THE STATE VERSUS

1. VINCENT MASHININI
2. GARNET MAHLANGENI
3. PAUL FAKUDU

1977
PRETORIA

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JUDGMENT

Lubbe Opnames/Pta/HG

C.C. 669/77

IN THE SUPREME COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

PRETORIA,

31st August 1977.

Vide De Nastes.
Not revised for
and time time
pressed for time
mention to Judge Myburgh.

THE STATE

versus

VINCENT MASHININI,

GARNET MAHLANGENI

PAUL FAKUDU

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JUDGMENT

ESSELEN, J.: In this matter the three accused are charged with contravening Section 2(1)(b) read with Sections 1, 2(2) and 5 of Act No. 83 of 1967, namely participation in terrorist activities. It is alleged by the State that the accused during October, 1976 to February, 1977 and at Soweto, Piet Retief and Manzini in Swaziland, wrongfully and with intent to endanger the maintenance of law and order inter alia incited, aided, advised, encouraged or procured certain persons who are named in the annexure to the charge-sheet to undergo military(10) training outside the Republic namely in Tanzania, or elsewhere which could be of use to a person intending to endanger the maintenance of law and order.

In addition it is alleged by the State that the accused No. 1, during the period October, 1976 to January, 1977, at the aforesaid places and with the aforesaid intention, attempted, agreed or took steps to undergo military training at the aforementioned place or elsewhere, which could be of use to a person intending to endanger the maintenance of law and order. Certain further particulars are furnished by the State in (20)

regard/...

regard to the summary of facts of the case which had been supplied to the defence.

It is however unnecessary to refer thereto and also to the question of the amendments granted to the State at the commencement of the trial.

In considering the evidence it is perhaps necessary to bear in mind that in respect of the said offence the State must prove the following:

1) That the accused committed one or more of the alleged acts in respect of military training in Tanzania or elsewhere and;

2) That such training would be of use to a person intending to endanger the maintenance of law and order.

When the State has, objectively considered, proved the above two elements beyond a reasonable doubt, it would have succeeded in establishing prima facie the offence set out in terms of Section 2(1)(b) with which the accused are charged.

Thereafter the position is that in terms of the said Section, the onus rests on the accused to prove beyond reasonable doubt:

1) That they did not incite, aid, advise, encourage or procure such persons to undergo such training;

2) That they did not do it with the purpose of using it or causing it to be used to commit any act, and

3) That such act was not likely, objectively considered, to have any of the results referred to in sub-section (2) in the Republic or any portion thereof.

See S. v. Moumbaris and Others, 1974(1) S.A. 681 (T) at page 685(c). If the accused discharges the onus resting on him the Court cannot find them guilty of participation in terrorist activities but where they do not succeed in

discharging/...

discharging the onus, the Court is obliged to find them guilty.

The aforementioned principles are also applicable to accused No. 1 insofar as the further allegations on the charge-sheet relate to his personal participation in terrorist activities.

The three accused pleaded not guilty. In terms of Section 115 of Act 51 of 1977 their counsel was asked whether they wished to make a statement indicating the basis of their defence.

Certain allegations which were not placed in issue by their pleas, were, after confirmation by them and with their consent, recorded as admissions by them of such allegations. (10)

The defence also admitted the policy and programme of the P.A.C. of Azania, is as set out in EXHIBIT D and that such exhibit was extant at all times which are relevant to the indictment preferred against the accused. It was also admitted that the P.A.C. has been declared an unlawful organisation and that it remained as such at all times which are relevant to the indictment preferred against the accused.

After the State had closed its case, Counsel for the defence applied for the discharge of the accused. The application is brought under and by virtue of the provisions of Section 174 of Act 51 of 1977. The expression, "no evidence" in this section which is similar in wording to Section 157(3) of the repealed Criminal Procedure Act No. 56 of 1955, has been construed to mean, no evidence upon which a reasonable man could or might convict. (20)

In other words it is the Court's duty to consider whether the evidence advanced by the State if believed, might or could be sufficient to satisfy a reasonable man acting carefully that the accused are guilty of a crime covered by the (30)

indictment/...

indictment upon which they are charged.

The Court is primarily concerned with the evaluation and in my view the reliability of the evidence.

However, according to the decision of S. v. Nanda Gopal Naidoo, 1966(1) P.H. Vol. 87 p. 104, there can be no warrant for excluding the question of credibility.

It is also accepted in R. v. Dladla & Others, (2) 1961(3) S.A. 921(N) at page 923, that it may be that when a Judge is himself the sole trier of fact, the rule against taking into consideration, question of credibility may from a practical(10) point of view be subject to modification.

It can be accepted that in certain circumstances there may be a difficulty in applying the aforesaid test with any measure of accuracy and in practice the Court in each case must and can only be guided by such good sense and discretion, as it can bring to bear upon the trial.

In regard to the evidence placed before the Court, reference must first be made to the witnesses William Tshimong, Johannes Ramohlabi and Francisco Ntwe.

It is apparent from their evidence that they recanted (20) certain material portions of the previous statements (being respectively EXHIBITS A, B and C), which related to accused No. 1 either inviting or persuading them to undergo military training. They were accordingly discredited by the State so that no reliance can be placed on their evidence. The activities testified to by Rogers Mpanbane certainly indicate that during January, 1977, he was deceived into taking accused No. 2 and four youths, who were described to him as No. 2 accused's four nephews, to a point outside Piet Retief near the Swaziland border, and that accused No. 2 was active in assisting the (30) youths to reach Swaziland.

Furthermore/...

Furthermore Louisa Marunjane's evidence also indicates that accused No. 1 and 2 were active in assisting youths in groups to proceed to Swaziland. She was also informed by accused No. 1 after his younger brother Lebakeng had left, that he was proceeding to Swaziland to attend school. Accused No. 1's mother, Virginia Mashinini's evidence indicates that at the stage when she proceeded to Swaziland on the 20th January, 1977, after accused No. 2 had visited her house and informed her of Lebakeng's whereabouts, she, together with accused No. 2 and 3 were at the house in Manzini and were informed about military training in Tanzania. She not only testified to Makwanazi and Ndlovu being present on that occasion but Sefudi also testified to them being present when he subsequently proceeded there on the 26th January, 1977.

The fact that Virginia Mashinini was concerned about her son Lebakeng who was 15 years of age and wanted him to go to school and yet did not trouble to find out what school he would in fact attend in Swaziland, or where the schools were in relation to the house which she visited, is possibly a factor which could be considered in drawing the inference that he in fact would not be attending school.

On the other hand it can fairly be contended that as she was satisfied he would attend school, it was unnecessary to make further enquiries. Moreover there is her evidence that only the bigger and/or older ones would be sent for military training, and that she was satisfied that Lebakeng would, together with the other youths, who were between 15 and 20 years of age, be sent to school. In this regard she explained how the persons who came there and had received military training were all approximately Makwanazi's age, namely 50 years of age, except one person who was approximately

30 - 35 years of age.

Other factors which indicate that accused Nos. 2 and 3's activities were of a sinister nature and which, if weighed cumulatively could be of significance in drawing the inference that the youths were not going to attend school but would undergo military training, concern the method in which the youths entered Swaziland, the place where the vehicle was parked in Manzini and the return of Virginia together with accused No. 2 and 3 via a different border gate than the one through which they entered Swaziland. (10)

On the other hand it can be fairly contended that these factors weighed either singularly or cumutatively are equally consistent, on the evidence as a whole, with merely having taken immigrants illegally out of the Republic of South Africa into Swaziland, for the purpose of enabling them to attend school.

It must be remembered that Rogers gave no evidence that accused No. 2 and his so-called nephews were being taken to Swaziland for the purpose of undergoing military training.

Furthermore, insofar as the knowledge of accused No. 2 and 3 are concerned, regarding military training, it appears (20) from Virginia Mashinini's evidence that they would have been aware that if they took youngsters to Swaziland there was no possibility that they would be sent for military training.

It is correctly conceded by the State that the evidence of Rogers, Louisa and Virginia is not by itself sufficient to warrant the dismissal of the application. The question which however arises is whether their evidence should be considered in the light of the evidence given by David Sefudi, which in turn depends on whether the latter's evidence is acceptable or reliable. It must be remembered that David Sefudi is a (30) youth of 17 years of age who, at the request of the prosecutor

was/...

was warned in terms of Section 204 of Act 51 of 1977. Furthermore it was pointed out by the defence counsel that regard being had to the fact that he considered himself to be a member of the P.A.C., he can in the circumstances, be said to be an aider or abetter and would in that event on the authority of S. v. Kellner, 1963(2) S.A. 445 A.D. at p. 443, 444, 446, 447 be an accomplice.

While it is true that in terms of Section 208 of Act 51 of 1977, an accused may be convicted of any offence on the single evidence of any competent witness and that the previous statutory requirement, in regard to accomplice evidence, has been repealed, it nevertheless remains necessary for the Court to apply the cautionary rule of practice as propounded in inter alia R. v. Ncanana, 1948(4) S.A. 399 A.D. at p. 405 to 406.

It is also submitted by counsel for the defence that in respect of the allegations contained in paragraph 3 and 6 of the summary of material facts, that he is a single witness and that the rule in regard to such a witness must accordingly be applied in respect thereof.

It must furthermore be borne in mind that Sefudi has been in solitary confinement for 6½ months and that in such circumstances the approach of the Court is, as set out in S. v. Hassim and Others, 1973(3) S.A. 443 A.D. at page 454 namely -

> "The object is the acquiring of information. But if a prosecution should ensue, the Court is not obliged to be satisfied with the evidence so acquired. The Court retains its normal power and function, which it will exercise with vigilance and scrutiny, to pronounce upon the evidence placed before it,

bearing in mind, inter alia, in any particular case, the question whether the circumstances under which the evidence is obtained has affected its credibility.

No hard-and-fast rule can be laid down."

In regard to, inter alia, the questions of solitary confinement and detention, the following extract from the judgment a quo is quoted with approval by the Learned Judge in Hassim's case, supra at page 454 and 455:

"..... All those things were no doubt considered necessary by the authorities, who have the grave responsibility of ensuring that the security of the State is protected but they can undoubtedly create situations in which the evidence of witnesses coming to Court in these circumstances has to be subjected to even more careful scrutiny than is usual, before the Court can come to any conclusion as to whether a particular witness can be relied on as truthful and reliable. This is because these circumstances raise the possibility that they may have induced in a witness a state of mind which may tempt him to fall in readily with suggestions put to him while under interrogation and thereby to depart from the absolute truth or to depart voluntarily from the proof to ingratiate himself with the police, or at least to make him unwillingly (sic) to depart from the sworn statement he has given to the Police for fear that this may lead to a prosecution for perjury."

It is in the light of the aforegoing aspects that Sefundi's

evidence/...

evidence must be assessed. I do not however consider it necessary in the circumstances to deal with his evidence seriatim. I say this, regard being had to the attitude adopted by the State.

Suffice it to say that it bristles with material contradictions. Moreover, he showed himself to be highly susceptible to suggestions, that were made to him and at times was forgetful, vague and confused as to what he had or had not said in his evidence. It can be mentioned that the defence Counsel enumerated at least eight material contradictions (10) and certain ramifications in respect thereof, which I need not detail, as Counsel for the State correctly in my view, conceded that the criticism in regard thereto was justified.

It follows in my view, that if these contradictions are weighed cumulatively then his evidence considered as a whole is totally unreliable, and any attempt at a dissection of what might be reliable and what might be unreliable would in the circumstances be a perilous undertaking.

It follows that the evidence of the other State witnesses to whom reference has been made, stands alone, and (20) accordingly, does not assist the State in resisting the application.

Even if it were to be found that the accused in certain respects told untruths it does not follow that by reason thereof they participated in terrorist activities. Only admissions by the accused that they so participated would supplement the shortcomings in the State case, and it is hardly conceivable that that will occur, more especially if regard is had to the basis of the defence which was set out in summary form by counsel at the commencement of the trial. (30)

Accordingly it cannot be contended that were the

application/...

application for discharge to be granted it would result in a miscarriage of justice.

There may be a suspicion that the accused were either directly or indirectly concerned in terrorist activities or were assisting persons in regard thereto; the fact that accused No. 2, a man of 33 years of age should in the circumstances have been concerned with accused No. 1, a youth of 17 years of age in regard to the question of schooling, also calls for comment. The suspicion is however not of such a nature as to require the Court to call upon the accused (10) to enter upon their defence. A mere scintilla of evidence is insufficient. There are, in my opinion no grounds of which I am aware which would justify the prolongation of the trial and in the light of the aforegoing test, the application is granted.

The three accused are accordingly FOUND NOT GUILTY AND DISCHARGED.

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