THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case no:288/2021

In the matter between:

AUGUSTINUS PETRUS MARIA KOUWENHOVEN	**APPELLANT**
and	
DIRECTOR OF PUBLIC PROSECUTIONS (WESTERN CAPE)	**FIRST RESPONDENT**
THE STATE	**SECOND RESPONDENT**
THE MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	**THIRD RESPONDENT**
THE ADDITIONAL MAGISTRATE, MAGISTRATES' COURT FOR THE DISTRICT COURT OF CAPE TOWN	**FOURTH RESPONDENT**

Neutral citation: *Kouwenhoven v DPP (Western Cape) and Others* (288/2021) [2021] ZASCA 120 (22 September 2021)

Coram: PONNAN, WALLIS, SCHIPPERS and HUGHES JJA and KGOELE AJA

Heard: 27 August 2021

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Summary: Section 10(1) of the Extradition Act 67 of 1962 – discharge of person whose extradition is requested on question of law – appealable in terms of s 310(1) of the Criminal Procedure Act 51 of 1977. Procedure for preparing stated case in terms of s 310(1) – questions of law to be determined by Director of Public Prosecutions – magistrate to prepare stated case in relation to those questions – magistrate to state factual findings on which questions were answered – person discharged not entitled to notice that the DPP has requested the magistrate to state a case – not entitled to make representations in relation to the terms of the stated case.

Section 3(1) of Extradition Act – meaning of expression 'committed within the jurisdiction' – not confined to territorial jurisdiction of court of requesting state – refers to the power of the court in the requesting state to conduct criminal trial in relation to person whose extradition was requested and determine their guilt or innocence – extradition permissible where all criminal acts were committed outside the territorial jurisdiction of the requesting state's courts.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Rogers J and Sher J, sitting as (1) court of first instance in review proceedings under Case No 181/2020; and as (2) court of appeal from the decision of the fourth respondent under Case No A181/2020):

1 The appeal against the dismissal of the application under case no 181/2020 is dismissed.

2 In case no A181/2020 the answer to the third question posed in the case stated in terms of s 310(1) of the Criminal Procedure Act 52 of 1977 is amended by the insertion of the words 'under its domestic law' after the word 'jurisdiction'.

3 The appeal against the high court's order in case A 181/200 is dismissed.

Reported *sub nom Director of Public Prosecutions, Western Cape v Kouwenhoven; Kouwenhoven v Director of Public Prosecutions, Western Cape and Others* [2021] 1 All SA 843 (WCC); 2021 (1) SACR 579 (WCC).

JUDGMENT

Wallis JA (Ponnan, Schippers and Hughes JJA and Kgoele AJA concurring)

[1] Mr Kouwenhoven, the appellant, is a Dutch citizen, who was arrested on 8 December 2018 pursuant to a warrant of arrest issued in terms of s 5(1)(*b*) of the Extradition Act 67 of 1962 (the Act). He unsuccessfully challenged his arrest in review proceedings before the Western Cape Division of the high court and his appeal against that decision is dismissed in a separate judgment to be delivered at the same

time as this one. [1] After the high court handed down its judgment in the review,[2] an extradition enquiry was held before the fourth respondent, an additional magistrate in Cape Town. Mr Kouwenhoven contended that he was not subject to extradition in terms of s 3(1) of the Extradition Act 67 of 1962 (the Act) because the crimes of which he had been convicted in the Netherlands had been committed in Liberia and not within the territorial area of jurisdiction of the Netherlands itself. The magistrate upheld this point and as a result held that Mr Kouwenhoven was not a person liable to be extradited in terms of the provisions of s 3(1) of the Act. Following from that conclusion he was discharged in terms of s 10(3) of the Act.

[2] The National Director of Public Prosecutions, Western Cape (the DPP), then asked the magistrate to state a case for consideration of the high court in terms of s 310(1) of the Criminal Procedure Act 51 of 1977 (the CPA), as read with rule 67(12) of the Magistrates' Court Rules. On 10 July 2020, the magistrate stated a case in accordance with this request and on 20 July 2020 the DPP lodged a notice of appeal with the Western Cape Division of the High Court. This prompted Mr Kouwenhoven to launch a fresh application for review on 3 September 2020, against the DPP, the State and the Minister of Justice and Correctional Services, the first, second and third respondents respectively in this appeal. The basis of the review was twofold. It was first contended that s 310(1) of the CPA was not available to challenge the outcome of an extradition enquiry Alternatively it was alleged that the statement of case prepared by the magistrate was invalid and fell to be set aside because Mr Kouwenhoven had not been afforded notice of the request to state a case, nor given an

[1] *Kouwenhoven v Minister of Police and Others* [2021] ZASCA 119.
[2] *Kouwenhoven v Minister of Police and Others* [2019] 4 All SA 768 (WCC); 2021 (1) SACR 167 (WCC).

opportunity to make representations to the magistrate in regard to its preparation.

[3] The combined appeal and review proceedings came before the full bench which delivered judgment on 23 December 2020.[3] In a judgment by Sher J the points relating to s 310 of the CPA were dismissed. In a judgment by Rogers J it was held that the magistrate had erred in construing the expression 'committed within the jurisdiction' in s 3(1) of the Act as restricted to the territorial jurisdiction of the court of a requesting state. In the result the review failed and the appeal succeeded. The matter was remitted to the magistrate to finalise the extradition enquiry in accordance with the answers given to the questions posed in the stated case. This court granted special leave to appeal against the decision in the appeal. Thereafter, Rogers and Sher JJ granted leave to appeal in the review, principally for reasons of convenience and to avoid further delays, although they did not think that it had any reasonable prospects of success. There are therefore two appeals before us, one against the upholding of the DPP's appeal, and one against the dismissal of Mr Kouwenhoven's review. They were combined for the purposes of argument and dealt with together with the appeal against the judgment in the earlier review proceedings.

The issues

[4] Three issues arise in these appeals, two from the review and one from the appeal. The first is whether the DPP was entitled to invoke s 310(1) of the CPA for the purpose of challenging the decision by the extradition magistrate that Mr Kouwenhoven was not liable to be

[3] *Director of Public Prosecutions, Western Cape v Kouwenhoven; Kouwenhoven v Director of Public Prosecutions, Western Cape and Others* [2021] 1 All SA 843 (WCC); 2021 (1) SACR 579 (WCC) (High Court judgment).

extradited. The second is whether, if he was, Mr Kouwenhoven was entitled to notice of the request and to have input into the magistrate's formulation of the stated case. The third, which is only reached if the first two are answered against Mr Kouwenhoven, is whether the magistrate's decision on the interpretation of s 3(1) of the Act was correct. Each will be dealt with in turn. An anterior issue that the entire process was vitiated because of the alleged invalidity of Mr Kouwenhoven's arrest has been disposed of by the dismissal of the appeal in the earlier proceedings.

Section 310(1) of the CPA

[5] As with all questions of statutory interpretation it is best to start with the provision in question. Section 310 of the CPA, provides that:

'When a lower court has in criminal proceedings given a decision in favour of the accused on any question of law, including an order made under section 85(2), the Attorney General . . . may require the judicial officer concerned to state a case for the consideration of the provincial or local division having jurisdiction, setting forth the question of law and his decision thereon and, if evidence has been heard, his findings of fact, insofar as they are material to the question of law.'

The language of the section is not obscure. It confers a right of appeal on the DPP where a magistrate has given a decision (a) in criminal proceedings; (b) in favour of an 'accused'; (c) on 'any question of law'. The magistrate's decision to discharge Mr Kouwenhoven was undoubtedly a decision based on a question of law. Was it given in 'criminal proceedings' and, for the purposes of those proceedings, was Mr Kouwenhoven an 'accused'.

Preparatory examinations

[6] In terms of s 9(2) of the Act the magistrate holding the enquiry shall proceed in the manner in which a preparatory examination is held in terms of the CPA in the case of a person charged with an offence in South

Africa. While preparatory examinations have now largely, if not entirely, fallen into disuse,[4] under s 54 of the Criminal Procedure Act 56 of 1955 (the CPA 1955), which was the applicable statute when the Act was passed in 1962, no person could be tried in a superior court unless they had first been committed for trial by a magistrate after conducting a preparatory examination. The procedure was for the person concerned to be brought before a magistrate, who would then 'enquire into the charge against the accused'.[5] No charge would be put to the accused and they would not be required to plead. However, if the magistrate at any stage regarded the charge to be groundless, they were entitled to discharge the accused.[6] If at the conclusion of the preparatory examination the magistrate was of the opinion that on all the evidence no sufficient case was made out to put the accused to a trial, the magistrate was obliged to discharge the accused.[7]

[7] Under the CPA 1955, where the magistrate discharged the accused at the end of a preparatory examination the charge could not be revived unless new evidence upon oath came to light.[8] However, if the discharge followed upon a decision by the magistrate on a point of law, that could be the subject of an appeal by way of a case stated by the magistrate under s 104 of the Magistrates' Courts Act 32 of 1944 (the MCA). The right of appeal followed from the fact that a preparatory examination was expressly included in the definition of 'criminal proceedings' in s 1 of the CPA 1955. Section 104 of the MCA provided that:

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[4] *Shabalala v Attorney-General, Transvaal* [1995] ZACC 12; 1996 (1) SA 725 (CC) para 18; Du Toit et al *Commentary on the Criminal Procedure Act* (Looseleaf) ch20-1 (RS 42, 2009)
[5] Section 60(1) of the CPA 1955.
[6] Section 68(3) of the CPA 1955.
[7] Section 68(1) of the CPA 1955.
[8] Section 68(2) of the CPA 1955.

'(1) When a magistrate's court has in any criminal proceedings given a decision in favour of the accused on any matter of law, the Attorney-General … may require the judicial officer concerned to state a case for the consideration of the court of appeal, setting forth the question of law and his decision thereon, and, if evidence has been heard, his findings of fact, in so far as they are material to the question of law.
(2) When such case has been stated, the Attorney-General …may appeal from that decision to the court of appeal referred to in subsection (1) of section *one hundred and three*.'

[8] The CPA 1955 was replaced by the CPA, which retained the preparatory examination in an amended form. The most important changes were that a charge was to be put to the accused who was obliged to plead to the charge.[9] To that extent the preparatory examination now marks the commencement of a criminal trial. Even without the definition of 'criminal proceedings' in s 1 of the CPA, there could be no doubt that a preparatory examination now constituted criminal proceedings. However, the procedure otherwise remained the same. At the end of a preparatory examination the magistrate would discharge the accused if of the opinion that no sufficient case had been made to put the accused on trial upon the charge, or any offence of which the accused could be convicted on that charge.[10] However, the DPP was empowered, notwithstanding the discharge, to arraign the accused for trial even in the absence of further evidence.[11]

[9] These changes did not do away with the right to appeal on a question of law from a magistrate's decision to discharge the accused. The CPA repealed s 104 of the MCA, but replaced it in substantially the same terms with s 310. The definition of 'criminal proceedings' in the

[9] Sections 130 and 131 of the CPA.
[10] Section 135 of the CPA.
[11] Section 139(2) of the CPA.

CPA continued to include a preparatory examination. Accordingly, the DPP's decision whether to challenge the accused's discharge by way of an appeal, or arraign them for trial, would depend on whether the discharge was on a clear-cut legal point that was likely to be decisive of the outcome of a prosecution.

[10] Two aspects of this right of appeal against decisions by magistrates in preparatory examinations are noteworthy. The first is that the right of appeal was confined to decisions adverse to the DPP on questions of law. Absent a right of appeal, the discharge of the accused on a question of law would preclude their being arraigned in a superior court on the charge in question. The magistrate's decision would then be decisive of their criminal liability, even though the charge was probably one falling outside the statutory jurisdiction of magistrates' courts.[12] The question of law would have been within the magistrate's jurisdiction, so the decision would not have been reviewable.[13] It would only have become potentially reviewable for error of law after the seminal decision in *Hira v Booysen*.[14] The right of appeal under s 104, and thereafter s 310(1), satisfied the obvious need for the prosecution authorities to be able to challenge such a decision. But the right of appeal was confined to issues of law. If the discharge was on the facts, further evidence had to be produced and a fresh preparatory examination held. The second point is that no right of appeal was given to the accused if the magistrate committed them for trial. The reason is obvious. The accused would be able to defend themselves on the facts in the course of the trial.

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[12] If it were within the magistrate's jurisdiction it is improbable that a preparatory examination would have been held.
[13] *Doyle v Shenker* 1915 AD 233; *Union Government (Minister of Mines and Industries) v Union Steel Corporation (South Africa) Ltd* 1928 AD 220; *South African Railways v Swanepoel* 1933 AD 370.
[14] *Hira v Booysen* 1992 (4) SA 69 (A).

[11] In summary, therefore, in 1962 when the Act was passed, a decision by a magistrate presiding over a preparatory examination to discharge an accused on a question of law was subject to a clear right of appeal by way of a case stated. The right originally vested in the Attorney-General. The repeal of the CPA 1955 and its replacement by the CPA did not alter this right in any way. It remained open to the Attorney-General, and is now open to the DPP, to challenge, by way of an appeal on a case stated, a magistrate's decision to discharge an accused at the end of a preparatory examination on the basis of a conclusion on a question of law.

Extradition enquiries

[12] Section 9(2) of the Act requires the magistrate to conduct the enquiry in the same manner as a preparatory examination. A preparatory examination under CPA 1955 and an extradition enquiry under the Act were extremely similar. Both were enquiries, not trials. Both were a necessary precursor to the person concerned being charged with a criminal offence – in the Supreme Court in the case of a preparatory examination and in a foreign court of competent jurisdiction in the case of an extradition enquiry. Both were conducted on the basis of sworn testimony and the person concerned had a right of legal representation, including the right to cross-examine witnesses and, if so advised, to give evidence on oath. Both could end in the discharge of the person brought before the enquiry. In both cases the person concerned could, if they had been arrested, be released on bail. The similarities were marked. The changes introduced by the CPA created differences between the two, but none that would affect the appealability of a decision in an extradition enquiry.

[13] An extradition enquiry is not deemed to be a preparatory examination. One cannot therefore extrapolate from the NDPP's right of appeal on a point of law under s 310 of the CPA in relation to a preparatory examination, that there must be a similar right of appeal in the case of a discharge at the end of an extradition enquiry. That will only be the case if extradition enquiries are criminal proceedings for the purposes of s 310 of the CPA. The marked similarity between the preparatory examination and the extradition enquiry is but one factor to be taken into account in considering that question.

[14] The CPA does not define criminal proceedings beyond saying that a preparatory examination is included. In *Swanepoel*[15] this court considered whether a preparatory examination concluded under the CPA 1955 constituted the same criminal proceedings as the subsequent trial after the accused's committal. The question arose in the context of the transitional provisions governing criminal proceedings commenced before the repeal of the CPA 1955 and its replacement with the CPA. Rumpff CJ said in regard to the definition of criminal proceedings that:[16]

Section 1 of Act 51 of 1977 provides that 'criminal proceedings' include a preparatory examination in terms of Chapter 20. It is thus clear that Act 51 of 1977 does not attempt to provide a definition of the term 'criminal proceedings' save to say that it also includes a preparatory examination. It would be impossible to give a precise definition of the term 'criminal proceedings' because when one looks at the Act, the words do not apply to only one specific type of criminal proceeding, but to different types of criminal proceedings.' (My translation.)

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[15] *S v Swanepoel* 1979 (1) SA 478 (A) at 488C-H.

[16] Ibid. The judgment is in Afrikaans and reads as follows:

'In art 1 van Wet 51 van 1977 word bepaal dat "strafregtelike verrigtinge" "ook 'n voorlopige ondersoek ingevolge Hoofstuk 20" beteken. Dit is dus duidelik dat Wet 51 van 1977 nie probeer om 'n omskrywing te gee van die term "strafregtelike verrigtinge" nie behalwe deur te sê dat dit ook 'n voorlopige ondersoek behels. Dit sou onmoontlik wees om 'n presiese omskrywing van die term "strafregelike verrigtinge" te gee omdat, indien na die Wet gekyk word, dié woorde nie net kan slaan op een bepaalde soort strafregtelike verrigting nie maar op verskillende soorte van strafregtelike verrigtinge.'

The court held that the preparatory examination and the trial were separate criminal proceedings and accordingly the latter was properly conducted in terms of the CPA and not the CPA 1955.

[15] Rumpff CJ did not identify the different types of criminal proceedings that he perceived in the CPA and the topic has not been explored subsequently in a context similar to the present case. A number of possibilities spring to mind, for example, an enquiry into the non-appearance of an accused in response to a summons under s 55 of the CPA;[17] a bail application; an enquiry into the failure of an accused on bail to appear at the trial or to return after an adjournment;[18] and an enquiry under s 205 of the CPA. These are all proceedings provided for in the CPA in connection with actual or potential criminal trials. But that does not mean that every provision of the CPA is applicable to each and every one of them. For example, a bail application has been held not to constitute criminal proceedings for the purposes of s 211 of the CPA dealing with the admissibility of evidence of previous convictions.[19]

[16] There are dicta in some cases where, in contrasting the proceeding before them with a criminal trial, courts have remarked that the proceedings before them were not criminal proceedings. For example, in *Heyman*[20] the court was concerned with two individuals who refused to give evidence, or to be sworn or give an affirmation. They had been sentenced to twelve months imprisonment and, on appeal contended that the proceedings were irregular because they had been refused the services of a lawyer. They also appealed against their sentences. Steyn CJ said that

[17] This was formerly not a criminal offence under s 309 of the CPA 1955 (see *R v Hlengwa* 1958 (4) SA 160 (N) at164B-165A), but now is. See s 67A of the CPA.
[18] Sections 67, 67A and 170 of the CPA.
[19] *S v Hlongwa* 1979 (4) SA 112 (D) at 114E-F.
[20] *S v Heyman and Another* 1966 (4) SA 598 (A).

the purpose of the section[21] was to place pressure on an unwilling witness to testify and added:

' Sec. 212 (1) does not in specific terms create an offence or require the presentation of a formal charge to which the witness has to plead, and the provision in sub-sec. (4) for an appeal against the sentence as if it were a sentence imposed in a criminal case clearly implies that an enquiry under this section does not constitute criminal proceedings.'

Section 212(4) conferred a right of appeal against sentence 'as if it was a sentence imposed in a criminal case', so it is apparent that Steyn CJ was not concerned with whether the proceedings were criminal proceedings as defined in CPA 1955, but with the different question of whether this was a criminal trial. This became explicit when he said thereafter that it was clear that the enquiry was not a criminal trial or a prelude to a criminal trial, but that the distinction was of a purely formal nature.[22]

[17] When a person subjected to a s 205 enquiry claimed the constitutional rights of an accused person under s 25 of the Interim Constitution, the Constitutional Court held, in reliance on *Heyman*, that they were not an accused person and therefore not entitled to invoke those rights. In an obiter dictum, Ackermann J said that the proceedings were not 'regarded as' criminal proceedings.[23] He repeated that when dealing with the committal of a witness refusing to answer questions at an insolvency enquiry under the Insolvency Act 24 of 1936.[24] Again, however, that was said by way of contrasting the proceedings with a criminal trial and the dictum appears to have been motivated by the fact

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[21] Section 212 of CPA 1955.

[22] *Heyman* op cit, fn 20, at 602E-603F. By contrast Rumpff JA in his judgment upheld the appellants' 'convictions and sentences', suggesting that he saw no difference between the proceedings and a conventional criminal trial.

[23] *Nel v Le Roux NO and Others* [1996] ZACC 6; 1996 (3) SA 562 (CC) para 11 and fn 17. In *De Lange v Smuts NO and Others* [1998] ZACC 6; 1998 (3) SA 785 (CC) para 149 O'Regan J said that s 205 formed 'part of the criminal justice system'.

[24] *De Lange v Smuts NO*, ibid, para 37.

that the refusal by the witness did not constitute a crime. This conclusion was reached even though the proceedings leading to the witness being committed were judicial proceedings.[25]

[18] I have considered these dicta for the sake of completeness as they were not relied on by Mr Kouwenhoven's counsel. An inquest has also been held not to be criminal proceedings.[26] In so holding, Preiss J said:

'… a proceeding such as an inquest, which is not a step in the prosecution of an accused person on a specific charge, is a far cry from criminal proceedings.'

There does not appear to be any further consideration of what, other than a criminal trial, may constitute criminal proceedings for the purposes of s 310, save for the decision in *Paz*.[27] That dealt with the same issue as this case and held that the DPP could resort to s 310 where an extradition enquiry ends with the discharge of the person concerned on a point of law. I will revert to the reasoning in due course. Counsel for Mr Kouwenhoven contended that it was wrong and should be overruled.

[19] Returning to textual questions, the two express references to extradition in the CPA are not of any assistance. Neither has any bearing on whether for the purposes of the appeal provisions of s 310 the extradition enquiry before a magistrate constitutes criminal proceedings. Under s 40(1)(*k*) a peace officer may arrest without warrant any person:

'who has been concerned in or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists that he has been concerned in any act committed outside the Republic which, if committed in the Republic, would have been punishable as an offence, and for which he is, under any

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[25] Ibid, para 80.
[26] *Wessels and Others v Additional Magistrate, Johannesburg, and Others* 1983 (1) SA 530 (T). But see the qualifications in *S v Ramaligela and Another* 1983 (2) SA 424 (V) at 429G-430H.
[27] *Director of Public Prosecutions v Paz and Another* [2000] 3 All SA 119 (W)(*Paz*).

law relating to extradition or fugitive offenders, liable to be arrested or detained in custody in the Republic'

An arrest under this provision may lead to a magistrate issuing a warrant for the arrested person's further detention under s 7(1) of the Act and the matter must then proceed to an enquiry within the scheme of the Act. Its purpose seems to be to empower a peace officer to secure that a person does not escape extradition by fleeing the country before the procedures under the Act can be followed. Take this case. A police officer received an Interpol Red Notice advising that Mr Kouwenhoven had been convicted of war crimes in the Netherlands and warning him to expect a request for Mr Kouwenhoven's extradition. Had that police officer, prior to receipt of the request, learned that Mr Kouwenhoven planned to flee the country, he could have been arrested without a warrant and taken before a magistrate to be dealt with under s 7 of the Act.

[20] Section 60(6) of the CPA is of even less assistance. It deals with bail and lists factors to be considered by a court in considering whether there is a likelihood that the accused, if released on bail, will attempt to evade his or her trial. One of these is whether the extradition of the accused could readily be effected if they fled across the borders of South Africa in order to evade trial. This is only concerned with whether South Africa would be able to extradite the person to face trial in this country, not with extradition from this country to another.

[21] The provisions of the Act are likewise of no assistance in regard to whether for the purposes of s 310 of the CPA the enquiry is a criminal proceeding. The two references to 'criminal proceedings'[28] clearly refer to criminal proceedings by way of a prosecution in South Africa. That does

[28] In ss 11(*b*)(i) and 20(*a*).

not assist in answering the pertinent question of whether the extradition enquiry itself is a criminal proceeding. The extradition enquiry provisions are self-contained in the Act and require no cross-reference to the CPA. It was not submitted that because they are not conducted under the CPA, but under a separate statute, that disqualifies them from being criminal proceedings for the purposes of s 310.

[22] Those sections mentioned in argument were unhelpful. The fact that s 9(2) says that the enquiry shall proceed in the manner of a preparatory examination identifies the procedure to be followed, not the nature of the proceedings, and more especially not whether it is a criminal proceeding in the same way as a preparatory examination is a criminal proceeding. But the fact that it proceeds in the same way as a preparatory examination is not inconsistent with it being a criminal proceeding.

[23] Counsel relied on s 13(4) of the Act dealing with the release on bail pending an appeal of someone after they have been held to be extraditable.[29] Stress was placed on the incorporation *mutatis mutandis* of certain provisions of the CPA dealing with bail, for which purpose references to the accused are deemed to refer to the person being released on bail. But that adds nothing to the fact that the relevant sections apply *mutatis mutandis*, that is, with the changes necessary to the context. The deeming is an example of a belt and braces approach to drafting a statute and nothing more. It has no effect on the issue before us.

[24] The last textual argument advanced on behalf of Mr Kouwenhoven was that s 13 provides for an appeal by the person sought to be extradited

[29] The provision was introduced to address the difficulties arising from the decision in *Ex parte Graham: In re United States of America v Graham* 1987 (1) SA 568 (T). See s 2(*b*) of Act 46 of 1987.

and no-one else.[30] This begs the question of whether it was necessary to do so. The response to the argument was that it was unnecessary to provide for such an appeal in the Act, because the right of appeal on questions of law already existed under s 310 of the CPA as it had under its predecessor, s 104 of the MCA. The converse argument, that appealed to the high court in *Paz*[31] and in this case, that it would be absurd for Parliament not to have provided for a right of appeal against a discharge on a legal issue at the end of an enquiry, is circular as it assumes that those who drafted the Act and Parliament considered the necessity for such an appeal. The inclusion of s 13 merely enables a person found to be extraditable at the end of an enquiry to challenge that decision on both the facts and the law without having to bring *habeas corpus* proceedings. It says nothing about the nature of the enquiry itself.

The nature of extradition proceedings

[25] In the absence of any direct textual indications of the position, resolving this issue requires a close examination of relevant context. The procedural similarities between a preparatory examination and an extradition enquiry have already been noted. To those must be added that an extradition enquiry is characterised by a number of features that are encountered in a criminal trial. It commences with the arrest of the accused. The arrested person must be brought before a court as soon as possible. They are then entitled to apply for bail. If admitted to bail their position is the same as any person awaiting trial. The proceedings continue with evidence being led by the DPP's representative, which is subject to cross-examination. The person whose extradition is sought may

[30] For present purposes I accept this although, if there were no other right of appeal, s 13(1) might be capable of an interpretation that it provided a right of appeal to the DPP as a party to the proceedings in terms of s 17 of the Act.
[31] *Paz*, op cit, fn 27 at 132 and High Court judgment para 115.

lead evidence. At the end of the enquiry they are either committed to prison pending the decision of the Minister on whether they should be extradited, or discharged. There are therefore substantial similarities between a conventional criminal trial and an extradition enquiry.

[26] These similarities caused Howie JA to say in *McCarthy*:[32]

'Extradition proceedings are, in substance, in the nature of criminal proceedings. The arrest, detention and committal provisions of the [Extradition] Act carry obvious implications adverse to the right to liberty, to the presumption of innocence which is basic to the criminal law and to any such right which the accused may have to be in this country and to remain here.'

This passage was cited by the Constitutional Court in *Harksen*[33] with the additional comment that:

'Extradition is in substance a criminal proceeding.'

[27] The justification for extradition was pithily articulated in the following way by Sachs J in *Quagliani*:[34]

'The Act furthers the criminal justice objectives of ensuring that people accused of crime are brought to trial and that those who have been convicted are duly punished.'

When criminals leave a country in order to escape the criminal law, extradition is an essential step in the criminal process in that State to secure their return to face trial and, if convicted, punishment. The connection between extradition and the enforcement of the criminal law is direct and close. The extradition enquiry is not directed at determining the guilt or innocence of the person concerned, but at an anterior

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[32] *S v McCarthy* 1995 (3) SA 731 (A) at 741G-H., relying on *S v Bagattini* 1975 (4) SA 252 (T) at 267H.

[33] *Harksen v President of the Republic of South Africa and Others* [2000] ZACC 29; 2000 (2) SA 825 (CC) para 30.

[34] *President of the Republic of South Africa v Quagliani*; *President of the Republic of South Africa and Others v Van Rooyen and Another*; *Goodwin v Director-General, Department of Justice and Constitutional Development and Others* [2009] ZACC 1; 2009 (2) SA 466 (CC) para 40.

question, namely, whether they should stand trial for their alleged crimes in the courts of the requesting country.[35]

[28] In the majority judgment in *McCarthy* Van Heerden JA explained that:[36]

'In general the reason why State A agrees in an extradition treaty to assist State B to enforce the criminal law of the latter in regard to crimes committed within its jurisdiction is precisely because State B accepts a reciprocal obligation. In construing legislation of State A applying to extradition treaties too much emphasis should therefore not be placed on the fact that in proceedings under such legislation State A is not enforcing its own criminal law but is assisting State B to enforce the latter's penal law.'

There seems to me to be little difference between enforcing one's own criminal law and enforcing the criminal law of another country when deciding whether extradition enquiries are criminal proceedings. The individual is an accused person in both. It is merely the identity of the prosecutor and the identity of the court that will try them that is different

[29] At the outset of the discussion whether the DPP was a litigant in extradition proceedings for the purpose of Rule 19 of the Constitutional Court Rules in *Robinson*,[37] Yacoob J said:

'There can be no doubt that extradition proceedings are sui generis and that there are fundamental differences between extradition proceedings and criminal proceedings. It can therefore not be gainsaid that the DPP is not a party to extradition proceedings in the same way in which it participates in criminal proceedings. The role of the state representative in criminal proceedings is different to that in extradition proceedings.'

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[35] *Geuking v President of the Republic of South Africa and Others* [2002] ZACC 29; 2003 (3) SA 34 (CC) paras 2 and 44.
[36] *S v McCarthy*, op cit, fn 32 at 748C-E. This was cited with approval in *Director of Public Prosecutions, Cape of Good Hope v Robinson* [2004] ZACC 22; 2005 (4) SA 1 (CC) para 36 (*Robinson*).
[37] Ibid, para 33.

This does not assist the argument for Mr Kouwenhoven. Yacoob J was contrasting extradition proceedings with a criminal trial. He was not concerned with the definition of criminal proceedings in the CPA.[38] That becomes clear later in the discussion when he cited with approval the passage from Van Heerden JA's judgment in *McCarthy* quoted in paragraph 28.

[30] These judicial pronouncements are all consistent with an extradition enquiry being different from a criminal trial. Properly analysed extradition enquiries, although a precursor to a criminal trial, are nonetheless appropriately characterised as criminal proceedings. As Wunsh J pointed out in *Paz*,[39] the House of Lords had considered[40] the identical question of whether extradition proceedings were a 'criminal cause or matter', when determining whether the dismissal of a *habeas corpus* petition was appealable to the Court of Appeal.[41] In the principal speech, Viscount Simon LC said:[42]

'As regards the right to appeal, it has been consistently held that there is no right of appeal from the refusal of the writ in extradition proceedings: *Ex p Woodhall*, or in proceedings under the Fugitive Offenders Act 1881: *R v Brixton Prison* (*Governor*), *Ex p Savarkar*. It will be observed that these decisions, which I accept as correct, involve the view that the matter in respect of which the accused is in custody may be "criminal" although he is not charged with a breach of our own criminal law; and (in the case of the Fugitive Offenders Act 1881) although the offence would not necessarily be a crime at all if committed here. *It is the nature and character of the*

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[38] Nor was Brand J in *Harksen v Director of Public Prosecutions, Cape and Another* 1999 (4) SA 1201 (C) paras 32-42.
[39] *Paz*, op cit, fn 27, at 118-119.
[40] In *Amand v Home Secretary* [1943] AC 147 (HL); [1942] 2 All ER 381 (HL) *(Amand*).
[41] In 1943 appeals in criminal causes or matters were governed by the Criminal Appeals Act 1907 and the Supreme Court of Judicature Act, 1925. The latter was replaced by the Administration of Justice Act, 1960 (8 & 9 Eliz 2. C.65). Under both statutes the Court of Appeal's jurisdiction was excluded in any criminal cause or matter. Under s 15(2) of the Administration of Justice Act no appeal lay from a decision of a single judge on a criminal application for *habeas corpus*. Similar provisions applied in 1943.
[42] *Amand*, op cit, fn 40 at 385. See to similar effect Lord Wright at 387-388.

proceeding in which habeas corpus is sought which provide the test. If the matter is one the direct outcome of which may be trial of the applicant and his possible punishment for an alleged offence by a court claiming jurisdiction to do so, the matter is criminal.' (Emphasis added.)

Mr Amand had been arrested in order to be handed over to the Dutch military authorities on a charge of desertion. His failed *habeas corpus* petition was held to have been a criminal cause or matter.

[31] Shortly after the decision in *Paz* the House of Lords again had cause to examine what constitutes a criminal cause or matter.[43] It was a case involving restraint orders granted under English legislation in support of a forfeiture order made by a United States court after the conviction of the accused in a criminal prosecution. Restraint orders were granted provisionally in the High Court, but subsequently discharged. On appeal to the Court of Appeal they were reinstated. On further appeal to the House of Lords the appellants contended that the orders had been discharged in a criminal cause or matter and, for that reason, the Court of Appeal was not entitled to hear an appeal against the order discharging them or reinstate them. The House rejected the argument and held that the forfeiture proceedings created a civil debt, even though the order arose out of a criminal trial.[44] Lord Hoffmann, who made the principal speech, explained that the passage quoted above from Viscount Simon's speech did not mean that every order made in the course of a criminal trial would be made in a criminal cause or matter. The emphasis lay on the nature

[43] *United States Government v Montgomery (Montgomery, third party)* [2001] 1 All ER 815 (HL). The more recent decision in *R (on the application of Belhaj and another) v Director of Public Prosecutions and Another* [2018] UKSC 33; [2018] 4 All ER 561 (SC) at paras17-18 (Lord Sumption) and 52 (Lord Mance), affirms the approach in the earlier cases.

[44] The position is the same under ss 13 and 37 of the Prevention of Organised Crime Act 121 of 1998.

and character of the proceedings and the final sentence from that passage was merely an illustration of the principle.[45]

The statutory history

[32] Where the statutory picture has altered over time, it is helpful to examine the history in order to contextualise the current state of the law.[46] One can conveniently start in 1944 with the MCA containing s 104 and the right of appeal by way of case stated in criminal proceedings. At that time our law governing extradition was to be found in two English statutes, namely, the British Extradition Act[47] as amended up to 1906 and the British Fugitive Offenders Act.[48] These dealt respectively with extradition between Britain and her colonies on the one hand, and foreign states on the other, and extradition between the United Kingdom and her colonies and possessions *inter se*.

[33] Under the BEA the procedure leading to the surrender of a fugitive criminal was that they should first be arrested on a warrant issued by a police magistrate or justice of the peace pursuant to an order of the Secretary of State or on evidence provided to the magistrate or justice.[49] They would then be brought before a magistrate who would enquire into the case in the same manner as if the prisoner had been brought before the court charged with an indictable offence committed in England. If the evidence related to an extraditable crime, not of a political character, and would have justified the committal of the prisoner for trial for that offence if committed in England, the magistrate would commit the

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[45] *Montgomery*, op cit, fn 44, paras 15 to 19.
[46] *Santam Insurance Ltd v Taylor* 1985 (1) SA 527 (A) at 526I-527C.
[47] British Extradition Act, 1870 (33 & 34 Vict. C52) as amended up to 1906 (the BEA).
[48] British Fugitive Offenders Act, 1881 (44 & 45 Vict. C 69) (the FOA).
[49] BEA, s 8.

prisoner to prison, but otherwise discharge him or her.[50] The magistrate would then send a certificate of committal to the Secretary of State who would determine whether the person should be extradited.[51]

[34] It is apparent that the provisions of ss 5, 8, 9, 10 and 11 of the Act were modelled upon the provisions of the BEA, which they replaced. The committal provisions of the BEA were replaced by the preparatory examination provisions of the various Criminal Procedure Acts in South Africa.[52] When one turns to the FOA the procedures were more direct and in line with those that apply in relation to associated states under the Act. As we are not concerned with an extradition at the instance of an associated state, it is unnecessary to set out the parallels. In effect the Act, which came into effect shortly after South Africa was declared a republic, replaced the old imperial statutes with a domestic statute to substantially the same effect. There was in existence a functioning system of extradition and extradition agreements and there was no reason to make major alterations to it. All that was required was to repatriate the extradition system by enacting domestic legislation.

[35] Reverting to the BEA, if a magistrate committed a person to prison after an enquiry, they were obliged to inform them of their right to apply for a writ of *habeas corpus*.[53] And, as we saw in the previous section of this judgment, the English courts have consistently held that an unsuccessful *habeas corpus* petition from a committal in extradition proceedings is not appealable to the Court of Appeal, because extradition proceedings are a criminal cause or matter. When the BEA and the FOA

[50] BEA, ss 9 and 10.
[51] BEA, ss 10 and 11.
[52] The Acts of 1926, 1955 and 1977.
[53] BEA, s 11.

became part of South African law, prior to 1910 and on Union,[54] it had been authoritatively held that an extradition enquiry under these statutes was a criminal cause or matter.

[36] That raises the question whether a South African court would have been bound to hold likewise if the question whether extradition proceedings were criminal proceedings had been raised in this country prior to 1962 and the replacement of these United Kingdom statutes by the Act. That question was not argued before us and I would be hesitant to express a final view on it without the benefit of full argument.[55] It suffices, I think, to say that the authorities to which reference has been made in the previous section make it clear that had that question arisen between 1944 and 1950, before appeals to the Privy Council were abolished,[56] it would have been held that an extradition enquiry was a criminal proceeding. Such a conclusion meant that if a person had been discharged on a point of law at the end of an extradition enquiry, the magistrate could have been required to state a case for appeal in terms of s 104 of the MCA.

[37] There is nothing in the subsequent repeal of the BEA and FOA and their replacement by the Act, or in the repeal of s 104 of the MCA and its re-enactment as s 310 of the CPA, to suggest that any right of appeal vested in the Attorney General prior to 1962, arising from the discharge

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[54] By the South Africa Act, 1909 (9 Edw VII. C 9). Section 135 preserved all colonial laws in force after union.
[55] C/f the decisions in *Van der Linde v Calitz* 1967 (2) SA 239 (A) at 249D-251F and *Transol Bunker NV v MV Andrico Unity and Others: Grecian-Mar SRL v MV Andrico Unity and Others* 1989 (4) SA 325 (AD) at 339A-340F.
[56] By the Privy Council Appeals Act 16 of 1950.

on a point of law of the person brought before an extradition enquiry, was to be removed. Such repeals by implication are not lightly inferred. [57]

Conclusion

[38] Drawing all these threads together I conclude that an extradition enquiry is a criminal proceeding for the purposes of s 310 of the CPA. I agree with Viscount Simon LC and Lord Hoffmann that it is the nature and character of the proceedings that determines whether they are criminal proceedings. An extradition enquiry shares many common features with criminal trials. The procedural model in the United Kingdom was committal proceedings and, in this country, it was the preparatory examination. Extradition enquiries under the pre-1962 legislation were criminal proceedings and there was a right of appeal against discharges on points of law under s 104. There is no indication that the Act removed this right.

[39] Viscount Simon's example seems apposite in this context and is worth repeating:

'*If the matter is one the direct outcome of which may be trial of the applicant and his possible punishment for an alleged offence by a court claiming jurisdiction to do so, the matter is criminal.*'

That is similar to a suggested description of criminal proceedings put to counsel in the course of the hearing, namely that they are proceedings directed at securing the presence of a person before a court of competent jurisdiction in order for it to be determined whether they were guilty according to law and for the imposition of any sanction due upon conviction. Extradition proceedings undoubtedly fall within this

[57] *Minister of Justice and Constitutional Development and others v South African Litigation Centre and Others* [2016] ZASCA 17; 2016 (3) SA 317 (SCA) para 102.

description.[58] They are criminal proceedings, but of a very special kind.[59] Their aim in this case is to have Mr Kouwenhoven brought back before the Dutch courts in order to be compelled to serve his sentence.

[40] For those reasons the decision by the magistrate was appealable in terms of s 310 of the CPA and Mr Kouwenhoven's appeal on this point must fail. That is a satisfactory conclusion, as otherwise a wrong decision by a magistrate on a matter of law, resulting in the person sought to be extradited being discharged, could only be remedied on review under the principle of legality, which might create its own problems, not least considerable delay in the extradition process. Instead, the DPP aggrieved by the magistrate's decision on a question of law can challenge it by way of the case stated procedure. That also removes what would otherwise be an anomaly flowing from the right of appeal afforded under s 13 of the Act to the person whose extradition is sought. If their committal is challenged on the basis that the magistrate erred in law, the DPP is entitled to appear and defend that decision. If the appeal goes against the DPP, they can pursue an appeal before this court and potentially the Constitutional Court to argue the same point of law. They can equally resist further appeals challenging the magistrate's decision. It would be incongruous if in the converse situation the DPP could only challenge the magistrate's decision by way of a review.

Procedure for stating a case

[41] The magistrate delivered her decision discharging Mr Kouwenhoven on 21 February 2020 and on 5 March 2020 the DPP delivered a request that she state a case on certain questions of law. The

[58] *R v Governor of Brixton Prison, ex p Levin* [1997] 3 All ER 289 (HL).
[59] Ibid at 289.

magistrate eventually sent a draft stated case to the DPP on 9 July 2020 and after receiving some representations delivered a signed stated case to the DPP on 10 July 2020. Pursuant to that stated case the DPP filed a notice of appeal in terms of s 311 of the CPA and served it upon Mr Kouwenhoven's representatives. Neither they, nor their client had been aware that the DPP intended to do this nor were they afforded any opportunity to participate in the process of preparing the stated case.

[42] Mr Kouwenhoven contended that he had a right to be informed that the DPP had requested the magistrate to state a case and to make representations on how that case should be stated. He claimed that he had those rights in consequence of his right to a fair trial under s 35 of the Constitution, alternatively his right to a fair public hearing under s 34 of the Constitution, alternatively the principles of natural justice and the right to be heard. He based this upon the proposition that ex parte communication between the representatives of one party and a judicial officer performing a judicial function is improper, and that a party to judicial proceedings must be permitted to make representations before a judicial officer exercises a judicial power.

[43] The DPP is entitled under s 310(1), which is quoted in paragraph 5 of this judgment, to 'require' the magistrate to state a case for the consideration of the appeal court, with a view to an appeal on the question of law that has led the magistrate to decide the case in favour of the accused. The process to be followed in preparing the stated case is set out in rules 67(11) to (13) of the magistrates' courts rules. These provide as follows:

'(11) A director of public prosecutions or other prosecutor who contemplates an appeal under section 310 of the Criminal Procedure Act, 1977, shall, within 20 days

after the conclusion of the criminal proceedings, in writing request the judicial officer to state a case.

(12)(*a*) Upon receipt of the request referred to in sub-rule (11), the registrar or clerk of the court shall prepare a copy of the record of the case, including a transcript thereof if it was recorded in accordance with the provisions of rule 66 (1), and then place the record before the judicial officer who shall within 15 days thereafter furnish a stated case to the registrar or clerk of the court who shall transmit a copy thereof to the director of public prosecutions or other prosecutor, as the case may be.

(*b*) The stated case contemplated in paragraph (*a*) shall be divided into paragraphs numbered consecutively and shall be arranged in the following order—

(i) the judicial officer's findings of fact in so far as they are material to the questions of law on which decision in favour of the appellant was given;

(ii) questions of law; and

(iii) the judicial officer's decision on such questions and his or her reasons therefor.

(13) The director of public prosecutions or other prosecutor may, within 15 days after the receipt by him or her of the stated case, deliver notice of appeal against the decision on questions of law.'

[44] The rules reflect the fact that the DPP takes the initiative in asking the magistrate to state a case. The notice to the magistrate must set out the questions of law that the DPP wishes to form part of the case. Otherwise the magistrate would not know what they were. On receipt of the DPP's notice the clerk of the court must prepare a copy of the record and place it before the magistrate, who *shall* within 15 days thereafter furnish a stated case to the clerk for transmission to the DPP. The magistrate's role is to formulate the material findings of fact on which the questions of law were decided. This is akin to preparing a judgment. Neither the DPP nor the accused plays any part in the formulation of those findings of fact. That is entirely a matter for the magistrate. The court on appeal is not bound by

those facts, although they will usually be regarded as correct.[60] The case stated must include the questions of law. Otherwise the appeal court cannot know that the facts stated were those on which the question of law was determined. The stated case stands as a statement of the legal issues to be canvassed on appeal and the facts relevant to those issues. If the questions of law are omitted from the stated case, the problem cannot be overcome by setting out questions in the notice of appeal.[61] The reason is that the appeal court cannot then know whether the factual findings in the stated case are the findings the magistrate made in relation to the question or questions of law.

[45] The language of s 310(1) does not suggest that the magistrate has a discretion either to state a case or to refuse to do so, or to determine the terms of the questions of law that the DPP wishes to have stated.[62] The purpose of stating a case is to enable the DPP to decide whether to appeal on a question of law. The questions of law are determined by the DPP. Otherwise, the peculiar situation could arise where the questions of law in the stated case did not reflect the issues that the DPP wished to argue on appeal. If the magistrate refused to state a case, because they thought the suggested questions were not questions of law, or thought that a different legal issue had been decided, there is no provision entitling the DPP to appeal against that decision. Contrast this with a refusal by a judge to reserve a question of law under s 319(1) of the CPA, or to reserve the question the DPP wishes to have reserved. That is appealable under

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[60] *Attorney-General, Transvaal v Flats Milling Company (Pty) Ltd and Others* 1958 (3) SA 360 (A).
[61] *S v Saib* 1975 (3) SA 994 (N) at 995G-H. It was in that context that Miller J said that: 'It is not for the Attorney-General himself to state the question of law which the Court of appeal is to consider; that question must be set forth in the case stated by the magistrate.' See *Attorney-General, Transvaal v Moores (SA) (Pty) Ltd* 1957 (1) SA 190 (A) at 195G-H.
[62] I express no view on the extent to which the magistrate may amend the proposed questions in order to express them more clearly, whilst ensuring that they remain the questions that the DPP wants to raise.

s 319(5). Section 310 has no equivalent. The obvious reason is because the magistrate does not have any discretion in that regard[63] and is not responsible for formulating the questions of law.

[46] The accused, or in this case a person whose extradition is being sought, has no role to play in the formulation of the question to be reserved. If the decision had been adverse to Mr Kouwenhoven, the DPP could not have claimed a right to participate in the formulation of his grounds of appeal under s 13 of the Act. This has nothing to do with fairness to the other party. It has to do with the rights of a disappointed litigant wishing to appeal. Where they are entitled to do so, they are also entitled to formulate the grounds of their appeal in terms they choose, not terms suggested by their opponent, or dictated by the court whose decision will be the subject of the appeal. This is so with any litigant formulating their grounds of appeal including the DPP. Neither the court against whose decision the appeal lies, nor the other party, decides what is to be argued. Section 310 gives the DPP an untrammelled right to require a case to be stated on a question of law and thereafter to appeal.

[47] When the DPP invokes s 310 there is no basis for the accused to receive notice or have any input in the preparation of the stated case. They may believe that the question is not a question of law – a matter of some difficulty[64] – and may argue successfully on appeal that it is not.[65] They may contend, as indeed Mr Kouwenhoven has contended, that an appeal under s 310 is not available in extradition enquiries. As a reason why he was entitled to notice and to be heard on the formulation of the

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[63] The contrary conclusion in *S v Kameli* [1997] 3 All SA 230 (Ck) at 238-239 is incorrect.
[64] *Magmoed v Janse van Rensburg and others* 1993 (1) SACR 67 (A) at 93B-95C.
[65] *Director of Public Prosecutions, KwaZulu-Natal v Ramdass* [2019] ZASCA 23; 2019 (20 SACR 1 (SCA).

stated case, Mr Kouwenhoven claimed in his founding affidavit that the manner in which the case was formulated meant that he could not raise the two arguments on which the magistrate held against him. These were that that the State had failed to prove that the Netherlands was a party to an extradition treaty with South Africa and that the required documents in terms of Article 2(1) read with Article 12 of the European Convention on Extradition were not before the enquiry.

[48] That contention, advanced on legal advice, was incorrect. If the magistrate's decision had to be upheld on a different legal ground emerging from the record, there was nothing to prevent his legal representatives advancing that ground. As Ogilvie-Thompson AJA said in *Flats Milling*:[66]

'*Port's* case was somewhat unusual in that it was there claimed that the accused was entitled to an acquittal upon legal grounds other than those embraced in the 'question of law' upon which the magistrate had given a decision in accused's favour. The legal grounds so sought to be advanced before the Court of appeal had not been the subject of decision by the magistrate, and it is not entirely clear from the report whether such legal grounds were apparent from the stated case. In circumstances such as these, the Court of appeal must necessarily exercise its discretion having due regard to the balance of convenience, the preparedness of counsel to argue the additional questions of law, and suchlike practical considerations. Subject to the considerations just mentioned however, *if the circumstances reveal that the accused is entitled to be acquitted on some question of law other than the one decided in his favour by the magistrate and appealed against by the Attorney-General, the latter question is, so far as concerns the conviction or acquittal of the accused, entirely academic and, as such, the Court of appeal is not obliged by the provisions of sec. 104 to give a decision upon it.*' (Emphasis added.)

The court also held that if an answer to the question of law would not result in a different outcome, the appeal would be struck from the roll. If

[66] Op cit, fn 59 at 374D-E, with reference to *Attorney-General v Port* 1938 TPD 208 at 212.

on the facts the decision in favour of the accused would remain the same, the court would not entertain the appeal on questions of law. There is nothing unusual about this. It has always been permissible to defend a favourable judgment on grounds other than those on which the litigant achieved success in the lower court.[67] Had the legal position been correctly appreciated and the additional points argued on behalf of Mr Kouwenhoven, as should have been the case, the procedural problems to which I will advert at the end of this judgment would not have arisen.

[49] Once the case has been stated the DPP has an opportunity to reflect, in the light of the magistrate's factual findings, whether to proceed to lodge an appeal in relation to the question so stated. Until then there is no appeal before any court. The magistrate's findings of fact may be such that it is apparent that the accused would have been acquitted even if the point of law were to be decided in favour of the DPP. In that event the DPP will reconsider whether to appeal because the question of law will be entirely academic and the appeal court will not determine it.[68] If the DPP decides to proceed with the appeal, in terms of s 309(2) of the CPA the appeal is noted and prosecuted in accordance with the rules of court. In terms of Uniform Rule 51 (3) the DPP is responsible for ensuring that all copies of the record are properly before the court. In practical terms therefore there is no difficulty in the accused advancing arguments other than merely defending the decision of the magistrate.

[50] In the result there was no merit in this point and it was rightly rejected by the high court. Taken together with the conclusion on the

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[67] *Municipal Council of Bulawayo v Bulawayo Waterworks Ltd* 1915 AD 611 at 625 and 631-2; *Sentrale Kusmis Korporasie (Bpk) v NKP Kunsmisverspreiders (Edms) Bpk* 1970 (3) SA 367 (A) at 395F-396A.

[68] *Flats Milling*, op cit, fn 60, at 373A-374G.

point of appealability under s 310, the result is that the appeal against the dismissal of Mr Kouwenhoven's review application must fail.

Section 3(1) of the Extradition Act

[51] This section is headed 'Persons liable to be extradited' and reads as follows:

'Any person accused or convicted of an offence included in an extradition agreement and committed within the jurisdiction of a foreign State a party to such agreement, shall, subject to the provisions of this Act, be liable to be surrendered to such State in accordance with the terms of such agreement, whether or not the offence was committed before or after the commencement of this Act or before or after the date upon which the agreement comes into operation and whether or not a court in the Republic has jurisdiction to try such person for such offence'

Mr Kouwenhoven argued that the acts alleged to constitute the crimes of which he was convicted by the Dutch court were all committed in Liberia and were therefore not committed 'within the jurisdiction' of the Netherlands. Accordingly, he submitted that he was not liable to be extradited to the Netherlands in relation to such crimes. The magistrate upheld the point leading to his discharge. The high court reversed the magistrate.

[52] The DPP argued that the magistrate's approach gave too narrow a meaning to the expression 'within the jurisdiction', by confining it to the territorial area of a state's jurisdiction. Jurisdiction is a legal concept, being the power that a court has to hear and decide cases brought before it.[69] That power is not confined to the physical area within which a state exercises jurisdiction, but extends to those matters and persons in relation

[69] *Wright v Stuttaford* 1929 EDL 10 at 42 cites Roman Dutch authority for the proposition that jurisdiction is: '… a lawful power to decide something in a case, or to adjudicate upon a case, and to give effect to the judgment, that is, to have the power to compel the person condemned to make satisfaction'

to which the courts of that state are entitled to adjudicate cases. A crime committed 'within the jurisdiction' of a state is therefore a crime that, under the domestic laws of that state, its courts are empowered to try and either acquit, or convict and sanction, the accused.

[53] Mr Kouwenhoven's primary argument was that the second construction was not open on the language of the section read in context. The magistrate appears to have understood the submission to be that on every occasion where reference is made in the Act to matters 'within the jurisdiction' of the requesting state it is clearly used in the narrow sense of 'within the territorial jurisdiction'. The argument in this court was more nuanced. It was that this was the preferred grammatical interpretation, and was supported by the Afrikaans text, which throughout uses the expression 'regsgebied' as the equivalent of 'jurisdiction'.

[54] Section 3(1) deals with persons liable to be extradited under an extradition agreement. The conclusion of such agreements is dealt with in s 2(1). They read as follows:

'2(1) The President may, on such conditions as he or she may deem fit, but subject to the provisions of this Act—

(*a*) enter into an agreement with any foreign State, other than a designated State, providing for the surrender on a reciprocal basis of persons accused or convicted of the commission within the jurisdiction of the Republic or such State or any territory under the sovereignty or protection of such State, of an extraditable offence or offences specified in such agreement …

3(1) Any person accused or convicted of an offence included in an extradition agreement and committed within the jurisdiction of a foreign State a party to such agreement, shall, subject to the provisions of this Act, be liable to be surrendered to such State in accordance with the terms of such agreement, whether or not the offence was committed before or after the commencement of this Act or before or after the

date upon which the agreement comes into operation and whether or not a court in the Republic has jurisdiction to try such person for such offence."

[55] Both sections use the expression 'committed within the jurisdiction' to identify the crimes that may give rise to a person's extradition and that may form the basis for an extradition agreement. It is convenient to start with that expression in s 2(1), as the existence of a lawfully concluded extradition agreement forms the basis for the extradition in this case. If Mr Kouwenhoven's contention is correct then some at least of the provisions of that extradition agreement provide for extradition in circumstances not permitted by the Act.[70]

[56] The construction of the phrase 'within the jurisdiction' in s 2(1) governs its construction elsewhere in the Act. One portion of s 2(1), not found in s 3(1), was relied on in argument as affecting the interpretation of the contentious words. For the sake of coherence in the narrative it is therefore preferable to address s 2(1) at the outset, knowing that the conclusion in that regard will resolve the issue of the scope of s 3(1). The question to be determined is what is meant by saying that a crime was committed 'within the jurisdiction' of the requesting state. The relative clause 'within the jurisdiction' is an adverbial clause relating to the commission of the extraditable offence. It is not an adjectival clause qualifying the words 'accused or convicted'. The concern is therefore with the commission of the offence and particularly with the acts constituting the crime. Do the words relate to the place where those acts were committed or the power of the courts of the requesting country to adjudicate their criminality in accordance with its domestic laws?

[70] The point is canvassed in detail in paras 15 to 19 of the High Court's judgment.

[57] The words 'within the jurisdiction' are capable of being construed as restricted to the territorial jurisdiction of a state, but limiting them in that way gives rise to difficulties. The first is the obvious one that this purpose would have been achieved more clearly and directly by using the word 'territory' instead of the word 'jurisdiction'. There would then be no doubt about the meaning. That was the case with the treaty considered by this court in *Devoy*.[71] It referred to crimes committed 'within the territory'. For that reason this court held that extradition on a count alleging a conspiracy outside the territory of Malawi could not be ordered.[72] Why then use the expression 'within the jurisdiction' which introduced a legal concept, unless it was that legal concept of the power of courts to deal with criminal acts that was being referred to?

[58] The second problem arises in relation to crimes committed on the high seas and outside the jurisdiction of any nation state. These are quintessentially crimes that are committed extra-territorially and crimes which may give rise to a need to extradite the offender from a foreign country where they have taken refuge. I have in mind not only the obvious example of piracy, but also crimes committed on board vessels while at sea. Piracy is dealt with under the Geneva Convention on the High Seas,[73] to which South Africa acceded on 9 April 1963. Article 19 provides for universal jurisdiction in respect of seizure and prosecution of acts of piracy on the high seas. It reads as follows:

'On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be

[71] *S v Devoy* 19971 (3) SA 899 (A) at 910D-G.
[72] The treaty was then amended to read 'within the jurisdiction'. Proc 67 in GG 3424 of 24 March 1972, Article 1.
[73] 29 April 1958, UN Treaty Series (450) 82.

imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.'

There are currently sixty-three State parties to this Convention.[74]

[59] States exercise jurisdiction over other crimes committed at sea, or on board vessels, on at least two bases, namely, the law of the flag under which the vessel sails or citizenship of either the criminal or the victim. By way of illustration, s 372(1) of the Merchant Shipping Act 57 of 1951 provides for criminal jurisdiction over South African citizens for crimes committed on the high seas on board a South African registered vessel and in any foreign port, whether on a South African or a foreign registered vessel. It also provides for criminal jurisdiction over non-South African citizens for crimes committed on board South African registered vessels. It reads:

'(1) If any person—

(*a*) being a South African citizen, is charged with having committed an offence on board a South African ship on the high seas, or on board a South African ship in any port outside the Republic, or on board any ship (other than a South African ship) irrespective of whether he belongs to that ship or not; or

(*b*) not being a South African citizen is charged with having committed an offence on board a South African ship on the high seas,

and that person is found within the area of jurisdiction of any court in the Republic which would have had jurisdiction to try the offence if it had been committed within the said area, that court shall have jurisdiction to try the offence.'

If extradition is impermissible, unless the offence is committed within the territorial jurisdiction of the requesting state, it would be excluded in these instances. But that would undermine long-established practice in international law, which has always recognised the right of states to

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74 https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXI-2&chapter=21 accessed 13 September 2021.

exercise jurisdiction in cases such as these and where appropriate seek the extradition of offenders.

[60] A third problem relates to other instances where states exercise criminal jurisdiction in respect of extra-territorial activities. At the very least in South Africa this includes the crime of treason,[75] which is an extraditable offence, but may extend to other crimes. No fewer than five different principles are recognised in different jurisdictions in this regard. In summary they are the territorial, nationality, passive personality, protective and universality principles. Under the territorial theory nations claim jurisdiction over crimes committed within their borders. Under nationality they claim jurisdiction based on the nationality of the perpetrator.[76] Under passive personality they base liability on the nationality of the victims of the crime. The protective principle covers treason and any other crime particularly damaging to specific national interests. Universal jurisdiction deals with crimes like piracy, crimes against humanity, war crimes, torture and slavery.[77] Considerable difficulties arise in adhering to a strict territorial principle[78] and the result is that most, if not all, states sanction departures from it. We have not been referred to any rule of international law that outlaws extradition on the basis of such extended grounds of jurisdiction. It seems more likely that if the requesting state is claiming an exorbitant jurisdiction in the

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[75] *R v Holm; R v Pienaar* 1948 (1) SA 925 (A) read with the definition of an extraditable offence in s 1 of the Act. See also *S v Basson* [2005] ZACC 10; 2007 (3) SA 582 (CC) paras 223-225

[76] As does the United Kingdom in relation to murder committed by one of its citizens abroad. *Re Al-Fawaaz; Re Elderous and Others* [2001] UKHL 69; [2002] 1 All ER 545 (HL) (*Al-Fawaaz*) paras 102 and 137.

[77] G T Felkenes 'Extraterritorial criminal jurisdiction: its impact on criminal justice' (1993) 21 *Journal of Criminal Justice* 583-594.

[78] Rollin M Perkins 'The Territorial Principle in Criminal Law' (1971) 22 *Hastings Law Journal* 1155. The classic example is that of a shot being fired from one state across the boundary with another state and killing a person in the second state. Neither state could exercise jurisdiction on a purely territorial basis.

eyes of the state receiving the request, it will be refused at the political stage of the process.[79]

[61] The construction advanced on behalf of Mr Kouwenhoven would have the result that South Africa would be unable to conclude extradition agreements under which it could seek the extradition of anyone for piracy, or a South African citizen for committing a crime on board a South African registered vessel. A simple example illustrates the difficulty. A crew member of a fishing vessel kills another crew member while they are at sea. The vessel puts into a foreign port to obtain medical assistance for the victim, or to discharge the body for repatriation and burial. The port is in a state with which South Africa has an extradition agreement and the killer manages to flee the ship while in port. The crime would not have been committed within the territory of South Africa and could not on the suggested construction result in the killer's extradition. That would be a serious inroad into the scope of extradition and would be a surprising result, given that the legislature would presumably have been aware of the need to deal with such crimes when the Act was being drafted. Section 16 of the BEA dealt expressly with crimes committed at sea and the schedule to that Act listed four crimes that could only be committed on the high seas,[80] including piracy, assault, scuttling a vessel or mutiny. Section 33 of the FOA likewise dealt with crimes committed at sea. The problem could hardly have been overlooked.

[62] Conversely, if the physical acts constituting the crime occurred outside the territorial area of the requesting states, South Africa would be

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[79] *Al-Fawaaz*, op cit, fn 76, paras 95 and 148-150.

[80] Piracy by law of nations; Sinking or destroying a vessel at sea, or attempting or conspiring to do so; Assaults on board a ship on the high seas with intent to destroy life or to do grievous bodily harm and Revolt or conspiracy to revolt by two or more persons on board a ship on the high seas against the authority of the master.

unable to extradite individuals such as Mr Kouwenhoven, where requesting states were exercising criminal jurisdiction unconfined by the territorial principle. That would be so even in regard to crimes where our courts would exercise a similar extended jurisdiction. Examples of such an extended jurisdiction are to be found in s 6 of the Prevention and Combating of Torture of Persons Act 13 of 2013; s 5 of the Prevention and Combating of Corrupt Activities Act, 12 of 2004 and s 12 of the Prevention and Combating of Trafficking in Persons Act 7 of 2013. At a practical level and having regard to the recognition by the Constitutional Court of the reasons for extradition and the expanding reach of international criminal activities, these are powerful contextual reasons for not accepting the construction put forward on Mr Kouwenhoven's behalf.

[63] Mr Bishop, who argued this part of the appeal on behalf of Mr Kouwenhoven, referred us to the additional words 'or any territory under the sovereignty or protection of such State' appearing in s 2(1) after the words 'within the jurisdiction of the Republic or such State'. He submitted that this was an express reference to a physical territory and that it pointed towards a similar construction of the reference to 'within the jurisdiction'. In my view it points in the opposite direction, because of the contrast between the references to 'the jurisdiction' and 'territory'. The purpose of these additional words was to enable an extradition treaty to cover territories that were not separate sovereign states, but subordinate to another sovereign state. When the Act was passed there were very real examples of such territories. On South Africa's border there was present day Botswana[81] and elsewhere, mainly in Africa, there were other British protectorates where questions of extradition prior to 1962 would have

[81] Then and until independence in 1996 the Bechuanaland Protectorate. A list of British Protectorates will be found at https://en.wikipedia.org/wiki/Protectorate.

fallen under the FOA. As these were not sovereign states South Africa could not conclude extradition agreements with them, but could secure extradition to and from them by way of this extension. However, as they were not sovereign states no question of their exercising extra-territorial jurisdiction would arise. The provision is now largely academic.

[64] There is no need for me to dwell on the other provisions where the expression 'within the jurisdiction' occurs, [82] as they plainly bear the same meaning as the expression does in s 2(1) of the Act. It was not suggested otherwise. The next reference to jurisdiction is to be found in s 9(1), which refers to the person detained under a warrant of arrest or further detention being brought before a magistrate 'in whose area of jurisdiction' that person has been arrested. The addition of the words 'area of' before 'jurisdiction' make it clear that this is only concerned with the specific territorial area over which the magistrate exercises jurisdiction. Interestingly, given the stress that counsel placed on this in argument, the Afrikaans translation of 'area of jurisdction' is 'regsgebied', which is the same as the translation of 'jurisdiction' in 'within the jurisdiction'. The English and Afrikaans texts of statutes were signed alternately, so that the signature is no indication of the language in which the statute was first drafted. If it was in English, there was a clear distinction between 'area of jurisdiction' – a territorial reference – and 'within the jurisdiction' that was not recognised in the Afrikaans version. If it was drafted in Afrikaans the differences when translated into English are marked and suggest that a difference of meaning was intended. For those reasons the reliance on the Afrikaans text was unhelpful.

[82] Sections 3(1), (2) and (3); 5(1)*b*); and 7(2).

[65] Mr Bishop's strongest linguistic argument was based on s 9(4) of the Act,[83] which reads:

'At any enquiry relating to a person alleged to have committed an offence—

(*a*) in a foreign State other than an associated State, the provisions of section 10 shall apply;

(*b*) in an associated State—

(i) the provisions of section 10 shall apply in the case of a request for extradition contemplated in section 4 (1); and

(ii) the provisions of section 12 shall apply in any other case.'

The submission was that committing an offence referred to the criminal acts constituting the crime (the *actus reus*). The reference to it being committed 'in' either a foreign state or an associated state could only refer to the place where those acts had been performed. It was submitted that this made it plain that elsewhere the Act was concerned with the territory of the requesting state and not its laws governing which crimes its courts could lawfully entertain.

[66] There is force in this submission, but when viewed in context it is incorrect. Our cases have stressed that in the first instance context encompasses all of the other provisions of the statute[84] and secondly that, to the extent possible without unduly straining the words, one endeavours to construe the different provisions of a statute in harmony with one another. For the reasons already canvassed the other provisions of the Act, when referring to crimes committed within the jurisdiction of a foreign state, are more consonant with that being a reference to the jurisdictional authority of those countries, rather than being restricted to their territorial jurisdiction. That is supported by the contextual factors to which I have alluded.

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[83] Supported by the headings to ss 10 and 12 referring to offences 'committed in' foreign states or associated states.

[84] *Hoban v ABSA Bank Ltd t/a United Bank and Others* 1999 (2) SA 1036 (SCA) para 20.

[67] Section 9(4) does not alter this. Its purpose is not to determine which offences will be extraditable and may be encompassed by an extradition agreement. It performs the more mundane task of distributing extradition matters between the procedures under ss 10 and 12 of the Act. Cases involving foreign states are dealt with under s 10 and those involving associated states are dealt with under the different procedure in s 12. In the case of an associated state the role of magistrates, which is derived from the procedure under the FOA, is far greater, because they make the decision whether the person brought before them is to be surrendered. The role of the magistrate under s 10 is more narrowly focussed on determining whether the person is extraditable, but the decision whether they will be extradited then lies with the Minister. Giving a provision directed at this administrative task, the importance suggested is reminiscent of the tail wagging the dog. Expressed differently, the argument gives greater weight to the preposition 'in' than it can safely bear.

[68] In my view there is no difficulty, linguistic or otherwise, in understanding the references to offences being committed 'in' either a foreign state or an associated state, as being references to the offences being committed in those states, if, in accordance with the law of those states, they are criminal offences triable by that state's courts. That is where the offence is committed, because it is by the laws of that state that the crime is committed. Mr Kouwenhoven has not been convicted in the Netherlands of a crime committed elsewhere. He has been convicted by a Dutch court of a crime under Dutch law. It is in the jurisdiction of the Kingdom of the Netherlands that his crime was committed, notwithstanding that his actions occurred elsewhere.

[69] In the various sections of the Act in which it appears, I consider the expression 'within the jurisdiction' to mean that the alleged crime is one in relation to which the requesting state is entitled to exercise its criminal jurisdiction to prosecute the person whose extradition is requested, determine whether they are guilty and, if so, to impose a sanction. It is not constrained by issues of territoriality or considerations of whether the conduct alleged to constitute the crime occurred within or outside the territorial boundaries of the requesting state. So long as its courts are vested with authority to determine the question of criminality it is within the requesting state's jurisdiction for the purposes of these sections. To the extent that *Carolissen*[85] proceeded on the basis that territorial jurisdiction was required it was incorrectly decided.

[70] I have reached that conclusion by way of a conventional exercise in statutory interpretation. It is reinforced by the decision of the House of Lords in *Al-Fawaaz*.[86] That involved the extradition of three people to the United States arising out of their conduct outside that country's territory. There was no dispute that if extradited the United States courts were entitled under their law to exercise criminal jurisdiction over them. The point taken in resisting extradition was that the allegedly criminal conduct had not occurred within the jurisdiction of the United States, because it had not occurred in its territory.

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[85] *Carolissen v Director of Public Prosecutions* [2016] 3 All SA 56 (WCC) paras 49 and 50. I do not think that the decisions in *S v Meiring and Another* [1992] 4 All SA 120 (W) at 123-124 and *Abel v Minister of Justice* 2001 (1) SA 1230 (C) para 24 take the matter any further or lend support to Mr Kouwenhoven's case. In neither case was the court faced with a situation comparable to the present one. On the approach in this judgment all three cases were correctly decided on the facts.

[86] Op cit, fn 76.

[71] The issue arose because in order for the extradition of the three to be ordered they had to be 'fugitive criminals' in terms of the definition of that expression in s 26 of the BEA and the offences with which they were to be charged had to be 'extradition crimes' within the definition of that expression in the same section of the BEA. These provisions were part of our law prior to 1962 and the enactment of the Act. In relevant part the two definitions read as follows:

'The term 'fugitive criminal' means any person accused or convicted of an extradition crime committed within the jurisdiction of a foreign state …

The term 'extradition crime' means a crime which, if committed in England or within English jurisdiction, would be one of the crimes described in the first schedule to this Act.'

As already mentioned among the crimes in the first schedule to the BEA were four offences that would ordinarily be committed outside the territorial jurisdiction of England.

[72] The unanimous view of their Lordships, each of whom gave a separate speech, was that the meaning of the words 'within the jurisdiction' in the definition of 'fugitive criminal' was not confined to the territorial jurisdiction of the requesting state, but included its extra-territorial jurisdiction. My reasons set out above overlap in many respects with those advanced by their Lordships in their speeches, but I am mindful that the language of the definition of 'extradition crime' had one significant difference from the language of the Act, in that it referred to and contrasted the words 'committed in England' with the words 'or within English jurisdiction'. That contrast played an important role in the speeches of their Lordships.[87] In view of that difference I have preferred to set out my own reasoning in accordance with the approach in this

[87] Lord Slynn at para 30; Lord Hutton at para 65; Lord Millett at para 105 and Lord Rodger at para 140. Lord Scott (para 117) expressed his complete agreement with the reasons of his colleagues.

country to statutory interpretation, rather than adopt the views of another court. But notwithstanding the important distinguishing feature I have mentioned, the broad thrust of the speeches in that case is consistent with and supportive of the conclusion I have reached.

[73] That conclusion is consonant with the purpose of extradition as articulated in the judgments of the Constitutional Court. Sachs J explained in *Quagliani*:[88]

'Transnational mobility of people, goods and services, as well as new technological means, have contributed to increased mobility of criminals. La Forest J states that—

"[the extradition process] strengthens the law enforcement agencies within the state requesting the surrender by reducing the possibility of its criminals escaping. And it is to the advantage of the state to which a criminal has escaped, for no country desires to become a haven for malefactors."

The Act furthers the criminal justice objectives of ensuring that people accused of crime are brought to trial and that those who have been convicted are duly punished. The need for effective extradition procedures becomes particularly acute as the mobility of those accused or convicted of national crimes increases.'

[74] To that can be added the following passage from the judgment in *Geuking*:[89]

'The need for extradition has increased because of the ever-growing frequency with which criminals take advantage of modern technology, both to perpetrate serious crime and to evade arrest by fleeing to other lands. The government of the country where the criminal conduct is perpetrated will wish the perpetrator to stand trial before its courts and will usually offer to reciprocate in respect of persons similarly wanted by the foreign State. Apart from reciprocity, governments accede to requests for extradition from other friendly States on the basis of comity. Furthermore, governments do not wish their own countries to be, or be perceived as safe havens for the criminals of the world.'

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[88] *Quagliani*, op cit, fn 33 paras 40-41.
[89] *Geuking*, op cit, fn 34, para 2.

[75] The interpretation of ss 2(1) and 3(1) set out above is wholly consistent with the long-established and beneficial purposes of extradition as explained in these passages. By contrast the interpretation contended for on behalf of Mr Kouwenhoven negates that desirable purpose. In the result all relevant factors point to the conclusion that the appeal against the high court's decision upholding the DPP's appeal against the decision of the magistrate to discharge Mr Kouwenhoven, must fail.

The order

[78] The outcome of the appeal in the review proceedings is straightforward. No order for costs was sought against Mr Kouwenhoven on the basis that it is inappropriate to make orders for costs in criminal proceedings. Accordingly, the order in those proceedings is that:

'The appeal against the dismissal of the application under case no 181/2020 is dismissed.'

[79] The approach adopted by the high court to the questions in the stated case and the disposal of the appeal created procedural difficulties. The questions of law in the stated case were the following:

'4.1 Is a judicial officer conducting an extradition enquiry empowered to consider the question of the jurisdiction of the requesting state or is this a question for consideration by the executive, specifically the Minister of Justice and Constitutional Development?

4.2 Is jurisdiction a relevant consideration in an extradition enquiry where the requested person has already been convicted by the requesting court?

4.3 Is the reference to jurisdiction in the Extradition Act confined to the territorial jurisdiction of the requesting state only or does it include extraterritorial jurisdiction?

[80] To describe these as ineptly drafted does them no disservice. The first two were not matters on which the magistrate had expressed any opinion whatsoever, much less made a decision in favour of Mr Kouwenhoven leading to his discharge. The third one lacked a reference to the relevant section or sections of the Act in which the word 'jurisdiction' was used in a manner giving rise to the question on which the appeal was based. However, I am prepared to accept that this omission was overcome by asking whether jurisdiction was confined to territorial jurisdiction or extended to extraterritorial jurisdiction. On this legal issue the magistrate had made a decision in favour of Mr Kouwenhoven leading to his discharge.

[81] The high court should have held that the first two questions were not properly stated and made no other ruling on them. Instead it held, for other reasons, that neither required an answer. Whether that is ever permissible in relation to questions properly asked by way of a stated case, except where the answer to a prior question renders later ones academic, is doubtful. Be that as it may, having said that the questions did not require an answer, the court went on to say in relation to both of them 'Insofar as an answer may be necessary' and proceeded to provide an answer. What is to be made of these answers? Pursuant to the appeal being upheld on the third question the matter was remitted to the magistrate to finalise 'in accordance with the answers given to the questions posed in the stated case'. That suggests that the magistrate was obliged to engage with the answers proffered by the court in this unsatisfactory way. The short answer to this problem is that they were in their entirety obiter dicta and must be disregarded by the magistrate in dealing with the remittal.

[82] The high court's answer to the third question was that:

'…the requirement in s 3(1) of the Extradition Act that the offence should be committed "within the jurisdiction" of the requesting State is a requirement that the requesting State should have jurisdiction to try the person in question for the offence, including where applicable the jurisdiction to try such person for an offence committed outside the territory of the requesting State'

Following upon that answer it made the following order:

'(a) The three questions of law posed in the stated case are answered as are set out in paras 86-88 of this judgment.

(b) Because of the answer given to the third question, the appeal succeeds. The order of the court *a quo* discharging the respondent in the appeal, Mr Augustinus Petrus Maria Kouwenhoven, in terms of s 10(3) of the Extradition Act 67 of 1962 is set aside, and the matter is remitted to the court *a quo* to finalise in accordance with the answers given to the questions posed in the stated case.'

[83] In saying that 'the requesting State should have jurisdiction to try the person', without identifying by which law that jurisdiction should arise, may be confusing. That can be averted by inserting the words 'under its domestic law' after the word 'jurisdiction'. A more serious difficulty arises from the order granted in consequence of the appeal succeeding. The magistrate had already rejected the two points that Mr Kouwenhoven had raised about the existence of the extradition agreement and the authentication of the documents. Once her decision in regard to the s 3(1) issue was overturned on appeal, there was nothing further for her to decide. Within the limited parameters of an extradition enquiry her task was complete and, had she not erred on this one point, the only decision open to her was to commit Mr Kouwenhoven in terms of s10(1) of the Act.[90] He could then have appealed against her decision

[90] *Director of Public Prosecutions, Cape of Good Hope v Robinson* op cit fn 37, para 49; *Mochebelele v Director of Public Prosecutions, Gauteng and Another* [2019] ZASCA 82; 2019 (2) SACR 231 (SCA) para 17.

in terms of s 13 raising all the arguments that he could and should have raised in this appeal, but refrained from doing so because of the erroneous view of the law referred to in para 48 of this judgment.

[84] Had the procedurally correct route been followed the high court ought to have upheld the appeal and made the order that the magistrate should have made committing Mr Kouwenhoven in terms of s 10(1) of the Act. Instead it remitted the matter to the magistrate. It is too late now for that to be remedied, but it is appropriate to record that the remittal does not amount to an invitation to reopen the issues on which the magistrate has already made a decision. As matters stand the only purpose of the remittal is for her to make an order for Mr Kouwenhoven's committal. Neither the order of the high court, nor this order, authorises the re-opening of issues or the creation of fresh issues. The effect of the remittal is that the magistrate deals with the issues in the light of the answer to the question of law as set out on appeal. In reconsidering its decision in the light of the court of appeal's setting out of the legal position, the court *a quo* is limited to the record.[91] Nothing in the high court's order, or in this order authorises the magistrate to reopen any issue or deal with any new issue not previously before her.

[85] In the result in the appeal against the High Court's decision upholding the DPP's appeal against the magistrate's discharge of Mr Kouwenhoven, the following order is made:

1 In case no A181/2020 the answer to the third question posed in the case stated in terms of s 310(1) of the Criminal Procedure Act 52 of 1977 is amended by the insertion of the words 'under its domestic law' after the word 'jurisdiction'.

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[91] Du Toit et al, *Commentary on the Criminal Procedure Act* (loose-leaf) R5 57, 2016 ch 30- p63.

2 The appeal against the high court's order in case A 181/200 is dismissed.

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M J D WALLIS

JUDGE OF APPEAL

Appearances

For appellant: A Katz SC (with him D Cooke)

Instructed by: Eisenberg & Associates, Cape Town;
Webbers Attorneys, Bloemfontein

For first to third respondents: A M Breitenbach SC (with him A G Christians)

Instructed by: State Attorney, Cape Town and Bloemfontein

For second respondent
on the Extradition Act: C L Burke
Office of the DPP, Cape Town.