constitution arbitrarily or without just cause. This means no more than an extension of the provisions of the Act by reading into it a provision that a person who has been found liable to be extradited should be afforded the right to apply for bail pending the decision of the Minister and that such provision should be constitutionally compliant.

150. The respondents have asked this Court to include in such a reading in the provisions of section 60(11)(a) and (b) of the CPA[39] and submit that it should find

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[39] Section 60 (11) of the CPA provides as follows:
"Notwithstanding any provision of this Act, where an accused is charged with an offence—

application when a court decides whether or not an extraditee should be granted bail pending the Minister's decision. The respondents therefore submit that the nature of the offence for which a person such as the appellant is sought should be taken into account in considering whether he should be granted bail pending the Minister's decision. They submit further that if an extraditee is sought on an offence listed under Schedule 6 of the CPA, the test to be applied should be similar to that applied in sections 60(11)(a) of the CPA.

151. Schedule 6 lists the most serious offences in our criminal law including murder, rape and robbery with aggravating circumstances. The provisions of this section of the CPA place an onus on an accused person to satisfy the court that exceptional circumstances exist which permit his release on bail "in the interests of justice".

152. This Court is well aware of the circumstances that existed at that time (and persist in our society due to the ever-increasing surge in violent crimes) which justified the enactment of these provisions. The crimes listed in Schedule 6 are by their nature those very crimes which are violent, and which are most invasive of the rights of personal security of ordinary South Africans. This legislation was also enacted in circumstances there was a perception that bail was too readily granted in such serious cases. See in this regard the comments made in S v Dlamini et al[40] at paragraphs 67 and 68.

153. We are, however, of the view, that it is not our task, in fashioning a provision to be read into the Act, to determine that the provisions of section 60(11) should find application in circumstances such as the present. We bear in mind that section 60(11) was included in the CPA to address the pressing situation of criminal conduct in our society. *Non constat* that we should be called upon to decide the extent of the gravity with which an offence is viewed in the requesting state. Further, it would in

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(a) referred to in Schedule 6, the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that exceptional circumstances exist which in the interests of justice permit his or her release;
(b) referred to in Schedule 5, but not in Schedule 6, the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that the interests of justice permit his or her release."

[40] 1999(2) SACR 51(CC).

our view be an unreasonable limitation on an extraditee's personal liberty to foist upon that person an onus to establish criteria for the granting of bail in circumstances where we are unaware of the criteria applicable to the granting of bail in a foreign jurisdiction.

154. Furthermore, if regard be had to the provisions of sections 12(2) and (3) of the Act, we note that the legislature has set fixed criteria for the determination of bail pending an appeal to the High Court under that section. Those criteria do not contain any restrictive reference to section 60(11) of the CPA as the respondents have asked for here. We note further that those sections were added to the Act in 1996, thereby introducing an entitlement to apply for bail before a magistrate once an appeal to the High Court had been noted, and we wonder whether it was a legislative oversight or not that section 10 was not amended to make provision for bail in circumstances such as the present.

155. In any event, we consider that it should be left to the legislature to deliberate whether it is necessary to include the provisions of the CPA relating to bail to be made applicable to persons who are liable to be extradited. In this regard we remind ourselves that the Constitutional Court pointed out in National Coalition that a court must keep in mind the principle of separation of powers, and flowing therefrom the deference it owes to the legislature in devising a remedy for a breach of the Constitution in a particular case: it should be left to the legislature to fine-tune the precise extent of the remedy.

156. We are accordingly of the view that the reading-in provision as proposed by the appellant should suffice in order to protect an extraditee's right to not be deprived of the right to freedom arbitrarily and without just cause pending the decision of the Minister or pending an application to the High Court to review either the decision of the magistrate or the Minister, and to provide for the right to apply for bail in such circumstances. In our view then the following provision should be read into the Act after the existing section 10(4):

> *"(5) The magistrate issuing a committal order as aforesaid may grant bail, or extend the bail already granted under section 10(1), to the person brought*

before him, if the interests of justice permit that person to be released, or the continued release of such person on bail, pending the Minister's decision in terms of section 11 of this Act, or any legal proceedings instituted to review the decisions of either the magistrate or the Minister."

CONCLUDING REMARKS

157. We consider that the review and appeal[41] against the decision of the Magistrate should only succeed to the extent that he found that the appellant is liable to be extradited in respect of counts 1, 2, 3 and 4. Our finding in this regard is based on the fact that we are satisfied that the crimes under those counts for which the appellant is sought in the United Kingdom have prescribed in terms of our law.

158. In respect of the finding that the appellant is liable to be extradited on counts 5, 6 and 7 his application for review and his appeal in that regard is dismissed. We find that the Magistrate was correct for the reasons stated above in concluding that the appellant was liable to be extradited on those counts to the United Kingdom.

159. In respect of the decision of the Minister, we find that the review should succeed in its entirety given that the Minister based his decision on a finding by the Magistrate that was partly-flawed. In this regard we consider that the Minister should now exercise her decision-making power on the basis that the Magistrate's errors have been corrected – she will now know what the correct legal position is, and she should be entitled to exercise her discretion with a clean slate that is free of any reviewable errors.

160. The counter-review application launched by the Minister on the basis that the magistrate was wrong in not committing the appellant to prison in terms of section 10(1) of the Extradition Act is upheld on the basis that we consider that the

[41] The issues such as the lack of dual criminality and the evidence presented in the form of section 220 admission, were raised both as grounds of review and appeal, by the appellant for the reasons stated in paragraphs 5 and10 of his counsel's heads of argument. The appellant sought an order that the decision of the Magistrate to declare him extraditable be set aside on the basis that the charges against him had prescribed. And similarly, that the Minister's decision to extradite him be reviewed and set aside based on the grounds that the charges had prescribed.

Magistrate was not entitled to extend the bail of the applicant under section 10(1) of the Act.

161. Lastly, we are satisfied that the collateral challenge to the counter-review application to declare section 10(1) of Act inconsistent with the Constitution of the Republic of South Africa must be upheld for the reasons stated above.

QUO VADIS?

162. The last question is how this matter should move forward. The appellant asked that it should be returned to the Magistrate so that he could reconsider the matter afresh, particularly with respect to his reviewable errors relating to the prescription of certain of the charges and the extension of bail in the light of our proposed reading in. In such circumstances the appellant asks that his original bail be reinstated and that he need not surrender himself to the authorities.

163. The respondents on the other hand ask that the matter be referred back to the Minister for a fresh decision on whether the appellant should be surrendered to the UK authorities on counts 5 -7 or not. They submit further that the appellant should be returned to custody because we have found that the Magistrate did not have the power to grant him bail pending the Minister's decision.

164. As we have said, we are exercising our powers under section 172(1)(b) and we are duty bound to grant an order that is just and equitable in the circumstances. We consider that such order should comprise a referral of the matter back to the Minister for a fresh decision under section 11 of the Act. We do not think it makes sense to send the application back to first base in light of our finding that we are satisfied that certain of the charges (1- 4) have prescribed while the remainder (5 -7) have not, and there is nothing further for the Magistrate to decide, given that we are satisfied that the dual criminality element has been established. Those findings will also facilitate the reconsideration of the Minister's decision.

165. As far as the appellant's bail is concerned, his entitlement to apply for bail pending the Minister's decision will now be the subject of confirmation of

unconstitutionality by the Constitutional Court. Pending such confirmation, we propose a reading-in provision as set out above by the inclusion of a section 10(5) in the Act. In order to avoid any confusion regarding the power of the Magistrate to consider bail pending the Minister's decision under section 11, or any further challenges in that regard, we consider that it is just and equitable that, following the approach in Graham and Veenendal, we should exercise our inherent jurisdiction and extend the appellant's bail on the same terms and conditions as presently apply.

166. As far as costs are concerned, it is so that the appellant has been partially successful in so far as he has avoided being extradited on counts 1 – 4. He has also successfully challenged the constitutionality of the Act. Following Biowatch[42], it is fair and in the interests of justice that Mr. Wares should be awarded his costs herein. Both parties were represented by two counsel and in our view these costs were warranted.

ORDER OF COURT

Accordingly, it is ordered that:

1. The delay of the Applicant/Appellant ("Mr. Wares") in instituting the application for review of the decisions of the First Respondent ("the Magistrate") made on 23 August 2019 and of the Second Respondent ("the Minister") made on 19 February 2020, and the appeal, is condoned.

2. The Minister's delay in bringing the counter-review application in respect of the Minister's decision to surrender Mr. Wares to the United Kingdom is condoned.

3. Paragraphs 2 and 3 of the finding section of the Magistrate's order of 23 August 2019 are amended to read as follows:

"*2. That Mr Wares:*

[42] Biowatch Trust v Registrar, Genetic Resources and Others (CCT80/08) ZACC14;2009(6) SA 232(CC):2009(10) BCLR 1014 (CC) (3 June 2009).

2.1 is a person whose extradition is sought in terms of 3(1) of the Extradition Act No. 67 of 1962; and

2.2 is liable to be extradited to the United Kingdom.

3. There is sufficient information to confirm that in respect of the offences listed as charges 5 to 7 in Annexure "A" to the Certificate of Authentication of James Wolffe, QC, Lord Advocate (reflected on page 59 of bundle 2 of the record), Mr Wares was accused of extraditable offences in the United Kingdom."

4. Save as stated in paragraph 3 above, Mr. Wares' review application and the appeal in respect of the Magistrate's decision are dismissed.

5. The order made by the Magistrate on 23 August 2019 that Mr. Wares be granted bail awaiting the decision of the Minister is reviewed and set aside and substituted with the following order:

"1. It is ordered that Mr Wares be committed to prison to await the Minister's decision regarding his surrender to the United Kingdom"

6. Notwithstanding the provisions of para 5 above, and pending the decision of the Minister and/or the final determination of any further legal proceedings in relation to this matter, this Court, exercising its inherent jurisdiction, orders that Mr. Wares is forthwith released on bail on the same terms and conditions as were determined by the Magistrate on 23 August 2019.

7. The decision taken, and the order made by the Minister on 19 February 2020 in terms of section 11(a) of the Extradition Act ordering that Mr. Wares be surrendered to the United Kingdom to stand trial on six charges of lewd, indecent and libidinous practices and behaviour and one charge of indecent assault for which his extradition is sought for, is reviewed and set aside and the matter is remitted to the Minister for reconsideration on such terms as she considers fit.

8. Section 10(1) of the Extradition Act is declared to be inconsistent with the Constitution of the Republic of South Africa and invalid to the extent that it does not provide for the power of a magistrate to extend or grant bail after a committal order, pending an application to review such committal order or pending the Minister's decision in terms of section 11 of the Extradition Act.

9. The operation of such declaration of invalidity is suspended for a period of 24 months to afford Parliament an opportunity to enact remedial legislation;

10. The declaration of invalidity shall take effect from the date of the Constitutional Court order declaring the section unconstitutional;

11. Pending the aforementioned suspension, the following words are hereby read in to the Extradition Act as section 10(5):

> "*5 The magistrate issuing the order of committal may grant bail or extend the bail of the person brought before him, if the interests of justice permit that person's release or continued release on bail, pending the Minister's decision to be made in terms of Section 11 of this Act, or pending any review of the Magistrate's decision made in terms of Section 10 of this Act.*

12. In the event that Parliament does not enact remedial legislation within the period of suspension, the interim reading-in remedy shall become final.

13. The respondents shall be jointly and severally liable to pay Mr. Wares' costs of the appeal, the reviews and the costs of the challenge to section 10(1) of the Extradition Act, such costs to include the costs of two counsel where so employed.

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GAMBLE, J

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HENNEY, J

APPEARANCES

For the Applicant	:	Adv W King SC et Adv B Prinsloo
Instructed by		Mathewson Gess Inc Attorneys, Cape Town
For the 2nd & 3rd Respondent	:	Adv F Petersen et Adv C de Villiers
Instructed by		State Attorney, Cape Town