RESEARCH ARTICLE

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THE ADMISSIBILITY OF FOREIGN CONVICTIONS IN BAIL APPLICATIONS IN SOUTH AFRICA: A COMMENT ON LEWIS-SPRINGFIELD V S (CA&R40/2022) [2022] ZANCHC 54 (4 OCTOBER 2022)

SUMMARY

Sec. 35(1)(f) of the *Constitution of South Africa* (1996) provides for the right to be released on bail. However, this right is not absolute. The applicant must meet certain conditions, in order to be released on bail. Sec. 60(11)(B)(a)(i) of the *Criminal Procedure Act* provides that an applicant's previous conviction is one of the factors that a court has to consider in deciding whether to release him or her on bail. However, sec. 60(11)(B)(a)(i) is silent on whether it is also applicable to foreign previous convictions. Apart from sec. 60(11)(B)(a)(i), other provisions in the *Criminal Procedure Act* empower courts to consider previous convictions during trial or at sentencing. In two instances, courts are expressly empowered to consider foreign convictions. In *Lewis-Springfield v S*, the court invoked, *inter alia*, the applicant's foreign conviction to dismiss his application for bail. The court did not explain the legislation which empowered it to consider the foreign conviction. In this article, I argue, *inter alia*, that South African courts should be conscious when dealing with foreign convictions from some countries. I suggest the criteria that South African courts may have to invoke in deciding whether or not to admit foreign convictions.

1. INTRODUCTION

Sec. 35(1)(f) of the *Constitution of South Africa* (1996) states that "[e]veryone who is arrested for allegedly committing an offence has the right to be released from detention if the interests of justice permit, subject to

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reasonable conditions". The right to be released on bail is not absolute. In other words, before a person can be released on bail, he or she has to meet some conditions.[1] The *Criminal Procedure Act* (1977) provides, *inter alia*, for the circumstances in which a person may be released on bail. It also provides for some of the factors that a court has to consider in determining whether or not to release a person on bail; for some of the conditions which a court may impose before it releases a person on bail, and the circumstances in which bail may be cancelled.[2] An accused's criminal record is one of the factors a court has to consider in deciding whether to release him or her on bail or whether to cancel his or her bail. Thus, sec. 60(11)(B)(a)(i) of the *Criminal Procedure Act* provides that "[i]n bail proceedings the accused, or his or her legal adviser, is compelled to inform the court whether the accused has previously been convicted of any offence". Likewise, sec. 68(1)(e) of the *Criminal Procedure Act* empowers a court to cancel bail in case where "the accused has not disclosed or has not correctly disclosed all his or her previous convictions in the bail proceedings or where his or her true list of previous convictions has come to light after his or her release on bail".[3] These provisions are silent on whether the conviction in question should have been that of a South African court or it also includes a foreign conviction. However, in *Lewis-Springfield v S*,[4] although the court did not refer to sec. 60(11)(B)(a)(i), it declined to release the applicant on bail pending an extradition inquiry on, among other grounds, that he had been convicted of offences in the United States of America.[5] In this article, the author argues that, although secs. 60(11)(B)(a)(i) and 68(1)(e) are silent on the issue of foreign convictions, courts can invoke foreign convictions when dealing with bail applications or cancellations. However, when deciding whether to admit foreign convictions, courts should be cautious when dealing with foreign convictions where there is evidence to suggest that the applicant's trial leading to the previous conviction may have been unfair.

The author starts by highlighting the provisions dealing with previous convictions in the *Criminal Procedure Act* generally (both South African and foreign convictions),[6] before dealing with the brief facts holding in *Lewis-Springfield v S*.[7] Finally, the author explains the circumstances in which South African courts may decline to admit foreign convictions.

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1 *S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat* 1999 (4) SA 623.
2 *Criminal Procedure Act*:secs. 59-70.
3 Sec. 68(2)(b) of the *Criminal Procedure Act* empowers the magistrate to cancel bail in similar circumstances.
4 *Lewis-Springfield v S* (CA&R40/2022) [2022] ZANCHC 54 (4 October 2022).
5 The High Court held that bail applications in extradition proceedings are criminal in nature and therefore governed by the *Criminal Procedure Act*. See, for example, *S v Tucker* 2018 (1) SACR 616 (WCC); *Otubu v Director of Public Prosecutions, Western Cape* 2022 (2) SACR 311 (WCC); *Director of Public Prosecutions, Western Cape v Mhlanga N.O. and Another; Tucker v Director of Public Prosecutions, Western Cape* [2022] 4 All SA 332 (WCC).
6 The discussion excludes other pieces of legislation that refer to previous convictions.
7 *Lewis-Springfield v S*.

2. PREVIOUS CONVICTIONS IN THE SOUTH AFRICAN CRIMINAL JUSTICE SYSTEM

As mentioned earlier, secs. 60(11)(B)(a)(i) and 68(1)(e) of the *Criminal Procedure Act* deal with the issue of previous convictions in the context of bail. Secs. 60(11)(B)(a)(i) and 68(1)(e) are applicable to both convictions after a trial and to cases where the accused paid an admission-of-guilt fine. Sec. 271 provides for circumstances in which the accused's previous conviction may be admitted for sentencing. However, under sec. 271A, some convictions fall away for the purposes of sentencing.[8] In other words, they are considered non-existent and a court cannot rely on them in determining the sentence to impose on the offender.[9] An accused's conviction does not fall away under sec. 271A for bail application.[10] In other words, even if the conviction is more than 10 years old and would have been irrelevant for sentencing under sec. 271A, the accused is obliged to disclose it in his or her bail application. However, in a case where the accused's conviction has been expunged[11] or where he or she is granted presidential pardon, he or she is not required to disclose such a conviction for bail purposes, because the effect of expungement or pardon is to "erase" the conviction.[12] It ceases to exist and a court cannot invoke it as a previous conviction for the purpose of bail, trial (in cases where courts are permitted to refer to previous convictions during trial), or sentencing.

Before entering into a plea and sentencing agreement, a prosecutor is required to consider the accused's previous conviction, if any.[13] Under sec. 106(1)(c) of the *Criminal Procedure Act*, "[w]hen an accused pleads to a charge he may plead that he has already been convicted of the offence with which he is charged". Under sec. 197, the accused should, as a general rule, not be asked whether he or she has ever been convicted of an offence, unless the prosecution proceeds under one of the exceptions. All the above provisions are silent on whether or not they are applicable to foreign convictions. However, nothing prevents courts from interpreting them as applicable to foreign convictions. A few provisions are expressly applicable to foreign convictions. For example, sec. 89 of the *Criminal Procedure Act* provides that "[e]xcept where the fact of a previous conviction is an element of any offence with which an accused is charged, it shall not in any charge be alleged that an accused has previously been convicted of any offence, whether in the Republic or elsewhere". Likewise, sec. 211 of the *Criminal Procedure Act* provides that:

8 For the drafting history of sec. 271A, see *Jacobs v S* 2015 (2) SACR 370 (WCC).

9 See, for example, *Tladi v S* (A301/2017, 463/2017) [2019] ZAGPJHC 110 (25 March 2019) (the court held that the convictions had not fallen away)

10 In *S v Rabele* (76/2014) [2016] ZAFSHC 178 (29 September 2016): par. 23, the court held that "[i]n terms of section 271A of the CPA, certain convictions fall away as previous convictions after expiration of ten years. It has been submitted by counsel for the state that this related to sentence only and not to sec. 60(11B) in bail proceedings. The court shares the same sentiments with counsel for the state.

11 *Criminal Procedure Act*: secs. 271B-271E.

12 See, generally, *Masemola v Special Pensions Appeal Board and Another* 2020 (2) SA 1 (CC).

13 *Criminal Procedure Act*:sec. 105A(1)(b)(ii)(cc).

> Except where otherwise expressly provided by this Act or the Child Justice Act, 2008, or except where the fact of a previous conviction is an element of any offence with which an accused is charged, evidence shall not be admissible at criminal proceedings in respect of any offence to prove that an accused at such proceedings had previously been convicted of any offence, whether in the Republic or elsewhere, and no accused, if called as a witness, shall be asked whether he or she has been so convicted.

The above provisions deal with both South African and foreign convictions expressly or by implication. Sec. 272 of the *Criminal Procedure Act* provides for the manner in which previous convictions are proved:

> When a previous conviction may be proved under any provision of this Act, a record, photograph or document which relates to a fingerprint and which purports to emanate from the officer commanding the South African Criminal Bureau or, in the case of any other country, from any officer having charge of the criminal records of the country in question, shall, whether or not such record, photograph or document was obtained under any law or against the wish or the will of the person concerned, be admissible in evidence at criminal proceedings upon production thereof by a police official having the custody thereof, and shall be *prima facie* proof of the facts contained therein.

Courts have developed rich jurisprudence on the admissibility of South African criminal records.[14] However, there is no reported case in which courts have dealt with the admissibility of foreign convictions for the purpose of bail. In *Lewis-Springfield v S*,[15] the judgment is silent on whether sec. 272 was invoked in admitting evidence of the applicant's criminal records. Put differently, the court does not refer to any law which allows it to admit foreign criminal records. South African courts have held that applications for bail are of a criminal nature.[16] This means, *inter alia*, that sec. 272 is applicable to bail proceedings. Sec. 272 should be read with sec. 273 of the same *Act*. It is to the effect that:

> Whenever any court in criminal proceedings requires particulars or further particulars or clarification of any previous conviction admitted by or proved against an accused at such proceedings- (a) any telegram purporting to have been sent by the officer commanding the South African Criminal Bureau or by any court within the Republic; or (b) any document purporting to be certified as correct by the officer referred to in paragraph (a) or by any registrar or clerk of any court within the Republic or by any officer in charge of any prison within the Republic, and which purports to furnish such particulars or such clarification, shall, upon the mere production thereof at the relevant proceedings be admissible as prima facie proof of the facts contained therein.

14 See, for example, S. Terblanche, *A guide to sentencing in South Africa* (2016).
15 *Lewis-Springfield v S.*
16 See, generally, *Tucker v S* 2018 (1) SACR 616 (WCC) (and the relevant cases discussed therein).

The use of the term 'accused' in the *Criminal Procedure Act* includes a person applying for bail.[17] Although there is no reported case in which South African courts have relied on sec. 272 to admit foreign convictions, the following observations should be made about secs. 272 and 273 within the context of foreign convictions. Sec. 273 is applicable to South African convictions, because South Africa does not enforce prison sentences imposed by foreign courts.[18] For different policy reasons, it has not yet enacted a prisoner transfer agreement that would have enabled it to enforce such sentences.[19] However, with the adoption of the SADC Protocol on the Inter-State of Sentenced Offenders,[20] there is a possibility that South Africa could ratify it and have some of its nationals transferred to serve their sentences in South Africa. Although South Africa does not enforce foreign prison sentences, it can enforce foreign suspended sentences. This is possible under sec. 297B of the *Criminal Procedure Act*. Under sec. 272, for a foreign conviction to be admissible, it has to "purport" to emanate "from any officer having charge of the criminal records of the country in question". Once tendered in evidence, it is "prima facie proof of the facts contained therein". This implies that the admissibility of such a record can be challenged at least in two ways: its source and its content. It is inadmissible if evidence proves that the person who issued it (from which it emanated) was not "having charge of the criminal records" of the country from which it originated. In other words, evidence has to be adduced to prove that the person who issued it was indeed "having charge of the criminal records". If the prosecution passes that hurdle, the second issue is whether the content therein is admissible. As the Supreme Court of Appeal held in *S v Jantjies and Another*:[21]

17 *Criminal Procedure Act*:sec. 58 provides that "[t]he effect of bail granted in terms of the succeeding provisions [secs. 59-71] is that an accused who is in custody shall be released from custody upon payment of, or the furnishing of a guarantee to pay, the sum of money determined for his bail, and that he shall appear at the place and on the date and at the time appointed for his trial or to which the proceedings relating to the offence in respect of which the accused is released on bail are adjourned, and that the release shall, unless sooner terminated under the said provisions, endure until a verdict is given by a court in respect of the charge to which the offence in question relates, or, where sentence is not imposed forthwith after verdict and the court in question extends bail, until sentence is imposed".

18 South African law provides for the execution of foreign civil judgments. This is governed by the *Enforcement of Foreign Civil Judgments Act*, 32/1988. For the discussion of the circumstances in which this *Act* is applicable, see, for example, *Government of the Republic of Zimbabwe v Fick and Others* 2013 (5) SA 325 (CC); 2013 (10) BCLR 1103 (CC):paras. 36-53; *Fattouche v Khumalo* (508/2012) [2014] ZAGPJHC 102 (6 May 2014):par. 17; *Ex parte: Balkan Energy Limited and Another*; *In re: Balkan Energy Limited and Another v Government of the Republic of Ghana* 2017 (5) SA 428 (GJ):par. 14, and *Society of Lloyds v Price; Society of Lloyd's v Lee* 2006 (5) SA 393 (SCA):paras. 36-41.

19 See *Gerber v Government of the Republic of South Africa and Others* (51128/09) [2010] ZAGPPHC 240 (9 December 2010).

20 See Problem Masau, "Cabinet approves SADC prisoner swop protocol", https://www.newsday.co.zw/local-news/article/200003699/cabinet-approves-sadc-prisoner-swop-protocol (accessed on 17 November 2022). The Protocol is available at https://www.sadc.int/document/sadc-protocol-inter-state-transfer-sentenced-offenders-2019.

21 *S v Jantjies and Another* (158/92) [1993] ZASCA 100 (26 August 1993).

The words 'prima facie evidence' cannot be brushed aside or minimised. As used in the … [*Criminal Procedure Act*] they mean that the judicial officer will accept the evidence as prima facie proof of the issue and, in the absence of other credible evidence, that that prima facie proof will become conclusive proof.[22]

The duty is, therefore, on the person against whom the foreign conviction is being adduced as evidence to convince the court why it is inadmissible. He could argue, for example, that, in the laws of the sentencing country, it is no longer recognised as a criminal record for any reason such as that it was expunged, he was pardoned by the President, or his conviction was overturned on appeal or review. If he or she does not challenge the admissibility of such a conviction (as was the case in *Lewis-Springfield v S*), the court will admit it.

The record is admissible "whether or not" it was "obtained under any law". This implies that, even if it was obtained contrary to the law of the foreign state, it is still admissible in South Africa. For example, the fact that it was obtained contrary to the laws that govern privacy or access to personal information in the foreign state does not render it inadmissible. Likewise, the record is admissible even if it was obtained "against the wish or the will of the person concerned". This implies that, in cases where privacy laws in a foreign country provide that such a record can only be released with the consent of its owner and that consent was not sought or obtained before the record was released to the South African authorities, it is still admissible in evidence. This approach may not be ideal for the good relationship between South Africa and other countries. It may create the impression that South Africa does not respect the laws of other countries. For a foreign conviction to be admissible, it has to be produced "by a police official having the custody thereof". This means that, as a general rule, such a police officer has to be in court to produce it as evidence. However, he or she can also give evidence while based abroad, for example, under the *International Co-operation in Criminal Matters Act*[23] or under sec. 158(2)(a) of the *Criminal Procedure Act*.[24] The above discussion takes us to the next issue of highlighting the facts and decision in *Lewis-Springfield v S*.

22 *S v Jantjies and Another*:par. 23.

23 *International Co-operation in Criminal Matters Act* 75/1996. See, generally, *Thint Holdings (Southern Africa) (Pty) Ltd and Another v NDPP, Zuma v NDPP* 2008 (2) SACR 557 (CC).

24 Sec. 158(2)(a) provides that "[a] court may, subject to section 153, on its own initiative or on application by the public prosecutor, order that a witness, irrespective of whether the witness is in or outside the Republic, or an accused, if the witness or accused consents thereto, may give evidence by means of closed circuit television or similar electronic media".

3. FACTS AND DECISION IN *LEWIS-SPRINGFIELD V S*

The magistrate dismissed the appellant's application for bail pending an extradition inquiry and he appealed against that decision to the High Court.[25] The appellant and his three children, all American nationals, entered South Africa on tourist visas.[26] There was a custody agreement between the appellant and the children's mother, which was made a court order, that he was to return the children to her after their vacation in South Africa.[27] However, he breached this agreement and decided to stay with the children in South Africa, although his visa and those of the children had expired.[28] Consequently, the children's mother reported the appellant to the USA "authorities and [the] appellant was subsequently sought on allegations or charge of 'International Parental Kidnapping'".[29] Against that background, the USA Department of Justice requested the South African Department of Justice "to assist in the arrest and extradition of the appellant".[30] Based on that request, the applicant was arrested and detained pending an extradition inquiry.[31] In the meantime, "[t]he children were 'rescued' and returned to their home country (and to the custodian parent)".[32] The Court held that the accused was facing an extraditable offence and, therefore, his detention, pending the extradition inquiry, was justified.[33] The Court agreed with the appellant and stated that:

> [T]he bail proceedings that the offence appellant charged with or circumstances falls under the provisions of section 60(11)(b) of the Criminal Procedure Act (schedule 5 offence). The appellant could only be released from detention if he adduces evidence which satisfies the court that the interests of justice permit his release. In the United States, appellant has previous convictions involving a firearm and others were of domestic violence and was now facing kidnapping of children.[34]

In dismissing the appellant's appeal, the court held, among other factors,[35] that the appellant had "previous convictions in the United States involving a firearm and others involving domestic violence".[36] The court concluded that "the interests of justice did not permit the release of [the] appellant on bail (pending the extradition enquiry)".[37] This takes us to the issue of whether there are circumstances in which a South African court may decline to admit a foreign conviction in evidence, even if it is adduced in full compliance with sec. 272 of the *Criminal Procedure Act*.

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25 *Lewis-Springfield v S*:paras. 1, 8-12, 16-17.
26 *Lewis-Springfield v S*:par. 2.
27 *Lewis-Springfield v S*:par. 3.
28 *Lewis-Springfield v S*:par. 3.
29 *Lewis-Springfield v S*:par. 3.
30 *Lewis-Springfield v S*:par. 4.
31 *Lewis-Springfield v S*:paras. 5-6.
32 *Lewis-Springfield v S*:par. 7.
33 *Lewis-Springfield v S*:paras. 13-15, 18-30.
34 *Lewis-Springfield v S*:par. 15.
35 *Lewis-Springfield v S*:paras. 31-33.
36 *Lewis-Springfield v S*:par. 34.
37 *Lewis-Springfield v S*:par. 35.

4. THE ADMISSIBILITY OR OTHERWISE OF QUESTIONABLE FOREIGN CONVICTIONS

An important question is whether South African courts are willing to ignore a foreign conviction for bail purposes, or for any other purpose, on the ground that the trial, which resulted into that conviction, was not fair.[38] As a matter of principle, South African courts do not express opinions on the effectiveness or otherwise of foreign judicial systems. For example, in *Director of Public Prosecutions, Western Cape v Mhlanga N.O. and Another; Tucker v Director of Public Prosecutions, Western Cape*,[39] the magistrate "revised" his order for the detention of the applicant pending his extradition to the United Kingdom on, among other grounds, that his trial was unlikely to be fair, should he be extradited. The High Court set aside the magistrate court's decision and held that:

> [I]t is not for our courts … to criticize the legal systems of other countries, whatever our view of them may be … [E]xtradition is largely a process which is based on comity between foreign states, and as such it is founded on the interstate recognition of and mutual respect for each other's legal systems, and it is accordingly not for our courts to attempt to impose our rules and standards on others … [T]he European Court of Human Rights as well as the UK Supreme Court have cautioned courts which deal with extradition matters to avoid imposing their own country's constitutional or fair trial standards (or those contained in international treaties or conventions) on states that are not party thereto.[40]

The Court added that "[f]or a magistrate in an extradition enquiry to express an adverse view in relation to a foreign requesting state's legal system is inappropriate and a cause of judicial and political embarrassment".[41] It is argued that the above rule should not be absolute. There should be cases in which South African courts are allowed to ignore foreign convictions arising out of trials that did not meet international minimum standards.[42] This approach of ignoring some foreign convictions has been taken by the European Court of Human Rights and courts in some European countries albeit in the context of trials. However, nothing prevents courts from adopting the same approach in bail proceedings, where the accused challenges the admissibility of the record

38 In *Falk and Another v National Director of Public Prosecutions* 2011 (1) SACR 105 (SCA):par. 14, the court held that a South African court does not have the jurisdiction to rescind a restraint order issued by a foreign court.

39 *Director of Public Prosecutions, Western Cape v Mhlanga N.O. and Another; Tucker v Director of Public Prosecutions, Western Cape* [2022] 4 All SA 332 (WCC).

40 *Director of Public Prosecutions, Western Cape v Mhlanga N.O. and Another; Tucker v Director of Public Prosecutions, Western Cape*:par. 65.

41 *Director of Public Prosecutions, Western Cape v Mhlanga N.O. and Another; Tucker v Director of Public Prosecutions, Western Cape*:par. 66. See also *Khama v Director of Public Prosecutions Gauteng Local Division Johannesburg and Others* 2023] 3 All SA 193 (GJ); 2023 (2) SACR 588 (GJ):par. 87.

42 These standards are provided for under art. 14 of the International Covenant on Civil and Political Rights.

on the ground that the trial in a foreign country was unfair. For example, the European Court of Human Rights will not recognise a conviction when the trial in question amounted to a flagrant denial of justice. The Court of Justice of the European Union referred to various judgments of the European Court of Human Rights to develop the criteria that European countries should use to assess whether a trial amounted to a flagrant denial of justice. These are

> a conviction in absentia without the possibility of obtaining a re-examination of the merits of the charge; a trial that is summary in nature and conducted in total disregard of the rights of the defence; detention whose lawfulness is not open to examination by an independent and impartial tribunal; and a deliberate and systematic refusal to allow an individual, in particular an individual detained in a foreign country, to communicate with a lawyer. The European Court of Human Rights also attaches importance to the fact that a civilian has to appear before a court composed, even if only in part, of members of the armed forces who take orders from the executive.[43]

Since disregarding a foreign conviction requires strong reasons to avoid "judicial and political embarrassment", a high threshold, as the one stipulated earlier, is needed.[44] Those criteria have been followed in some countries outside Europe.[45] There are instances in which South African courts have been informed of cases where foreign trials did not meet minimum international standards. For example, in case where the applicant's trial took place *in absentia* before a military court.[46] In such cases, South African courts may disregard a foreign conviction. By disregarding foreign convictions in cases where the trial did not meet the minimum international standards, South African courts would be adopting the same approach followed by courts in some common-law jurisdictions. For example, in *Khazaal v R*,[47] the Supreme Court of New South Wales held that it will not have regard to foreign convictions where "the procedures leading to those convictions were such as to evoke the outrage of this Court".[48] One of the courts in the United Kingdom followed a similar approach. In *R v Zhang*,[49] the accused was prosecuted for manslaughter. During the trial, the prosecution adduced, among other evidence, a certificate showing that he had been convicted of rape in China. The accused objected to the admission of the foreign conviction on the basis that he had been tortured before he made a confession, which formed the

43 *Minister for Justice and Equality (Defaillances du système judiciaire) (European arrest warrant – Grounds for refusal to execute – Opinion)* [2018] EUECJ C-216/18PPU_O (28 June 2018):par. 82.

44 *National Crime Agency v Hajiyeva* (Rev 1) [2018] EWHC 2534 (Admin) (3 October 2018):par. 77.

45 See *Kim v Minister of Justice* [2016] NZHC 1490; [2016] 3 NZLR 425 (1 July 2016):par. 106 (High Court of New Zealand).

46 *Consortium for Refugees and Migrants in South Africa v President of the Republic of South Africa and Others* (30123/2011) [2014] ZAGPPHC 753 (26 September 2014).

47 *Khazaal v R* [2011] NSWCCA 129.

48 *Khazaal v R*:par. 158.

49 *R v Zhang* [2008] NICC 4 (13 March 2008).

basis of his conviction.[50] The court held that, although the certificate met the formal requirements for admissibility under the relevant law and was admissible,[51] it found that the evidence showing his previous conviction was inadmissible because the prosecution had failed "to disprove the allegations beyond reasonable doubt".[52] The Court gave some recommendations which South African courts may find of interest:

> This case highlights some of the difficulties that can arise when the prosecution seek to rely upon foreign convictions in criminal proceedings, and such applications are likely to arise much more frequently in future. The prosecution should, therefore, consider carefully whether such applications are necessary in each case, and both prosecution and defence must be alert to the need to have suitably qualified experts in the relevant foreign law available to give evidence. Such issues should be clearly identified well in advance of the trial, even if the application is to be dealt with at the trial. For example, where the prosecution serve a notice relying on a foreign conviction, the defence should be required to serve a skeleton argument well in advance of the trial identifying exactly what issues arise, and advance notice of any expert evidence relied upon should also be served in accordance with the Crown Court Rules.[53]

Likewise, in *Mueen-Uddin v Secretary of State for the Home Department*,[54] the England and Wales Court of Appeal held that before a court relies on the accused's foreign conviction, it "must necessarily give careful scrutiny to any question raised as to whether an accused had a full opportunity to defend himself in the foreign court".[55] If a previous conviction is from a court based in a country where there are substantial grounds to believe that the accused's trial may not have been fair and the accused challenges its admissibility on that ground, courts should not admit it, unless the prosecution adduces evidence, beyond reasonable doubt, that the accused's trial met minimum international standards. The burden to search for that evidence should be on the prosecution and not the court.[56] This should be the case whether

50 *R v Zhang*:par. 7.
51 *R v Zhang*:par. 8.
52 *R v Zhang*:par. 32.
53 *R v Zhang*:par. 34.
54 *Mueen-Uddin v Secretary of State for the Home Department* [2022] EWCA Civ 1073 (28 July 2022).
55 *Mueen-Uddin v Secretary of State for the Home Department:* para. 71. See also *The Commissioner of Police for the Metropolis v Bary* [2022] EWHC 405 (QB) (25 February 2022): par. 21.
56 In *Bazegurore & Anor v R* [2020] EWCA Crim 375 (21 February 2020):par. 18, the court held that "[i]ndeed it is predictable that in many cases the facts relevant to the foreign offending might be difficult to determine to a sufficient probative standard to make the subsequent sentencing exercise accurate, objective and fair, if it is the case that it must be taken into consideration. If there was an obligation upon courts to dig out evidence about such proceedings this could trigger all sorts of satellite disputes and litigation about the facts underlying a foreign conviction and as to what did or did not occur and as to the role of the defendant in those underlying facts. The logistical difficulties of a rule requiring foreign sentences to be taken into account as part of totality are legion."

or not the accused is legally represented. In other words, the general rule should be that convictions from such countries are inadmissible. They are admissible in exceptional circumstances: for example, when their admissibility is not challenged by the accused or if challenged, the prosecution proves that the trial met the international minimum standards. Evidence showing that there are substantial grounds to believe that the trial may have been unfair could be obtained from different sources such as the accused's testimony and reports by reputable human rights organisations.[57] The Supreme Court of Appeal held that, in civil matters, South African courts will recognise foreign judgments when, *inter alia*, the rights of the parties were respected during the proceedings.[58] Nothing prevents courts from following this approach in criminal matters. However, in cases where a conviction emanates from a country that is known for its good human rights record, the general rule should be that the criminal record is admissible, unless the defence challenges its admissibility, in which case the prosecution should prove, beyond reasonable doubt, that the conviction met international standards. This is the approach taken by countries in the European Union.[59] Either way, the admissibility of foreign convictions poses challenges.[60] South Africa may have to enter into agreements with some countries, in terms of which the foreign sentences are automatically recognised in South Africa. Such an approach has been recognised, for example, in the enforcement of suspended sentences under sec. 297B of the *Criminal Procedure Act*.

5. CONCLUSION

In this article, the author discussed the provisions on previous convictions in the *Criminal Procedure Act*. The author showed that the *Criminal Procedure Act* deals with the issue of previous convictions in three ways. First, some provisions deal with South African previous convictions exclusively. Secondly, some provisions deal with both South African and foreign previous convictions. Lastly, some provisions are silent on whether they are also applicable to foreign convictions. Although the general rule is that Parliament normally intends South African law to have domestic application, there are expressly mentioned exceptions in the *Criminal Procedure Act*. It is illustrated that, although sec. 60(11)(B)(a)(i) of the *Criminal Procedure Act* does not expressly refer to foreign convictions, in *Lewis-Springfield v S*, the court invoked the appellant's foreign convictions, among other factors, to reject his bail application. This implies that the court was of the view that sec. 60(11)(B)(a)(i) of the *Criminal Procedure Act* is applicable to foreign convictions. This approach is understandable in light of the fact that sec. 60(11)(B)(a)(i) of the *Criminal Procedure Act* does not expressly exclude foreign convictions. Since the court took this approach, the author has discussed the circumstances in

57 *Gavric v Refugee Status Determination Officer, Cape Town and Others* 2019 (1) SA 21 (CC):par. 87.

58 *Government of the Republic of Zimbabwe v Fick and Others*:par. 28.

59 *A Local Authority v M & Others* [2022] EWHC 2127 (Fam) (21 June 2022):paras. 41-42.

60 See, for example, *Bazegurore & Anor v R*:par. 18.

which South African courts may admit foreign convictions. It is suggested that South African courts should decline to admit foreign convictions where there is evidence to believe that the trial, from which such a conviction resulted, was unfair.[61] Foreign convictions should also be inadmissible in cases where the conduct of which the person was convicted in a foreign country is not criminalised in South Africa.[62] The *Hollington rule*, which states that "a judgment in previous [criminal] proceedings is not admissible in subsequent [civil] proceedings as evidence of the facts on which such a judgment was based",[63] should also be applicable to foreign convictions.[64] However, as in the case of the admissibility of foreign convictions in bail applications, safeguards should be put in place to ensure that the trial which resulted into such convictions met international minimum standards.

61 Legislation may have to be enacted to provide for the procedure that has to be followed to prove foreign convictions. See, for example, *Minister for Justice and Equality v Iancu* [2020] IEHC 316 (High Court of Ireland). See also *John s/o Daudi & Another v The Republic* (DC Criminal Appeal 71 of 2022) [2023] TZHC 18640 (3 July 2023) (High Court of Tanzania) dealing with the admissibility of foreign court proceedings in Tanzania.

62 See, for example, *Gosturani v Secretary of State for the Home Department* [2022] EWCA Civ 779 (09 June 2022):par. 36.

63 *A Local Authority v M & Others* [2022] EWHC 2127 (Fam) (21 June 2022): par. 15.

64 For a discussion of this rule, see *Technology Corporate Management (Pty) Ltd and Others v De Sousa and Another* (613/2017) [2024] ZASCA 29 (26 March 2024): paras. 161 – 164. The court held that "[t]he rule in *Hollington v Hewthorn* should not be extended beyond the circumstances to which it expressly applied [that is, to prevent the reliance on a judgment in criminal matter to prove facts in a subsequent civil case]. In other instances where it is sought to use findings in a previous case to prove facts in a subsequent case, the test for admissibility should be relevance and the court must pay careful attention to the weight to be attached to the evidence thus tendered." See par. 165. See also, *Benyatov v Credit Suisse Securities (Europe) Ltd* (Rev1) [2022] EWHC 135 (QB) (25 January 2022): para. 355. For a different view on the issue of the applicability of the *Hollington rule* to foreign convictions, see *W-A (Children: Foreign Conviction)* [2022] EWCA Civ 1118 (05 August 2022) (England and Wales Court of Appeal)