

SOUTH AFRICA / JUDGMENT

Olalere v Director of Public Prosecutions North Gauteng (A61/2024)

[2025] ZAGPPHC 9 (6 January 2025)

[2025] ZAGPPHC 9**COURT**

North Gauteng High Court, Pretoria

BEFORE

Engelbrecht, JJ Strijdom

CASE / FILE NUMBER

A61/2024

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****GAUTENG DIVISION,****PRETORIA****CASE****NO: A61/2024****Heard****on: 23 October 2024****Judgment:**

6 January 2025

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED

DATE:

06/01/2025

SIGNATURE

In

the matter between: SHERIFF
OPEYAMI OLALERE
APPELLANT
and
THE
DIRECTOR OF PUBLIC
PROSECUTIONS
NORTH
GAUTENG RESPONDENT

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 6 January 2025.

JUDGMENT

ENGELBRECHT, AJ

- [1] This is an appeal from the Magistrate in Pretoria. The Director of Public Prosecutions North Gauteng (the State) requested that the appellant (Olalere) be extradited in terms of Section 10 of the Extradition Act 67 of 1962 (the Act). Olalere is the first of two accused in the committal phase of the extradition process.
- [2] On 19 May 2022 the Magistrate Pretoria (court a quo) pursuant to a request from the State, issued warrants of arrest for two of four accused who were sought for the commission of cybercrimes in the United States of America. The appellant, Olalere, was arrested on the 28th September 2022. Shortly thereafter the State requested the court a quo to commit the accused since they are liable to be surrendered to the United States of America.

The State further contended that there is sufficient evidence to warrant the prosecution of Olalere for the alleged offences mentioned in the request from the United States of America which request is supported by the certificate issued in terms of Section 10(2) of the Act by the United States of America. Furthermore, although the certificate issued in terms of Section 10 (2) of the Act refers to cybercrime related activities these are akin to the common law crime, fraud, in the South African legal system. Thereby establishing criminal duality. In light of the aforesaid there was sufficient evidence to warrant the committal to prison of Olalere pending the decision of the Minister to surrender Olalere to the United States of America.

- [3] Counsel for Olalere confirmed his identity as correct. He further argued that:

– there is a pending matter against Olalere. The extradition proceedings should be placed on hold pending the finalisation of the criminal matter,

– Relying on *Harksen v The President of the Republic of South Africa and others* 2000(2) SA 825, he argued that bearing in mind that there are two more accused to be added to the charge sheet, Olalere will not have a fair trial since the state did not establish that the crime in the foreign state will be tried immediately.

[4] Counsel for the second accused, confirmed the identity of his client as correct. He expressed his satisfaction with the content of the certificate in terms of Section 10(2) of the Act. Although the Cybercrime legislation was not in force in South Africa at the time of the commission of the alleged offences in the Foreign State he took solace in the fact that it can be likened to fraud in the South African context. He was not opposed to the committal to prison of his client.

[5] Olalere was arrested on the 27th September 2022. On 28 September 2022 the committal process commenced. The finding of the court a quo in respect of the committal to prison was made known on 29 May 2023. In February 2024 Olalere was convicted for the unlawful possession of a firearm and sentenced to a term of two years imprisonment.

[6] It is not in dispute that Olalere is the person mentioned in the warrant of arrest. Neither is there a dispute about the alleged criminal offences in the Foreign State. It is also not in dispute that Olalere is extraditable. The content of the certificate in terms of Section 10(2) of the Act is not in dispute. What is in dispute is the timing of the extradition process vis a vi the pending criminal litigation namely the unlawful possession of a firearm in South Africa. It was also argued that Olalere will not receive a fair trial since only two accused were arrested on the 27th September 2022 whilst it is clear from the certificate in terms of Section 10(2) of the Act that four persons were wanted for the

perpetration of the crimes and, the state had not confirmed that a separation of trials will take place in the Foreign State.

[7] The extradition process comprises of three phases:

- Section 9 of the Act deals with the preparatory phase and pertains to the arrest of the person sought;
- Section 10 (1) of the Act deals with the committal phase where the Magistrate is tasked with determining whether the person sought is liable to be surrendered and commits the sought person to imprisonment pending the decision of the Minister;
- Section 10 (1) and Section 11 of the Act deals with the surrender phase. After the Magistrate has committed the person sought to imprisonment, the Minister decides to order the person sought to be surrendered to the foreign state or the Minister can refuse to order the surrender of the person sought.

[8] The first issue to be determined is whether the extradition process was premature. Section 11(b)(i) and (ii) of the Act reads as follows: “The Minister may order that a person shall not be surrendered

- (i) where criminal proceedings against such person are pending in the Republic, until such proceedings are concluded and where such proceedings result in a sentence of a term of imprisonment, until such sentence has been served; (ii) where such person is serving or is about to serve a sentence of a term of imprisonment, until such sentence has been completed;”. At the time of the commencement of the extradition process Olalere was not arrested nor convicted on the pending charge of the unlawful possession of a firearm. The Extradition Act 67 of 1962 is clear, is applicable to convicted persons and accused persons alike. There is no bar against commencing extradition proceedings. Olalere was an accused person sought in the Foreign State as well as in the Republic of South Africa. The State was thus free to request the warrants of arrest for the accused. In February 2023 Olalere was convicted and sentenced to two years imprisonment for the unlawful possession of a firearm. Section 11(b)
- (i) and (ii) of the Act merely halts a step in the extradition process, namely the surrender. The process to extradite appears not to be a hasty process and in light of Section 11 (b) (i) and (ii) respectively the Minister, in all likelihood, would not order the surrender of the sought person, bearing in mind that allowance is made for an appeal process, without obtaining all relevant information to order the surrender. Common sense dictates that it would be to the advantage of Olalere to have these processes, the serving of the term of imprisonment and the committal to imprisonment pending the Ministers decision to surrender, run concurrently as opposed to having Olalere complete serving the term of imprisonment and commence the extradition process afresh after the sentence period. When one has regard to the argument of Counsel for Olalere on

page 68 of the transcript in the court a quo: “Your Worship, the Minister’s decision is not detached from the court. If the court were to make a decision today that the first respondent should be surrendered it is quite clear that the Minister will not be (able) to affect that decision or make that decision.”, it would appear that the committal phase is being confused with the surrender phase. The fact that the court a quo found Olalere liable to be surrendered and committed him to prison does not mean that the Minister will summarily order Olalere to be surrendered to the Foreign State. The decision to order the surrender of a person sought is the competency of the Minister.

- [9] Will Olalere receive a fair trial? The law is clear, a magistrate is obliged to admit evidence that is relevant to the Minister’s decision to surrender the person sought. In this regard you are referred to *Geuking v The President of the Republic of South Africa* {2002} ZACC 29 2003(1)SACR 404 (CC) 2004(9)BCLR 895 (CC) par [13] where Goldstone J held as follows; “After the process of extradition has been initiated by the issue of a warrant of arrest by a Magistrate under section 5(1)(a), section 9(1) requires that the arrested person be brought before him or her as soon as possible for the purpose of holding “an enquiry with a view to the surrender of such person to the Foreign State concerned”. Under section

9(2) the enquiry shall proceed in the manner in which a preparatory examination is to be held, i.e. a preparatory examination held in terms of Chapter 20 of the Criminal Procedure Act (CPA). This means that the enquiry must be held in open court (section 152 of the CPA), subject to the provisions of section 9(3) of the Act; the evidence must be lead under oath or affirmation (sections 162 and 163 of the CPA); and oral evidence is subject to cross- examination and re-examination (section 166 of the CPA). The state first leads evidence and thereafter the person has the opportunity of making a statement, testifying or calling witnesses (section 128, 133 and 134 of the CPA).” That means that the Magistrate must heed the audi alteram partem rule, namely, that both sides must be heard. The aforesaid was reiterated in *Garrido v The Director of Public Prosecution, Witwatersrand Local Division* [2006] ZASCA 169, 2007(1) SACR (1)SCA and amplified in the Constitutional Court in 2020 in the matter of the Director of Public Prosecutions, Western Cape and Lee Nigel Tucker CCT 85/20 where Justice Theron, referring to the above - mentioned case law at par [92] held “This court’s finding and reasoning in *Geuking* was followed by the Supreme Court of Appeal in *Garrido*. In *Garrido*, the sought person had been prevented by the Magistrate from adducing evidence to show that the request by the United States of America was not made in good faith. This evidence challenged whether a certain official was an “appropriate authority in the requesting State and was aimed at revealing the ‘paucity of credible evidence’ which the prosecution in the United States had available to lead against him. The Supreme Court of Appeal, following *Geuking*, found that the sought person was entitled to lead this evidence at the committal enquiry, notwithstanding the fact that it related to surrender under section

11. The Court concluded that the Magistrate failed to observe the procedural requirements of audi alteram partem, and that the order committing the appellant should, for this reason, be set aside”.

[10] In the matter at hand the following is clear: the State compiled a bundle of documents that it relied on in support of the application to have the accused committed to prison pending the Minister’s decision to surrender. The compilation was made available to the legal counsel of both the accused and subsequently also presented as evidence in the enquiry. Furthermore, both legal representatives had an opportunity to prepare for the enquiry. Counsel for Olalere commenced his presentation at page 44 of the transcript in the court a quo as follows: “Your Worship, we are basically going on argument. There is not any documentation whatsoever that can be presented by the respondent”. What follows is then a detailed address of the concerns of Counsel for Olalere relating to the fairness or not that Olalere will receive in the Foreign State. There was no request from Counsel for Olalere to present evidence whatsoever. Neither was there a request that the State should give clarity on the issues raised in argument by Counsel for Olalere. Be that as it may, the State replied to the argument raised by Counsel for Olalere, that the concerns raised by Counsel for Olalere are not concerns that can be dealt with by the court a quo but are considerations to be addressed by the Minister. At that point the concerns were fully recorded as can be seen from the transcript. Which transcript (together with a report as the Magistrate may deem necessary) is readily available and should, in terms of Section 10(4) of the Act be made available to the Minister pending his decision to order the surrender of the person sought. In this instance it

cannot be said that Olalere was not given a fair opportunity to present his case, his legal representative chose to argue and not lead evidence or present documentation. The court record is clear, the magistrate received the argument and concerns expressed by Counsel for Olalere, which argument and concerns will no doubt assist the Minister in reaching a just surrender decision.

[11] There is no reason why the term of imprisonment of two years for the unlawful possession of a firearm cannot run concurrently with the application for extradition to the foreign State. In light of the fact that the Magistrate received the arguments of Olalere, there is no reason for this matter to be remitted to the Magistrate.

[12] The appeal is dismissed with costs.

NA ENGELBRECHT

ACTING JUDGE OF THE HIGH COURT

I agree.

JJ STRIJDOM J

JUDGE OF THE HIGH COURT

APPEARANCES:

For the Appellant: Adv MAFOKO For the Respondent: Adv NYAKAMA Date of hearing: 23 October 2024 Date of judgment: 6 January 2025

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