IN THE HIGH COURT OF SOUTH AFRICA

NORTHERN CAPE DIVISION, KIMBERLEY

CASE NUMBER: CA&R 66/2023

Reportable: **YES** / NO

Circulate to Judges: **YES** / NO

Circulate to Regional Magistrates: **YES** / NO

Circulate to Magistrates: **YES** / NO

In the matter between:

C[...] A[...] L[...]-S[…] **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Lewis-Springfield v The State* (CA&R 66/2023 [2025] 17 April 2025.

Coram: Tlaletsi JP et Stanton J

Heard: 17 March 2025

Delivered: 17 April 2025

Summary: Criminal appeal against the finding of the magistrate court in an extradition enquiry - whether the offence for which the appellant's extradition is sought is an extraditable offence - whether there is sufficient evidence upon which the appellant can be prosecuted in the United States of America - section 10 of the Extradition Act – appeal dismissed.

ORDER

1. The appeal is dismissed.

JUDGMENT

Stanton J

Introduction:

[1] This is an appeal against the finding of the Upington Magistrates' Court that the appellant was liable to be extradited in terms of section 10(1) of the Extradition Act 67 of 1962 ("the Act"), more specifically the findings that:

1.1 The offence for which the extradition is sought, is extraditable in terms of the Act; and

1.2 There is sufficient evidence to warrant the prosecution of the offence in the United States of America ("the USA").

Relevant background:

[2] In terms of a custody order granted by the Milwaukee County Circuit Court on 20 September 2021 ("the custody order"), the appellant and the biological mother, N[...] M[...], have joint custody and shared placement of the minor children, M[...] [...] L[...] and M[...] [...] L[...] ("the minor children") . The custody order provides that the parties shall have two non-consecutive one-week blocks of vacation per year on condition that 60 days written notice is given, and if travelling, an itinerary is provided. The appellant has two other children,

one who has reached the age of majority and a minor daughter, A[...] [...] L[...], of whom he has primary placement.

[3] The appellant and his four children are USA citizens. He came to this country towards the end of October 2021 on a visitor's visa that expired on 29 January 2022. He brought his 4 children with him, without giving the mother the required 60 days' written notice or providing her with an itinerary in terms of the custody order.

[4] In terms of the custody order, the appellant had to return the minor children to their mother on 03 November 2021 at 14h00, which he failed to do. The mother consequently reported the matter to the USA authorities, and the appellant was sought on allegations or charges of International Parental Kidnapping.

[5] The USA Department of Justice made a request to the South African Department of Justice to assist in the arrest and extradition of the appellant. On 01 February 2022, the Pretoria Magistrate's Court authorised and issued a warrant for the arrest of the appellant, and he was subsequently arrested on 16 March 2022 in Upington, Northern Cape.

[6] The magistrate conducted and finalised the enquiry in terms of section 10 of the Act on 22 September 2023 and determined that the offence the appellant is charged with, namely the USA offence of international parental kidnapping for which the appellant's extradition is sought, is an extraditable offence; and that there is sufficient evidence to warrant the appellant's prosecution in the USA.

Grounds of appeal:

[7] The grounds of appeal the appellant avers that the court *a quo* had erred upon, can be distilled as:

7.1 The finding that the USA offence of International Parental Kidnapping for which the appellant's extradition is sought is an extraditable offence; and

7.2 The finding that there is sufficient evidence (whether by way of evidence or a certificate in terms of the Act to warrant the appellant's prosecution in the USA.

Applicable law:

[8] It is common cause that South Africa and the USA concluded an extradition agreement; and that the USA in *casu* is a foreign and requesting State as defined in section 1 of the Act.

[9] The Act determines the conditions that must be complied with in South Africa before any person sought by a foreign State to undergo trial or serve a sentence there can be surrendered to the requesting State for that purpose. Moreover, the determination by the extradition magistrate as to whether the person is liable to be surrendered is governed by the provisions of section 10 of the Act. 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".

[10] The following sections of the Act are applicable to this appeal:

10.1 Ss 9(1) and 9(4) of the Act stipulate that:

'(1) Any person detained under a warrant of arrest or a warrant for his further detention, shall, as soon as possible be brought before a magistrate in whose area of jurisdiction he has been arrested, whereupon such magistrate shall hold an enquiry with a view to the surrender of such person to the foreign State concerned.

(4) At any enquiry relating to a person alleged to have committed an offence—

(a) in a foreign State other than an associated State, the provisions of section 10 shall apply;

(b) in an associated State—

(i) the provisions of section 10 shall apply in the case of a request for extradition contemplated in section 4(1) ; and

(ii) the provisions of section 12 shall apply in any other case."

10.2 Section 10 of the Act, with regard to the enquiry where an offence is committed in a foreign State, states that:

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

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

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

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

[11] To recap, the crux of the appeal is:

11.1 Whether the offence for which the appellant's extradition is requested is an extraditable offence; and

11.2 Whether there is sufficient evidence upon which the appellant can be prosecuted.

Was there sufficient evidence for the appellant's prosecution in the USA?:

[12] During argument, Mr MR Mogwera, for the appellant, conceded that the court *a quo* complied with the procedural aspects of the extradition enquiry. He also acknowledged that there was sufficient evidence to warrant a prosecution in the USA as the magistrate was entitled to accept as conclusive proof the certificate issued by an appropriate authority in charge of the prosecution in the foreign State concerned, if it confirms that there is sufficient evidence at its disposal to warrant the prosecution of the person concerned.

[13] During the extradition enquiry, the section 10(2) certificate, together with annexures thereto, issued by the Assistant United States Attorney for the Eastern District of Wisconsin, was received by the court *a quo* as an exhibit.

[14] The Constitutional Court in *Geuking v President of the Republic of South Africa and Others ("Geuking"),*[1] confirmed that a magistrate who holds the enquiry is *obliged to accept as conclusive proof that there is sufficient evidence to warrant a prosecution in the requesting State, on submission of a*

[1] 2003 (3) SA 34 (CC); 2004 (9) BCLR 895 (CC); 2003 (1) SACR 404 (CC) para 31.

certificate to that effect by an appropriate authority in the foreign State [My emphasis].

[15] From the record, it is clear that the court *a quo* correctly found that the section 10(2) certificate complies with section 10 of the Act and that there is sufficient evidence upon which the appellant could be prosecuted. That disposes of the first enquiry.

Extraditable offence:

[16] According to the appellant, there is no offence in South African Law that the appellant committed that is equivalent to "*International Parental Kidnapping",* which meant that the finding of the court *a quo* was wrong, and the appeal must be upheld. After initially persisting with this argument, Mr Mogwera conceded that the appellant's failure to adhere to the custody order amounts to an extraditable offence.

[17] For the purpose of this contention it is important to note that section 1 of the Act defines an extraditable offence as:

'Any offence which in terms of the law of the Republic and the Foreign State concerned is punishable with a sentence of imprisonment or other form of deprivation of liberty for a period of six months or more, but excluding any offence under military law which is not also an offence under the ordinary criminal law of the Republic and of such foreign State.'

[18] The offence which the appellant is facing in court in the USA is International Parental Kidnapping, that is defined as:

'(a) Whoever removes a child from the United States, or attempts to do so, or retains a child (who has been in the United States) outside the United States with intent to obstruct the lawful exercise of parental rights shall be fined under this title or imprisoned for not more than 3 years, or both.

(b) As used in this section –

(1) The term “child” means a person who has not attained the age of 16 years; and

(2) The term “parental rights”, with respect to a child, means the right to physical custody of the child –

(A) whether joint or sole (and includes visiting rights); and

(B) whether arising by operation of law, court order, or legally binding agreement of the parties.

(c) It shall be an affirmative defence under this section that –

(1) The defendant acted within the provisions of a valid court order granting the defendant legal custody or visitation rights and that order was obtained pursuant to the Uniform Child Custody Jurisdiction Act or the Uniform Child Custody Jurisdiction and Enforcement Act and was in effect at the time of the offense;

(2) The defendant was fleeing an incidence or patterns of domestic violence; or

(3) The defendant had physical custody of the child pursuant to a court order granting legal custody or visitation rights and failed to return the child as a result of circumstances beyond the defendant’s control, and the defendant notified or made reasonable attempts to notify the other parent or lawful custodian of the child of such circumstances within 24 hours after the visitation period had expired and returned the child as soon as possible.’

[19] The court a *quo* found dual criminality in, *inter alia,* sections 305(1)(q) and 305(6) of the Children’s Act 38 of 2005 (“the Children’s Act”).

[20] Section 305(1)(q) determines that a person is guilty of an offence if that person contravenes or fails to comply with an order of a High Court, Divorce Court in a divorce case and children’s court, issued in terms of the Children’s Act, including section 153(6), or contravention of any condition contained in such order. Section 305(6) provides for a fine or the imprisonment for a period not exceeding 10 years, or to both imprisonment and a fine, if a person is convicted of an offence in terms of section 305(1)(q) of the Children’s Act.

[21] In dealing with Child Abduction, Chapter 17 of the Children's Act gives effect to the Hague Convention on International Child Abduction ("Hague Convention").[2] In combating parental child abduction, section 275 provides that: '*the Hague Convention on International Child Abduction is in force in the Republic and its provisions are law in the Republic, subject to the provisions of this Act.'* Article 12 of the Hague Convention provides that, '*where a child has been wrongfully removed or retained in terms of article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.'*

[22] In *Geuking (supra),* the Constitutional Court emphasised that:

'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 s 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 s 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.'[3]

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[2] S 274(a) of the Children's Act.

[3] *Geuking Ibid* fn 1, paras 39-40.

And further that:

' . . . 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.'[4]

[23] Professor CR Snyman describes the crime of kidnapping as "*consisting in unlawfully and intentionally depriving a person of his or her freedom of movement and/or, if such person is under the age of 18 years, the custodians of their control over the child.*"[5] Thus, "*a parent cannot commit the crime in respect of his or her own child. Accordingly, if the father and natural guardian of a child, having divorced his wife, removes the child from her care in order to*

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[4] *Geuking (Supra)* paras 44-45.

[5] CR Snyman *Criminal Law* 6 ed (2014) at 471.; See also SV Hoctor *Snyman's Criminal Law* 7 ed (2020) at 417.

keep her in his own care, he does not commit the crime. This is true even if the court awarded the custody and control of the child to the mother. <u>However, this does not mean that the divorced father can with impunity remove a child from the care of the mother to whom the court has awarded custody and control, since by so doing he infringes a court order, and may be guilty of contempt of court.'</u>[6] [My emphasis].

[24] The conduct of the appellant in South African Law would therefore fall under the definition of kidnapping or contempt of court or amount to the contravention of section 305(1)(q) of the Children's Act, which offence would be punishable with a sentence of imprisonment for a period of six (6) months or more. The evidence tendered in the enquiry shows that the appellant kept the children at a secluded farm in Upington. Despite several requests from the mother to him to disclose the exact location of the children, he refused to do so. He furthermore denied the mother direct communications with the children. It took a police operation to trace the whereabouts of the children whereafter they were removed from his care and returned to their mother. This conduct shows that he did not intend to return the children to their mother in the USA.

[25] It follows that the contention by the appellant that there is no extraditable offence cannot be sustained.

[26] In the result, the following order is made:

1. **The appeal is dismissed**.

STANTON J

[6] CR Synman *Criminal Law Ibid* at 473; see also SV Hoctor *Snyman's Criminal Law* (*ibid*) at 419.

I concur,

TLALETSI JP

On behalf of the appellant:	Adv MR Mogwera
On instructions of:	Legal-Aid SA
On behalf of the State:	Adv A van Heerden
On instructions of:	The NDPP