

in front, my lord.

Why did you say yesterday that it was No. 1 who gave instructions to the lorry driver when to stop? ---I said yesterday Accused No. 1 said to us after we stopped to gather wood and to make fire.

NB Do you deny that you said that Accused No. 1 said when you must stop?---No, I deny that because I could not hear in front of the lorry.

Now Gladstone, I want to take you back to the time shortly after your conviction. You had been sentenced to two years imprisonment?---Yes. /10

So had Bambani?---Yes.

Now, do you remember that you still had some hope then, because there was an appeal pending?---Yes, I knew about it.

Yes, you knew that there was some prospect of your getting off the difficulties that you were in, because your proceedings were said to have been irregular? ---Yes, we expected to get off on appeal, because they had appealed on our case. /20

And in fact, your sentences were set aside, and ... you were sent back for re-sentencing and you received the same sentence?---I did not go back.

You did not go back, but anyway, you expected some sort of remission. You heard that an appeal failed for all practical purposes?---I heard it.

Now, did you hear that whilst this question of appeal was going on, that Bambani had started giving evidence?---I heard it.

And that he was getting certain benefits, as a result of giving evidence?---I did not hear about his treatment, I heard that he gave evidence. /30

Now, some time after that, did the police come to you?---Yes, some time after that when they came.

And was it obvious to you at this visit that Bambani had spoken to the police about your group?---No, they did not come in that manner to me.

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Well, when the police came to you did you get the impression that they knew everything?---Not at that time, I did not think of it.

When did you get to think that the police knew everything?---When I was told by the police. /10

And was it correct that they know everything?---What they have told me was the truth.

They knew of the sabotage that you had taken part in in the Eastern Districts?---They knew about it.

They knew of the fact that you were going on military training?---They told me about it.

They knew who was responsible for getting the people out of the country?---Yes, they knew who they were, they told me.

They knew who were the leaders that led the group from Lobatsi to the Zambesi?---That they did not tell me. /20

Did they know?---Whether they knew it or not, but I was not told by them.

Well, what did you think they knew about this trip?---I did not know what they knew about it.

They knew about Joe Modiso?---I was asked about Joe Modiso.

You were asked about Joe Gqabi?---I was asked.

And did they show particular interest in Joe Modiso and Joe Gqabi?---Perhaps, I do not know. /30

Well, did they ask you a lot of questions about

Joe Gqabi?---I was asked whether Joe Gqabi was amongst the others in this trip, and I said yes.

And were you asked whether he was the leader?
---I told the police that he was the person who gave us instructions along the way.

And you knew that the more co-operative you could be to the police, the greater your prospects of being released?---I did not know, I also expected to be arrested.

Are you saying that you started giving evidence, /10 or rather, the fact that you are giving evidence, had nothing to do with any benefit that you might get?--- No, I also expected to be charged.

You expected to get no benefit whatsoever?--- After I made the statement, I was informed by the police that I may be charged.

Did you expect to get any benefit?---I was between two things, I thought that I could be charged, and I thought that I would not be charged.

Did you expect to get any benefit?---As I say, /20 I was between two things.

Why do you not answer the question?---I am answering the question.

Did you hope not to be charged?---My hopes was between two - being charged and not to be charged.

What were you hoping for?---My hope was not to be charged.

Yes, that is why you made the statement to the police?---I have already told the Court when I made the statement how it happened. /30

Would you mind answering my question?---....

Is that why you made the statement to the

police?---No.

Was your statement made to the police without any regard to your hope of not being charged?---That is correct, I made the statement at the time whether I was going to be charged, or whether I was not going to be charged.

Nobody had in a crude sort of a way ever suggested to you that ^{if} you ever admit that you were promised anything, that you will get into difficulty?---I was told that if the police told me anything that I should not admit it. /10

AT THIS STAGE THE COURT ADJOURNS FOR LUNCH.

ON RESUMING:

GLADSTONE MAKAMBA, still under oath (Interpreted)

CROSS-EXAMINATION BY MR. BIZOS (CONTINUED):

When you arrived in Bechuanaland and you were told that you were to wait, was there any certainty as to when transport would become available?---No, we had no knowledge.

Were you told that there was no certainty, and that was the reason why you had to keep together? ---We were not told when we will leave. We were just told to wait. /20

Now, did you say this about your trip to, or rather, your going into Lobatsi? On page 27 of the Natal case, did you say the following: "Did you go into Lobatsi at all while you were there?---I did not. Did you remain where you were?---Yes. Did any of the 37 go to Lobatsi?---No, nobody went. You all remained there? Would it surprise you if Harry Bambani says you went into Lobatsi?" Your answer was: "Perhaps he may be talking of some other time that he had gone to Lobatsi. I am /30

referring to the time that you spent in the location?---
We were all there. He did not go to Lobatsi? Did you
not have to go to Lobatsi?---We did not go". Very
definite answers - were those your answers?---(No reply).

Were those your answers?---Yes, I did say so.

Then it was put to you on page 44: "I put it
to you that Accused No. 9 went into Lobatsi that first
day?---I deny that, I was with him, he did not go there.
Were you with him all the time?---All this time that we
were there, we were all together. You were not there, /10
you walked away for a while?---Yes, I admit that I
went to the toilet. Do you know how far Lobatsi is from
the Bechuanaland border?---I will not be able to know.
You were quite close to Lobatsi where you camped in
the forest?---It was a distance away, as far as I could
see the houses." Was that your answers?---Yes.

And I read you another passage yesterday where
you repeated the same thing. Now, is it true that in re-
examination by the prosecutor you changed your mind, and
you said that you had been to Lobatsi? Have you any /20
explanation for the emphatic way in which you denied this
allegation that was going to be made by the Accused No. 9
for instance?---I told the Court at the tea adjournment
at Pietermaritzburg after I left the Court, it came back
to me that we were at Lobatsi.

Belt
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Did you see anybody during the tea adjournment
at Pietermaritzburg?---No, I did not see anybody I came
back to myself without meeting anybody.

Tyulu told us that you were given a false
name?---At Pietermaritzburg I gave my correct name. /20

Now, we are not talking about Pietermaritzburg.

Tyulu has told us that for the purposes of the trip, he was

given a false name?---Do you mean myself and Tyulu?

Were you given a false name?---No, I was not given a false name.

At any stage?---I was not given a false name.

Now, did your clothes get wet?---Where?

On that Monday night in the bush outside Lobatsi?---They got wet, but I would say they got damp not very wet.

Did they require ironing?---No, they were not ironed. /10

Did they require ironing?---No.

Did some of you go into the village?---....

And ask for your clothes to be ironed?---I did not see anybody going away.

But I thought that you went in groups into Lobatsi? Or do you want to change that again?---We went together.

Not in groups?---No.

Did all 37 of you march in one column?---Yes.

In single or double file?---We just walked /20 along two or three, and so on.

And that is what you had forgotten on the three occasions. Now, is it correct that you left Lobatsi after dark?---To go where?

To the Zambesi?---It was strong dusk - half-past seven to eight o'clock it was.

Now, you could identify the persons who were outside the lorry at the back, could you?---Yes, (witness indicates just outside the lorry), I could identify them.

Were you right at the back of the lorry?--- /30 Yes, I was not quite on the edge, but not far from the edge of the lorry at the back.

Would you like to indicate how far from the edge of the lorry?---My lord, the witness indicates from here about two feet.

So, was there only one person in front of you? ---I cannot say, I did not count them.

Now, I am going to put to you that Accused No. 1 was not sitting in front of the lorry with the driver?

---I say he did.

Do you remember that yesterday you dealt with me rather shortly when I asked you about the platforms at Livingstone? Do you remember what you said - you took no notice of how many platforms there were, and it was quite obvious that I knew how many there were?---I said that because Counsel said there was more than one. I was under the impression that he knew how many platforms there were. /10

And did I not ask you was there not only one platform there?---I told the Court that I saw the one platform where I was standing, I did not see any other platform. /20

Well, let me read to you what you said to Counsel cross-examining you in the Natal case at page 35: "When you go to a station to catch a train, do you not make enquiries where the train is leaving from, what platform?" And you dealt with him in a similar way "There is only this one platform which we saw, there was not more than one platform". Did you say that in Natal?---I said I saw the platform where I was standing.

Did you say there was not more than one platform?---I did not say so. /30

I beg your pardon?---I did not say so.

And if it is on record, then you were not

correctly recorded?---Yes.

MR. BIZOS: No further questions.

RE-EXAMINATION BY MR. REDPATH:

You told us that you had not been given a false name?---No.

I am not too clear on this - were you never instructed to take a false name, either in the Republic or elsewhere?---I will not deny it, but I did not hear such instruction.

In fact, you never took one?---No. /10

And when you were arrested in Livingstone, did you give your correct name?---I gave my name.

Now, your last reply before the luncheon adjournment was, you were told that if the police told you something you should not admit it?---Yes.

First of all, could you clarify what you meant by that statement?---I meant when I was travelling on this journey that if I am questioned by the police not to say anything what I did during the time in Port Elizabeth, my lord. /20

In other words, that if.....

MR. BIZOS: Objects as he feels that Mr. Redpath is leading the witness.

MR. REDPATH: I will leave it at that, my lord.

BY THE COURT TO WITNESS:

Did you say that on the journey when you were questioned by police, you were instructed not to tell them what?---Why I was going to this place.

Why you were going to Tanganyika?---Yes, my lord.

RE-EXAMINATION BY MR. BIZOS (CONTINUED): /30

Now, you were questioned by my learned friend about your evidence at Pietermaritzburg, in connection

with Lobatsi, and it was pointed out to you that you denied in the first instance that you had ever been to Lobatsi?---Yes.

And was it also put to you that later on when you were re-examined by the prosecutor there that you then remembered that in fact, you had been to Lobatsi?---Yes, my lord.

I do not think you have told us why you forgot in the first instance? Why you did not mention that fact in the first instance, but then you did mention it in the second instance?---After the adjournment of the Court I thought about it and I remembered it. /10

You remembered it. Now, was that of your own volition that you went to the...who did you go and tell about it when you remembered it?---I did not talk to anybody nor to the prosecutor about it.

How was it that you came back and gave that evidence?---It was the tea adjournment and I had not finished my evidence and I continued after the tea break.

And it was then that you remembered and then you rectified the position?---Yes. /20

And did the prosecutor on page 50, put to you a question directly concerning the immigration ~~late~~ officer in Lobatsi?---Yes.

And did you thereupon tell him how you went to the immigration office in groups of five?---Yes. //

MR. REDFATH: No further questions.

BRUNO MTOLO, declares under oath (Interpreted)

EXAMINATION BY MR. REDPATH:

MR. REDPATH: Addresses the Court and tells the Court that there was some question as to the admissibility of this witness' evidence. He informs the Court that he will be willing to inform the Defence without his lordship's presence what the evidence will be, so that the defence can decide whether to contest this evidence or not. He would like it on record what has been going on, as he feels that in these trials it should be so. /10

AT THIS STAGE THE COURT ADJOURNS TO ALLOW MR. REDPATH TO INFORM THE DEFENCE WHAT THE EXTENT OF THE EVIDENCE WILL BE.

MR. REDPATH: Informs the Court that he has informed the defence in broad outline what this evidence will be. He continues to address the Court on this aspect, and informs the Court that the defence would like to argue the admissibility of this evidence tomorrow morning. He feels that the evidence is plainly admissible, and that he would like this witness' evidence recorded at this stage. /20

BY THE COURT: I think we will leave it and then you can argue the admissibility tomorrow morning.

MR. REDPATH: Asks permission for Freddie Tyulu and Gladstone Makamba to go back to Port Elizabeth, and he also informs the Court that he does not intend to call Bambani. The Defence will not be calling Bambani and neither will they require the other two witnesses again.

BY THE COURT: They will be excused from further evidence.

THE COURT warns Bruno Mtololo in terms of Section 254 as amended. /30

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter of the application of :

HENRY MOKHATI

SAMSON FADANA

and

MICHAL MAHLANGU

Applicants

APPLICATION FOR SPECIAL LEAVE TO APPEAL AND THE
MAKING OF A SPECIAL ENTRY IN TERMS OF THE
PROVISIONS OF SECTIONS 363 and 364 OF THE
CRIMINAL PROCEDURE ACT, 1955, and SECTION
21(3) OF ACT 59 OF 1959.

TO THE HONOURABLE THE CHIEF JUSTICE OF THE REPUBLIC OF
SOUTH AFRICA AND THE OTHER HONOURABLE JUDGE OR JUDGES
OF APPEAL TO WHOM THIS PETITION MAY BE REFERRED

P E T I T I O N

THE PETITION OF :

HENRY MOKHATI

SAMSON FADANA

and

MICHAL MAHLANGU

humbly sheweth that :

1.

Your Petitioners are HENRY GORDON MOKHATI (Accused No. 2), SAMSON FADANA (Accused No. 3) and MICHAL MAHLANGU (Accused No. 4), all of whom are convicted prisoners, presently being held at Leeukop Prison, Transvaal.

2.

Your Petitioners, together with a certain Joe Gquabi, were charged together with the offence of contravening Section 11(b)(ter) read with Section 11(i)(bis) of the Suppression of Communism Act No. 44 of 1950. Joe Gquabi was accused No. 1 at the trial, and your Petitioners were accused Nos. 2, 3 and 4 respectively. During the hearing a separation of trials was ordered, as a result of which The State was directed to conduct separate trials against your Petitioners on the one hand, and Joe Gquabi on the other hand. The State elected to continue with the trial against your Petitioners, and to try Joe Gquabi on wider allegations at a later stage. Throughout the evidence your Petitioners were referred to as accused Nos. 2, 3 and 4, and for the sake of convenience your Petitioners will continue to refer to themselves as accused Nos. 2, 3 and 4.

3.

The trial of the three accused took place before his Lordship Mr. Justice Hiemstra, sitting without assessors. The trial was on the 17th, 18th, 19th and 20th May, and the 21st, 22nd, 23rd and 25th June, 1965. At the end of the trial judgment was reserved, and on the 28th June 1965 judgment was given, convicting the three accused

of the/...

the charge referred to in paragraph 2 hereof. Your Petitioners annex hereto marked "A" a transcript of the judgment which was supplied to their attorneys by the official shorthand writer.

4.

After hearing argument on the question of sentence, His Lordship Mr. Justice Hiemstra sentenced Accused Nos. 2 and 3 to six (6) years imprisonment with hard labour, and Accused No. 4 to five (5) years imprisonment with hard labour.

5.

On the 29th June 1965 an application was made to His Lordship Mr. Justice Hiemstra for leave to appeal to the Appellate Division against the conviction of the three accused, and for a special entry to be made as to the admissibility of certain evidence which had been elicited through the cross-examination of the accused. A copy of the Notice of Application for leave to Appeal, and for the special entry is annexed hereto marked "B".

6.

On the 29th June 1965, both applications were refused by the learned judge. A copy of the judgment discussing the applications is annexed hereto marked "C".

7.

As a result of the refusal of the application for leave to appeal and the refusal to make a special entry,

the/...

the three accused have made this petition for special leave to appeal in terms of Sections 363 and 364 of the Criminal Procedure Act 1955, and Section 21(3) of the Supreme Court Act, 1959.

8.

The charge against the Accused was that they had consented, or attempted, or taken steps to undergo military training which could have been of use in furthering the achievement of the objects of the African National Congress (or the Umkonto We Sizwe) an organisation which had been declared to be unlawful under the provisions of Act No. 34 of 1960.

9.

The State case was that thirty seven South African residents including the three accused had been recruited to undergo military training beyond the borders of South Africa, and had been arrested in Northern Rhodesia, en route to their destination.

10.

The State case depended on the evidence of two of the persons who had been arrested in Northern Rhodesia. These persons were Gladstone Makamba and Freddie Tyulu. Their evidence was to the following effect :

- (a) They had been recruited in Port Elizabeth to undergo military training for Umkonto We Sizwe.
- (b) They then travelled to Johannesburg with other persons from the Eastern Cape. Makamba and Tyulu

did/...

did not travel together, but both of them arrived at Johannesburg at about the same time.

- (c) They remained in Johannesburg for a few days, and were then transported by motor vehicles to the Bechuanaland border.
- (d) They crossed into Bechuanaland on foot and lived for a few days in a plantation outside Lobatsi.
- (e) They say that they saw accused Nos. 2, 3 and 4 in the plantation.
- (f) They were then transported by lorry from Bechuanaland to the Zambesi River, and by Land rover, from the Zambesi River to Livingstone. Accused Nos. 2, 3 and 4 were with them on this journey.
- (g) Makamba and Tyulu had been instructed to keep secret the fact that they were going for military training, and held themselves out to persons (including their fellow travellers) as students.
- (h) Before the lorry left Lobatsi the travellers were addressed by a certain Joe Modise who had arranged the transport for them, and in his address Modise made mention of the fact that they were going to receive military training.
- (i) On the way to Livingstone Joe Gquabi (who had been Accused No. 1 when the trial started) acted as leader of the group and distributed money to the travellers at the Zambesi River. This money was to enable the travellers to purchase railway tickets to Tanganyika.

(j)/...

- (j) Most of the group were arrested at Livingstone station, but some were arrested later at different places.
- (k) All the arrested persons were kept together, and were then taken back to South Africa by lorry. On the way back they sang songs, including one, or possibly two songs with a political flavour.

11.

Portions of the evidence of Makamba and Tyulu were not disputed, but there were certain material issues between the accused and those two witnesses. As these issues are not defined in the judgment (Annexure "A" hereto) it will be convenient to indicate what the accused admitted and what the accused disputed.

12.

- (a) The allegations referred to in paragraphs 10(a), (b), (c) and (d).

None of the accused came from Port Elizabeth, and it was common cause that the accused had not met up with Makamba and Tyulu in South Africa. The accused were accordingly unable to deal with the facts referred to in paragraphs 10(a), (b), (c) and (d).

- (b) The allegations referred to in paragraph 10(e).

Accused Nos. 2 and 4 denied that they had stayed in the plantation, but accused No. 3 admitted that he had stayed there.

- (c) The allegations referred to in paragraph 10(f).

These/...

These allegations were admitted.

- (d) The allegations referred to in paragraph 10(g).

The three accusxd said that they were told that the other persons on the lorry were students, and to this extent the allegation is confirmed.

- (e) The allegations referred to in paragraph 10(h).

Accused Nos. 2 and 3 admitted that Modise addressed the travellers before they left, but deny that any reference was made to military training. Accused No. 4 said that he arrived at the lorry just before it left, and that nothing was said by Modise whilst he was there.

- (f) The allegations referred to in paragraph 10(i).

This was denied by all three accused.

- (g) The allegations referred to in paragraph 10(j).

This was admitted by the accused. Accused Nos. 3 and 4 were two of the persons who were not arrested at Livingstone Station. They had broken away from the group and were proceeding independently to their destinations.

- (h) The allegations referred to in paragraph 10(k).

The singing was not disputed. Accused Nos. 2 and 4 were not asked if they had joined in the singing of political songs; accused No. 3 admitted to having sung one of the political songs, but said that it was a well known song which he had heard at beer drinks, and which was commonly sung, even by children/...

children.

13.

In addition the Accused admitted that none of them had travel documents and that they had been convicted and sentenced to two years imprisonment for leaving the Republic without proper documents. There was, however, evidence (including evidence given by an official from the Department of the Interior) that it was difficult for Africans to obtain passports, and that this was a matter of common knowledge. There was also evidence that Africans who wished to travel from South Africa to the North African States, would congregate in Lobatsi, and make their way Northwards from there. This was known in the townships, was publicised in newspapers, and was referred to by the accused as the reason for their having gone to Lobatsi.

14.

Finally there was evidence that Accused No. 3 was wearing a button marked "Amandla" when he was handed over to the South African police at Beit Bridge. Warrant Officer Dirker the investigating officer, and a member of the Security Branch of the South African Police, said that "Amandla" was a slogan used by the unlawful African National Congress. He admitted, however, that the buttons were sold openly after the African National Congress had been banned, and that they were freely displayed by persons who were not necessarily members of the African National Congress.

15.

Accused No. 3 admitted in his evidence that he had adopted a false name for the purpose of his travels.

16.

To sum up, then, the State case was as follows :

(a) Admitted Facts.

- (i) Thirty seven South African residents, including the three accused, travelled together from Lobatsi to Livingstone.
- (ii) All thirty seven persons were arrested in Northern Rhodesia, and subsequently handed over to the South African Police at Beit Bridge.
- (iii) Gladstone Makamba, and Freddie Tyulu, were amongst the travellers, but held themselves out as students.
- (iv) None of the accused had proper travel documents.
- (v) Accused No. 3 was wearing a button marked "Amandla", and was travelling under a false name.

(b) Facts of which the accused had no knowledge, and could not rebut.

- (i) Makamba and Tyulu were recruited in Port Elizabeth for the purpose of receiving military training beyond the borders of South Africa.
- (ii) Makamba and Tyulu travelled with other persons from Port Elizabeth to Johannesburg, and were

then/...

then transported from Johannesburg to the Bechuanaland border.

(c) Facts which were denied by the accused.

- (i) That accused Nos. 2 and 4 stayed in the plantation at Lobatsi.
- (ii) That Joe Modise spoke to the group about military training.
- (iii) That Joe Gquabi acted as leader of the group during the journey from Lobatsi to Livingstone.
- (iv) That Joe Gquabi distributed money to the group at the Zambesi River.

17.

The learned judge failed to make a specific finding on the disputed issues and dealt with the evidence of Makamba and Tyulu as follows :

" In his able address Mr. Chaskelson picked numerous holes in their testimony, and also showed that these two witnesses must generally be approached not only with caution but even with suspicion. They are self-impressed with the saboteurs who gave evidence as part of a bargain in which they gain indemnity as a reward. Not only do they clash on many points with the indictment, they are also at odds with themselves in this Court and in other Courts

where/...

where they have testified in the same type of case, but however much one chisels away from what they said, some major facts remain unshaken."

Judgment Page 4, L. 3 - 13.

18.

If reference is made to the rest of the judgment it seems that the judgment was based on certain facts which the learned judge regarded as having been admitted.

Judgment Page 4, L. 33 - Page 5, L. 8.

19.

It is submitted that the learned judge misdirected himself in regarding these facts as having been admitted. It will be convenient to set out the facts relied upon, and then to draw attention to the respects in which it is submitted that there have been misdirections.

20.

The facts relied upon by the learned judge, were the following :

- (a) The trip from Lobatsi was undertaken by a group of people.
- (b) The trip was a purposeful act in a major suppressive plan.
- (c) The three accused were on the lorry that left Lobatsi.

(d)/...

- (d) The three accused had been associated with the African National Congress before it had been banned.
- (e) The trip proceeded under camouflage.
- (f) The accused travelled under assumed names.

Judgment, Page 4 L. 33 - Page 5, L. 8.

21.

It is admitted that the accused were members of the party which travelled from Lobatsi to Livingstone but it is submitted that the learned judge erred in holding that the other facts were admitted, and erred in relying on them. In particular :

- (a) "That the trip was a purposeful act in a major suppressive plan".
 - (i) No admissions were made by the accused as to the purpose of the trip, or the objects of the other travellers. They all said that they were told that the persons on the lorry were students, who were travelling Northwards to further their education. This was confirmed by Makamba and Tyulu who said that they held themselves out as students. What was admitted, was that the accused were not in a position to dispute the evidence of Makamba and Tyulu as to the object with which they made the trip.
 - (ii) There was no direct evidence that persons other than Makamba and Tyulu had been recruited for/...

for military training, and even if it is assumed that all the persons from Port Elizabeth had the same objective they comprised less than half in number of the persons on the lorry.

- (iii) The African National Congress was apparently associated with the transportation of the thirty-seven persons. Although there was evidence that the African National Congress arranged for persons to travel to North Africa to receive military training, there was no evidence that their activities were confined to this. On the contrary, it was proved at the trial that the African National Congress purported to assist students who wanted to further their education outside of South Africa. In particular a letter which had been found at one of the headquarters of the underground African National Congress by the police, and which had been written by the African National Congress secretariat in Johannesburg to the external office at Dar-es-Salaam, was produced in terms of Section 12(4)(b) of Act No. 44 of 1950. This letter contained the following reference to the African National Congress' activities in assisting students to obtain education outside of South Africa.

"Scholarships:

- (a) In your letter you mentioned that 20 students are returning home by the month end. We want clarification on this. Are these MK brothers

(Amadela-kufa)/...

(Amadela-kufa) or students engaged in academic work.

When they arrive at Dar they should be kept there until we have clarification when we shall give instructions.

- (b) Your letter of the 21st gives the impression that you do not want academic students and that you are making arrangements only for MK. This seems to cut across your instructions in yours of the 15th in which you stated : 'Dar has 27 scholarships for the year 1963-64'. We have accordingly suspended our arrangements for the 28 academic students until we hear from you. Please state definitely if you want students to take up scholarships to do academic work. If you do we shall send them early in July, since we have had to call off the recruiting campaign for the others."

According to evidence given at the time, MK is the abbreviation for Umkonto We Sizwe, and Amadela Kufa is used to mean "Warriors".

In this regard it is important to draw attention to the fact that the African National Congress' activities in assisting persons to obtain military training had not yet been exposed, and that there was no reason why the accused should have suspected that their fellow

travellers/...

travellers were not all genuine students.

(b) "That the three accused had been associated with the African National Congress before it was banned."

- (i) Accused No. 2 admitted an association with the lawful African National Congress but denied any association with the unlawful African National Congress. Accused No. 3 denied a prior association with the African National Congress, and there was no evidence to show that his denial was untrue. Accused No. 4 denied that he had ever been a member of the African National Congress, but admitted that his father had been a member. There was no evidence to show that Accused No. 4's denial was untrue.
- (ii) In so far as Accused No. 3 and No. 4 were concerned, the learned judge misdirected himself in holding that they had been associated with the African National Congress.
- (iii) In so far as Accused No. 2 is concerned, it is submitted that the learned judge misdirected himself in holding that the prior association with the lawful African National Congress demonstrated that he was susceptible to the "blandishments" of the unlawful organisation.

cf: Judgment, Page 5, L. 2-6.

There was no evidence as to whether the means and objects of the unlawful African National Congress were the same as or different to the means and objects of the lawful African National Congress. In the absence of such evidence it is submitted that there was no

basis/...

basis for drawing the conclusion that the learned judge did. In particular, there was no evidence from which an inference could be drawn that, because of his previous association with the lawful African National Congress, Accused No. 2 was the sort of person who would have been willing to participate in violence. That such an inference could not be drawn against an accused person was the view adopted by Ludorf, J. in a similar case - State v. Hashe (W.L.D. 28.8.64). Although Hashe's case was brought to the attention of the learned judge, it was not referred to by him in either of his judgments.

(c) "The trip proceeded under camouflage".

This assumes that the true purpose of all the travellers was to receive military training, and that they falsely held themselves out as students. But there was no direct evidence that this was so, and if some of the travellers were in fact students, then the conclusion would be wrong. Indeed, if everybody was going for military training there would have been no need for the travellers to pretend to each other that they were students. It is only if some, but not all, were going for military training that this pretence would have been necessary.

(d) "The accused travelled under assumed names".

There was no evidence that accused Nos. 2 and 4 adopted false names. Indeed, of all the witnesses it was only Tyulu and Accused No. 3 who adopted false names.

22.

It is submitted, therefore, that there were material misdirections by the learned judge as to the facts against which the explanations of the accused were judged.

23.

Although the learned Judge set out the effect of the evidence of Tyulu and Makamba it appears from the judgment that he did not rely on those portions of the evidence of Tyulu and Makamba which had been disputed.

Judgment, Page 4, L. 1 - 13.

He failed, however, to make a specific finding on the disputed issues, and your Petitioners have been advised that in the circumstances they should set out briefly the reasons for their submission that Makamba and Tyulu should be regarded as unreliable witnesses. If required, your Petitioners can amplify their submissions on this issue, by submitting detailed heads of argument, referring to particular passages in the evidence of Tyulu and Makamba.

24.

(a) Both Tyulu and Makamba were accomplices (or equivalent to accomplices).

cf: S. v. Mbela 1964(4) S.A. 401 (N) at 408.

(b) It seems that they did not make a favourable impression on the learned judge.

Judgment, Page 4 L. 3 - 13.

(c) By giving evidence they both obtained indemnities from prosecution, and they both admitted that at

the/....

the trial they gave evidence, they believed that they would be charged if their evidence was unsatisfactory.

- (d) They both admitted that material facts had been disclosed to them by the police during interrogations, and they were aware that their evidence would not be regarded by the police as satisfactory, if they did not attest to such facts.
- (e) Tyulu was admonished by the learned judge for endeavouring to evade questions in cross-examination.
- (f) Tyulu admitted that on two occasions evidence given by him as a State witness in previous trials had been incorrect, and was demonstrably dishonest when he tried to explain why he had given such evidence.
- (g) It was also established that Tyulu had contradicted himself from time to time, on the following issues :
 - (i) Who was in charge of the group at Lobatsi;
 - (ii) Who told him to go to Lobatsi to register with the immigration officials;
 - (iii) Who told him to adopt a false name;
 - (iv) When he saw Joe Modise in Lobatsi.
- (h) Makamba first denied that he would ever lie to suit his own purposes, but was then obliged to admit that he had lied to the police in order to help himself. He denied that he had given evidence to suit his own purposes, and denied that he could benefit by giving evidence. Ultimately he admitted that he would obtain an indemnity if his evidence was satisfactory.

- (i) It was possible to demonstrate that Makamba had given false evidence on a material issue at a previous trial, and that his explanation for having given such evidence was untruthful.
- (j) He was shown to have contradicted himself on the following issues :
 - (i) Whether he went to Lobatsi to register with the immigration officials.
 - (ii) As to who was in charge of the group at Lobatsi.
 - (iii) Whether there was an arrangement to give a false explanation to the police if questioned by them.
 - (iv) Whether Joe Gquabi gave instructions to the lorry driver.
- (k) He was dogmatic about certain facts which were subsequently conceded by him to have been incorrectly stated.
- (l) Neither Tyulu nor Modise mentioned the Modise speech when they gave evidence against certain of the travellers at a trial held in Graaf Reneit; they are not consistent as to the content of the speech, and contradict each other on what Modise in fact said.

25.

It is submitted that the learned judge was correct in failing to rely on those portions of Makamba's evidence and Tyulu's evidence which had been disputed. But even if Makamba and Tyulu had been accepted on all the disputed issues, *it is submitted that the explanations* of the accused, would none the less have been consistent with/...

with all the proved facts.

26.

Makamba and Tyulu were not able to and in fact did not say that any one of the accused had consented to undergo military training.

27.

Makamba spoke to accused No. 2 in gaol whilst they were both serving sentences for leaving the Republic without travel documents. His evidence on the conversation which he had with accused No. 2 was as follows :

"Q. Did you ever have any conversations with No. 2 while you were in Leeukop.

A. Yes, I had spoken to accused No. 2.

Q. That is Henry Makgothi. What did you speak about.

A. We talked about the he told me about the life in Johannesburg and I told him about the life in the Colony. He then told me that he knew the Colony. That he had been at the school in Fort Hare in 1952.

Q. Yes.

A. He then told me that he came up here to Johannesburg teaching. He also told me that this journey we had been on that he would try to get a position as a teacher.

By the Court to the Witness.

Q. He would try to get a position as a teacher.

A. Yes.

Q/...

Q. Where.

A. Where we were going to.

Q. At the place you were going to.

A. Yes, on this journey we had been on when we were arrested.

Q. But I thought he was going there to undergo military training.

A. Yes.

Q. To be a teacher in military affairs.

A. After we had been arrested that was a conversation saying that he would also have tried to get a position as a teacher.

Q. In addition to this military training.

A. I dont know whether that was in addition to the training.

28.

Although the learned judge suggested to the witness that accused No. 2's purpose in undertaking the trip was to receive military training, there had been no evidence that Makamba knew why accused No. 2 had accompanied them, and it is clear from his evidence that he merely inferred that the object of accused No. 2 was the same as his. In fact, Makamba in his evidence in Chief said that he had not spoken to any of the accused before they were arrested. His evidence on this was as follows :

"Q. Now, on the way from the bush where you met the four accused, did you ever have any opportunity of speaking to the first accused?

A/...

A. No, I did not talk to him.

Q. No. 2?

A. No, neither did I speak to Accused No. 2.

Q. No. 3?

A. No.

Q. And No. 4, Michael?

A. No, on our way there, I did not speak to either of the accused."

29.

It is submitted that the conversation in gaol between Makamba and Accused No. 2, which took place after they had both been convicted, and before any further charges had been laid, provides strong corroboration for the explanation which Accused No. 2 gave to the Court.

30.

Apart from this conversation, neither Makamba nor Tyulu spoke to Accused No. 2 about the object of the trip.

31.

Neither of the witnesses spoke to Accused No. 3 about the trip.

32.

Tyulu spoke to Accused No. 4 about the trip.
His evidence about the conversation was as follows :

"Q/...

"Q. Did you ever speak to No. 4.

A. Yes, I did speak to accused No. 4.

Q. Where

A. I spoke to him after we came back from Lobatsi.

Q. What did you speak about.

A. He asked me my name. I told him and I asked him who he was and what his name was.

Q. Yes.

A. He asked me where I was going to.

Q. Did he ask you.

A. Yes.

Q. Yes

A. I told him.

Q. What did you tell him.

A. I told him I was going to school; that is where I was going to.

Q. Where.

A. In Tanganyika.

Q. Yes.

A. He told me he was also going to his school; that he had been to a school in Mafeking.

Q. Yes.

A. And he told me that he had not been out of school very long and that he was going there for education. He did not say where he was going to.

Q. You mean he did not tell you which country he was going to.

A. No.

Q/...

Q. Now, why did you tell No. 4 that you were going to Tanganyika to go to school.

A. The reason is because I was told not to just tell anybody where I was going to."

33.

It is submitted that this conversation corroborates the explanation given by accused No. 4. It shows that Tyulu did not look upon him as a person who was going for military training; moreover, his statement to Tyulu is consistent with what he told the Court.

34.

At the close of the State case there was no evidence, (apart from the two conversations referred to in the preceding paragraphs) as to the intention with which the three accused embarked upon the journey.

35.

The State case was based on circumstantial evidence. It was a case of guilt by association - the Court was asked to infer from the fact that Makamba and Tyulu were going for military training, that all the persons with them were going for the same purpose.

36.

Each of the accused explained his presence on the lorry, and it is submitted that the explanations given might reasonably have been true.

37.

The explanation of accused No. 2 is referred to in the judgment on page 5, L. 18 to page 6, L. 7.

38.

It is submitted that in dealing with the explanation of accused No. 2 the learned judge misdirected himself in several respects.

- (a) In holding that the accused's inability to obtain a teachers post had made him embittered and frustrated; and that he was ideal material for the African National Congress to work on.

There was no evidence that the accused was embittered, and though there was evidence of frustration, this was as consistent with his case which was that he wanted to emigrate from South Africa, as it was with the State case.

- (b) In holding that the accused made no proper enquiries about the teaching position at the institution, and that he did not know with certainty that it had been erected.

The accused in fact gave evidence that he had met a certain Dr. Ame at the Institute of Race Relations. Dr. Ame was a Norwegian associated with the project to build the institution and had assured the accused that a post would be found for him if he came to Tanganyika. The accused knew from his conversation with Dr. Ame, and from newspaper reports, that the institution would be completed in 1963 and he planned his trip accordingly.

(c)/...

- (c) He made no attempt to acquire valid travel documents.

In his evidence in Chief the Accused said he thought he could not get a travel document. He was not cross-examined on his reasons for this and it is submitted that in the circumstances no adverse inference can be drawn against him on this issue.

- (d) He proceeded to Lobatsi not knowing how he would go further.

No cross examination was directed to this issue. The accused had said in Chief that he was in contact with friends in Bechuanaland and Northern Rhodesia who would have been able to help him if necessary, and in the absence of cross-examination it is submitted that an adverse inference should not have been drawn against him on this issue.

- (e) No. 2 was obviously in difficulty in the witness box.

The learned judge does not indicate what the difficulties were, and your Petitioner submits that there was in fact no contradictions, inconsistencies or other criticisms which could be levelled against him.

39.

In addition the learned judge appears not to have taken into account the following factors.

- (a) That Accused No. 2 travelled to Lobatsi with a friend, Peter Mabena, and not with the convoy that transported Makamba and Tyulu.
- (b) *That Accused No. 2 was a consumptive and in poor health when he left South Africa.*

- (c) That Accused No. 2 took his teaching certificates with him.
- (d) That he knew Joe Modise who was the organiser of the group which travelled from Lobatsi to Livingstone, and arranged with him to join the group which were described to him as students.

No cross-examination was directed to any of these issues, all of which it is submitted were relevant to explain the accused's presence on the lorry, and to show that he was not likely to have been recruited for military training.

40.

There was also his conversation with Makamba in gaol, which is not referred to in the judgment.

41.

The explanation of Accused No. 3 is dealt with in the judgment at Page 6, L. 8 - 25.

42.

It is submitted that in dealing with the explanation of Accused No. 3 the learned judge misdirected himself in the following respects :

- (a) "He was a member of the African National Congress". There was no evidence to support this, and accused No. 3 denied that he was a member of the African National Congress.

(b)/...

- (b) "He was arrested whilst wearing a lapel button with an African National Congress slogan and his name on it."

There was no evidence that the accused's name was on the button. It was also conceded that these buttons were sold openly and worn by people who may not have been African National Congress members. If the accused regarded the button as an African National Congress symbol, he would have had ample opportunity for discarding it between Livingstone and Beit Bridge.

- (c) "He knows African National Congress songs and took part in the rendition of them."

The accused admits to having sung one song with a political flavour, and says that it was a well known song, sung at beer drinks and even by children.

- (d) "He only had the vaguest notion of the whereabouts and identity of the experts he wanted to consult."

But the accused said he had been to Nyasaland in 1950 and was going back to the same place. He required the further training in order to qualify himself to join the Nyanga Association. He was never cross-examined on this issue, and it is submitted that in the circumstances the learned judge should not have drawn the adverse inference that he did.

- (e) "He arrived in Lobatsi just in time for his fortuitous trip".

There was no evidence as to when he arrived at Lobatsi.

- (f) "He never asked for valid travel documents."

But he said that he had been told that it was not possible for Africans to obtain passports.

43.

There was also the following factors which were not taken into account.

- (a) That he travelled alone to Bechuanaland.
- (b) That he left the group at Livingstone, and was arrested in the location on the day after the main body had been arrested. The reason why he left the group was because he was going to Nyasaland, and they were going to Tanganyika.
- (c) That the people on the lorry were held out as being students.

44.

The explanation of Accused No. 4 is dealt with in the judgment at Page 6, L. 26 to Page 7, L. 6.

45.

It is submitted that in dealing with the explanations of the accused, the learned judge misdirected himself in the following respects :

- (a) "He had no idea where to enquire about the scholarship, what the amount of the scholarship was, what his schooling would be, or whether he would be accepted."

But the accused said in his evidence that there was much talk at his school in Mafeking that anybody who wanted a scholarship could get one. The existence of such scholarships was mentioned in the newspapers, and he was told that one of his school mates had in fact obtained such a scholarship. Moreover, he said he spoke to a relative in Lotatsi

who/...

who said she knew who arranged for the transportation of students and she introduced him to a certain person called Kistsing who told him that students left Lobatsi from time to time for Tanganyika, and that he would arrange for the accused to accompany the next batch of students. None of this evidence was challenged in cross-examination.

(b) "He did not apply for travel documents."

He said that he lived in Mafeking and frequently travelled from Lobatsi to Mafeking without travel documents. As a result he did not know that travel documents were necessary. He was not cross-examined on this explanation, and it was accepted by the State in argument that the explanation was probably true.

(c) "He did not use the obvious conveyance to Livingstone, namely the railway train."

He said that he was told that arrangements had to be made at Lobatsi, and went to Lobatsi to make the necessary enquiries. Whilst at Lobatsi he was promised assistance, and in fact he needed the assistance, because he had insufficient money to make his own way to Tanganyika.

(d) "He did not tell his father or mother of his plans."

In this regard no reference was made to the accused's evidence that he was afraid that if he told his parents of his plans, they would try to stop him.

46.

There were also the following factors which were not taken into account.

(a)/...

- (a) He travelled alone to Lobatsi.
- (b) There was considerable publicity about African students travelling from Lobatsi to Tanganyika and elsewhere for education. The accused who was a frequent visitor to Lobatsi had heard about these student trips, and had also read about them in the newspapers. Cuttings from newspapers were produced and handed in as evidence to corroborate the accused. Warrant Officer Dirker also confirmed that there was such publicity.

47.

It is submitted that the explanations advanced by each of the accused were consistent with all the proved facts, and that the explanations might reasonably have been true.

48.

Since the case against the accused is based on circumstantial evidence the Appellate Division would be in as good a position as the trial judge to assess the reasonableness of the explanations given by the accused.

49.

In a similar case in which substantially similar evidence had been given by Makamba and Tyulu against other persons who travelled with them and the accused, his Lordship Mr. Justice Harcourt sitting with assessors in the Natal Provincial Division held that the following explanation might reasonably have been true:

That/...

That a particular accused before him had joined the group of travellers in order to proceed to Lusaka to become an electrician. He had no travel documents, and had made no previous arrangements, but decided to go when a friend of his in Natal told him that he was going to North Africa on a scholarship, and that if he wished to he could come with.

(State v. Konyele - unreported).

50.

The judgment of his Lordship Mr. Justice Harcourt was made available to his Lordship Mr. Justice Hiemstra, and was referred to in argument (both at the end of the trial, and in support of the application for leave to appeal) but was not dealt with by the learned judge in either of his judgments.

51.

It is submitted that the explanations given by the accused in the present case or any one of them are more convincing, and that in the circumstances the learned Judge ought to have granted leave to appeal.

52.

In addition to the application for leave to appeal your Petitioners applied for the following special entry to be made.

"Whether in the absence of evidence as to what were the aims and objects of the lawful A.N.C. of which accused no. 2 and the father of accused no. 4 had been members it was proper to allow the State Prosecutor to ask questions in relation

thereto/...

thereto and to take their innocence into account in arriving at a conclusion."

53.

During the trial the State Prosecutor indicated to your Petitioners' Counsel that it was intended to lead evidence through Warrant Officer Dirker to the effect that accused No. 2 had been a member of the lawful African National Congress and that the father of accused No. 4 had also been a member of the lawful African National Congress. Before this evidence was given His Lordship was invited to give a ruling as to whether or not such evidence would be admissible, Counsel for the accused relied on the judgment of His Lordship Mr. Justice Ludorf in the case of The State v. S.G. Hashe, delivered in the Witwatersrand Local Division on the 28th August 1964 which was to the effect that such evidence would be inadmissible. His Lordship Mr. Justice Hiemstra held that in view of this judgment the evidence of Warrant Officer Dirker on this point was not admissible.

54.

During the course of the cross-examination of accused No. 2 the State Prosecutor asked accused No. 2 whether he was a member of the lawful African National Congress. Objection was taken to the question. His Lordship Mr. Justice Hiemstra ruled that the question could be asked. It was drawn to His Lordship's attention that His Lordship Mr. Justice Ludorf in the Hashe case had ruled that cross-examination on the same point was inadmissible, for the reasons which he had/...

had given when he excluded the direct evidence that the State intended to lead. It was submitted that there was no difference between leading evidence as part of the State's case and cross-examining the accused thereon but despite this the cross-examination was allowed.

55.

When the application for a special entry was made, the judgment of His Lordship Mr. Justice Ludorf was again referred to by your Petitioners' Counsel. As will more fully appear from annexure "C" hereto, His Lordship declined to follow the previous judgment.

56.

Your Petitioners submit that such cross-examination should not have been permitted, and that in view of the judgment of His Lordship Mr. Justice Ludorf it could not be said that their application for a special entry to be made was either frivolous or vexatious.

57.

Your Petitioners submit that His Lordship Mr. Justice Hiemstra erred in failing to make the special entry sought by your Petitioners.

58.

The fact that accused No. 2 was a member of the lawful African National Congress, that the father of accused No. 4 was a member of the lawful *African National* Congress, and that His Lordship Mr. Justice Hiemstra thought/...

thought that there was evidence that accused No. 3 was a member of the lawful African National Congress, was considered to be of importance and reliance was placed upon such facts in arriving at a conclusion.

WHEREFORE your Petitioners humbly pray that it may please the above Honourable Court to grant them leave to appeal, and/or to make the following special entry :

"Whether in the absence of evidence as to what were the aims and objects of the lawful A.N.C. of which accused No. 2 and the father of accused No. 4 had been members it was proper to allow the State Prosecutor to ask questions in relation thereto and to take their innocence into account in arriving at a conclusion."

AND YOUR PETITIONERS AS IN DUTY BOUND WILL EVERY HUMBLY PRAY.

DATED at LEEUKOP this day of JULY, 1965.

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter of the application of :

HENRY MOKHATI

SAMSON FADANA

and

MICHAL MAHLANGU

Applicants

VERIFYING AFFIDAVIT

I, the undersigned, HENRY MOKHATI, being Accused No. 2 referred to in the Petition do hereby make oath and say that :

I have read the Petition and honestly believe the contents thereof to be true and correct.

SIGNED and SWORN to at LEEUKOP on this the day of JULY, 1965 the Deponent having acknowledged that he knows and understands the contents of the foregoing Petition.

BEFORE ME,

COMMISSIONER OF OATHS.

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter of the application of :

HENRY MOKHATI

SAMSON FADANA

and

MICHAL MAHLANGU

Applicants

V E R I F Y I N G A F F I D A V I T

I, the undersigned, SAMSON FADANA, being Accused No. 3 referred to in the Petition do hereby make oath and say that :

I have read the Petition and honestly believe the contents thereof to be true and correct.

SIGNED and SWORN to at LEEUKOP on this the day of JULY, 1965 the Deponent having acknowledged that he knows and understands the contents of the foregoing Petition.

BEFORE ME,

COMMISSIONER OF OATHS.

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter of the application of :

HENRY MOKHATI

SAMSON FADANA

and

MICHAL MAHLANGU

Applicants

V E R I F Y I N G A F F I D A V I T

I, the undersigned, MICHAL MAHLANGU, being Accused No. 4 referred to in the Petition do hereby make oath and say that :

I have read the Petition and honestly believe the contents thereof to be true and correct.

SIGNED and SWORN to at LEEUKOP on this the day of JULY, 1965 the Deponent having acknowledged that he knows and understands the contents of the foregoing Petition.

BEFORE ME,

COMMISSIONER OF OATHS.

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