

SOUTH AFRICA / JUDGMENT

S v Khanyisile and Another (CA 12/2012)

[2012] ZANWHC 35 (19 July 2012)

[2012] ZANWHC 35**COURT**

North West High Court, Mafikeng

BEFORE

A A Landman, R D Hendricks

CASE / FILE NUMBER

CA 12/2012

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Source record**REPORTABLE****IN THE NORTH WEST****HIGH COURT****(MAFIKENG)****CASE NO: CA 12/2012****In the matter****between:-****KHANYISILE****SIYABONGA**.....**First****Appellant****STANLEY NDLOVU**.....**Second****Appellant****and****THE STATE**.....**Respondent****EXTRADITION****APPEAL****Coram: Hendricks****J and Landman J**

Heard: 8 June 2012

Delivered: 19 July 2012

JUDGMENT

LANDMAN J:

Introduction

- [1] This is an appeal against the whole of the judgment of the learned Magistrate of Lehurutshe, North West Province, delivered on 2 November 2011. The learned Magistrate found that the appellants are extraditable to the Republic of Botswana (“Botswana”).
- [2] The first appellant is a Zimbabwean national who was residing at Flat no 102 Hilbrow, Johannesburg in the Republic of South Africa. He comes from Impilo, house number 1230 6th Street, Bulawayo in the Republic of Zimbabwe. The second appellant is a South African citizen, residing at Flat 34, Lilly Bears Towers, Hilbrow, Johannesburg.

Background

- [3] It is alleged that on 1 May 2011, Unique Super Store at BBS Mall, in Gaborone, Botswana, was robbed of certain items (Mascom Airtime amounting to BWP12 188.70; Orange Airtime amounting to BWP5118.75; Be-Mobile amounting to BWP7515.45; Kwik recharge amounting to BWP50 000 and Cash amounting to BWP53 000.00) by the appellants and others used violence against the employees of the store.
- [4] The appellants were arrested by South African Authorities (South African Police services) on 2 May 2011 near the Ramotswa Border post. It is alleged that they were in possession of firearms (pistols) and were carrying suspected stolen goods (vouchers, Mascom airtime cards, etc).
- [5] Both appellants were charged with unlawful possession of firearms and were subsequently detained at the Nietverdien Police Station but are currently detained at the Groot Marico police station. Exhibits were seized when the appellants were arrested. The exhibits have been handed to the Botswana Authorities with the necessary authorization. The charges (unlawful possession of firearms) were withdrawn against the appellants in South Africa in the court a quo.

The extradition request

- [6] Botswana Senior Magistrate, Abigail Masawi issued a warrant for the arrest of the two appellants on 30 May 2011. The office of the High Commissioner of Botswana, by letter, dated 3 June 2011, submitted a request to the Department of International Relations in South Africa for the extradition of the appellants. On 6 June 2011 the Director-General of the former Department sent a letter to the Justice and Constitutional Development Minister (the Minister of Justice). On 18 July 2011 the Minister of Justice, the Hon Mr J.T Radebe, issued a notification in terms of section 5(1)(a) of the Extradition Act 67 of 1962 (“the Act”).

The extradition inquiry

- [7] The extradition request served before the learned Magistrate who conducted the inquiry in terms of section 10 of the Act.¹ The respondent handed in the extradition documents and led the viva voce evidence of Ms Abigail Masawi, Ms Pricilla Kedibone Israel and Mr Philane Madabe. After the address by the defence the respondent was granted leave to re-open its case and recalled Ms Israel and also called Mr Petswelesa Ranka.
- [8] The appellants opposed the extradition application in the court a quo. The appellants did not testify. Instead they handed in sworn statements and medical documents. A diagnosis note, relating to the first appellant, issued by Doctor Salwa Othman and a medical certificate, issued by Dr S Harryprasadah, relating to the second appellant was handed.

Grounds of appeal

- [9] The appellants rely upon four grounds of appeal. These grounds are:
- (a) The Magistrate erred in finding that Botswana is a "foreign state" as envisaged in the Extradition Act 67 of 1962 ("the Act") and that the enquiry should be conducted in terms of section 10 instead of following a decision of the full court of the High Court, Gauteng South, which held that Botswana is an "associate state" and that the enquiry should be conducted in terms of section 12 of the Act.²
 - (b) The court a quo erred in finding that the appellants are extraditable to Botswana, a state where the sentence for the offence of robbery carries corporal punishment.
 - (c) Whether the appellants' constitutional right to access to proper medical care/treatment will not be violated if they are surrendered to Botswana and/or whether their right against discrimination will not be encroached upon.
 - (d) Whether the appellants' right to legal representation at the state expense will not be encroached upon if they are extradited to Botswana.

First ground: associated or foreign state

- [10] The appellants aver that Botswana is not a "foreign state" as envisaged in the Act and that the learned Magistrate should have followed a decision of the Gauteng South High Court and held that Botswana is an "associated state".
- [11] It is important to determine whether Botswana is a "foreign state" or an "associated state". This is because different sections and different procedures apply depending on the classification of the state requesting extradition. If a state is a "foreign state", as the Magistrate held, then the enquiry must be conducted in terms of section 10 of the Act by a Magistrate but the final decision, whether to extradite the person concerned, is that of the Minister of Justice. If a state is an "associated state" the Magistrate holds the inquiry in terms of section 12 of the Act and the Magistrate, subject to appeal, has the final decision whether the persons sought should be extradited to the requesting state.

[12] The question in issue has been decided in this Court in *Shoniwa v State by Hendricks J* (Gutta AJ, as she then was, concurring). Hendricks J concluded that Botswana was a “foreign state” as

contemplated by the Act and the Treaty. On the other hand the full court of the Gauteng South High Court in *Emmanuel Tsebe and another v The Minister of Home Affairs and Others* (unreported case 27682/10 (Gauteng South High Court) decided on 22 September

2011) decided that Botswana was an “associated state”.

[13] Hendricks J had the following to say about the classification of Botswana in *Shoniwa* para 14 and 15:

‘[14] The Act defines an associated state as any foreign state in respect of which section 6 of the Act applies. Section 6 deals with warrants of arrest issued in certain foreign states in Africa, and the crux thereof lies in the reciprocal endorsements of warrants of arrest that was issued in a foreign state. The Treaty on extraditions between the Republics of South Africa and Botswana does not provide for the endorsement of warrants issued in either state on a reciprocal basis as provided for in section 6 of the Act.

[15] Accordingly Botswana is a foreign state’.

[14] In arriving at this decision the Court dissented from *S v Williams* 1988 (4) SA 49 (W) on the basis that: “Despite the fact that the status of Botswana as a foreign or associated state was not pertinently

before that Court, it treated Botswana as an associated state.” See para 13 of the *Shoniwa* judgment.

[15] The Treaty discussed in the *Shoniwa* judgment is the same Treaty which is applicable to the appellants. It does not provide for the endorsement of warrants issued in either Botswana or South Africa on a reciprocal basis as provided for in section 6 of the Act. Therefore Botswana is a “foreign state” and not an “associated state”.

[16] The Court which delivered the *Tsebe* judgment considered the Act and the Treaty and found that Botswana was an “associated state”. Para 59(6) of the *Tsebe* judgment reads as follows:

‘Section 12 applies directly to the facts of this case. Section 12(1) is comparable in wording to section 10(1) save for the fact that section 12 deals with the extradition of a foreigner from an “associated State” as contemplated in section 9(4)(b) referred to above. Botswana is such an associated State by virtue of the Extradition Treaty concluded with South Africa as contemplated in section 6 of the Act. In terms of section 12(1) the magistrate conducting the enquiry concerning a foreigner from an associated state who has committed an offence may surrender such person to such state subject to the provisions of subsection (2). In terms of this latter subsection the magistrate is given similar powers to that held by the Minister to refuse the extradition of a foreigner under section 11(b)(i) to (iv).’

[17] It is not apparent from this, or any other passage that the Court examined the treaty to see what it said about the endorsement of warrants issued in either Botswana or South Africa on a reciprocal basis.

[18] As the Treaty makes no such provision, I respectfully differ from the Tsebe judgment. The result is that I am satisfied that Botswana is a “foreign state” and that the learned Magistrate correctly

heard the application in terms of section 10 of the Act.

Magistrate’s decision re precedent

[19] Mr Skibi submitted that the learned Magistrate should have followed the Tsebe judgment in preference to the Shoniwa judgment. The basis for this submission, according to Mr Skibi, is that the Tsebe judgment is the decision of the full court of the Gauteng South High Court while, the Shoniwa judgment, although a decision of this Division, is that of two judges. In other words he submits that a judgment of a full court of another Division trumps a judgment by two judges of this Division.

[20] The law regarding judicial precedent in a Magistrate’s Courts is clear. Hahlo and Kahn The South African Legal System and its Background at 257 say:

“On the other hand, the magistrate is bound by the ratio of the decision of a superior court. In general, the same principles of stare decisis apply as with a single judge: for instance, a magistrate must follow the A.D. in preference to a full court of the provincial division of the Supreme Court having jurisdiction in his area. In addition, he is bound by the decision of a single judge of his area. His primary loyalty is to the division of the Supreme Court of his area and he cannot choose between its decisions and those of other divisions, even if, so it seems, this means following a single-judge decision in preference to one of a full court elsewhere. If faced by conflicting decisions of benches of equal size in his area, a magistrate, it appears, should follow the latest one, even though it does not advert to the earlier ones. Where there is no governing case of the A.D. of the division of his area, it is suggested that he should follow the decision of another division, for magistrates’ court are portion not of the hierarchical structure of the Supreme Court but of a country-wide organization of inferior tribunals. First allegiance lies to the Supreme Court of the area, as appeals lie to it, but there should be a secondary allegiance to other divisions, in order of size of bench. If there be conflicting decisions of two benches of equal size outside his area, the magistrate, following practice in analogous situations in the Supreme Court, should follow the latest one, even if it does not refer to the earlier ones.”

[21] It follows that the learned magistrate acted correctly in following the decision of this court in the Shoniwa judgment.

Second ground: corporal punishment

[22] Mr Skibi submitted that the court a quo erred in finding that the appellants are extraditable to Botswana, because in Botswana the sentence for the offence of armed robbery carries corporal punishment.

- [23] Mr Skibi submitted that there is no guarantee that corporal punishment will not be imposed if the accused is sentenced to a long term imprisonment. He went on to contend that corporal punishment is a form of torture which is outlawed in South Africa. He contends that if the appellants are extradited and convicted they will be subjected to this form of sentence and there will be no control over the judicial authority of Botswana to prevent a sentence of corporal punishment being executed. Mr Skibi points out that the appellants are entitled to equal protection and the benefit of the law like all the citizens in the Republic. They not be unfairly discriminated against, directly or indirectly, on any one of the prohibit grounds, including ethnic or social origin and/or birth. See sections 9 and 10 of the Constitution of the Republic of South Africa Act of 1996.
- [24] Mr JJ Van Niekerk, who appeared on behalf of the respondent, submitted that there was no merit in Mr Skibi's contention. He contended that:
- (a) Article 6 of the Treaty only provides that where the death penalty (capital punishment) is applicable may extradition be refused. This indicates that corporal punishment is not seen in the same serious light and is not to be treated in the same way.
 - (b) The decisions of the Appeal Court of Botswana contained in exhibit "M" demonstrate that corporal punishment in the case of the appellants is a remote possibility.
 - (c) The Minister of Justice has the final say on whether the appellants should be extradited or not, that is an assurance as the Minister may require Botswana to give sufficient assurances that corporal punishment will not be administered on the appellants. The Minister can refuse extradition on that ground alone if assurances are not forthcoming.
- [25] The short answer to this complaint is to be found in the finding made earlier that the request for extradition was correctly held in terms of section 10. The complaint raised is not one which the learned Magistrate was entitled to entertain in terms of the section 10 inquiry. It follows that there is no merit in this ground.

Grounds three and four

- [26] The next two grounds may be considered together. The third ground is that the appellants' constitutional right to access to proper medical care/treatment will be violated if they are surrendered to Botswana and that their right against discrimination may be encroached upon.
- [27] Mr Skibi's concern on this core is that the first appellant is HIV positive. He is terminally ill and his health condition is deteriorating by the day. He is currently receiving medical treatment for his illness while detained in a South African correctional facility. There is no assurance that inmates who are detained in Botswana and are in such state of health, as is the first appellant, will have access to medical treatment i.e (ARV's) Anti Retro Viral medication.

- [28] The second appellant is being treated for tuberculosis (TB). Foreign detainees in Botswana do not receive medical treatment in terms of the Botswana government's current policy. In Botswana he will be excluded from medical assistance as he will be a detainee of a foreign nationality (South African).
- [29] The fourth ground concerns the question whether the appellants' right to legal representation at the State expense will not be encroached upon if they are extradited to Botswana. The concern is that the appellants will not have a fair trial as neither the Botswana Constitution nor the Penal Code provides for legal representation at State expense.
- [30] The answer to each of these grounds, including the second ground, was provided in the Shoniwa at para 33 relying on *Director of Public Prosecutions, Cape of Good Hope v Robinson* 2005 (4) SA 1 (CC). In this judgment the Constitutional Court held at para 71 that:
- "This judgment holds that an extradition magistrate conducting an enquiry in terms of s 10(1) of the act has no power to consider whether the constitutional rights of the person sought may be infringed upon extradition. That aspect must be considered by the Minister in terms of s 11 of the Act. The correctness or otherwise of the decision of the Minister to extradite the respondent is subject to judicial control. This judgment also holds that the documents before the extradition magistrate were all properly authenticated as required by the extradition agreement. The consequences of this judgment are that the extradition magistrate's order for the committal of the respondent to prison stands and that it is for the Minister to decide whether the respondent should be extradited in all the relevant circumstances, including the fact that he will, if extradited, have to serve a term of imprisonment that was imposed upon him in his absence."*
- [31] See also the longer exposition by the Constitutional Court in *Geuking v President of the Republic of South Africa and Others* 2003 (1) SACR 404 (CC) paras 36 to 44.

New diplomatic developments

- [32] Mr Van Niekerk very properly drew the attention of this Court and Mr Skibi to recent developments which the Minister of Justice must take into account when considering a request for extradition in terms of section 11 of the Act. These developments relate to the Southern African Development Community Protocol on Extradition, which this country ratified on 14 April 2003 and which came into effect on 1 September

2006. See section 2(3) of the Act read with GN 405 in GG 35368 of 25 May 2012.

- [33] Article 4 reads:

"Extradition should be refused in any of the following circumstances:

- (a) if the offence for which extradition is requested is of a political nature. An offence of a political nature shall not include any offence in respect of which the State Parties have assumed an obligation, pursuant to any multilateral convention, to take prosecutorial action where they do not extradite, or any other offence that the State Parties have agreed is not an offence of a political character for the purposes of extradition;
- (b) if the Requested State has substantial grounds for believing that the request for extradition has been made for the purpose of prosecuting or punishing a person on account of that person's race, religion, nationality, ethnic origin, political opinion, sex or status or that the person's position may be prejudiced for any of those reasons;
- (c) if the offence for which extradition is requested constitutes an offence under military law, which is not an offence under ordinary criminal law;
- (d) if there has been a final judgment rendered against the person in the Requested State or a Third State in respect of the offence for which the person's extradition is requested;
- (e) if the person whose extradition is requested has, under the law of either State Party, become immune from prosecution or punishment for any reason including lapse of time or amnesty;
- (f) if the person whose extradition is requested has been, or would be subjected in the Requesting State to torture or cruel, inhuman or degrading treatment or punishment or if that person has not received or would not receive the minimum guarantees in criminal proceedings, as contained in Article 7 of the African Charter on Human and Peoples Rights; and
- (g) if the judgment of the Requesting State has been rendered in absentia and the convicted person has not had sufficient notice of the trial or the opportunity to arrange for his or her defence or he or she has not had or will not have the opportunity to have the case retried in her or her presence."

[34] Article 5 reads:

'Extradition may be refused in any of the following circumstances:

- (a) if the person whose extradition is requested is a national of the Requested State. Where extradition is refused on this ground, the Requested State shall, if the other State so requests, submit the case to its competent authorities with a view to taking appropriate action against the person in respect of the offence for which extradition had been requested;
- (b) if a prosecution in respect of the offence for which extradition is requested is pending in the Requested State against the person whose extradition is requested;

- (c) if the offence for which extradition is requested carries a death penalty under the law of the Requesting State, unless that State gives such assurance, as the Requesting State considers sufficient that the death penalty will not be imposed or, if imposed, will not be carried out. Where extradition is refused on this ground, the Requesting State shall, if the other State so requests, submit the case to its competent authorities with a view to taking appropriate action against the person for the offence for which extradition had been requested;
- (d) if the offence for which extradition is requested has been committed outside the territory of either State Party and the law of the Requested State does not provide for jurisdiction over such an offence committed outside its territory in comparable circumstances;
- (e) if the offence for which extradition is requested is regarded under the laws of the Requested State as having been committed in whole or in part within that State. Where extradition is refused on this ground, the Requested State shall, if the order State Party so requests submit the case to its competent authorities with a view to taking appropriate action against the person for the offence for which extradition had been requested; and
- (f) if the Requested State, while also taking into account the nature of the offence and the interest of the Requesting State, considers that, in the circumstances of the case, the extradition of that person would be incompatible with humanitarian considerations in view of age, health or other person circumstances of that person.'

Compliance with section 10 and the Treaty

- [35] Request for extradition was made by the Republic of Botswana which communicated the request through the Diplomatic channels to the South African Minister of Justice as required by section 4 of the Act. The State proved that the request was correctly transmitted and received in terms of the procedural requirements outlined in the Act and the Treaty. See exhibits "C", "D", "E", "F" and "G".
- [36] Botswana submitted through the State the extradition application which is exhibit "H". Exhibit "H" complies with the requirements of section 9(3) of the Act. The documents attached to the requesting document are authenticated in the manner provided for in section 9(3)(a)(i) to (iii) of the Act.
- [37] The appellants were brought before the Magistrate's Court in terms of section 9(1) of the Act in order for an enquiry to be held. The Magistrate holding the inquiry was required to consider and did consider (a) whether the subjects were liable for extradition and if the subjects were accused of having committed an offence in a foreign state, (b) whether there is sufficient evidence to warrant a prosecution in the requesting state.
- [38] The requesting document indicates that the offence for which the appellants are sought is armed robbery committed in Botswana. Robbery is an extraditable offence in terms of article 2 of the Treaty and section 3(2) of the Act. The penalty for robbery is imprisonment exceeding 12 months as required by article 2 of the Treaty. Robbery is not a political offence. See article 3. Robbery is not a military offence. See article 4. Robbery is not a fiscal offence.

See article 5. Capital punishment is not applicable. See article 6. The offence has not been barred by the lapse of time. See article 9.

[39] There are no grounds to interfere with the order made by the learned magistrate. The appeal must consequently fail.

Order

[40] In the premises the following order is made:

1. The appeal is dismissed.

A A LANDMAN

JUDGE OF THE HIGH COURT

I agree

R D HENDRICKS

Appearances:

counsel for appellants : adv n z skibi

counsel for respondent : adv j j van niekerk

attorneys for appellants : mafikeng justice centre

attorneys for respondent : director of public prosecutions

1Section 10 of the Act reads: “[10] Enquiry where offence committed in foreign state –

- [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 wait 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 too 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.”

1Section 10 of the Act reads:

“[10] Enquiry where offence committed in foreign state –

- [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 wait 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 too 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.”

2Section 12 of the Act reads: “[12] Enquiry where offence committed in associated state –

- [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 subsection (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.
- [2] The Magistrate may order that the person brought before him or her shall not be surrendered- [a] 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; [b] where such person is serving, or is about to serve a sentence to a term of imprisonment, until such sentence has been completed; or [c] at all, or before the expiration of a period fixed by him or her, or make such order as to him or her seems just if he or she is of the opinion that- [i] by reason of the trivial nature of the offence or by reason of the surrender not being

required in good faith or in the interest of justice, or that for any other reason it would, having regard for the distance, the facilities for communication and to all the circumstances of the case, be unjust or unreasonable or too severe a punishment to surrender the person concerned; or [ii] the person concerned will be prosecuted or punished or prejudiced at his or her trial in the associated state by reason of his or her gender, race, religion, nationality or political opinion.

- [3] If the Magistrate finds that the evidence does not warrant the issue of an order under subsection (1) or that the required evidence is not forthcoming within a reasonable time and the delay is not caused by the person brought before him or her, he or she shall discharge that person.”

2Section 12 of the Act reads:

“[12] Enquiry where offence committed in associated state –

- [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 subsection (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.

- [2] The Magistrate may order that the person brought before him or her shall not be surrendered-

[a] 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;

[b] where such person is serving, or is about to serve a sentence to a term of imprisonment, until such sentence has been completed; or

[c] at all, or before the expiration of a period fixed by him or her, or make such order as to him or her seems just if he or she is of the opinion that-

[i] by reason of the trivial nature of the offence or by reason of the surrender not being required in good faith or in the interest of justice, or that for any other reason it would, having regard for the distance, the facilities for communication and to all the circumstances of the case, be unjust or unreasonable or too severe a punishment to surrender the person concerned; or

[ii] the person concerned will be prosecuted or punished or prejudiced at his or her trial in the associated state by reason of his or her gender, race, religion, nationality or political opinion.

- [3] If the Magistrate finds that the evidence does not warrant the issue of an order under subsection (1) or that the required evidence is not forthcoming within a reasonable time and the delay is not caused by the person brought before him or her, he or she shall discharge that person.”
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