

Judgment No. S.C. 116/83 Crim. Appeal No. 148/83

CEPHAS NDLOVU v THE STATE

SUPREME COURT OF ZIMBABWE,
GEORGES, CJ, BECK, JA & GUBBAY, JA,
HARARE, OCTOBER 17 & NOVEMBER 14, 1983.

The appellant in person
M. Werrett, for the respondent

GEORGES CJ: The appellant appeared to answer two charges: The first was that of contravening s 339 of the Criminal Procedure and Evidence Act as read with s 24(2) of the Law and Order (Maintenance) Act in that upon dates unknown in November 1981 and at Beitbridge he wrongfully and unlawfully attempted to attend any course or undergo any training outside Zimbabwe, namely in the Republic of South Africa, for the purpose of furthering a political object by the use of force, violence, sabotage, intimidation, civil disobedience, resistance to law or other unlawful means within Zimbabwe. In the second count the appellant was charged in the alternative with doing an act preparatory to attending or undergoing a course of training outside of Zimbabwe, namely in the Republic of South Africa, for the purpose above mentioned. The appellant was convicted on the alternative count and sentenced to three-and-a-half years' imprisonment with labour.

The appellant pleaded not guilty. The evidence for the State consisted principally of a warned and cautioned statement which he did not challenge. The gist of the statement-was as follows:

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The appellant gave evidence at his trial*
This did not add anything of significance to his statement. The magistrate commented on the fact that the appellant had failed to mention the job offer by Branfield in his Defence Outline and gave no satisfactory explanation for that.

The omission does not appear to me significant. The Job offer was mentioned clearly in the appellant's warned and cautioned statement and it was plain that he was adhering to that statement as his defence.

The magistrate concluded that the appellant had not told the truth that he was going to South Africa on an innocent holiday as the guest of Branfield. He then asked if that was so what was the purpose, hearing in mind the method by which the appellant had crossed the border on each occasion. He then continued

"The whole tenor of his visit is sinister and having said that, one asks the question what could be the reason for his visit to South Africa, I think the Court can take judicial notice of the fact that there are training camps on the South African side of the, Limpopo River, where persons are trained for committing acts of sabotage and generally disrupting the Law and Order of this country and I say this bearing in mind that I myself have dealt with cases where persons have been tried and convicted by me' in this Court, for having come illegally into this "Country having been trained in South Africa."

Hoffmann, in his Law of Evidence (2 Ed) at 291, sets out the basic principle underlying the concept of judicial notice

"A court takes judicial notice of a fact when it accepts it as established, although there is no evidence on the point. Generally speaking, judicial notice will be taken of fact's which are either so notorious as not to be the subject of reasonable dispute, or which are capable of immediate and accurate.

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/accurate demonstration by resort to sources of indisputable accuracy. The date of Christmas would fall within the first category, while the date of Easter in a particular year would be an example of the second." The appellant had, prior to Independence, been a member of the Special Branch. After Independence he continued in Government Service as a member of the Central Intelligence Organization. In November 1981, shortly before he was due for a month's leave, he met in a Bulawayo hotel a Mr Branfield who had been a member of Special Branch. Branfield bought him a beer and asked him whether he was in a position to go to see how South Africa stood. Just after the 1980 elections Branfield had warned him that he would be in trouble because of his Special Branch activities. He informed Branfield that he was going on leave for a month shortly and on his return he would be writing an accelerated examination.

Branfield gave the appellant \$100 and a route was arranged by which the appellant would cross over from Zimbabwe to the Republic of South Africa on 10 November without going through a proper border crossing. The appellant did cross as agreed and met two males in a Peugeot 404 pick-up. He joined them and was driven for the whole night. At dawn they paused, slept for a while and then continued to Johannesburg where he telephoned Branfield. He was booked in at the Fontana Inn as

were the two men who had accompanied him, but in separate rooms.

The appellant expected Branfield to visit him but this did not happen. He remained at the Inn for five days, not moving around because he had been warned not to do so.

After five days the men who had brought the appellant to the Inn took him in a car and they all drove off. They paused at a small river for 30-45 minutes.

A European in a car stopped and the appellant's companions spoke/

spoke to him. Shortly after he saw the Peugeot 404 pick-up in which he had been driven from the border. It was being driven by Peter Ncube who spoke to one of his companions - and told him they were needed at the farm.

Thereafter his companions drove off with him in the car, made a U-turn and then travelled for about one kilometre - going towards Johannesburg. They came to a farm where he saw many young men who were ex-members of the Security Force Auxiliaries. He realised that they had driven past that farm on the drive to Johannesburg but he did not ask about this. They dropped off right inside the farm in a security fence. He greeted the boys whom he knew from Zimbabwe.

Branfield then arrived and took him, Peter Ncube and one of his companions on the drive to an office where they met a Mr Nel. Mr Nel asked him when he was coming to join them but did not mention what job they wanted him to do. They asked him how much he was earning and told him he could get more. Branfield asked him to put in his ticket for 30 January 1982 and join them. Accommodation was discussed and he was told that if he did not wish to live in a hostel they were in a position to build six houses for married men.

At this stage the appellant was given cigarettes, food and \$300 and Ncube and one of his driving companions took him to town. He was under the impression that they had been deliberately instructed to stay with him.

At the farm he saw no weapons nor did he see any training.

An arrangement was made for Mm to return to the farm on 26 November but that failed. On the 27th Mr Branfield and two others took him in a vehicle towards the Zimbabwe border. They reached Messina between 5.00 pm and 5.30 pm. Branfield said it was too late to go over the border so Branfield booked in at the Messina Hotel and he and the two others were given money to stay in the location. Meanwhile one of his companions had received word that one of his relatives was ill in Belingwe and he was given permission to go and see that relative.

The following morning they drove to where Branfield had been staying and met Branfield who asked them to return at noon, which they did. Branfield then drove to the western farming area and stated that he was expecting a plane at 3.00 pm. He drove slowly until they reached an airstrip.

About 3.00 pm the appellant saw a plane approaching from the south. It circled the airfield and then landed. Branfield approached the plane. He then called them to it and on Branfield's instruction they removed two black trunks from the plane and took some small cardboard boxes from the car and put them in the plane. He and the companion who was to visit the sick relative in Belingwe then boarded the plane. There were two Europeans in the plane - the pilot being the smaller of the two. As they left Branfield reminded him to make sure he put his ticket in.

The plane landed at a farm near the Victoria Falls Road, He and his companion were driven in a Landrover and dropped in King's Avenue. He was not prepared to accept Branfield's offer so he did not put in his ticket and he never saw Branfield or his companions again.

The/

While the principles are simple enough to state, the results of their application might well occasion surprise to the layman who may be inclined to accept as indisputable matters which are quite liable to being successfully disputed. For example, the layman may immediately assert that if the robot shows green for travellers on one of two intersecting roads it would show red on the other. But plainly this is so only if the robot is working properly. If it is not it may show green on both roads and a motorist could not be convicted merely by proving that he entered one road in the intersection while the light on the other road was showing green. Particularly in criminal cases in which proof beyond a reasonable doubt is required assumptions of notoriety can only be made in cases in which a dispute seems impossible.

It must also be borne in mind that a fact cannot be said to be notorious merely because the judge is well aware of it as an individual. The trial magistrate in considering that he could take judicial notice of the existence of the camps relied on the fact that he had himself tried people' who had entered the country illegally having trained in South Africa. Reliance on such knowledge is clearly wrong. Judicial notice can be taken of a fact because it is well known - not because the particular judge is well aware of it. It is vital to keep the distinction clear, otherwise whether or not judicial notice is taken of a fact will depend on the judge before whom the case is tried. If a judge happens to have tried several cases of a certain type before/

before he will take judicial notice of facts proved in those cases whereas if he has not he will require proof - Clearly an undesirable situation;

The difficulty arises because in the conduct of our daily lives we constantly accept as a basis for action facts for which courts necessarily require proof if they are to be satisfied beyond a reasonable doubt of the guilt of an accused person on trial; It would, for example, in my view be unexceptionable for a court to take judicial notice of the fact that a very large number of people in Zimbabwe and elsewhere believe that there are camps in South Africa maintained for the purpose stated by the magistrate. To take judicial notice of the existence of the camps is, however another matter;

Indeed in the course of her argument Miss Werrett quoted from a case - S v Ncube and Anor High Court Case No CRB 16767/82 - in which the State called a member of the C.I.O. to confirm the existence of training facilities in South Africa which were used by Zimbabwe nationals;

The appellant in this case was not admitting the existence of any such camps and in my view the State should have led such evidence; The appellant would then have had an opportunity to challenge it or he may well have been content merely to have put the State to proof:

Miss Werrett then asked that in the event it was held that judicial notice could not be taken of the existence of such camps then the matter should be remitted to the trial magistrate for proof of that fact; She did not appear to press this application vigorously and for good reason.

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An appellate tribunal will itself hear evidence

or remit a case for the hearing of further evidence only in exceptional cases. A pre-requisite for the exercise

of that power is that the party seeking leave **to introduce**

it must show that it could not have been produced at **the trial**. In R v Van Heerden and Anor 1956 (1) SA 366 at

371G to 372A CENLIVRES CJ stated:-

"The mere fact that a miscarriage of justice may have taken place is not sufficient to justify the admission of fresh evidence for, in cases where - "the evidence was available at the trial,

'there must be some possible explanation based on allegations that may be true why the evidence was not put before the Court'.

(per GREENBERG J, in Rex v Foley, 1926 TPD 168 at 171 and see Rex v Carr /1949 (2) SA 6937 at 699).

I am drawing attention to this factor because the sole criterion in an application for leave to lead further evidence on appeal is not whether a miscarriage of justice may have taken

place.

However strongly the further evidence may indicate that there may have been a miscarriage of justice, the Courts will not allow it to be led unless the appellant satisfies the requirement laid down in the decided cases."

No reason was advanced for the failure to call evidence in the court a quo of the existence of training camps. The reasonable inference is that it was an error of judgment; no-one thought of it.

In R v Muruven 1953 (2) SA 779 the accused was convicted of assault with intent to do grievous bodily harm. He appealed and applied for leave to set aside the conviction and to remit the case for the hearing of further evidence. It was conceded that the evidence which was proposed to be led would be material in deciding on the guilt or innocence of the accused. The accused had been defended by an articled clerk who was/

was necessarily inexperienced in court procedure.

The two witnesses whom it was intended to call had been available at the trial and indeed one had been actually in court. Failure to call them had been an error of judgment. The prosecutor had in no way contributed to that error. BROOMS JP, with whom HOLMES J concurred, stated at 780 E-F:-

"Now the general rule is that a litigant is bound by what is done by his representative. I do not say that this rule is entirely inflexible but it is clear that a very strong case must be made before a decided case can be re-opened on the ground of an error of judgment on the part of the legal representative. But for that, there would be a lack of finality about court judgments which be entirely against the public interest."

The application to remit the matter for the hearing of further evidence must be refused.

I did not understand Miss Werrett to press very strongly that the conviction could be sustained if judicial notice could not be taken of the existence of training camps. I have nonetheless considered various inferences which could be drawn from the evidence without taking that finding into account.

The alternative count with which the appellant was charged was tailored to meet very specific conditions which then existed. In S v K and Ors 1976 (1) RLR 147 MACDONALD JP (as he then was) (LEWIS JA concurring) had decided that the actions of certain students at a seminary who had left the seminary Intending to go to Mozambique for guerilla training did not amount to an attempt to undergo such training. On their way they paused at the Outward Bound

School in the Chimanimani area for food and/

and water and were detained there. There had been **no prior** arrangement with any recruiting agent that they **should** leave. The Court held that what had taken place **could** not be said with certainty to have progressed beyond preparation.

The Emergency Powers (Maintenance of law and Order) Regulations No 405 of 1977 contained for the first time a section (s 43) making it an offence to do **any** act whatever with the intention of, or preparatory to, undergoing any course of training referred to in s 24(1) **of** the Law and Order (Maintenance) Act /**Cap** 59). The course of training there referred to is **a** course undertaken for the purpose of "furthering a political object **by** the use of physical force, violence, sabotage, intimidation, civil disobedience, resistance to law or other **unlawful** means." This has been repeated as s 41 of the Emergency Powers (Maintenance of Law and Order) Regulations No 441 of 1980 under which the appellant was charged.

The trial magistrate found that the appellant went to South Africa knowing well that he had been offered a job there. He disbelieved the appellant when he asserted that it was merely a holiday. If judicial notice cannot be taken of the fact that there exist camps set up for the purpose of training people for committing acts of sabotage in Zimbabwe then the inference that the appellant was going for training at such a camp cannot be safely drawn, Indeed there might be serious difficulties in concluding that that is the only reasonable inference even if the existence of such camps is presumed.

Since Branfield was concerned with intelligence gathering/

gathering in Zimbabwe and was attempting to recruit the appellant whom he knew to be an intelligence officer, it would be proper to infer that he planned to offer him a job in the security apparatus in South Africa and that the appellant was well aware of that. The offence, however, involves undergoing training and there is no compelling reason to infer that there would be need for such training. Even if the inference was drawn that induction into the security services of a country of a person trained in another country would require some re-orientation which could be said to be training there is no compelling reason to infer that the purpose would be the furthering in Zimbabwe of a political object by the use of physical force, violence, sabotage, intimidation, civil disobedience, resistance to law or other unlawful means. One can take judicial notice of the fact that the security services of South Africa are concerned with at least intelligence gathering in many countries other than Zimbabwe. A recruit inducted into those services could be used in Botswana, Zambia or Lesotho, to mention but a few.

The difficulties I have discussed would obviously not have arisen in the circumstances with which the section was constructed to deal. Anyone leaving Zimbabwe to join the liberation movement could have had no objective but the liberation of Zimbabwe by any possible means - an activity then considered subversive and unlawful. In the more complex conditions of today I am satisfied that inferences cannot be so conclusively drawn. I agree that the offence has not been properly proved and accordingly the appeal must be allowed.

BECK JA: I agree

GUBBAY JA: I agree