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G.P.-S. J. 445.

In the Supreme Court of South Africa
In die Hooggeregshof van Suid-Afrika

(APPELLATE DIVISION).
AFDELING).

APPEAL IN CRIMINAL CASE.
APPÈL IN STRAFSAAK.

WILLIAM VIVIAN DEVCY
Appellant.

versus/teen

THE STATE
Respondent.

Appellant's Attorney / Prokureur van Appellant — *Respondent's Attorney / Prokureur van Respondent* A.G. (Pmburg.)

Appellant's Advocate / Advokaat van Appellant In Person — *Respondent's Advocate / Advokaat van Respondent* H. J. Beyers S.C. [illegible]

Set down for hearing on / Op die rol geplaas vir verhoor op 4 - 5 - 1971

1 . 3 . 9

(N.P.D.)

Coram: Thompson C.J., Rumpff J.A., Corbett A.J.A.

C. a. v.

18-6-1971. Per Ogilvie Thompson C.J. appeal succeeds in part. Order as per written judgment [signature]

2.7.1971. Coram: Botha, Potgieter, Kotzé J.J.A. Botha J.A.: Order amending Order of 18.6.71 granted as prayed [signature]

IN THE SUPREME COURT OF SOUTH AFRICA.

(APPELLATE DIVISION)

In the appeal of:

WILLIAM VIVIAN DEVOY ..... Appellant

versus

THE STATE ..... Respondent.

Coram: OGILVIE THOMPSON, C.J., RUMPFF, J.A. et CORBETT, A.J.A.

Heard: 4th May 1971. Delivered: 18th June 1971

J U D G M E N T.

OGILVIE THOMPSON, C.J.:

Appellant appeals against an order that he be extradited to Malawi for the purpose of being tried in that country upon two criminal charges hereinafter detailed.

At the conclusion of an enquiry, held before him pursuant to the provisions of sec. 9 of the Extradition Act (No. 67 of 1962, hereinafter referred to as "the Act"), the Regional Magistrate for the Regional Division of Natal issued, on 14th May 1970, an order in terms of sec. 12 (1) of that Act that the present appellant

be..../

be surrendered "to Superintendent Derrick Stanley Tricker of the Malawi Police Force". An appeal to the Natal Provincial Division against that order was unsuccessful (vide 1971 (1) S.A. 359 (N)). On leave granted by the Provincial Division, appellant now appeals to this Court. Although he had been represented by counsel in both the courts below, appellant appeared before us in person. Making due allowance for the fact that he, a layman, was dealing with legal questions of some complexity, appellant nevertheless advanced his submissions with considerable competence.

All the procedural requirements of the Act were satisfied, and a variety of points raised, on behalf of the appellant, before the magistrate in resisting the granting of the extradition order sought were effectively disposed of by him in an able judgment. The issues raised before, and rejected by, the Provincial Division appear from the judgment of James, J.P., as reported in 1971 (1) S.A. 359. The two major submissions urged upon us by appellant in this Court were: (a) that no valid extradition agreement exists between the Republic of Malawi and the Republic of South

Africa; and (b) that, in any event, the Court should not authorise appellant's extradition on the first of the two criminal charges sought to be preferred against him in Malawi.

It is common cause that a valid extradition agreement was concluded between the Republic of South Africa and the Federation of Rhodesia and Nyasaland. That agreement was, in terms of sec. 2 (3) (a) of the Act, published, as Proclamation R.44 of 1963, in Government Gazette Extraordinary of 15th March 1963, and I shall hereafter refer to it as "the Agreement". The Federation was dissolved on 31st December 1963. After dissolution, Nyasaland retained its identity, later achieved independence as the State of Malawi on 6th July 1964, and finally attained republican status, as the Republic of Malawi, on 6th July 1966. It is also common cause that, apart from the aforementioned Agreement published in the Government Gazette of 15th March 1963, no further extradition agreement has ever been concluded between the Republic of South Africa and either Nyasaland or Malawi. Appellant's submission that there today exists no extradition agreement between the Republic of South Africa and the Republic of Malawi derives some support

from...../

from the decision of the Transvaal Provincial Division in S. v. Eliasov, 1965 (2) S.A. 770 (T), but is directly contrary to the later decision of that Division in S. v. Bull, 1967 (2) S.A. 636 (T). In the earlier of these two cases it was held that the Agreement no longer had any application and that the Republic of South Africa accordingly had no extradition treaty with Rhodesia. In Bull's case, the Agreement was held not to have lapsed but to remain of full force and effect between the Republic of South Africa and the Republic of Malawi.

The succession or otherwise to pre-existing treaties upon a State attaining independence remains a somewhat controversial question in International Law. Thus a handbook, published in 1965, under the auspices of the International Law Association and entitled "The Effect of Independence on Treaties", states at page 2 that:

> "One is not entitled to presume that all treaties survive independence, but a survey of the practice, undertaken in this book, tends to disclose that no new States (with the exception of Israel) are prepared to contend that no treaties survive independence".

Three..../

Three "possible attitudes" are then set out and examined. These were reproduced by Boshoff, J., in S. v. Bull (supra) at pp. 639 - 640 of the report and need not be repeated here. In the particular case of the dissolution of a Federation, Confederation or Union, there exists a considerable body of opinion, based upon prior State practice, among writers on international law in favour of the view that treaties continue in relation to the separate states which emerge from the dissolution (see the authorities and instances mentioned by Professor Dugard in 1965 S.A.L.J. 430, more particularly at pp. 431 - 432). As Dugard (ibid) points out, writers holding this view tend to base it upon the premise that States entering into a Federation or Union do not lose their identity and that, consequently, after dissolution any one of the individual, previously federated or united, States may be regarded as continuing the "personality of the original contracting party". This concept, in addition to being somewhat artificial, may - as Dugard (ibid) also indicates - require modification in its application to a Federation wherein neither the constituent States nor the Federation

itself are completely independent or where such States, although self-governing for internal purposes, enjoy no separate international status or treaty-making capacity (cf. Lord McNair: The Law of Treaties, 1961 Ed., p. 117).

Protagonists of views contrary to those indicated above are, however, by no means lacking. Nevertheless, some (although by no means all - see for example Starke, An Introduction to International Law, p. 282) writers in this category are of opinion that extradition treaties continue to operate despite changes in State personality (vide the authorities and instances mentioned by Dugard (loc. cit.) p. 433 et seq. See also, generally, two further writings by Professor Dugard to be found in 1967 S.A.L.J. 251 and 1968 S.A.L.J. 1.) The subject is discussed in some detail by D.P. O'Connell, (State Succession in Municipal Law and International Law, 1967 Ed., Vol 2) in Chapters 1, 4 and 10 of that work. In Chapter 10, dealing with the effect of dismemberment on treaties, the learned author, after pointing out, under the heading "Dissolution of a Union or a Federation", that upon dissolution there is

"a functional devolution in the performance of legal actions from the central to the local authorities" goes on (at p. 165) to state that:

> "The presumption in such circumstances is that treaties which are compatible with the transformation of the respective legal orders survive the change, and that each of the successor States remains a party thereto".

On the same page O'Connell emphasises the importance of the feature that the territory and people of the successor States are, though now partitioned, identical with those originally affected by the treaty and adds that "the resultant presumption of continuity is one not easily rebutted". With particular reference to the Federation of Rhodesia and Nyasaland, O'Connell remarks (at p. 175) that:

> "Generally speaking, federal treaties have been continued in force by all the three territories and, after their independence, by Malawi and Zambia",

but immediately adds that separate consideration must be accorded to certain types of agreement. At pages 176 and 177 the learned author indicates what was done regarding the Federation's double-taxation and visa agreements;

but no uniformly consistent policy would appear to have been followed in regard to these. After mention (at pp. 177 - 178) of R. v. Eliasov (supra) and, incorrectly, stating that that decision was "overruled" by Bull v. The State (supra), O'Connell cites (at p. 178) a communication from the Secretary General of the United Nations to Malawi wherein the latter's attention was drawn

> "To the practice which has developed regarding the succession of new States ..... Under this practice the new States generally acknowledge themselves to be bound by such treaties through a formal notification..... The effect of such notification ..... is to consider the new State as a party in its own name to the treaty concerned as of the date of independence, thus preserving the continuity of the application of the treaty in its territory".

Having regard to the aforegoing, it does not appear to me to be possible to formulate any universal International Law rule regarding the continuation or otherwise of treaties consequent upon the dissolution of the Federation of Rhodesia and Nyasaland. Each case must, I think, be decided upon the particular facts relating

to...../

to it, but, specifically as regards extradition treaties, at the same time also bearing in mind the existence of a general tendency in favour of their continuance. It may here not inappositely be mentioned that Starke (op. cit. p. 280), after stating that "State practice on the subject is unsettled and full of inconsistencies", goes on to say that "it is, however, a sound general working rule ..... to ascertain what was the intention of the State or States concerned as to the continuance or passing of any rights or obligations".

It is against the above background that the extradition treaty presently in issue should, in my opinion, be examined; and I now address myself to that task.

Article 2 of the Agreement reads:

> "The territories to which the present Agreement shall apply are the Republic of South Africa and any other territory falling under the jurisdiction of the Republic of South Africa on the one hand and the Federation of Rhodesia and Nyasaland on the other hand".

The Republic of Malawi comprises - so far

as..../

as the information before the Court goes - the same territory as did Nyasaland before and after the Federation. Upon the latter's dissolution, the Agreement, according to the information before the Court, continued in force as a part of the law of Nyasaland by virtue of The Extradition of Offenders Enactments (Adaptations and Modifications) Regulations, 1964. When Nyasaland achieved independence as the State of Malawi on 6th July 1964, the said Agreement continued in force as part of the law of Malawi by virtue of the Malawi Independence Order, 1964; and when Malawi became a Republic on 6th July 1966, the said Agreement continued in force as part of the Law of Malawi by virtue of the Republic of Malawi (Constitution) Act, 1966. A consistent and continuous intention on the part of Nyasaland and Malawi to be bound by the Agreement is thus exhibited.

So far as the Republic of South Africa is concerned, there was produced to the Regional Magistrate a certificate signed by the Minister for Justice which forms part of the record before us and the terms of which

are cited in full on p. 361 of 1971 (1) S.A. We were not referred to, nor have I been able to find, any South African authority concerning the conclusiveness or otherwise of such a certificate. It would, however, appear to be generally accepted that, in matters of this kind, the Courts take a certificate of this nature at its face value. Thus O'Connell (International Law, 1965 Ed., Vol. 1, p. 123) after stating that "many private law actions depend in their result upon the proof of some international fact" and giving illustrations of this, goes on to say that:

> "In most jurisdictions the executive branch of Government may issue to the Court a statement, known as the 'Executive Certificate', in which the relevant facts are disclosed. In varying degrees such a certificate is treated by the Courts as conclusive, so that the facts contained in it are not open to dispute by the litigants."

This passage is fortified by reference, in a foot note, to various writings which are, however, not presently available to me. According to Halsbury, 3rd Ed., Vol VII par. 603, matters and questions, the determination of which is solely in the hands of the Crown, may conveniently be

termed "facts of State", and of these the courts in England take judicial notice. For that purpose, the English Courts, in any case of uncertainty, seek information from a Secretary of State; and the information so received is conclusive. The conclusiveness of such a certificate in English Law is strikingly illustrated by the decisions in R. v. Bottrill: Ex parte Kuechenmeister, 1946 (2) All E.R. 434 (C.A.) and Carl-Zeiss-Stiftung v. Rayner & Keeler Ltd., 1966 (2) All E.R. 536 (H.L.). The attitude of the Government of the Republic of South Africa concerning the Agreement is a matter peculiarly within its own knowledge. Although the certificates under discussion have been said (vide the Carl- Zeiss case (supra) at p. 544) not to be in the nature of evidence", I am of opinion that in extradition cases a certificate from the Minister is an appropriate method of informing the Court of the Government's attitude. In the present case the Court accordingly accepts the certificate of the Minister as a statement of the matters therein mentioned.

In addition to criticising the concluding portions of the first two paragraphs of the Minister's

certificate as purporting to afford the answer to the very question which the Court must decide, appellant submitted that the third paragraph of the certificate, not only lacked any detail of time and place, but also failed to reveal by virtue of what considerations the Republic of South Africa regards itself as bound by the Agreement. In any event, so the submission continued, the third paragraph of the certificate is contrary to the intention of the Government of the Republic of South Africa as reflected in its dealings with Rhodesia in relation to the same Agreement. The last portion of this submission is supported by the fact that, on 23rd December 1963, the then Prime Minister of Southern Rhodesia wrote to the Acting Accredited Diplomatic Representative of the Republic of South Africa proposing that, "in view of the impending dissolution of the Federation of Rhodesia and Nyasaland", the terms of the Agreement "should continue to apply as between the Republic of South Africa and Southern Rhodesia". In a written reply of the same date, this proposal was accepted and it was further agreed

that.../

that the two letters "should be regarded as constituting an agreement between our Governments with effect from the dissolution of the Federation of Rhodesia and Nyasaland". These two Notes - which were subsequently published as Proclamation R.151 in the Government Gazette Extraordinary of 25th June 1965 and were later discussed in the judgment of this Court in S. v. Eliasov, 1967 (4) S.A. 583 - thus constituted an express, new, contract between the Republic of South Africa and Southern Rhodesia that, as from the date of the dissolution of the Federation, namely, 31st December 1963, the Agreement should continue to apply between them. In terms of sec. 2 (3) (a) of the Act, an extradition agreement is of no force and effect until it has been published by the State President by proclamation in the Government Gazette. The absence of any such publication of the aforementioned Notes was thus a vital factor in the earlier Eliasov case (1965 (2) S.A. at p. 772 (A-F)). The fact that these Notes were exchanged certainly lends colour to appellant's submission that, in the absence of any such Notes in regard to Nyasaland, the Agreement lapsed

upon the dissolution of the Federation on 31st December 1963. It does not, however, necessarily follow that, because Notes were exchanged between the Republic of South Africa and Southern Rhodesia, the Agreement lapsed as between Nyasaland and the Republic of South Africa. On the contrary, and as already indicated, the Legislature of Nyasaland, and thereafter of Malawi, sought to preserve the Agreement; and, as regards the Republic of South Africa, the attitude of the Government to the Agreement is reflected in the Minister's afore-mentioned certificate. As Schwarzenberger (A Manual of International Law, p. 89) remarks, "What cannot be attained on the level of international customary law, can always be achieved by way of consent. This is the safe road which, more often than not, the practice of States has chosen".

In the light of the various features which I have mentioned, the conclusion appears to me rightly to follow that by the tacit consent of all parties concerned, that is to say, the Republic of South Africa on the one

hand..../

hand and first Nyasaland, and then Malawi, on the other hand - the Agreement continued to be reciprocally binding notwithstanding the dissolution of the Federation on 31st December 1963. Nor, in my opinion, is it of vital consequence whether or not, prior to Malawi's acquiring the status of an independent Republic in 1966, Nyasaland, and later the State of Malawi, enjoyed full treaty-making capacity. For at the date of the dissolution of the Federation the Agreement was already in existence. After dissolution, first Nyasaland and thereafter Malawi, in the legislation previously mentioned, recognised the Agreement. The latter was duly promulgated in the Gazette in terms of the Act and has, according to the Minister's certificate, throughout been recognised, in relation to Nyasaland and Malawi, by the Government of the Republic of South Africa. As O'Connell, International Law (op. cit.) p. 181, states, "Recognition is a function of the executive branch of Government; it is a political act entailing legal consequences". It is much more a question of policy than of law (Starke, op. cit. p. 124). After the dissolution

of..../

of the Federation it was, accordingly, in my view, fully within the competence of the Government of the Republic of South Africa to recognise, in relation to the Agreement, first Nyasaland and thereafter Malawi, and to accept the rights and obligations reciprocally conferred by that Agreement. This, indeed, is what in my opinion actually occurred. The decision in S. v. Bull (supra) was therefore, in my view, correct. The decision of the Transvaal Provincial Division in S. v. Eliasov (supra) is, as I have indicated earlier, distinguishable by reason of the exchange of Notes which had taken place between the Republic of South Africa and Southern Rhodesia. In so far, however, as any of the dicta in that case may be contrary to the views I have expressed, it necessarily follows that I am not in agreement with such dicta.

I accordingly come to the conclusion that the Agreement remains of force and effect between the Republic of South Africa and the Republic of Malawi.

I turn now to appellant's second major submission, namely, that in any event the Court should not authorise his extradition on the first count. This submission, advanced for the first time in this Court, was not discussed in either of the courts below. As the point took counsel for the State by surprise, the Court authorised the filing of further written arguments. Such additional arguments have now been duly filed and considered.

Sec. 2(1) of the Act provides that the State President may conclude an extradition agreement with any foreign state on such conditions as he may deem fit but "subject to the provisions of this Act". In terms of sec. 1 of the Act, a "foreign state" includes any foreign territory. An extradition agreement must (vide sec. 2(1)) provide for "the surrender on a reciprocal basis of persons accused or convicted of the commission within the jurisdiction of the Republic or such State or any territory under the sovereignty or protection of such State, of offences specified in such agreement ..... ". Conditioned by a

proviso..../

proviso not relevant to the present case, art. 3 of the Agreement reads:

> "Subject to the provisions of the present Agreement, surrender shall reciprocally be granted in respect of any offence which is punishable by the law of each Party by death or by imprisonment for a period exceeding six months (whether direct or as an alternative to any fine prescribed)".

Section 3(1) of the Act provides that:

> "Any persons accused or convicted of an offence included in an extradition agreement and committed within the jurisdiction of a foreign State a party to such agreement, shall, subject to the provisions of this Act, be liable to be surrendered to such State in accordance with the terms of such agreement..... ".

The first article of the Agreement reads:

> "The Contracting Parties undertake to surrender to each other, in the circumstances and subject to the conditions specified in the present Agreement, those persons who, being accused or convicted of offences referred to in Article 3 hereof committed within the territory of the one Party or on the high seas on board a vessel registered in the territory of that Party, shall be found within the territory of the other Party".

The words I have italicised in this article correspond to, and must be correlated with, those I have italicised in the above-cited sections 2(1) and 3(1) of the Act.

Malawi is an "associated State" within the meaning of secs. 1 and 6 of the Act. The warrant for appellant's arrest, which falls within those sections read together with art. 9 of the Agreement, describes the offences with which appellant is charged as follows:

> "First Count: CONSPIRACY to commit a felony, contrary to Section 402 of the Penal Code.
>
> PARTICULARS OF OFFENCE.
>
> William Vivian Devoy, and Mohamed Nasin Sirdar and Yusuf Ahmed, on divers days during the month of September, 1968, and on divers other days thereafter and including the 6th day of October, 1968, at several places outside and within the Republic of Malawi, conspired together, and with other persons unknown, to steal copper.
>
> Second Count: STEALING, contrary to Section 278 of the Penal Code.
>
> PARTICULARS OF OFFENCE.
>
> William Vivian Devoy, on or about the 6th day of October, 1968, at Fandani Village, Chief Chiwere, Dowa District, stole 61 bars of copper valued at £3,050, the property of Mufulira Copper Mines".

Theft is of course a crime in the Republic of South Africa. So also under the provisions of sec. 278 of the Malawi Penal Code. The theft of copper charged against appellant in

the second count is alleged to have occurred in Malawi. Accordingly, once it is postulated that the Agreement is operative, it follows that extradition was rightly ordered in respect of the second count.

The position is, however, somewhat different in relation to the first count. Conspiracy to commit a crime is itself a crime in South Africa. Sec. 402 of the Penal Code of Malawi (since replaced, in substantially identical terms, by sec. 404 of the Penal Code) mentioned in the first count, provides that:

> "Any person who conspires with another to commit any felony, or to do any act in any part of the world which if done in the Protectorate would be a felony, and which is an offence under the laws in force in the place where it is proposed to be done, is guilty of a felony ..... ".

I do not propose to endeavour to determine the precise meaning of this section. It is sufficient to say that its very wide terms are at least susceptible of the construction that it purports to embrace a conspiracy committed wholly outside the borders of Malawi. The above-cited

particulars.../

particulars of the first charge pointedly refer to "several places outside and within the Republic of Malawi", and that phrase is reiterated in the certificate of the Malawi Director of Public Prosecutions filed of record and which is reproduced at p. 360 of 1971 (1) S.A. This last-mentioned certificate alleges that the theft constituting the second count was committed "in pursuing this conspiracy". As already mentioned, the theft forming the subject of the second count is alleged to have been committed within the borders of Malawi. The conspiracy "to steal copper" charged in the first count may therefore, in part, well be a conspiracy, committed in Malawi, to steal, in Malawi, the copper mentioned in the second count. It is also conceivable that the mention, in the first count, of conspiracy "outside ..... the Republic of Malawi" was merely to indicate an intention to adduce evidence of occurrences outside the borders of Malawi in support of a charge of conspiracy actually committed within Malawi. Nevertheless, as the charge stands, it incorporates, as an integral

portion of the complaint against appellant on the first count, a charge of conspiracy committed outside Malawi. Such a charge does not fall within the ambit of the Agreement which, by reason of the above-cited provisions of art. 1 of the Agreement, read with secs. 2(1) and 3(1) of the Act, is restricted to crimes committed "within the territory" of Malawi. Inasmuch as the onus is upon the State seeking extradition to show that the crime in respect of which extradition is sought falls within the scope of the Agreement, I do not consider that the Court should, while declining to authorise extradition in relation to conspiracy committed outside Malawi, nevertheless authorise extradition on the first count in so far as that charge may be claimed to relate to a conspiracy committed within the boundaries of Malawi. For it does not appear to me to be the Court's function to dissect out of the first charge as formulated that which falls within the Agreement. In my opinion, the appropriate course, under all the circumstances, is for the Court to decline to authorise extradition on the first count.

As already emphasised, the Court can only authorise extradition in respect of alleged crimes which fall within the ambit of the Agreement read together with, and in the light of, the Act. Where extradition is sought in respect of a plurality of charges, one of which does not fall within the Agreement so read, the Court should, in my judgment, decline to authorise extradition in respect of that charge, even although it may be ordering extradition in respect of the remaining charges. While I arrive at that conclusion on an interpretation of the Agreement and the Act, it is not without interest to note in passing that the English Courts appear to adopt the same attitude, see eg. R.v. Brixton Prison Governor: Ex parte Rush, 1969 (1) All E.R. 316 (C.A.), where, incidentally, the crime in respect of which the extradition from England to Canada was refused, was a conspiracy allegedly committed beyond the borders of Canada.

While this Court naturally assumes - as did, indeed, the Provincial Division vide pp. 363 - 364 of 1971 (1) S.A. - that, inasmuch as diplomatic relations exist between the Republic of South Africa and the Republic

of Malawi, the latter will strictly observe the terms of the Agreement (cf. Ex parte Rolff, 26 S.C. 433 at p. 439; and Royal Government of Greece v. Brixton Prison Governor & Ors., 1969 (3) All E.R. 1337 (H.L.)), it is not inappropriate to record that art. 8 (1) of the Agreement reads:

> "A person surrendered shall not be kept in custody or proceeded against in the territory of the requesting Party for any offence other than an offence (in respect of which surrender may be granted in terms of this Agreement) established by the facts in respect of which his surrender has been granted or on account of any other matters, nor shall he be surrendered by that Party to a third State until he has been restored or until the expiration of thirty days after he has had an opportunity of returning to the territory of the requested Party".

For the foregoing reasons:

1) The appeal succeeds to the extent that extradition is authorised only in respect of the second count, to wit, the charge of theft of 61 bars of copper allegedly committed on or about 6th October 1968, at Fandani Village.

2) The order granted on 14th May 1970 by the Regional Magistrate for the Region of Natal is amplified to read:

"In terms of section 12(1) of Act 67 of 1962, it is ordered that the Accused, William Vivian Devoy, be surrendered to Superintendent Derrick Stanley Tricker of the Malawi Police Force, such surrender, however, being restricted to the second count only, namely, that of theft of copper allegedly committed at Fandani Village on 6th October 1968."

RUMPFF, J.A.)
CORBETT, J.A.) Concur.