

SOUTH AFRICA / JUDGMENT

Chanthunya v S (4/2013) [2013] ZANWHC 45 (30 May 2013)

[2013] ZANWHC 45

COURT

North West High Court, Mafikeng

BEFORE

Kgoele, Gutta

CASE / FILE NUMBER

4/2013

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IN THE NORTH WEST HIGH

COURT

MAFIKENG

CASE NO: 4/2013

In the matter between:

MISOZI CHANTHUNYA

.....Appellant

and

THE STATE

.....Respondent

CRIMINAL APPEAL

KGOELE J, GUTTA J

DATE OF HEARING : 03

MAY 2013

DATE OF JUDGMENT : 30

MAY 2013

FOR THE APPELLANT :

Adv. Van Den Heever

FOR THE RESPONDENT :

Adv. J. Van Niekerk

JUDGMENT**KGOELE J:****A. BACKGROUND**

[1] This is an appeal against an order by the Magistrate Rustenburg, Mr Motiang, on the 2nd of July 2012 granting a request by the Ministry of Foreign Affairs and International Cooperation of the Republic of Malawi for the

extradition of the appellant in terms of an Extradition Agreement between Malawi and the Republic of South Africa (“the Agreement”) concluded on 25 February 1972 in terms of section 10 of the Extradition Act No 67 of 1962 (the Extradition Agreement).

[2] On the 17th of July 2012 the appellant filed his notice of appeal with the following grounds:

that the magistrate erred in his interpretation of section (assumed article) 6, 10 and 12 of the extradition treaty between South Africa and Malawi;

that the learned magistrate erred in finding that the Malawian authority will exercise his discretion not to imposed the death penalty, in favour of the appellant;

that the magistrate erred in finding that the Malawian President, with reference to Exhibit “F” gave sufficient assurance that the death penalty will not be imposed;

that the magistrate erred in finding that the appellant’s argument that the former president passed on, holds no water;

that the magistrate erred in finding that the state had met all the requirements and that the application for extradition is successful.

[3] In the current matter, appellant is accused of murder in terms of section 209 of the Penal code of Malawi (Penal Code) which is punishable in terms of section 210, as amended by section 125 of the Malawian Amendment Act (LEG.1974.001.CO3) (the Amendment Act) which reads: “Any person convicted of murder shall be liable to be punished with death or with imprisonment for life”;

[4] According to the statements regarding the alleged murder the following seems to be the facts on which the prosecution in Malawi will rely on:

the appellant and the deceased were lovers;

- the deceased was pregnant and the appellant wanted her to

terminate the pregnancy;

- on 4 August 2010 the appellant took her to his cottage at Monkey Bay in Malawi;

- she was last seen in the company of the appellant and deemed missing by her relatives since 5 August 2010;
- upon enquiries the appellant said that he dropped her at the BP Station in Blantyre, Malawi on 4 August 2010 at 24:00;
- after an extensive search which involved Customs and Immigration the deceased's body was found buried under the bathroom floor of the appellant's cottage with a fresh cement floor covering it;
- the appellant was the last known person to be in the company of the deceased;
- the body of the deceased displayed several stab wounds and she was clearly brutally murdered.

[5] It can be assumed as a matter of certainty that the prosecution in Malawi will argue that:

the murder was pre-meditated;

that there was motive (the pregnancy);

that it was committed in the most inhumane way possible; and

that the appellant has no remorse in that he lied and tried to cover his deed up.

all of these factors as mentioned above will be seen as severely aggravating circumstances and it is clear that upon conviction of appellant the imposition of the death penalty will be inevitable.

B. THE POSITION IN SOUTH AFRICA

[6] In 1995 the death penalty was declared unconstitutional in the well-known case of *S v Makwanyane and Another* [1995] ZACC 3; 1995 (3) SA 391 (KH). The lawmaker went further by officially scrapping section 277 of the Criminal Procedure Act ("CPA") by the Amendment Act 105 of 1997. It needs to be noted that in 1972, when the death penalty in South Africa was mandatory and without hesitation imposed by our courts, the Government recognized the principle against inhumane and cruel punishment applied by certain Governments. This necessitated enactment of Article 6 of the Extradition Agreement.

[7] Previously when the death penalty was imposed in South Africa, the convicted person had an automatic right of appeal to the then Appeal Court. In that way it was ensured that the condemned person had every chance to avoid the ultimate penalty.

[8] The Constitution of South Africa Act 108 of 1996 (the Constitution) is the cornerstone against which all actions and laws are tested. For purposes of this case sections 10, 11 and 12(1)(e) are relevant.

Section 10 deals with the right to dignity, section 11 with the right to life and section 12(1) the right not to be subjected to punishment which is cruel, inhumane or degrading.

- [9] In the Makwanyane matter above, the Constitutional Court held that the death penalty infringes on the right to dignity, the right to life and the right not to be punished in a cruel, inhumane and degrading way. Against this backdrop the Constitutional Court passed judgment in *Mohamed and Another v President of South Africa and Others* [2001] ZACC 18; 2001 (3) SA 893 (CC). In this matter the validity and applicability of Makwanyane was confirmed. The rights in question namely sections 10,11 and 12(1)

were confirmed.

- [10] It was also held firmly that any deportation or extradition of any person to a foreign country for trial on an offence carrying the death penalty without Government first securing an undertaking that the death penalty will not be imposed, or, if imposed, nor carried out, is contrary to sections 10,11 and 12(1) of the Constitution.

C. THE POSITION IN MALAWI

- [11] The Malawian High Court matter *Kafantayeni v Attorney General*, Constitutional case No. 12 of 2005 [2007] MWHC 1 states very clearly that section 210 of the Penal Code is only invalid to the extent of the mandatory requirement of the death sentence for murder. It does not outlaw the death penalty. It is still applicable as a discretionary maximum punishment. This case brought about the amendment mentioned in paragraph 3 above.
- [12] From the papers attached to this application outlining the Malawian laws it appears that there is no automatic right of appeal to an Appeal Court or a higher court if the death sentence is imposed. Also from the affidavits nothing is mentioned regarding any possibility of appeal. It must therefore be accepted that a person who is sentenced to death in Malawi has no automatic appeal and his only and last hope will be a Presidential Pardon.
- [13] Presidential Pardon is regulated by section 89(2) of the Malawian Constitution, which states that the President may pardon convicted offenders, but such a decision shall only be taken in consultation with an advisory committee on the granting of pardon. It thus stands to reason that the President does not have that prerogative alone and is not the ultimate authority with respect to the granting of pardon.
- [14] The Malawian former President, who is deceased, gave an undertaking in this matter to the effect that the death penalty will not be imposed upon the appellant if he is extradited. There is nothing in the Act that states that his successor in title is bound to undertakings given by the deceased President.

D. APPELLANT

SUBMISSIONS

- [15] The appellant submissions can be succinctly summarised as follows. Article 6 of the Extradition Agreement requires “sufficient assurance”. It was submitted that there was no sufficient assurance given by the Malawian Government. The assurance is further complicated because of the President’s death. There is no undertaking by his successor in circumstances where such undertaking could have been obtained. The President of Malawi is not the “ultimate authority” as stated in the undertaking. Section 89(2) confirms this.
- [16] According to the appellant’s counsel there is a very real possibility that the death sentence will be imposed in this instance. If regard is had to the aggravating circumstances stated in paragraph 5 above, the prosecution is under obligation to ask for the ultimate penalty. The court hearing the case in Malawi will have to consider all the facts presented to it and cannot be bound to an undertaking by the Government. In view of the facts of the matter it will almost certainly impose the death sentence as maximum punishment, should appellant be convicted.
- [17] It was submitted that the deceased President’s undertaking as reflected on pages 17 – 19 of Exhibit “F” cannot by any stretch of the imagination be considered “such assurance as the Requested Party considers sufficient that the death penalty shall not be imposed, or if imposed shall not be executed”. The late President clearly, on his own statement (Exhibit “F” pages 17-19), has to act in consultation with an Advisory Committee on the granting of Pardon. It was submitted that before giving the undertaking in question it would have been necessary for the late President to consult the Advisory Committee which clearly was not done, thereby rendering the said undertaking null and void.
- [18] It was further submitted that the Requested Party (the Republic of South Africa) should, before the enquiry in terms of the Extradition Agreement is initiated, properly consider the assurance given by the Requesting Party and that the decision to accept the said assurance, with proper motivation for such decision, should be properly placed before the magistrate conducting the enquiry, as an essential element, failing which the order by the magistrate, as is submitted, is the position in this matter, will be unconstitutional.
- [19] Lastly that extradition should not have been ordered as it would be contrary to sections 10, 11 and 12(1) of our Constitution as there is no assurance from the Malawian Government; alternatively there is no sufficient assurance from the Malawian Government that the death penalty would not be imposed. It is for these reasons that the appeal by the Appellant is to be upheld.

E. RESPONDENT’S SUBMISSION

- [20] The respondent on the contrary submitted that the application for the extradition was correctly before court in terms of section

10. The appellant never disputed this, but it is an important factor that would need to be visited to establish whether the magistrate had any other powers but to find that the appellant is liable to be surrendered, and that there is sufficient evidence to warrant his extradition. Further that, all the requirements of the Act and the Treaty (with reference to the protocol) have been satisfied in the requesting document Exhibit F.
- [21] That the appellant is liable for extradition and that there is sufficient evidence to warrant his prosecution in the requesting State. Further that the Magistrate was not supposed to entertain the constitutional issue raised by the appellant
- [22] That the issue regarding the assurance and whether it is sufficient (constitutional issue) as raised by the appellant should be considered by the Minister before issuing the required certificate for the appellant's surrender to the requesting State in terms of section 11 of the Act.
- [23] It was thus the respondent's argument that, taking cognizance of all the above mentioned submissions, together with the fact that all the prerequisites for the appellant extradition had been complied with, the finding by the magistrate that the appellant should await the decision of the Minister of Justice and Constitutional Development regarding his extradition and surrender should not be interfered with.
- [24] The respondent submitted that in the circumstances no harm was done since the appellant was committed to prison, awaiting the Ministers

decision regarding surrender. However, it was respondent's submission that the magistrate lost sight of the reasoning in the matter of DPP, Cape of Good Hope v Robinson 2005 (4) SA 1 (CC), about what constitutes constitutional matters.

- [25] According to the respondent, the magistrate further lost sight of the fact that he had to determine two things only namely:

that the subject is liable for extradition, and if the subject is accused of having committed an offence in a foreign state, whether;

there is sufficient evidence to warrant a prosecution in the foreign state.

To consider the assurance was not warranted by the two findings the Magistrate had to make. The magistrate therefore attached a too wide interpretation to the phrase "liable to be surrendered" as was warned about in the Robinson matter.

F. ISSUES TO BE DECIDED

- [26] Paragraph 12 on page 5 of exhibit F gives an assurance that capital punishment will not befall the appellant if convicted. It goes further by also giving South Africa a written undertaking by the then President of the Republic of Malawi on behalf of that Country. The appellant submitted before the enquiry magistrate that that Court should not consider his Extradition as by doing so it will act unconstitutionally, the reason being that there is no

assurance alternatively not sufficient assurance given by the requesting Country that the death penalty will not be imposed, and if imposed on the appellant being found guilty of Murder in Malawi, not executed.

- [27] The respondent submitted before the enquiry Magistrate that the whole question about the assurance should be determined by the Minister as it eventuate into a constitutional question, because the extradition of any person is connected to that person's constitutional rights, as was decided in the Robinson matter supra. Alternatively, it was the contention of the respondent that before the enquiry magistrate there was an assurance as required by the treaty and that the assurance was sufficient.
- [28] The magistrate found that the question about the assurance was not a constitutional issue and he was therefore required to rule on it, including whether it was sufficient or not. The magistrate analysed the assurance and found it to be sufficient.
- [29] The first question to be decided upon by this court is therefore whether the magistrate in dealing with an inquiry in terms of section 10 of the Act, is authorised only to deal with the question as to whether the assurance was given or not and not supposed to go further to pronounce on its sufficiency. If the answer to this question is in the affirmative, then it is the end of this matter. What remains will only be that the matter should be referred to the Minister to decide on the sufficiency of the assurance given as respondent suggested. If the answer is in the negative, then this court should further consider whether the assurance given is sufficient or not as the applicant submitted.

G. THE LAW

- [30] Extradition applications should be dealt with on the basis of section 10 or 12 of the Extradition Act 67 of 1962. The enquiry magistrate had to rule in other words as to whether the extradition request should be dealt with on the basis that the Republic of Malawi is a foreign State (section 10) or on the basis that the Republic of Malawi is an associated State (section 12)
- [31] Article 6 thereof provides:-

“When the offence for which extradition is requested is punishable by death under the laws of the requesting Party and the laws of the requested party do not permit such punishment for that offence, extradition may be refused unless the requesting party provides such assurance as the requesting party considers sufficient that the death penalty shall not be imposed and if imposed shall not be executed.”

(The South African Development community protocol on extradition at article 5(c) has similar wording).

- [32] Further that from a reading of Minister of Home Affairs and Others v Tsebe and Others 2012 (5) SA 467 (CC), it would become clear that it is desirable that the question of assurances should be sorted out between the contracting parties.

Paragraph 23 lines 4,5 and 6 on page 474 of the Tsebe matter supra is valuable in this regard where it says:

“There is also some urgency in the need to ensure that the executive knows exactly what is expected of it in cases of extradition and deportation involving the position of Mr. Tsebe and Pale.”

These gentlemen in the Tsebe matter were facing the same fate as the appellant (possible death sentence). Yet the Constitutional Court addresses the executive and not the enquiry magistrate. Further reading at Paragraph 52 of the Tsebe matter provides further support for the respondents view:

“Counsel for the Minister also submitted that the executive must be given an opportunity to resolve the dispute (about an undertaking,

respondent’s emphasis) between South Africa and Botswana politically through the organ of politics, defense and security under the auspices of the SADC. This is correct and a resolution in that forum is desirable.”

In paragraph 59 the following is said:

“Having said this I am of the view that the preferable solution to the problem lies, as already pointed out, in intergovernmental

interaction and an admittance by Botswana that South Africa’s conduct is not in breach of, but in accordance with the Extradition

treaty between them and in accordance with the SADC Extradition Protocol”

[33] However our Courts will not preclude the executive from performing the function that it was given by legislation governing Extradition. This is very clear from the following authorities:

Robinson matter (supra).

Geuking v President of the Republic of South Africa and Others 2003 (1) SACR 404 (CC);

Sefelane Shoniwa and Others v The State Case No CA 41/2010 (North West High Court);

Ngqabuthu Mbele and Another v The State Case Number CA 12/2012 (North West High Court).

[34] Section 12 of the Extradition Act 67 of 1962 reads as follows:

"(1) If upon consideration of the evidence adduced at the enquiry referred to in section 9(4)(b)(ii) the magistrate finds that the person brought before him or her is liable to be surrendered to the associated State concerned, the magistrate shall, subject to the provisions of sub section

(2), issue an order for his or her surrender to any person authorized by such associated State to receive him or her at the same time informing him or her that he or she may within 15 days appeal against such order to the Supreme Court."

[35] Section 11 of the Act provides:-

“When the offence for which extradition is requested is punishable by death under the laws of the requesting Party and the laws of the requested Party do not permit such punishment for that offence, extradition may be refused unless the requesting Party provides such assurance as the requested Party considers sufficient that the death penalty shall not be imposed, or, if imposed, shall not be executed.”

F.

ANALYSIS

[36] In this matter the fact that the extradition enquiry was correctly held by the trial court under section 10 of the Act is common cause between the parties. I will therefore deal directly with the only issue before this court as alluded in the previous paragraphs.

[37] I can do no more than to agree with the submissions by the respondent’s counsel, Adv. Van Niekerk, that:-

the trial court (magistrate) was not supposed to have entertained the issue surrounding the assurance by the Malawian Government

the trial court lost sight of the fact that he had to determine two things only namely, whether:-

there is sufficient evidence to warrant a prosecution in the foreign state;

that the trial court attached a too wide interpretation to the phrase “liable to be surrendered as warned in the Robinson matter”

[38] Advocate Van Niekerk went to great lengths in his heads of argument and during the submissions in court and quoted several authorities, which in my view are correct and relevant in this matter, to persuade this court that the trial court can go only as far as determining whether an assurance was given or not in the section 10 inquiry, but not to go further to inquire whether such given assurance is sufficient or not. The said authorities have already been mentioned in paragraph 34 of this judgment except the following:-

Minister of Home Affairs and Others v Tsebe and Others 2012 (5) SA 467 (CC); Khanyisile Siyabonga and Another v The State (Case NO CA 12/2012 – North West High Court).

I am of the view that they all need no further emphasis except to reiterate that Adv. Van Niekerk was correct that the issue of whether the sufficiency of the assurance is to be dealt with by the Minister is well established in the above mentioned authorities. The Robinson matter in particular addresses this issue pertinently.

[39] Despite this, Adv. Van Den Heever, on behalf of the appellant, persisted with her argument that the trial court was correct to deal with the assurance and also, whether the assurance given by the Malawian Government was enough or not. She referred to Section 11 of the Act and specifically sub-section (b) which specify the circumstances under which the Minister may order or refuse surrender. Her submission is that the issue around assurance and whether it is sufficient or not is not one of them. According to her, the issue as to whether

the assurance is sufficient or not is to be determined by the magistrate from the facts which has been supplied to him in court. The second leg of her argument on this issue is to the effect that the Malawian President does not in his statement state that he had consulted with his advisory board as required by their law, and therefore the assurance should be regarded as insufficient. She submitted that the appeal should therefore succeed and there is no need to refer this matter to

the Minister for his final decision.

[40] Unfortunately the above submissions by the respondent's counsel reveal a non-contextual approach in reading and interpreting the Act and its sections, especially the section relevant to the issue before court. A contextual reading of the section 10,11 and 12 of the Act reveals the following:-

the difference between section 10 and 12 inquiry by the magistrate is that, in section 10, the magistrate is empowered to only deal with whether the person brought before him or her is:

- (1) liable to be surrendered to the foreign state and
- (2) in case where such person is accused of an offence, that there is sufficient evidence to warrant prosecution for the offence in the foreign state, thereafter the magistrate shall commit such person to prison pending the Minister's decision with regard to her/his surrender;

section 11 is the one that actually empower the Minister to either order or refuse the surrender after the magistrate has established the two issues above;

in as far as Section 12 inquiry is concerned, the magistrate in addition to finding the person brought before him or her liable to be surrendered to the associated state, he/she shall subject to the provisions of subsection (2) of this section (section 12), issue an order for his or her surrender.

[41] The wording of the circumstances under which the magistrate under sub-section (2) may refuse the order is exactly the same as that provided in subsection 11(b) which provides the circumstances under which the Minister may refuse the order of surrender.

[42] A holistic interpretation of the three section is to the effect that in section 10 the magistrate is not empowered to order a surrender of a person, but can only make an order of committal to prison, for the Minister to make his/her surrender order, whereas in section 12, the magistrate after finding a person brought before him/her to be liable to be surrendered, need not even commit him to prison first, but simply order his/her surrender directly to any person authorised by such state to received him or her. Therefore the order of surrender in section 12 is done by the magistrate. He/she has the final say in the surrender. The Minister's decision has not been provided for in section 11. By implication, although not specifically stated for in the Act as far as the section 10 inquiry is concerned the decision to extradite a person is vested in the Minister. Therefore, the decision by the magistrate that the person

sought is liable to be surrendered does not result in the extradition of that person. Further by implication, the fact that a sufficient assurance that the death sentence will not be imposed on the appellant or not, is one of the grounds that the Minister is empowered by the Act to consider when granting or refusing the order of surrender.

- [43] Advocate Van Niekerk correctly in my view further drew the attention of this court to the fact that a treaty is concluded between the executives of the two countries. The phrase “unless the requesting party provides such assurance as the requested party considers sufficient” which is found in Article 6 of the extradition treaty between South Africa and Malawi which was published in the Government Gazette with number 3424 on 24 March 1972, refers to decisions in the realm of the executive as one of the contracting parties. I fully agree with these sentiments, and further that this also partly constitute the answer to the question this court is seized with.
- [44] There is another difference in as far as section 10 and 12 are concerned. Section 10 relates to extradition where offences are committed in a Foreign State and section 12 to the ones committed in an associated state. The Oxford dictionary meaning of associate refers to “to link or connect in the mind or imagination”. This meaning provides the answer to the question as to why the drafters of this piece of legislation decided to treat the extradition of the foreign state different from that of an associated state. The purpose why in section 10 the magistrate was not given a final say in the extradition of a person, and given such powers in section 12, lies herein.
- [45] Consequently, I find that the submissions by the appellant’s counsel are devoid of merit. Although the magistrate misdirected himself by continuing to assess the assurance and finding that it was sufficient, this misdirection on its own does not necessarily vitiate the whole proceedings. No harm was done since the appellant was already committed to prison by the trial court pending the decision of the Minister. The magistrate correctly held the extradition inquiry in terms of section 10. All the requirements of the Act and Treaty were satisfied. There are no grounds to interfere with the decision of the trial court to the effect that the appellant is liable to be surrendered to Malawi.

G. ORDER

- [46] Consequently the following order is granted:-

46.1 The appeal is dismissed;

46.2. The finding by the trial court (magistrate) to the effect that the assurance given by the Malawian Government is sufficient is hereby set aside and it is substituted by the following:-

“The constitutional issue raised by the appellant (whether the assurance given by the Malawian Government is sufficient or not) is to be considered by the Minister in terms of section 11 of the Act”.

A. M. KGOELE

JUDGE OF THE HIGH COURT

I agree

N. GUTTA

ATTORNEYS:

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Prepared on 12 October 2026 · Esheria