Case no 401/98

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

In the matter of

ANN PHYLLIS McCARTHY Appellant

and

THE ADDITIONAL MAGISTRATE, JOHANNESBURG (MR G VAN WYK) First Respondent

THE ADDITIONAL MAGISTRATE, JOHANNESBURG (MR R G LE ROUX) Second Respondent

THE STATE Third Respondent

CORAM: Hefer, Nienaber, Howie, Zulman JJA *et* Farlam AJA

DATE OF HEARING: **4 September 2000**

DATE OF JUDGMENT: **29 September 2000**

Extradition - application for warrant in terms of section 5 of Act 67 of 1962 - whether proceedings should be stayed on ground of unreasonable delay

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J U D G M E N T

/FARLAM AJA:

FARLAM AJA

Introduction

[1] The appellant in this matter brought an application in the Witwatersrand Local Division in which she sought the following orders:

(1) an order reviewing and setting aside a warrant for her arrest issued on 7 November 1991 in terms of section 5(1) of the Extradition Act 67 of 1962 by the first respondent, who is an additional magistrate for the district of Johannesburg (in what follows I shall refer to Act 67 of 1962 as "the Act");

(2) an order for the indefinite stay of the proceedings against her in the case in the magistrates' court for the district of Johannesburg in which an enquiry is to be held in terms of sections 9 and 10 of the Act with a view to the surrender of the appellant to the United States of America in terms of sections 11(a) and 16 of the Act;

(2) an order referring to the Constitutional Court for determination

in terms of section 103 (4) of the Interim Constitution, Act 200 of 1993, the issue as to whether the provisions of the Act which permit the same extradition proceedings to be reinstituted against a person discharged in terms of section 10 (2) thereof are inconsistent with the Constitution and invalid;

(3) an order directing that she should be set at liberty; and

(4) if the application were opposed, an order directing the respondent or respondents who do so to pay the appellant's costs of suit.

During argument in the Court below the relief sought by the appellant under paragraph (3) above was amended and the appellant sought an order declaring the Act to be invalid to the extent of its inconsistency with the Constitution, Act 108 of 1996, and determining the date from which the declaration of invalidity should come into effect, referring the case to the Constitutional Court for confirmation of the order of invalidity

and granting a temporary interdict against the third respondent, the State, from proceeding with the extradition proceedings against the appellant pending the decision of the Constitutional Court. The application having been dismissed by Heher J, the appellant appeals with the necessary leave to this Court.

[2] During the argument before this Court Mr *Bizos,* who appeared with Mr *Hodes* on behalf of the appellant, stated that the appellant was not persisting in her appeal against the Court *a quo*'s refusal to declare the Act or certain sections of it unconstitutional. He submitted, however, that the learned judge in the Court *a quo* had erred in failing to set aside the warrant for appellant's arrest and in failing to grant the indefinite stay of the proceedings in the magistrates' court which the appellant had sought.

Facts

[3] The appellant, who is an educational psychologist, was born in South Africa and is a citizen of this country and of Germany. After spending some years abroad, *inter alia* in the United States of America and

Germany, she returned to this country in about 1988 and has lived here ever since. During 1985, at a time when she resided in the United States, the appellant is alleged to have been involved in a conspiracy to murder the United States Attorney for the Federal District of Oregon. Before the indictment could be served upon her she left the United States and went to Germany. While she was in Germany an application for her extradition from Germany was unsuccessfully brought by the United States Government, after which she returned to South Africa.

[4] In 1990 the United States Government requested the South African Government to cause her to be extradited to the United States to face the conspiracy to murder charge to which I have referred. She was arrested in Johannesburg on 11 September 1990 on a warrant issued in terms of section 5 of the Act. The warrant was withdrawn the following day but on that date a second warrant was issued and the appellant, who in the meanwhile had been released, was re-arrested on the same day and brought before a magistrate who released her on bail and postponed to 18 October

1990 the enquiry as to whether she should be extradited. On 18 October 1990 the matter was again postponed, this time to 9 November 1990.

[5] On 9 November 1990 the State applied for a further postponement because the Government of the United States had not yet filed any evidence in support of its application for extradition. The appellant opposed this application but it was granted and the matter was postponed to 22 November 1990, on the basis that the postponement was a final one.

[6] On 22 November 1990 the appellant's counsel successfully contended that the documentary evidence filed in support of the extradition application was deficient in that the certification of one of the affidavits had apparently taken place thirteen days before the affidavit was deposed to and no evidence had been placed before the court regarding the procedure for authentication of documents according to the law of the United States. The State's application for a further postponement to cure the deficiencies was refused and the appellant was discharged by the magistrate on the ground that the required evidence had not been forthcoming within a reasonable time.

[7] Nearly a year later, on 7 November 1991, the State applied to an additional magistrate in Johannesburg, the first respondent in these proceedings, for another warrant, this time a third warrant, for the arrest of the appellant in terms of section 5 of the Act. The application was brought on the same papers as the previous one, supplemented by further affidavits to remedy the deficiencies in the papers which had caused the previous application to fail. It seems clear, and for the purposes of the appeal I am prepared to find, that the fact that there had been a previous unsuccessful application for the extradition of the appellant almost a year beforehand was not disclosed to the first respondent before he authorised the warrant. The appellant was arrested, for the third time, on 8 November 1991. She was brought before another additional magistrate for the district of Johannesburg, the second respondent. Her representatives raised a plea of *res judicata* on her behalf. It was argued on 10 December 1991 before the second respondent, who dismissed it on 13 December, 1991.

[8] On 27 January 1992 the appellant's application for a review of

the second respondent's rejection of her plea of *res judicata* was lodged. The review was heard by Stegmann and MacArthur JJ on 8 June 1992. Judgment on the review having been reserved, the application for review was dismissed on 1 March 1993 and leave to appeal against this decision was refused on 30 March 1993.

[9] On 19 April 1993 the appellant's petition to the Chief Justice for leave to appeal was lodged and leave to appeal was granted by this Court on 18 August 1993.

[10] The appeal itself having been argued on 24 February 1995, this Court by a majority of three judges to two dismissed the appellant's appeal on 23 May 1995. The judgment is reported as *S v McCarthy*, 1995 (3) SA 731 (A). The majority judgment was delivered by Van Heerden JA, who held that an essential element for the successful invocation of a plea of *res judicata* was lacking because, so he held, the appellant's discharge on the second warrant had not been a judgment on the merits.

The judgment proceeded (at 750 D - H):

"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."

[11] The extradition proceedings had been postponed pending the appeal. They were due to resume on 29 September 1995. On that day they were postponed by agreement to 13 November 1995.

[12] On 13 November 1995 the appellant gave formal notice of her intention to seek her discharge or in the alternative to have certain constitutional issues referred for determination by the High Court in terms of section 103 (3) of the Interim Constitution. The matter was postponed to 11 January 1996 to allow the State to file an answer and for the appellant to reply to the State's answer.

[13] The second respondent was unavailable on 11 January 1996 and the matter was postponed to 15 February 1996, on which date the appellant objected to the admission of certain further documents tendered by the State. This objection was overruled on 16 February 1996 whereupon the matter was postponed to 3 April 1996. The matter was argued on 3 and 4 April 1996, after which the second respondent reserved judgment. On 26 April

1996 appellant's application for discharge and a referral was dismissed and the second respondent ruled that the extradition enquiry should continue. The case was postponed to 10 June 1996 for the continuation of the enquiry.

[14] At about this time the appellant was advised by her legal representatives that it was possible that the third warrant could be set aside if the prosecutor had failed, when applying to the first respondent for the issue of the third warrant, to disclose the facts of the previous proceedings so as to enable him to exercise the discretion whether or not to issue a warrant which the majority of this Court held in the first *McCarthy* appeal a magistrate has.

[15] In order to be able to establish whether the facts of the previous proceedings had been disclosed to the first respondent the appellant's attorneys endeavoured to ascertain the identity and whereabouts of the magistrate who had issued the third warrant. This information took time to obtain. When they had ascertained that the first respondent had issued the third warrant and where he was, the appellant's attorneys wrote

to him on 22 May 1996 and asked for his reasons for authorising the third warrant. The first respondent asked for a copy of the warrant to be forwarded to him to enable him to consider the request. The following day the appellant's attorneys sent him a copy of the warrants and he replied to the request for his reasons by saying:

> "On the sworn statements put before me by the Attorney-General I was convinced that the authorisation of the warrant of arrest was justified and therefore I had signed it."

[16] On 29 May 1996 the appellant's attorneys asked the first respondent to furnish them with particulars of the documents and information placed before him in support of the application for the third warrant.

On 6 June 1996 the first respondent replied that the relevant information was in the possession of the Attorney-General for the Witwatersrand Local Division and that the request should be addressed to him.

[17] On 12 August 1996 the appellant's attorneys requested the

Attorney-General to afford them access to the information in his possession on which the third warrant was issued. On 14 August 1996 a telephone conversation took place between a representative of the appellant's attorneys and a member of the Attorney-General's staff, who stated that Advocate Dörfling, who handled the extradition proceedings on behalf of the Attorney-General, was engaged in a long trial in KwaZulu-Natal and would contact the appellant's attorneys on his return. On 3 September 1996 the Attorney-General invited the appellant's attorneys to arrange with Advocate Dörfling for inspection of the documents in his possession. Ten days later, on 13 September 1996, this application was launched.

The alleged invalidity of the warrant

[18] The first point argued by the appellant's counsel was that the third warrant for the appellant's arrest was incorrectly issued because the magistrate did not exercise the discretion bestowed upon him. It was contended that the State was obliged, when the third warrant of arrest was applied for, to disclose to the first respondent that there had been two

previous warrants of arrest issued in terms of section 5 of the Act, that the first had been withdrawn and the second had culminated in the appellant's discharge in terms of section 10(2) of the Act almost a year before.

[19] I have already said that I am prepared to find for the purposes of this appeal that the fact that there had been an unsuccessful application for the extradition of the appellant almost a year before the application for the third warrant was not disclosed to the first respondent before he issued the warrant. Counsel for the appellant contended that because the State did not make the required disclosure the first respondent did not realise when he issued the third warrant of arrest that there had been two previous abortive applications for extradition against the appellant; that the appeallant was discharged on the second occasion (albeit not on the merits); that the State had since then delayed for almost a year its application for a third warrant of arrest and, so it was contended, that there was no explanation for the delay.

[20] It was contended further that if the first respondent had known

of these matters they would have weighed with him in the exercise of his discretion in that he would have had to consider:

(a) whether the required evidence would be forthcoming within a reasonable time and if he was not satisfied that it would be done he would have had to refuse to issue a warrant; and

(b) what was called the State's delay for almost a year in applying for a third warrant of arrest and its failure to offer any explanation for that delay and whether in the exercise of his discretion he should grant the warrant despite the lengthy delay and the absence of any explanation for it, or whether justice and fairness required that he should decline to do so.

[21] Counsel for the appellant submitted that as a result of the State's failure to make what they contended was the required disclosure the first respondent failed to take into account considerations relevant and material to the proper exercise of his discretion. Relying on the decisions of this Court in *Johannesburg Stock Exchange and Another v*

Witwatersrand Nigel Ltd and Another 1988 (3) SA 132 (A) at 152 and *Hira v Booysen* 1992 (4) SA 69 (A) at 84 and 93, they contended that the first respondent failed "to apply his mind to the relevant issues in accordance with the behests of the statute and the tenets of natural justice". They accordingly argued that the third warrant of arrest was improperly issued and accordingly invalid. These submissions, which were also advanced before the Court *a quo*, were rejected by Heher J for the following reasons:

> "It seems to me that the learned Judge of Appeal speaking for the majority was saying that the magistrate to whom an application under section 5(1)(b) is made, exercises his discretion properly not merely by satisfying himself that the jurisdictional requirements of that section have been satisfied, but also by being awake to any facts which might render the authorisation of the warrant an abuse of the powers conferred on him, as for example that the application is being launched without adequate grounds for believing that the evidence necessary to justify the issue of an order for committal will be forthcoming within a reasonable time of the arrest of the suspect pursuant to the warrant which is applied for. However, the fact of previous arrest and detention (even of substantial length) would, as the learned Judge's analogy with arrests in ordinary criminal cases makes clear, not *per se*

> constitute such an abuse where the necessary evidence is immediately available. That availability lay at the heart of the application before the first respondent. That was the point of obtaining the supplementary affidavits which were furnished to the first respondent (albeit that he was not in terms so informed)."

He proceeded to point out that there had been placed before the first respondent, in addition to the original documents which had been found to be defective by the magistrate who had discharged the appellant on 22 November 1990, certain supplementary affidavits which clearly overcame the technical objections which had previously been upheld and that the information placed before first respondent was clearly sufficient to justify the exercise of his powers under section 5(1)(b) of the Act.

[22] The point raised by the appellant's counsel regarding the alleged unexplained delay was dealt with as follows:

> "The magistrate could not but have been satisfied that the evidence was immediately available. I do not agree with the submission of applicant's counsel that it was necessary for the State to explain the 'delay' in applying for the third warrant of arrest. The applicant had not been detained since the previous

> warrant was discharged. . . . [T]he treaty and the legislation are directed to protecting liberty. That was not in issue here. The failure of the State to place before the magistrate information concerning the applicant's previous arrests and discharge was accordingly not a factor which the first respondent needed to take into account once the evidence was complete. Disclosure would only have been relevant to the extent that the reason for the previous discharge had not been overcome by the time that the application was made to the first respondent. The irregularity (if such it was) in failing to apprise him of the history, was one without substance."

[23] In the view that I take of the case the so-called "delay" was not relevant to the point as to whether the warrant was invalidly issued. It is relevant, however, in regard to the second point argued and I shall accordingly deal with it when I consider the appellant's argument that an indefinite stay should have been granted.

[24] As I see it, the only point to be considered at this stage is whether there was a material non-disclosure by the State such as vitiated the magistrate's decision to grant the warrant. I have already found that the State did not disclose the previous applications and the appellant's discharge to

the first respondent. In my opinion if these facts had been disclosed to the first respondent they would not have affected his decision to grant a warrant. The position would have been different if the deficiencies had not been rectified. If that had been so the first respondent would and should have refused to grant the warrant until satisfied that the problems previously encountered had been rectified. But this had already happened.

[25] There was nothing in what had preceded the application for the third warrant to justify the magistrate in coming to the conclusion that enough was enough and that the time had come to put his foot down firmly and refuse the application. Indeed, if he had done so I have no doubt that the State could successfully have reviewed a refusal by him to grant the warrant.

[26] In my view Heher J correctly rejected the appellant's counsel's contention that the third warrant should be set aside.

The application for an indefinite stay

[27] In support of this prayer the appellant's counsel submitted that their client was entitled to the protection afforded to accused persons

embodied in section 25(3)(a) of the Interim Constitution , which provided:

> "(3) Every accused person shall have the right to a fair trial which shall include –
>
> (a) the right to a public trial before an ordinary court of law within a reasonable time after having been charged".

[28] This relief was argued before the second respondent who refused it on the ground that section 25(3)(a) did not afford a right to a person who was the subject of extradition proceedings and that the section only applied to persons charged with an offence in the Republic and not to a person such as the appellant who had not been charged and who was the subject in this country of extradition proceedings which were not a trial.

[29] Heher J did not agree with the second respondent on this point. In his view a person subject to extradition proceedings in this country was entitled, while the Interim Constitution was in force, to invoke the protection of section 25(3) (a) if able to show that no trial had taken place within a reasonable time of being charged.

[30] In view of the fact that I have come to the conclusion that the

appellant has not shown unreasonable delay in this matter such as to justify an indefinite stay, either in terms of section 25(3)(a) of the Interim Constitution or section 35(3)(d) of the Constitution, it is unnecessary for me to decide whether the views of the second respondent on this point are to be preferred to those of Heher J. I shall assume in what follows that the appellant is entitled, should the delay in disposing of her case be unreasonable, to an order for an indefinite stay and that the legal position in regard to the effect of delay in the case of persons charged in the Republic with criminal offences, as expounded by the Constitutional Court in *Sanderson v Attorney General, Eastern Cape* 1998 (2) SA 38 (CC) and *Wild and Another v Hoffert NO and Others* 1998 (3) SA 695 (CC), applies in her case also.

[31] In my opinion, in order to decide whether the period that has elapsed since the appellant was first charged (which I am prepared to assume for present purposes took place when she was arrested on the first warrant on 11 September 1990) was such that one can say there has been

unreasonable delay, it is necessary to divide up the period to see what occasioned the delay.

[32] The first period to be considered is from 11 September 1990, when the appellant was first arrested (and released on bail) to 22 November 1990 when she was discharged. This was the period covered by the first extradition enquiry in the magistrates' court. It was postponed thrice at the State's request for it to obtain the necessary evidence. I do not regard this period as excessive or unreasonable.

[33] The period from 22 November 1990, when the appellant was discharged, to 8 November 1991, when she was arrested on the third warrant, is undoubtedly for the State's account. Did it amount to unreasonable delay? The appellant's counsel contended strongly that it did and they described it repeatedly in their argument as an unexplained delay.

[34] I do not agree that it can be so described. The delay is explained as follows in an affidavit deposed to by Mr K M Attwell, then the Acting Attorney-General for the Witwatersrand Local Division:

> "Following on the finding by the magistrate, the respondent proceeded to get the papers in order and to supplement the papers with the necessary further documentation. Further papers were duly requested from the USA through diplomatic channels: this in itself is a time-consuming and lengthy process. Statements and supplementary documents had then to be revised and further requests made in order to settle such further documentation. A new warrant was then issued for the arrest of the applicant on 7 November 1991 - just less than one year from the date of the previous hearing on 22 November 1990."

This statement was not disputed and in the light thereof one cannot say that the period of just under one year was inordinately long nor that there is any unexplained delay.

[35] Since the third warrant was authorised and executed on 8 November 1991 approximately nine years have elapsed. I have summarised in paragraphs [7] to [17] above what has taken place. Some of the time has been lost through the appellant's failure to raise points of objection and file papers earlier than she did. I am prepared to assume, however, that the time which was lost in this way was not inordinate. The time from 10 December 1991 to 23 May 1995 was spent on an unsuccessful plea of *res*

judicata, which, though it ultimately failed, was held by two Judges of this Court to be correctly raised. So again it would not be fair to blame the appellant for the time so used. Further time was spent on the application for the referral of constitutional issues and then the attack on the warrant. In my view such delays as these were may be described as systemic delays in our courts.

[36] Though procedures exist for expediting the hearing of urgent matters and in the process abridging ordinary limits and avoiding delays, it is common cause that neither the appellant nor the State availed themselves of these procedures. Even in the case of the present appeal the representatives of the appellant, in the practice note which accompanied their heads of argument, stated that the appellant was out on bail and that no special reasons existed for them to request precedence on the roll. The appellant's counsel submitted that the systemic delays were attributable to the third respondent, the State, and not to the appellant.

[37] The topic of systemic delay was dealt with by Kriegler J in the

Sanderson case *supra,* at 56G - 57 B (para [35]) as follows:

> "The third and final factor I wish to mention is so-called systemic delay. Under this heading I would place resource limitations that hamper the effectiveness of police investigation or the prosecution of a case, and delay caused by court congestion. Systemic factors are probably more excusable than cases of individual dereliction of duty. Nevertheless, there must come a time when systemic causes can no longer be regarded as exculpatory. The Bill of Rights is not a set of (aspirational) directive principles of State policy – it is intended that the State should make whatever arrangements are necessary to avoid rights violations. One has to accept that we have not yet reached that stage. Even if one does accept that systemic factors justify delay, as one must at the present, they can only do so for a certain period of time. It would be legitimate, for instance, for an accused to bring evidence showing that the average systemic delay for a particular jurisdiction had been exceeded. In the absence of such evidence, courts may find it difficult to determine how much systemic delay to tolerate. In principle, however, they should not allow claims of systemic delay to render the right nugatory."

[38] Heher J held that he could not find that the systemic delay had been anything other than reasonable within the context of our legal system as

the workings of its procedures and courts were known to him.

[39] No attempt was made by the appellant to show that the average systemic delay for any particular jurisdiction, either the Johannesburg magistrates' court or the Witwatersrand Local Division or this Court, had been exceeded.

[40] I am in agreement with the view expressed by Heher J that it is not possible to find that the systemic delay encountered in this case has been anything other than reasonable in the context of our system. Nor can it be found that the systemic delays under consideration here have rendered nugatory the appellant's right to have her trial begin and conclude without unreasonable delay.

[41] Heher J set out the factors to be worked into the balance of the respective interests of the appellant and the State and the conclusion to which he came in the following passage in his judgment:

> "First, in excess of five years elapsed between the alleged commission of the crime and the first attempt to extradite the applicant from the Republic. I am not, for the moment, interested in why there was this delay; the fact is that it took that

long for the law enforcement authorities of the United States to catch up with the applicant. This initial delay is important because the effect of what followed cannot be considered independently but must be seen as an exacerbation of an already unsatisfactory situation.

Second, a further seven and a half years has passed since the applicant was first arrested and the charge brought to her attention. Since the judgment of the second respondent, almost a year and a half has been taken up by the present litigation.

Third, the lapse of more than thirteen years since the critical events must of itself (and even without evidence on the part of the applicant) suggest very strongly that the fairness of the trial will be materially adversely affected, in at least the following respects: the applicant's recollection of events, the tracking down of such witnesses for the defence as may survive, the willingness of witnesses to testify, the recollection of those witnesses and the procurement of real evidence.

Fourth, the absence of fault on the part of the applicant in relation to the delay cannot be ignored. As to the initial period, there is no firm evidence one way or the other. Thereafter, the applicant contributed nothing but acceptable steps directed at enforcing what, so she was no doubt informed, were her legal rights. The major delay was occasioned by the appeals to this Court and the Supreme Court of Appeal. The judgment of the

latter indicates how very close she came to complete success.

Fifth, the degree of 'fault' on the side of the State is limited to the initial period of about a year during which it was attempting to get the formalities of the extradition application in order. Although there has been no explanation for that delay, the facts of the matter speak, in some degree, for themselves. While the authorities in the United States were, no doubt, entitled to some degree of latitude in putting the technicalities right, it is a matter for adverse comment that nothing positive seems to have been done between November 1990 and August 1991, and little between August and November of that year. Since then the State has been ready to proceed but has been totally frustrated by the (not unreasonable) exercise of the applicant's legal rights.

Sixth, the prejudice personal to the applicant arising from the delay has been substantial. Since November 1990 the applicant has been released on bail. The conditions have been onerous, involving regular reporting to the police. The disruption of her personal life while justifiable within reasonable limits as in the case of any accused, has over the extended period of delay been material. In her affidavit in support of her application before the second respondent the applicant details the personal prejudices suffered by her as follows:

'16. To date, I have thus been hounded within the Republic of South Africa by the Government of the United States of America for a period in excess of five years, commencing on 11 September 1990. This has caused

me personal and financial prejudice.

17 I have not been able to travel freely within the Republic of South Africa, and have had my bail monies in the sum of R30 000,00 tied up over various periods of time. I have also been required to report regularly to the South African Police Services and compelled to request their permission to leave the Gauteng area. This in turn has caused problems with my studies, which were hampered by these interruptions, and my ability to work. I have been compelled to make a full disclosure of my situation to various potential employers and have thus foregone several career opportunities.

18 This case has enjoyed vast media coverage, which has had a detrimental effect on my personal life and career. I have suffered from stress, causing me endless sleepless nights and have had to seek psychological assistance.

19 I have also suffered from severe migraine headaches, which were blinding and incapacitating as a result of the stress of this recurrent application for my extradition. I have been prescribed various prophylactic medication to assist me with my migraines and the stress. This in turn caused me digestive problems, and I thus suffer from an irritable bowel syndrome which is stress-induced.

20 My husband and I have made arrangements to adopt a child, but due to this application for my extradition and the uncertainty of my future as a result thereof, we had to cease out attempts to do so. I have been advised that, with increasing age, the prospects of succeeding in adoption proceedings diminish and that it is unlikely that I will now be able to adopt a child.

21 I obtained a degree of Bachelor of Science in 1966 at the University of the Witwatersrand. I then went on to complete my Bachelor of Science Honours at the same

university in 1968. Thereafter I read for my Masters of Science in Mathematics at the London University in 1969. Despite the hinderance of these continuing extradition proceedings, I obtained my Bachelor of Arts Honours in Psychology at the University of the Witwatersrand in 1991. I then read for my Masters of Education Psychology at the very same university in 1993.

22 I am currently in private practice as an Educational Psychologist and actively involved in community work and the development of psychotherapy in the Republic of South Africa in general. I am also furthering my professional training by doing an extra curricular diploma in Integrative Psychotherapy and attending various workshops that occur here by visiting psychologists and psychiatrists.

23 I have not been able to realise my full potential in training due to the restrictions on my mobility. *Inter alia*, I was unable to attend a professional conference on child psychology known as the ACCAPAC - Conference, which was held in Durban during June and July 1995. I have not even been able to take a vacation in the Kruger National Park, due to objections by the representatives of the Government of the United States of America. I have now requested permission to take a vacation in Plettenberg Bay for three weeks commencing Saturday 18 November 1995, and have been informed that I will have to deposit a further amount of R30 000,00 as bail with the duration of my vacation, and report daily whilst on vacation.'

It appears from the foregoing that there are many and weighty factors in favour of assisting the applicant if that can be done in the context of fairness to both parties. As emphasised by Kriegler J in *Sanderson*'s case *supra* the length of elapsed time is obviously central to the inquiry (at para 28). *Prima facie* it

is very great. It seems however that there is one critical feature upon which this aspect of the case must turn. At paragraph 33 of *Sanderson*'s case Kriegler J said:

> 'I would suggest that if an accused has been the primary agent of delay, he should not be able to rely on it in vindicating his rights under section 25(3)(a). The accused should not be allowed to complain about periods of time for which he has sought a postponement or delayed the prosecution in ways that are less formal. There is, however, no need for the accused to assert his right or actively compel the State to accelerate the preparation of its case. Provided he has genuinely suffered prejudice as a result of the State's delay, he cannot be responsible for the State's tardiness.'

In this context, save for the initial delay of eleven months, the State has been fully prepared to pursue the application. That it has not done so has been entirely due to the tactics of the applicant (legitimate and without criticism though there may have been). In short, since November 1990 [*I take it this is a misprint for 1991*] the applicant has been almost the sole agent of delay. It is true that much of the delay has been systemic in nature but all (save for the period from 11 January to 15 February 1996) has stemmed from the actions of the applicant. I am unable to find that the systemic delay has been anything other than reasonable within the context of the South African legal system as the workings of its procedures and courts are known to me. In these circumstances, the consequences of delay, namely, the personal suffering, restrictions on freedom flowing from bail conditions and the problems inherent in the preparation and presentation of a defence at so great a remove

> in time and place from the events of 1985 are likewise to be laid to the applicant's own charge. I have read painstakingly the judgment of Kriegler J with the view to finding, if I can, a route fair to the interests of the State which would enable me to rationalise for the benefit of the appellant the delay in bringing the extradition proceedings to finality. I find, however, that the way is barred by the applicant's conduct. Any other conclusion would in future hold out the prospect to accused persons (whether in extradition or trial proceedings) that if they are able, by the employment of astute legal advisers, legitimately to hold the State at bay for long enough, they will eventually escape prosecution. This is not a case where the initial eleven month delay is sufficient to cause me to find that that of itself is a violation of section 25(3)(a) which, seen in the wider picture, justifies an order staying further proceedings against the applicant under the Act. In the result I conclude that the objection of unreasonable delay is unsound and that the applicant's reliance upon section 25(3)(a) of the Constitution must be rejected."

[42] Counsel for the appellant submitted that Heher J erred in holding that a large number of the delays were caused by the route followed by the appellant and that since November 1991 she had been almost the sole agent of delay. It was contended that Heher J erred because he had in effect

attributed systemic delay to the appellant.

[43] I do not read his judgment in that way. But even if that is what he held, nothing turns on the point in my view because, as was clearly stated in *Sanderson, supra,* at 57, paragraph [35], systemic factors, at present, do not tend to justify an indefinite stay unless an accused shows, *inter alia*, that the average systemic delay for a particular jurisdiction has been exceeded (which is not the case here) or any other delay is of such a nature as to render the right nugatory (which for the reasons that follow I do not consider happened in this case).

[44] What is important in this regard is the nature of the relief claimed by the appellant, i e, an indefinite stay, something which, according to *Sanderson, supra,* (at 58, paragraph [38]) is far-reaching and will seldom be warranted in the absence of significant prejudice to the accused. See also the *Wild* case, *supra,* at 708, paragraph [27], where it was said that in the absence of trial prejudice claims for a stay of prosecution (which is in effect what the appellant seeks) "must fail unless there are circumstances

rendering the case so extraordinary as to make the otherwise inappropriate remedy of a stay nevertheless appropriate". No such extraordinary circumstances are, in my judgment, present in this case, so it becomes necessary to have regard to the question whether trial prejudice is present here.

[45] The trial prejudice relied on is summarised by Heher J in the passage quoted above where he said that the lapse of 13 years (now 15) since the alleged conspiracy "suggest very strongly that the fairness of the trial will be materially adversely affected, in at least the following respects: the applicant's recollection of events, the tracking down of such witnesses for the defence as may survive, the willingness of witnesses to testify, the recollection of those witnesses and the procurement of real evidence".

[46] I do not think the grounds of prejudice listed in the passage I have quoted (on which the appellant's counsel strongly relied in argument and to which they did not seek to add) are sufficient to justify the far-reaching remedy of an indefinite stay. At least some of the handicaps from

which the appellant will suffer may well also render the prosecution's task more difficult, in particular those relating to the availability fifteen years on, of witnesses and their recollection of events. Furthermore these points which will all have a bearing on the question of proof beyond reasonable doubt will be able to be brought to the attention of the jury with all the emphasis at the command of her legal representatives.

[47] In *U S v Trammell* 133 F 3d 1343, 1351 (10th Cir. 1998), a case in which an accused alleged that his due process rights had been denied by delay in indicting him, Briscoe, Circuit Judge, with whom Toche and McKay, Circuit Judges, agreed, said:

> "Vague and conclusory allegations of prejudice resulting from the passage of time and the absence of witnesses are insufficient to constitute a showing of prejudice. Defendant must show definite and not speculative prejudice, and in what specific manner missing witnesses would have aided the defense. *United States v Jenkins*, 701 F. 2d 850, 855 (10th Cir.) 1983."

[48] I am not sure that one need go so far as that in this case, but something more than the factors listed in Heher J's judgment, not backed by

specific averments by the accused person in question, is in my view required before the far-reaching remedy of an indefinite stay can be granted in a case such as this.

[49] In my view also there is considerable force in Heher J's observation which I have already quoted that the grant of an indefinite stay in a case such as this would hold out to accused persons the prospect that they will eventually be able to escape prosecution "if they are able, by the employment of astute legal advisers, legitimately to hold the State at bay for long enough".

[50] In the present case it is clear, as I have already pointed out, that the State has been ready to proceed since November 1991 and the delays since then have been occasioned by the steps taken by the appellant. She may not be to blame for the bulk of the delays since then but neither is the State and the systemic delays are not such in the circumstances as to warrant the granting of an indefinite stay.

[51] Although a costs order was made against the appellant in the

Court below, as this case is in substance a criminal proceeding no cost order should have been made: see *Sanderson, supra,* at 60 H -61 B (paragraph [44]) and *Harksen v President of the Republic of South Africa and Others* 2000 (2) SA 825 (CC) at 837 D (paragraph [30]).

[52] The following order is made:

> The appeal is dismissed, save that the order in the High Court directing the appellant to pay the costs of those proceedings is set aside.

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I G FARLAM.

HEFER JA)
NIENABER JA)
HOWIE JA) **CONCUR**
ZULMAN JA)