THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case No.: 838/2015

In the matter between:

USMAN ISMAIL PATEL APPLICANT

and

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS: JOHANNESBURG RESPONDENT

Neutral citation: *Patel v NDPP* (838/2015) [2016] ZASCA 191 (01 December 2016)

Coram: Maya AP, Pillay, Swain and Van Der Merwe JJA and Schippers AJA

Heard: 15 November 2016

Delivered: 01 December 2016

Summary: Extradition: meaning of extraditable offence in Extradition Act 67 of 1962: double criminality: conduct to be criminal under law of requested State at date of extradition request not date of commission of offence: certificate under s 10(2) of the Extradition Act: conclusive proof that evidence warrants prosecution in foreign State: fugitive liable to be surrendered to foreign State.

ORDER

On appeal from: Gauteng Local Division of the High Court, Johannesburg (Coppin J and Vilikazi AJ sitting as a court of appeal): judgment reported *sub nom S v Patel* 2016 (2) SACR 141 (GJ).

The application for special leave to appeal is refused.

JUDGMENT

Schippers AJA (Maya AP, Pillay, Swain, Van Der Merwe JJA concurring):

[1] This is an application for special leave to appeal referred for oral argument in terms of s 17(2)(*d*) of the Superior Courts Act 10 of 2013. The matter concerns the requirements for extradition pursuant to the Extradition Act 67 of 1962 (the Act) and the extradition treaty entered into between the United States of America (the US) and the Republic of South Africa (RSA), which came into force on 25 June 2001 (the Treaty). Specifically, the first issue concerns the double criminality principle: whether, in order to constitute an extraditable offence as defined in the Act and the Treaty, the offence involved must be an offence in both the requesting and the requested State at the date of its alleged commission, or at the date of the extradition request. The second issue is whether the certificate issued by the requesting State, the US, stating that there is sufficient evidence to warrant the applicant's prosecution in that country, complies with s 10(2) of the Act.

The facts and proceedings below

[2] On 28 June 2011 the US Embassy in Pretoria sent a diplomatic note to the Department of International Relations and Cooperation of the RSA, requesting the extradition of the applicant, a US citizen, in terms of the Treaty. The note states that on 26 May 2011 the United States District Court for the Northern District of California, San Jose, issued a warrant for the applicant's arrest. He is wanted to stand trial on charges of 12 counts of structuring, and aiding and abetting, in violation of the United States Code (USC), which carries a maximum penalty of 10 years' imprisonment and/or a fine of US $50 000 per count; and a further 43 counts of structuring in violation of the USC, which carries a maximum penalty of 10 years' imprisonment and/or a fine of $500 000 per count. Under US law, financial institutions are required to file a report, called a currency transaction report (CTR), when more than $10 000 in cash is deposited into a bank account in a single day. It is an offence for an individual with knowledge of the reporting requirements to cause, or attempt to cause a financial institution not to file a CTR, by breaking down an amount of cash in excess of $10 000 into smaller amounts for deposit (structuring deposits) in order to evade the currency transaction reporting requirements.

[3] The offences for which the applicant's extradition is sought were allegedly committed when he was the owner of a retail clothing business in San Jose, California, that received US currency from customers. When the business had in excess of $10 000 to deposit, the applicant allegedly directed individuals working for him to break up the currency into amounts less than $10 000 for deposits into bank accounts associated with his business. As a result, it is alleged that between 23 May 2005 and 25 October 2007, the applicant caused $857 670 to be deposited into bank accounts in violation of Title 31, USC ss 5324(a)(1) and 5324 (a)(3). The diplomatic note also states that the offences

with which the applicant is charged are punishable by imprisonment of at least one year and are covered under Article 2.1 of the Treaty.

[4] Pursuant to the note, the Minister of Justice and Constitutional Development (the Minister) issued a notification in terms of s 5(1)(*a*) of the Act that he received a request for the surrender of the applicant to the US. Consequently, the applicant was arrested and appeared at an extradition enquiry in the Johannesburg Magistrate's Court. He was subsequently released on bail.

[5] The magistrate was of the view that the requirements for committal under the Act were fulfilled. The double criminality rule had been satisfied: in the US, structuring is an offence punishable by more than one year of imprisonment and in the RSA its equivalent is s 28 read with ss 64 and 68 of the Financial Intelligence Centre Act 38 of 2001 (FICA). Section 28 of FICA requires an accounting institution (which includes a bank) to report to the Financial Intelligence Centre the prescribed particulars concerning a transaction concluded with a client if that transaction involves an amount of cash in excess of the prescribed amount. Section 64 makes it an offence to conduct a transaction with the purpose of avoiding a reporting duty under FICA. Section 68 contains the penalty provisions. It provides that a person convicted of an offence referred to in Chapter 4 is liable to imprisonment for a period not exceeding 15 years or a fine not exceeding R100 million. The magistrate decided that the applicant was liable to be surrendered to the US and that there was sufficient evidence to warrant his prosecution in that country. She therefore issued an order in terms of s 10(1) of the Act. The applicant appealed that order to the Gauteng Local Division of the High Court (the high court).

[6] The high court dismissed the appeal. On the first issue it held that the date to determine compliance with the double criminality principle is the date of the

extradition request (the request date) and not the date on which the alleged offences were committed (the conduct date). It reasoned that the definition of 'extraditable offence' in the Act is not retrospective and refers to conduct that must be an offence in this country at the request date; and that Article 2.1 of the treaty which must be interpreted consistently with the definition of extraditable offence in the Act, also does not refer to the conduct date but envisages the request date for the purpose of double criminality. As to the second issue, the court found that a certificate by Mr Peter Axelrod, an assistant US attorney for the Northern District of California, stating that there is sufficient evidence under the laws of the US to justify the applicant's prosecution, complies with s 10(2) of the Act.

Double criminality

[7] The purpose of extradition is to secure the return for trial or punishment, persons accused or convicted of crimes. Extradition is essentially a process of intergovernmental legal assistance. Generally, the legal basis for extradition is treaty, reciprocity or comity. Comity is irrelevant for present purposes. Reciprocity in extradition occurs when the request for surrender is accompanied by assurances of reciprocal extradition in comparable circumstances.[1]

[8] The principle of double (or dual) criminality is internationally recognised as central to extradition law. The principle requires that an alleged crime for which extradition is sought is a crime in both the requested and requesting States. In other words, the crime for which extradition is sought must be one for which the requested State would in turn be able to demand extradition. Oppenheim puts it succinctly:

[1] M Cherif Bassiouni *International Extradition United States Law and Practice* 5 ed (2007) Chapter VIII; *Harksen v President of the Republic of South Africa & others* 2000 (2) SA 825 (CC) para 3.

'No person may be extradited whose deed is not a crime according to the criminal law of the State which is asked to extradite as well as the State which demands extradition.'[2]

[9] Double criminality, a substantive requirement for extradition, is predicated on the premise of reciprocity in the sense of equivalent mutual treatment deriving from mutuality of legal obligations.[3] Shearer states that the double criminality rule is based on reciprocity:

'The validity of the double criminality rule has never seriously been contested, resting as it does in part on the basic principle of reciprocity, which underlies the whole structure of extradition, and in part on the maxim of *nulla poena sine lege*. For the double criminality rule serves the most important function of ensuring that a person's liberty is not restricted as a consequence of offences not recognised as criminal by the requested State. The social conscience of a State is also not embarrassed by an obligation to extradite a person who would not, according to its own standards, be guilty of acts deserving punishment. So far as the reciprocity principle is concerned, the rule ensures that a State is not required to extradite categories of offenders for which it, in return, would never have occasion to make demand. The point is by no means an academic one even in these days of growing uniformity of standards; in Western Europe alone sharp variations are found among the criminal laws relating to such matters as abortion, adultery, euthanasia, homosexual behaviour, and suicide.'[4]

[10] The principle of double criminality is closely related to extraditable offences.[5] This is evident from the provisions of both the Act and the Treaty.

The relevant provisions of the Act and the Treaty

[11] The Act defines an 'extraditable offence' as meaning,

'any offence which in terms of the law of the Republic and of the foreign State concerned is punishable with a sentence of imprisonment or other form of deprivation of liberty for a period of six months or more, but excluding any offence under military law which is not also an offence under the ordinary criminal law of the Republic and of such foreign State.'

[2] L Oppenheim *International Law* 8 ed (1955) at 701.
[3] Bassiouni op cit fn 1 at 490.
[4] I A Shearer *Extradition in International Law* (1971) at 137-138.
[5] Bassiouni op cit fn 1 at 491.

[12] Section 3(1) of the Act designates the persons liable to be extradited where there is an extradition agreement between the RSA and a foreign State. It reads:

'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.'

[13] Section 10 deals with the sufficiency of the evidence against the fugitive in the foreign State and how that is proved. It reads:

'**Enquiry where offence committed in foreign State**

(1) If upon consideration of the evidence adduced at the enquiry referred to in section 9(4)(*a*) and (*b*)(i) the magistrate finds that the person brought before him or her is liable to be surrendered to the foreign State concerned and, in the case where such person is accused of an offence, that there is sufficient evidence to warrant a prosecution for the offence in the foreign State concerned, the magistrate shall issue an order committing such person to prison to await the Minister's decision with regard to his or her surrender, at the same time informing such person that he or she may within 15 days appeal against such order to the Supreme Court.

(2) For purposes of satisfying himself or herself that there is sufficient evidence to warrant a prosecution in the foreign State the magistrate shall accept as conclusive proof a certificate which appears to him or her to be issued by an appropriate authority in charge of the prosecution in the foreign State concerned, stating that it has sufficient evidence at its disposal to warrant the prosecution of the person concerned.'

[14] Article 1 of the Treaty describes the obligation of the contracting States to extradite as follows:

'The parties agree to extradite to each other, pursuant to the provisions of this Treaty, persons whom the authorities in the Requesting State have charged with or convicted of an extraditable offence.'

[15] Article 2 defines an extraditable offence:

'1. An offence shall be an extraditable offence if it is punishable under the laws in both States by deprivation of liberty for a period of at least one year or by a more severe penalty.

2. An offence shall also be an extraditable offence if it consists of attempting or conspiring to commit, or aiding, abetting, inducing, counselling or procuring the commission of, or being an accessory before or after the fact to, any offence described in sub-article 1.'

[16] To sum up. Extradition under the Act and the Treaty is determined on the basis of double criminality and a minimum punishment of imprisonment of one year. Extradition takes place in accordance with the terms of the Treaty, which is based on reciprocity, subject to the provisions of the Act. Sufficient detail of the offence alleged against the fugitive must be placed before the magistrate to decide whether the evidence is sufficient to warrant prosecution in the foreign State.[6] A certificate by the relevant authority in the foreign State constitutes conclusive proof of that fact.[7]

The extraditable offence: conduct date or request date?

[17] Counsel for the applicant contended that the applicant is not extraditable because the double criminality requirement has not been met. The offences with which he has been charged in the US were allegedly committed between 2005 and 2007, when that conduct was not criminal and therefore not punishable in the RSA because s 28 of FICA came into operation only in 2010. Therefore, so it was contended, the offences for which the applicant is being sought in the US are not extraditable offences as contemplated in the Act and the Treaty. In support of this contention counsel relied on *R v Bow Street Metropolitan*

[6] *Geuking v President of the Republic of South Africa & others* 2003 (1) SACR 404 (CC) para 39.
[7] *Geuking* fn 6 paras 44-46.

Stipendiary Magistrate & others, Ex parte Pinochet Ugarte (No 3);[8] *Palazzolo v Minister of Justice and Constitutional Development & others*;[9] and *Bell v S*.[10]

[18] Counsel for the respondent submitted that the request date is decisive for determining double criminality and that if it were the conduct date, a safe haven would be created for fugitives from justice. This, in turn, would seriously undermine mutual legal assistance and cooperation in criminal matters. It would also run counter to the stated purpose of the Treaty: to provide for more effective cooperation between the US and the RSA in the fight against crime.

[19] Both the Act and the Treaty do not expressly state that the relevant offence must be an extraditable offence at the conduct date or the request date. When the wording of s 3(1) of the Act and Article 2.1 of the treaty is examined closely, it is apparent that it can be divided into two parts. First, the person accused of an extraditable offence included in an extradition agreement must be surrendered to the foreign State in accordance with that agreement. Second, the offence must be punishable under the laws of both States by a term of imprisonment of at least one year. Article 1 of the Treaty makes it clear that the intention of the parties to the Treaty is to extradite on the basis of reciprocity and, in my view, the definition of 'extraditable offence', s 3(1) of the Act and Article 2.1 of the Treaty must be read in that light.

[20] There is nothing in the definition of 'extraditable offence' in the Act or Article 2.1 of the Treaty, which suggests that the fugitive's conduct must have been criminal in the RSA at the time that the alleged crime was committed in the foreign State. Instead, the definition of 'extraditable offence' refers to any

[8] *R v Bow Street Metropolitan Stipendiary Magistrate & others, Ex parte Pinochet Ugarte (No 3)* [1999] 2 WLR 824; [2000] 1AC 147 (HL).
[9] *Palazzolo v Minister of Justice and Constitutional Development & others* (4731/2010) [2010] ZAWCHC 422 (14 June 2010).
[10] *Bell v S* [1997] 2 All SA 692 (E).

offence which 'is punishable' with a sentence of imprisonment of six months or more. Likewise, Article 2(1) of the Treaty states that an offence shall be an extraditable offence 'if it is punishable' under the laws of both States by imprisonment of at least one year.[11] The tenses used are unequivocal on this point.

[21] The key lies in the repetition of the word 'is' in the two provisions. It does not refer to or contemplate past conduct. It unquestionably refers to the present: is the offence an extraditable offence, ie now, at the date of the request for extradition? The same applies to Article 2.1: is the offence punishable now under the laws of both States by deprivation of liberty for at least one year? If so, then the person is liable to be surrendered to the foreign State. Properly construed therefore, conduct which actually took place in the requesting State must be such that it is, ie at the request date, punishable under the laws of the RSA. This interpretation of 'extraditable offence' and Article 2.1 is straightforward, accords with the purpose of the double criminality principle and is easy to apply.

[22] On this construction there can be no violation of the principle of legality (*nulla poena sine lege* - no punishment without a law), nor the imposition of retrospective criminal liability. This is because the applicant's conduct will have had to have been an offence in the law of the requesting State, the US, at the time of its commission if he is to be convicted; and that same conduct would have been an offence under the law of the requested State, the RSA, at the date of the request for extradition.[12]

[11] Emphasis added.
[12] See C Warbrick '*Extradition Law Aspects of Pinochet 3*' (1999) 48 *International and Comparative Law Quarterly* 958 at 964.

[23] In this regard, the limited function of an extradition enquiry must be emphasised. In *Geuking*,[13] Goldstone J said:

'Extradition proceedings do not determine the innocence or guilt of the person concerned. They are aimed at determining whether or not there is reason to remove a person to a foreign State in order to be put on trial there. The hearing before the magistrate is but a step in those proceedings and is focused on determining whether the person concerned is or is not extraditable.'

[24] Section 3(1) of the Act, which states that a person accused of an (extraditable) offence is liable to be surrendered under an extradition agreement regardless of whether the offence was committed before or after the commencement of the Act or the coming into force of that agreement, likewise is not retrospective. Section 3(1) does nothing more than provide a legal basis, under the Act, to initiate or continue extradition proceedings in respect of offences committed prior to the coming into force of the Act or an extradition agreement. In other words, a fugitive may be extradited in terms of the Act, despite the fact that he committed the crime before the coming into operation of the Act or an extradition treaty. This interpretation is consistent with Article 23 of the Treaty which states, in terms, that the Treaty applies to any offence contemplated in Article 2, whether committed before, on, or after the date upon which the Treaty enters into force.

[25] The conclusion that the words, 'is punishable' refer to the present, may be illustrated by reference to *Re Ugarte; R v Evans & others ex parte Ugarte*.[14] The case concerned Spain's attempt to extradite the former Chilean Head of State from the United Kingdom to stand trial in Spain on several charges of torture committed (mainly in Chile) between 1972 and 1990. One of the issues which had to be decided was whether the double criminality rule must be

[13] *Geuking* fn 6 para 44.
[14] *Re Ugarte; R v Evans & others ex parte Ugarte* QB [1998]; *Bartle and the Commissioner of Police for the Metropolis & others, Ex parte Pinochet, R v* [1998] 3 WLR 1456; [1998] 4 ALL ER 897 (HL).

satisfied at the conduct date or the request date. At issue was the proper construction of s 2 of the UK Extradition Act, 1989, the relevant provisions of which read:

'(1) In this Act … "extradition crime" means-
(a) conduct in the territory of a foreign state … which, if it occurred in the United Kingdom, would constitute an offence punishable with imprisonment for a term of 12 months, or any greater punishment, and which, however described in the law of the foreign State, … is so punishable under that law;'

[26] The case initially came before the Divisional Court. Lord Bingham CJ gave the argument that the double criminality requirement must be met at the conduct date short shrift. He said:

'I would however add on the retrospectivity point that the conduct alleged against the subject of the request need not in my judgment have been criminal here at the time the alleged crime was committed abroad. There is nothing in s 2 which so provides. What is necessary is that at the time of the extradition request the offence should be a criminal offence here and that it should then be punishable with 12 months' imprisonment or more. Otherwise s 2(1)(a) would have referred to conduct which would at the relevant time "have constituted" an offence and s 2(2) would have said "would have constituted". I therefore reject this argument.'[15]

[27] Lord Lloyd's rejection of the argument in *Pinochet No. 1*[16] was equally trenchant. He said:

'It was argued that torture and hostage-taking only became extradition crimes after 1988 (torture) and 1982 (hostage-taking) since neither section 134 of the Criminal Justice Act 1988, nor section one of the Taking of Hostages Act 1982 are retrospective. But I agree with the Divisional Court that this argument is bad. It involves a misunderstanding of section 2 of the Extradition Act. Section 2(1)(a) refers to conduct which *would* constitute an offence in the United Kingdom now. It does not refer to conduct which *would have* constituted an offence *then*.'

[28] I interpose to say that the language of the definition 'extraditable offence' and Article 2.1 of the treaty is even plainer: an extraditable offence is one that 'is punishable' under the laws of both States by imprisonment of at least one

[15] Footnote 14 at 10.
[16] *R v Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No 3)* fn 8; *Bartle* fn 14 at 1481.

year.[17] Further, unlike the English statute, the Act and the Treaty are not conditional expressing a hypothesis (conduct in the foreign State which, if it occurred in the UK, would constitute an offence). The approach of Lord Bingham CJ (who incidentally authored a book on the rule of law[18]) that the double criminality rule requires the conduct to be criminal at the request date is, in my respectful opinion, correct.

[29] When the matter came again before the House of Lords, Lord Browne-Wilkinson agreed with Lord Bingham CJ and Lord Lloyd that if read in isolation, the words 'if it occurred … would constitute' read more easily as a reference to a hypothetical event happening now, ie at the request date, rather than to a past hypothetical event, ie at the conduct date. However, Lord Browne-Wilkinson (whose analysis was adopted by all the members of the House) was of the view that the double criminality rule required the conduct to be criminal under English law at the conduct date and not the request date. He reasoned that the word 'it' in the phrase 'if it occurred' is a reference back to the actual conduct of the individual abroad which, by definition, is a past event. This conclusion rested on two main grounds. First, on an interpretation of the provisions of the Extradition Act 1989, a magistrate has to be satisfied that if the conduct *had* taken place in the UK, the evidence was sufficient to warrant a trial of the fugitive in the foreign State. This, Lord Browne-Wilkinson said, was a clear reference to the position at the date when the conduct in fact occurred. Second, under the UK Extradition Act, 1870 the double criminality rule required the conduct to be criminal under English law at the conduct date. That

[17] Emphasis added.
[18] T Bingham *The Rule of Law* (2010). Of the principle that there should be no punishment without a law, Lord Bingham says, 'This is a rule of simple fairness, a rule which any child would understand, and it has featured in most legal systems since Roman times'.

Act specifically provided that a list of crimes had to be construed according to the law existing in England *at the date of the alleged crime*.[19]

[30] It follows that the applicant's reliance on *Pinochet (No 3)* is misplaced. The House of Lords based its conclusion on an interpretation of the specific provisions of the UK Extradition Acts. For the same reason, *Palazzolo*,[20] which cited *Pinochet (No 3)* as authority for the proposition that the conduct date is decisive for the purpose of double criminality, does not assist the applicant. To the extent that *Palazzolo* holds that the double criminality rule requires a fugitive's conduct to be criminal under South African law at the date of the commission of the offence in the foreign State, it is overruled.

[31] Finally on this aspect, *Bell v S*, referred to above, also does not assist the applicant. In that case the Attorney-General of Australia requested Bell's extradition. It was alleged that on numerous occasions he had indecently assaulted boys in Australia. At an extradition enquiry the magistrate found that there was sufficient evidence to warrant Bell's prosecution in Australia, and he made an order in terms of s 10(1) of the Act. On appeal the high court held that out of the 215 offences for which he was being sought, Bell could not be extradited for 40 offences, because the right to institute a prosecution for those offences had lapsed after the expiration of 20 years from the time when they were committed, in terms of s 18 of the Criminal Procedure Act 51 of 1977. And if he could not be prosecuted for those offences, then they were not punishable under South African law as contemplated in the definition of extraditable offence in the Act. The court therefore confirmed the order

[19] The temporal element of double criminality in Pinochet No 3 has been the subject of much criticism. See in this regard M Birnbaum '*Pinochet and Double Criminality*' (2000) *Criminal LR* 127 at 135; Warbrick fn 12; M du Plessis '*The Pinochet cases and South African Extradition Law*' (2000) *SAJHR* 669 at 686-688; and E Du Toit et al *Commentary on the Criminal Procedure Act* vol 2 at B20B-B20B-1.
[20] Footnote 9.

committing Bell to prison to await a decision of the Minister with regard to his surrender to Australia, but excluded the 40 offences.

[32] The applicant submits that the court in *Bell v S* applied the conduct date to determine whether the offences were punishable in South Africa and that had it applied the request date as the determining factor, then extradition should have been granted on all the requested offences despite the fact that many of them were not prosecutable and punishable in this country.

[33] But that is not so. *Bell v S* illustrates exactly the opposite. The court decided that the 40 offences in respect of which the fugitive's extradition was sought, were not punishable *as at the request date*. The operation of a statute of limitations is a recognised ground for denying extradition. Whether extradition should be denied on this ground must logically, and necessarily, be decided at the request date, since a court in the requested State must decide whether the offence 'is punishable' under its own law, ie at the date of the request for extradition. Bell's conduct in relation to the 40 offences was indeed criminal at the conduct date, but his extradition for those offences became barred by the lapse of time under South African law.

[34] Further, if the conduct date is decisive, Bell should have been extradited for the 40 offences as well, because then they would not have been hit by s 18 of the Criminal Procedure Act. The effect of the applicant's argument is that a person could then be extradited for an alleged offence which is no longer punishable (or indeed for conduct which is no longer an offence) in South African law. This would not only be unjust, it would also violate accepted principles of extradition law.

[35] A construction which interprets Article 2.1 of the Treaty as referring to the request date, also gives effect to intergovernmental cooperation, as the extradition in this case is a treaty matter bearing on the rights and duties of States. And it is generally a fundamental rule of the Vienna Convention on the Law of Treaties that a treaty must be interpreted according to the ordinary meaning of the words used in the text.[21] More than a century ago Lord Russell CJ said that treaties should receive a liberal interpretation, 'which means no more than that they should receive their true construction according to their language, object and intent'.[22]

[36] Thus, in *Canada v Schmidt*,[23] La Forest J said:

'I would add that the lessons of history should not be overlooked. Sir Edward Clark instructs us that in the early 19th century the English judges, by strict and narrow interpretation, almost completely nullified the operation of the few extradition treaties then in existence: see *A Treatise Upon the Law of Extradition* (4th ed., 1903), c. V. Following the enactment of the British *Extradition Act, 1870* (U.K.), 33 & 34 Vict., c. 52, upon which ours is modelled, this approach was reversed. The present system of extradition works because courts give the treaties a fair and liberal interpretation with a view to fulfilling Canada's obligations, reducing the technicalities of criminal law to a minimum and trusting the courts in the foreign country to give the fugitive a fair trial ….'

[37] Similarly, in *Rey v Government of Switzerland, & others (Bahamas)*[24] Lord Steyn said:

'The treaty was intended to serve the purpose of bringing to justice those who are guilty of grave crimes and it ought *prima facie* to be accorded a broad and generous construction so as to promote that objective.'

[38] That is the case here. The Treaty recites the mutual desire to provide for more effective cooperation between the RSA and the US in the fight against crime. This is underscored by the fact that the contracting States have expressly

[21] Article 31 of the Vienna Convention.
[22] *Re Arton (No 2)* [1896] 1 QB 509 at 517.
[23] *Canada v Schmidt* [1987] 1 SCR 500 at 524.
[24] *Rey v Government of Switzerland, & others (Bahamas)* [1999] AC 54 (PC) at 62G-H.

excluded the double criminality rule as regards offences against laws relating to taxation, customs duties, exchange control and other revenue matters.[25] An approach in terms of which the conduct date is decisive for the purpose of double criminality would, in my opinion, undermine mutual cooperation between the States;[26] and negate the very purpose of a bilateral extradition treaty: the parties enter into reciprocal rights and duties in order to bring to justice those who have committed serious crimes.

[39] This, of course, is not to say that the rights of the fugitive are unimportant, to the contrary. As was held in *Geuking*, the magistrate at an extradition enquiry must be satisfied that the conduct alleged by the foreign State constitutes criminal conduct in the RSA and that there is sufficient evidence to warrant prosecution in the foreign State. The fugitive is entitled to procedural fairness at every stage of the enquiry.[27]

[40] For the above reasons I have come to the conclusion that the double criminality rule must be satisfied as at the date of request for the extradition of a fugitive, not the date on which he is alleged to have committed the offences in the foreign State. The court a quo thus rightly dismissed the appeal under s 10(1) of the Act.

The s 10(2) certificate

[41] The applicant's counsel submitted that the s 10(2) certificate is fatally defective on two grounds. The first is that the certificate does not state that there

[25] Article 2(6) of the treaty reads:
'Where extradition of a person is sought for an offence against a law relating to taxation, customs duties, exchange control, or other revenue matters, extradition may not be refused on the ground that the law of the Requested State does not impose the same kind of tax or duty or does not contain a tax, customs duty, or exchange regulation of the same kind as the law of the Requesting State.'
[26] M du Plessis fn 19.
[27] Footnote 6 paras 45 and 47.

is sufficient evidence to 'warrant' the applicant's prosecution in the US. Instead, it states that there is sufficient evidence to 'justify' his prosecution. The second is that the certificate does not adequately describe the offences for which the applicant is to be prosecuted: it is 'ambiguous, ambivalent and unnecessarily vague.' These submissions may be dealt with briefly. They have no merit.

[42] As already stated, s 10(1) of the Act requires the magistrate at an extradition enquiry to be satisfied that there is sufficient evidence to warrant a prosecution for the offence in the foreign State concerned. Sufficient details of the offence must be placed before the magistrate to make that determination. According to s 9(3) of the Act, that evidence may take the form of a deposition or statement on oath or affirmation, whether or not it is taken in the presence of the person concerned, and must be duly authenticated in the manner provided in s 9(3)(*a*)(iii) of the Act.

[43] Nothing turns on Mr Axelrod's statement in the s 10(2) certificate that the evidence is sufficient to 'justify' the applicant's prosecution in the US. According to the Oxford English Dictionary the word 'warrant' also means 'to justify'.[28] And it is obviously used in that context in s 10(1) of the Act, which requires sufficient (not conclusive) evidence to justify (not guarantee) the prosecution in the foreign State. It is thus not surprising that the Afrikaans text states that the magistrate must be satisfied, 'dat daar voldoende getuienis is om 'n vervolging weens die misdryf in die betrokke vreemde Staat te *regverdig*'.[29]

[28] W Little et al *The Shorter Oxford English Dictionary on Historical Principles* 3 ed (1988) vol 1 at 2507.
[29] Section 10 of the Wet op Uitlewering 67 van 1962 (emphasis added). The English text reads: 'that there is sufficient evidence to warrant a prosecution for the offence in the foreign State concerned.'

[44] Moreover, the Constitutional Court has held that the s 10(2) certificate is consistent with the Constitution.[30] In this regard it found that once the double criminality rule has been satisfied, the magistrate must rely on the certificate as regards the narrow question whether the fugitive's conduct warrants prosecution in the foreign country, as that question would not normally be within the knowledge or expertise of South African lawyers or judicial officers. An extradition enquiry is not a trial. The process involves no adjudication of guilt or innocence.[31]

[45] As to the second ground, there is no complaint that the evidence placed before the magistrate does not comply with the provisions of s 9(3) of the Act. Neither is there any complaint that there has been no compliance with Article 9 of the Treaty, which lists the required supporting documents in an extradition request; or Article 10, which governs the admissibility of documents in evidence in extradition proceedings. The submission that the s 10(2) certificate is vague or ambiguous, or that the offences ought to have been described with greater precision is simply insupportable on the facts. The offences against the applicant are clearly set out in the indictment. Moreover, the evidence against him is described in considerable detail in the affidavits of Mr Axelrod and Mr Scott Lee, a special agent in the US Department of Homeland Security. Mr Lee is the case agent responsible for the investigation of the applicant.

Conclusion

[46] The applicant has not shown any special circumstances that warrant the granting of special leave to appeal. In the result, the application for special leave to appeal must be refused.

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[30] *Geuking* fn 6 para 51.
[31] *Geuking* fn 6 paras 41, 44 and 45.

[47] The following order is issued:

The application for special leave to appeal is refused.

A Schippers

Acting Judge of Appeal

Appearances

For the Appellant:	M R Hellens SC (with C T H McKelvey) Instructed by: BDK Attorneys, Johannesburg Symington & De Kok, Bloemfontein
For the Respondent:	D Barnard Instructed by: The Director of Public Prosecutions, Johannesburg The Director of Public Prosecutions, Bloemfontein