

Case No 611/93

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

ANN PHYLLIS McCARTHY

Appellant

and

THE STATE

Respondent

CORAM:

CORBETT CJ, VAN HEERDEN, VIVIER,
F H GROSSKOPF and HOWIE JJA

HEARD:

24 FEBRUARY 1995

DELIVERED:

23 MAY 1995

JUDGMENT

VAN HEERDEN JA:

I have carefully considered the judgment of Howie JA but have come to the conclusion that the appeal should be dismissed. Since it was rightly common cause that this result must follow if the discharge of the appellant at the first enquiry did not amount to a judgment on the merits of the proceedings and, in my view, it did not, I do not find it necessary to discuss the other issues debated before us and dealt with in my colleague's judgment.

At the outset one must determine the meaning of the word "discharge" in s 10(2) of the Extradition Act 67 of 1962 ("the Act"). Counsel for the appellant contended (i) that the word has the same denotation in relation to the second part of the subsection as it does in respect of the first part; (ii) that a discharge under the first part is the equivalent of a final acquittal on the merits of the proceedings, and (iii) that hence a discharge under the second part must of necessity have the

same effect. I have no quarrel with the first leg of the contention but think that both the second and third legs are flawed.

S 10(2) of the Act provides no more than that in two situations the accused (I use the word in the same sense as Howie JA) must be discharged. The subsection does not go further and in particular does not spell out the full legal effect of such a discharge. It does not say, either explicitly or by implication, that the accused may be subjected to a further arrest and enquiry in respect of the same causa petendi ("causa"). But nor does it prescribe the converse. In short, s 10(2) enjoins no more than that in the two situations the accused is to be discharged in relation to particular proceedings; i e the proceedings initiated by the warrant in question. Whether he can successfully rely upon a defence of res judicata should he be apprehended under a further warrant based on the same causa, falls to be answered with reference to the common law principles

governing that defence and not by a construction of the word "discharge" in s 10(2). That, I apprehend, is what Botha J conveyed in Minister of Justice v Bagattini and Others 1975 (4) SA 252 (T) 263A-C.

It follows that I do not agree that on a proper construction of s 10(2) the upholding of the time bar defence - to adopt the phrase used by Howie JA - in effect extinguishes the causa to which the warrant and the proceedings in question relate. It is true that conceptually there can be only one reasonable period, but on an application of s 10(2) that period pertains solely to the proceedings initiated by a particular warrant and not to the underlying causa.

I also do not consider that policy considerations warrant the conclusion that the legislature intended a discharge under the second part of s 10(2) to be final. In general the reason why State A agrees in an extradition treaty to assist State B to enforce the criminal law of the latter

in regard to crimes committed within its jurisdiction, is precisely because State B accepts a reciprocal obligation. In construing legislation of State A applying to extradition treaties too much emphasis should therefore not be placed on the fact that in proceedings under such legislation State A is not enforcing its own criminal law but is assisting State B to enforce the latter's penal law. Furthermore, although in many cases the timeous production of the necessary evidence lies within the control of the foreign state, this is not necessarily so. The failure to produce evidence timeously at an enquiry under s 9 of the Act may well be due to local remissness, e g the misfiling or accidental destruction of documents forwarded by the foreign state (cf Government of the Federal Republic of Germany v Sotiriades [1974] 1 All ER 692 (HL) 696g and 708e.) Finally, it should be stressed that, unlike under s 5(1)(a) of the Act, a warrant of arrest may be issued under s 5(1)(b) in the absence of a request from the

foreign state concerned for the surrender of the accused. The application for the warrant may indeed stem solely from local initiative not even made known to the foreign state (cf Sotiriadis at 696a to b and 702c). It is therefore possible that a reasonable time, for the purposes of s 10(2), may lapse without the foreign state being aware of the issue of the warrant and the resultant proceedings.

I revert to the second leg of the appellant's contention. It may be conceded that generally a discharge under the first part of s 10(2) will amount to a judgment on the merits of the proceedings, but this will not necessarily be the case. Assume that at the conclusion of proceedings under s 9 during which the "prosecutor" presented all the evidence which he wished to introduce, the magistrate issued a committal order; that on appeal under s 13(1) it was found that the proceedings were permeated by a gross irregularity vitiating the same, and that hence an order

discharging the accused was substituted for the committal order. In such circumstances it may well be that the substituted order would not ground a plea of res judicata in subsequent extradition proceeding pertaining to the same causa (cf State v Moodie 1962 (1) SA 587 (A) 596-7).

Assume, further, that in the present case the magistrate presiding at the first proceedings rejected the objections as to the admissibility of the affidavits tendered by the prosecutor and eventually issued a committal order; that on appeal it was held that the affidavits had indeed not been properly authenticated and were therefore inadmissible in evidence, and that the magistrate's order was consequently altered to one of a discharge of the accused. Here, again, it may well be that the substituted order will not present a bar to the initiation of further extradition proceedings in regard to the same causa (cf S v Nzuza 1963 (4) SA 856 (A) 859 A-B).

The question remains: was the order made at the first enquiry one on the merits of the matter? Although it was common cause that the principles of the exceptio rei judicatae apply to proceedings under s 9, and orders made under s 10, of the Act - see Bagattini at 259C-D - it is not all that easy to translate those principles as developed in criminal law to such proceedings. In particular, unlike in a criminal trial, an accused in proceedings under the Act is not called upon to plead to a charge. Be that as it may, those principles must be applied either directly, if that is possible, or by way of analogy.

Now, in R v Kaplan 1927 EDL 178, 181, Pittman J referred to a passage in which Carpzovius

"says that the accused must have been 'definitely absolved from the crime' ... or 'declared not guilty' ... and not merely 'discharged from the purview of the prosecution' by reason of some technical defect therein ..."

Save for having pointed out that the passage referred to by Pittman J occurs in one of Boehmer's Observationes and not in the text of Carpzovius himself, Hoexter JA in Moodie at 596A clearly accepted the passage as correctly reflecting the common law.

In a criminal matter the lis between the State and the accused is whether or not he is guilty of the crime with which he is charged. Hence in a subsequent trial concerning the same charge the accused cannot successfully rely upon a plea of res judicata unless at the first trial he was "declared not guilty" of the crime in question.

\ As regards a person accused of an offence included in an extradition agreement and allegedly committed within the jurisdiction of a foreign state which is a party to such an agreement, the cardinal question in proceedings under ss 9 and 10 of the Act is whether there would be sufficient reason for putting him on trial for the offence, had it

been committed in the Republic. On an analogous application of the above principles it therefore appears to me that only a discharge based on a finding that the evidence does not disclose "sufficient reason" could truly be said to be one on the merits of the proceedings.

In casu that question was not considered by the magistrate presiding at the first proceedings. He did not do so because of his finding that the evidence tendered by the prosecutor was inadmissible and his subsequent refusal to grant a further postponement. In the result, when he discharged the appellant there was no evidence relating to the merits before him. By way of analogy the position may be likened to a case where an accused in a criminal matter, who has not been asked to plead, is discharged when the magistrate refuses to grant the prosecution a further postponement. Such a discharge would clearly not constitute a judgment on the merits.

I am not unmindful of the fact that under the second part of s 10(2) of the Act the magistrate is enjoined to order a discharge if the evidence is not forthcoming within a reasonable time, and that in criminal proceedings a magistrate has a discretion whether or not to grant the prosecution a postponement, but in this regard two points should be made. Firstly, even under the second part of s 10(2) the magistrate must first determine whether a reasonable period has lapsed before discharging the accused. Secondly, in criminal proceedings the presiding officer is in general in duty bound to refuse a further postponement, and to discharge the accused, if in his view a reasonable time has lapsed since the date of the accused's first appearance (or, possibly, arrest).

It follows that in my view the discharge of the appellant at the first proceedings was not a judgment on the merits of those proceedings initiated by the warrant in question. (I need not consider what the position

would have been had the prosecutor not sought a further postponement.)

On this view the second part of s 10(2) is all but meaningless. Having been arrested under s 5 of the Act an accused may well remain in custody until the termination of the resultant proceedings. Should he then be discharged under that part, he will obviously be entitled to be released from custody.

I am also not unmindful of the fact that on my approach an accused discharged under the second part of s 10(2) may in at least some cases be subject to a number of arrests and enquiries relating to the same causa. It is therefore notionally possible that at the termination of two or even more such enquiries he may be discharged because of the lapse of a reasonable period, and yet again be arrested and "tried". Here, again, two points should be made. The first is that a similar situation may arise in criminal proceedings. I have referred to the example of an accused

discharged because of a magistrate's refusal to grant the prosecution a further postponement. Conceivably, upon re-arraignment the same may occur. Yet, because there has been no judgment on the merits he may be brought before the court for a third time. Then, again, it is not beyond the bounds of possibility that successive trials of an accused may be affected by gross irregularities vitiating the proceedings. Yet, in those circumstances the accused may be called upon to stand trial for a third time on the same charge.

The second point is this. Under s 5(1) of the Act a magistrate has a discretion whether or not to issue a warrant. If he is aware that the person in question was previously discharged under the second part of s 10(2) in relation to the same causa, he will no doubt refuse to issue a warrant unless satisfied that the required evidence will be forthcoming within a reasonable time. And the organ of the State applying for the

issue of the warrant - generally an Attorney-General or his representative

- will clearly be under an obligation to disclose to the magistrate the facts

of the previous proceedings.

The appeal is dismissed.



H J O VAN HEERDEN JA

CORBETT CJ

CONCUR

F H GROSSKOPF JA