

CANADA / JUDGMENT

Thailand v. Obi

2020 BCSC 991

COURT

Supreme Court of British Columbia

DECIDED

26 June 2020

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2020 BCSC 991 Thailand v. Obi IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Thailand v. Obi, 2020 BCSC 991 Date: 20200626 Docket: 29251 Registry: Vancouver In the Matter of the Extradition Act, S.C. 1999, c. 18, as Amended Between: The Attorney General of Canada on Behalf of the Kingdom of Thailand Requesting State And Prince Michael Obi Person Sought Before: The Honourable Madam Justice MacNaughton Oral Reasons for Judgment Counsel for the Requesting State: A. Sanghera, C. Benton Counsel for the Person Sought: A. Bonfield Place and Date of Hearing: Vancouver, B.C. June 25, 2020 Place and Date of Judgment: Vancouver, B.C. June 26, 2020

- [1] This extradition case involves the Kingdom of Thailand's request for the extradition of Prince Michael Obi, also known as Mzwakhe Memela, to stand trial for the alleged murder of Susama Ruenrit on March 24, 2019.
- [2] On December 16, 2019, the Minister of Justice issued an Authority to Proceed under s. 15 of the Extradition Act, S.C. 1999, c. 18. I have been assigned as the extradition judge on this matter. In these reasons, I will refer to the person sought as Mr. Memela as that is how the witnesses whose evidence is summarized in the Record of the Case ("ROC") referred to him.
- [3] After the arresting RCMP officer gave her evidence about the arrest of Mr. Memela, his counsel asked that I declare a voir dire to consider a constitutional challenge with respect to the last page of the requesting state's ROC, which has been marked as Exhibit A. In these reasons, I will refer to the page in issue as the "Page".
- [4] The Attorney General of Canada ("AGC") was not provided with advance notice of Mr. Memela's intention to raise a Charter issue seeking to exclude part of the ROC, but did not object to dealing with it.
- [5] The Page contains a photocopy of a page of Mr. Memela's South African passport. The passport bears a photograph of its holder, the South African passport number A02657155, its date of issue, and its date of expiry. It also includes Mr. Memela's nationality, date of birth, and identity number.

- [6] At the bottom of the Page, below the photocopy of the passport page, there is some handwriting in what appears to be the Thai language. The text has not been translated into English and the writer or writers are unknown. Two dates, "26 Feb. 2019" and "27 Mar. 2019" are written in English. The February date precedes the date of the alleged murder. There are also some other handwritten letters and numbers on the Page, one of which may be a date reference, perhaps to early March or May 2019.
- [7] Counsel argues that in the ROC, Mr. Teerachai Pairatchawann, the Senior Public Prosecutor in the Office of Executive Director of Criminal Case Section 9, Office of Attorney General, explains that during interviews conducted by Police Lieutenant Colonel Phongsak Karnrat of five witnesses, they identified Mr. Memela, in part, or in whole, from Mr. Memela's South African passport photograph.
- [8] Counsel for Mr. Memela submits that I can infer that the Thai handwriting on the Page contains the signatures of the five witnesses, all of whom signed the same document in identifying Mr. Memela. He submits that the witnesses were shown a copy of Mr. Memela's passport photograph on the Page containing signatures indicating that another witness or witnesses had previously identified the same photograph. He says that proceeding in this manner breached the principles of fairness and Mr. Memela's s. 7 Charter rights, not to be deprived of his liberty except in accordance with the principles of fundamental justice. He submits that the evidence is tainted and that taints the entire file. He seeks an order that the Page be removed from the ROC. He does not seek a stay of the proceedings.
- [9] There is no dispute between the parties that the test for declaring a *voir dire* is whether the issue raised has an "air of reality". The proposed applicant must first satisfy the threshold requirement of presenting a basis upon which the extradition judge may grant the remedy sought. Once the initial requirement is met, as explained by Justice Romilly in *United States v. Freimuth*, 2004 BCSC 154 at para. 13, the applicant must be able to show that:
- [13] there is an air of reality to his contention that his Charter rights have been violated - - that is, there must be an offer of proof or an outline of evidence or other admissible material capable of establishing an air of reality to his allegation of Charter breach.
- [10] In the context of an extradition hearing, the evidentiary basis for a Charter application may be found in the evidence of the requesting state, or the person sought may present his or her own evidence. In this case, counsel for Mr. Memela does not rely on any additional evidence. Rather, he points to the Thai handwriting on the Page in the ROC and the five lines of text. He asserts that I can draw an inference that, potentially, the Page was shown to a succession of witnesses; with all but the first being aware of the prior signatures indicating that the witness identified the passport photograph as Mr. Memela.
- [11] I have concluded that a *voir dire* should not be declared in the circumstances of this case, as Mr. Memela has not put forward any evidence on which I could find an air of reality to the allegation of a breach of Mr. Memela's s. 7 Charter rights.

- [12] In the absence of a translation of what the Thai text on the Page says, I cannot infer that it contains witness signatures attesting to their identification of Mr. Memela. Nor can I conclude that the signatures were affixed in succession as the photograph was shown to each witness. I note that at least one of the dates printed in English predates the date of the murder for which Mr. Memela's extradition is sought.
- [13] Further, in the absence of evidence about what was shown to the various witnesses during their identification pRoCess, I cannot infer that they were shown the copy of the Page that is contained in the ROC. I note that in the ROC, four of the witnesses appear to have been shown "South African Passport No. A02657155". The fifth was shown what was described as a photograph of Mr. Memela. At page 10 of the ROC, Mr. Pairatchawan says that the during their witness statements, also referred to as their "interrogation", the five witnesses "identified that the person appearing in the South African Passport No. A02657155 as Mr. Mzwakhe Memela, the accused in this case, a copy of which is attached as Exhibit." The ROC does not say that the copy that was shown to the witnesses is attached as an exhibit.
- [14] In the absence of evidence, Mr. Memela's arguments are speculative and do not create an air of reality to his Charter challenge.
- [15] As explained by the Supreme Court of Canada in *United States of America v. Ferras*, 2006 SCC 33 [Ferrars] at para. 59, seeking a Charter remedy in extradition proceedings is not always necessary. An extradition judge has the discretion to give no weight to unreliable evidence when determining whether committal is justified under s. 29(1) of the Extradition Act.
- [16] Subject to the presumption of reliability in s. 32(1) of the Extradition Act, it is open to Mr. Memela to argue that I should give no weight to the identification of Mr. Memela by the witnesses who identified him solely from the passport photo. That argument may be dealt with in his submissions on whether there is evidence that would justify a committal order under s. 29(1) of the Extradition Act based on the test set out in *Ferras* and in *M.M. v. United States of America*, 2015 SCC 62. "MacNaughton J."

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