

19/78

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

(APPEAL) DIVISION
AFDELING)

APPEAL IN CRIMINAL CASE APPÈL IN STRAFSAAK

MBUBE MDINGI

Appellant.

versus/teen

THE STATE

Respondent.

Appellant's Attorney M. INTARE and P. A. G. (JOHANNESBURG)
Prokureur van Appellant Respondent's Attorney A. G. (JOHANNESBURG)
Prokureur van Respondent

Appellant's Advocate G. BIZOS Respondent's Advocate J. W. F. van Jaarsveldt
Advokaat van Appellant Advokaat van Respondent

Set down for hearing on 6
Op die rol geplaas vir verhoor op
(W.L.D.) — 26.11

Coram: Wessels, Hofmeyr, RRR & Trengore JJR.

Vir Appellante: G. BIZOS 9h45 - 11h00
11h15 - 12h45 2h15 - 2h30 2h45 - 3h35.

Vir Respondente: J. W. F. van Jaarsveldt
2h30 - 3h35.

C.F.V.

The Court allows the said
Appeal and set aside the
conviction and sentence.

(Judgment for)
(filed in 1/14)
78 04 15

(J.F.)
Kopstroom

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the matter between:

MBUBE WAVELL MDINGI

Appellant

and

THE STATE

Respondent

Coram: Wessels, Hofmeyr JJ.A. et Trengove A.J.A.

Heard: 6 September 1978

Delivered: 29 September 1978.

J U D G M E N T

WESSELS, J.A.:

On 1 November 1977 appellant appeared before COETZEE, J., in the Witwatersrand Local Division on a charge of contravening section 2(1)(b) read with sections 1, 2(2), 4, 5 and 8 of the Terrorism Act, No 83 of 1967. It was alleged in the indictment that appellant had during November 1976 in the Republic incited, instigated, aided, advised, encouraged and/or

4. DEUR na genoemde persone die omgewing van die Oshoekgrenspos bereik het, hulle te wys waar om die grens oor te steek sonder om deur die beheerpunt te gaan en aan hulle geld te gee. DIE BOGENOEMDE handeling(e) het geskied met die oogmerk om een of meer van die gevolge soos uiteengesit in artikel 2(2) van Wet 83 van 1967 in die Republiek te bereik."

After the case for the appellant had been closed, judgment was reserved by the Court a quo. Thereafter, on 25 November 1977, judgment was delivered. Appellant was found guilty, and sentenced to five years imprisonment (the compulsory minimum sentence). Leave having been granted by the Court a quo to do so, appellant appeals to this Court against his conviction and sentence.

The concluding paragraphs of the judgment of the Court a quo read as follows:

"I think, however, that although it is proved that the accused said, broadly speaking, what Mdluli and Radise say he said and that he did what they said he did, I should make doubly sure to find no more against him than those facts that cannot admit of any doubt.

I find therefore:

1. That the accused knew that at least three of his passengers wanted to leave the Republic surreptitiously for

Swaziland to undergo military training there for later use against the Republic.

2. That he knowingly assisted them in this purpose by conveying them to the Swaziland border.
3. That he knowingly facilitated the project by taking them up to the border for the crossing thereof under cover of darkness.

I make no other findings, for instance, that he was paid, that he actually instigated these persons to do so or encouraged them before or on the way in the manner alleged by the State.

There remains only the question whether on these limited facts the accused is nevertheless guilty of the contravention as charged. Section 2(1)(a) and 2(1) (b) of the Terrorism Act No. 83 of 1967 as read with sub-section (2) I think puts it beyond doubt that if he aided these persons in this fashion, he contravened sub-section (1)(a) or (b) of the Statute and I therefore find him guilty as charged."

The reference to section 2(1)(a) of

the Terrorism Act is not understood. Paragraphs (a), (b)

and (c) of section 2 create separate offences, and appellant

was charged with a contravention of section 2 (1)(b) only.

It...../5

It is stated in the judgment of the Court a quo that the following facts were not in dispute at the trial:

1. During the last week of November 1976 the accused conveyed the above-mentioned persons in his motor-car from Soweto to a point which is a few kilometres short of the Swazi/South African border post at Oshoek.
2. This occurred on a Tuesday or a Wednesday, probably the 23rd or 24th November 1976.
3. The accused left Soweto between 4 and 4.30 p.m. and stopped on the way, at least at Bethal.
4. When they arrived near the border post it was well after 10 p.m. which is closing time.
5. At that point the passengers got out of the motor-car and crossed the border during the night by surreptitiously going through a fence some distance from the border post.
6. Having reached Swaziland they were met by persons who were connected with the running of camps which

serve...../6

serve apparently as assembly points from where trainees are transported to other countries, amongst others Tanzania, to undergo military training for future use against South Africa.

7. The passengers of the accused, with the exception of Radise, were transported for this purpose from Swaziland to Tanzania during January 1977.
8. Radise returned to South Africa on the 25th February 1977 openly through the control point at Oshoek where he was detained. He was subsequently handed over to the Security Branch of the South African Police."

The first-quoted passage from the judgment of the Court a quo is somewhat equivocal. After stating: "I think, however, that although it is proved that the accused said, broadly speaking, what Mdluli and Radise say he said and that he did what they said he did", the learned Judge a quo concluded: "I should make doubly sure to find no more against him than those facts that cannot admit of any doubt." A conviction is justified

if...../7

if there is proof beyond any reasonable doubt. However, since the conviction was deliberately based on the "limited facts" numbered 1, 2 and 3 in the passage in question, I am of the opinion that the issues raised on appeal must be determined on the basis of those facts. In essence, it was held that it had been proved that appellant had knowingly aided at least three of his passengers to undergo training which could be of use to any person intending to endanger the maintenance of law and order by conveying them in his taxi from Soweto to a point close to the Swaziland border, so as to enable them to cross the border surreptitiously under cover of darkness. It is implicit in the judgment of the Court a quo that it was found that appellant had not discharged the onus resting upon him of proving beyond any reasonable doubt that he did not aid any of his passengers to undergo such training for the purpose of using it or causing it to be used to commit any act likely to have any of the results referred to in

section 2(2) of the Act in the Republic or any portion thereof. The results referred to in subsection (2)

are the following:

- (a) to hamper or to deter any person from assisting in the maintenance of law and order;
- (b) to promote, by intimidation, the achievement of any object;
- (c) to cause or promote general dislocation, disturbance or disorder;
- (d) to cripple or prejudice any industry or undertaking or industries or undertakings generally or the production or distribution of commodities or foodstuffs at any place;
- (e) to cause, encourage or further an insurrection or forcible resistance to the Government or the Administration of the territory;
- (f) to further or encourage the achievement of any political aim, including the bringing about of any social or economic change, by violence or forcible means or by the intervention of or in accordance with the direction or under the guidance of or in co-operation with or with the assistance of any foreign government or any foreign or international body or institution;
- (g) to cause serious bodily injury to or endanger the safety of any person;

- (h) to cause substantial financial loss to any person or the State;
- (i) to cause, encourage or further feelings of hostility between the White and other inhabitants of the Republic;
- (j) to damage, destroy, endanger, interrupt, render useless or unserviceable or put out of action the supply or distribution at any place of light, power, fuel, foodstuffs or water, or of sanitary, medical, fire extinguishing, postal, telephone or telegraph services or installations, or radio transmitting, broadcasting or receiving services or installations;
- (k) to obstruct or endanger the free movement of any traffic on land, at sea or in the air;
- (l) to embarrass the administration of the affairs of the State".

It was not contended on appeal by appellant's counsel that, assuming the correctness of the finding by the Court a quo that the State had discharged the initial onus of proof resting on it in regard to aid rendered by appellant, he had discharged the formidable onus resting upon him in regard to his purpose in aiding the persons concerned to undergo the training in question.

The substance of the argument on appellant's behalf was

that the trial Court had clearly erred (1) in accepting Radise's evidence as to what the appellant said and did on the journey from Soweto to the Swaziland border, and (2) in accepting the evidence of the State witness Samuel Mdluli as to his conversation with appellant immediately prior to the commencement of the journey to the Swaziland border. It was submitted that the positive finding by the Court a quo that Radise and Mdluli were credible and reliable witnesses was, in all the circumstances, not justified. A further submission on appellant's behalf was that the Court a quo erred, (1) in rejecting appellant's evidence as not being reasonably possibly true and, (2) in considering the evidence of a defence witness, Ephraim Shabalala, as unimportant in resolving the conflict between the evidence of the appellant and that of Radise.

Although the proper interpretation of section 2(1)(b) of the Terrorism Act was neither raised in counsels' heads of argument nor in argument before

this Court, it is necessary to refer thereto in the light of written submissions filed by counsel after the hearing of the appeal at the request of the Court. The crisp question is concerned with the elements to be established by the State before the accused is affected by the onus placed on him in the latter part of the sub-section in question. Section 2(1)(b) of the Act (which I have for the sake of easier reference divided into three paragraphs, and with the words relevant to the facts in this case underlined) reads as follows:

- "2. (1).....(i) any person who -
(b) in the Republic or elsewhere
undergoes, or attempts, consents or takes any steps to undergo or incites, instigates, commands, aids, advises, encourages or procures any other person to undergo any training (ii) which would be of use to any person intending to endanger the maintenance of law and order, and (iii) who fails to prove beyond a reasonable doubt that he did not undergo or attempt, consent or take any steps to undergo, or incite, instigate, command

aid, advise, encourage or procure
such other person to undergo such
training for the purpose of using it
or causing it to be used to commit
any act likely to have any of the
results referred to in subsection
(2) in the Republic, or any portion
thereof;

shall be guilty of the offence of parti-
cipation in terrorist activities....."

In my opinion it is clear from the wording of the sub-
section that the onus provided for in paragraph (iii)
only affects an accused if the elements of the offence
set out in paragraphs (i) and (ii) have been proved by the
State. Upon such proof, the accused is burdened with
the onus of proving beyond any reasonable doubt that he
did not aid such other person to undergo such training
(i.e., of the kind described in paragraph (ii) of the sub-
section) for the purpose of using it or causing it to be
used to commit any act likely to have any of the results
referred to in subsection (2) in the Republic, or any
portion thereof. In so far as paragraph (ii) of the sub-
section is concerned, it appears that it is to be

objectively...../10c

objectively determined, having regard to the type of training in question, whether it "could be of use" to any person intending to endanger the maintenance of law and order. In so far as paragraph (i) of the subsection is concerned, the question is whether the State is required to prove not only that the accused aided any other person in his purpose to undergo military training, but did so with knowledge of the purpose which that other person had in mind. Notwithstanding the general scope and purpose of the Act, I am of the opinion that the Legislature could not have intended penalising innocent aid furnished by an unsuspecting person to any other person who, unbeknown to the former, avails himself of the aid in order to undergo training of the kind referred to in paragraph (ii). Cf. the reasoning of Muller, J.A., in S. v. Essack and Another, 1974(1)S.A. 1(A.D.) at p 17D - 18D. In my opinion, therefore, in this case the State had to prove beyond any reasonable doubt not only that appellant in fact rendered aid to Radise and the other persons mentioned in the

indictment but also that his mens rea extended to the purpose which his passengers had in mind in undertaking the journey to Swaziland.

In so far as Radise is concerned, it appears from the record that at the commencement of his evidence counsel for the State informed the Court that

he...../11

he "may incriminate himself of an offence of also having contravened section 2(1)(b) of the Terrorism Act" and requested the Court to inform the witness of the provisions of section 204 of the Criminal Procedure Act, no 51 of 1977. The Court a quo complied with this request. It does not appear from the record of the proceedings that Radise was discharged from prosecution at the conclusion of the trial - there is no entry on the record to that effect (see section 204(2) of the Act). It is, however, implicit in the judgment of the Court a quo that it found that Radise had not given any evidence of a self-incriminatory nature in so far as the provisions of section 2(1)(b) of the Terrorism Act are concerned. I shall revert to this aspect of the matter at a later stage of this judgment.

It appears from the evidence of Radise that he was 24 years of age at the time of the trial and that he had left school at the end of 1973 when he was in standard 8. He lived with his parents in Pretoria.

He was employed for some time at a motor assembly plant in Rosslyn, near Pretoria. He stated that he was keen to continue his studies so as to matriculate. For some time prior to his leaving for Swaziland he was unemployed. He was then visiting a cousin (Rosina Mohammed) whose home was in Naledi - apparently a township for blacks in the Johannesburg district. During the middle of November 1976 three black men (named Sam, Joseph Lebakeng and David) came to the Mohammed's home to visit Hosia Mohammed. In the course of conversation Radise mentioned that he was keen to pursue his studies. He was told that there "are no schools in Soweto, even the schools which still existed there would be burnt." (It was common cause that there had been riots in the black townships from about the middle of June 1976 onwards). He was informed that if he wished to continue his studies he would have to proceed to "countries like Botswana or Swaziland". Radise said that he told the visitors that he would "think over it and see what happens". The following day the visitors returned and the question of

leaving the Republic was again discussed. He "ultimately" agreed to accompany them to Swaziland. On a Thursday afternoon (which must have been the 18th November 1976) Radise for the first time met appellant, who was the owner of a taxi business which was carried on in the Soweto area. Radise was accompanied by Hosia Mohammed, Joseph Lebakeng and David. Appellant told them that they could not leave for Swaziland on that day "because all the roads are cut." (I understand this to be a reference to police road blocks). He said that they should meet him again on the following Tuesday. According to Radise, he, Joseph, Hosia, Sam and David met appellant as arranged during the early afternoon on Tuesday (23 November). From evidence given by Radise under cross-examination, it appears that Joseph, Sam and David were all related to Hosia. I have already mentioned that Radise was also related to the Mohammed family - being a cousin of Rosina Mohammed.

After meeting appellant, they were taken to Jabulana's garage where they met Mdluli (also

referred to in the record as Akalati), who carried on business as a panelbeater. After a discussion between appellant and Mdluli, the former took possession of a motorcar belonging to him which the latter had repaired but which still had to be spraypainted. The green motorcar in which the party had been conveyed to the garage was left in Mdluli's possession. Thereafter the party proceeded to Shabalala's shop. As to what was discussed there, Radise testified as follows:

"COURT: To whose shop? ----
Shabalala's shop, my Lord. When we got there we stopped and accused had got out of the car and went into Shabalala's shop. The accused found Shabalala in his shop, my Lord. They spoke to each other at that stage in the shop, my Lord. After some time the accused came out, called us out of the car to go into Shabalala's shop. As we got into the shop, my Lord, we found Shabalala sitting in the shop. The accused spoke to him and said 'these are the people I am travelling with today'. My Lord, Shabalala asked from him why does he leave with these people before buying them clothing similar to the Zulu warriors, my Lord, Zulu garb.

Just a moment. Ask him why he --- just repeat that for me. ---Why he should leave with these people before buying them the clothing worn by the Zulu warriors, that is the Zulu garb, my Lord.

Zulu garment? --- Garb, my Lord, G.A.R.B.

Yes? --- He added that by buying them the clothing is to safeguard that they will not be troubled by the police along the road. When....if the police were to ask them where did they come from, he would reply they are his people; they come from Episto (?).

They come from? --- Episto, my Lord.

Yes. --- Accused said he would only buy the clothing for the people he would take on the second trip."

After a brief visit to appellant's home, the party left on the approximately 340 km. journey to the Swaziland border post, Oshoek. According to Radise he was then still under the impression that he and his friends were being conveyed to Swaziland in order to further their studies. On the way to Bethal, appellant volunteered information regarding his participation, and that of his family and relatives, in terrorist activities within the Republic. He stated, inter alia, that he and his

relatives had been arrested but had been released on bail. He also produced a document which "showed" that he had to appear before a court. I find it unnecessary to deal in further detail with Radise's evidence as to what further was said by appellant on the way to Bethal.

The party stopped at Bethal to buy food and refreshments. They met up with a group of students who were being conveyed in a van. After a stop of about half an hour appellant proceeded on his way to Ermelo. On the journey appellant again spoke about his association with unlawful organisations (the A.N.C. and P.A.C.) and his assistance to persons who left the Republic during the period of unrest. It was at this stage of the journey that Radise first heard about students undergoing military training with the intention that they should thereafter return "to fight against this country". On the road between Ermelo and Oshoek appellant stopped the car. On appellant's instructions the passengers alighted and took part in physical exercises.

Thereafter they proceeded on the journey, and eventually drew up alongside the road at a spot which was 1 - 2 kms. from the border post at Oshoek. They found themselves in the company of the students they had seen at Bethal. The students guided them to a point some distance from the border gate where they climbed through the fence. After appellant had handed money to David and Joseph to cover expenses they proceeded on their way to a nearby village. The next morning they left by bus for Mbabane where they were met by "a certain Dan, a member of the P.A.C." Radise and the other students were accommodated at a camp where he learnt that he would have to undergo military training. As to his return to the Republic, Radise testified as follows:

"MR. VAN JAARSVELDT: Did you eventually return to Oshoek? --- That was on the 25th February this year.

(Question inaudible) --- No, my Lord.

How did you come back to South Africa? --- My Lord, after we'd arrived there seeing that I wanted to go to school we were told to go to a military training. My Lord, seeing that I did not want to undergo the military training

I made a request to the Swazi Government that I should come back to this country.

Did they allow you? --- Yes, my Lord, they said they would.

And eventually you returned to this country? --- I think that they delayed, my Lord. I came back on my own."

It appears from evidence given under cross-examination, that Radise claimed that he did not know in what circumstances it was arranged that appellant should convey him and his friends to the Swaziland border. He was unable to dispute what was put to him, namely, that appellant would state in evidence that he had been approached on the Thursday morning (18 November) by one of the group with a request that he should convey them to Swaziland. Radise gave contradictory evidence regarding the reason why the group did not leave on that Thursday. In his evidence-in-chief he stated that appellant had said that they could not leave on that day because "the roads were cut". In cross-examination he stated, firstly, that appellant had mentioned that the days from Thursday to Sunday were "busy days" for a taxi operator, and that it was

for that reason that the departure was postponed until the following Tuesday, "because mid-week is not a busy day." Almost immediately thereafter, Radise gave yet another explanation why the departure was postponed.

As to this, the record reads as follows:

"And on the Tuesday when you did come as you had arranged there were five of you? ---Yes.

And do you recall that on that Tuesday you did not leave because the car that the accused wanted to use to take you to Swaziland was out of order and you postponed it on the Tuesday until the following day, the Wednesday? --- It was on the Thursday when he said that the car was out of order, that we should go back, my Lord.

Well, this may or may not have been on the Thursday. What I am putting to you is that you were due to leave on the Tuesday and you did not leave on the Tuesday because the car that you were supposed to use was defective. Do you recall that? --- Yes, I remember.

Yes. So that you in fact postponed this trip on two occasions; one from the Thursday and one from the Tuesday. --- My Lord, it was the details....(unclear) do not understand the whole story, because I saybecause the position is this, my Lord. It was only once that the journey was postponed and we were told that we

were told that we were going to leave the following week on the Tuesday and we actually left on Tuesday, my Lord.

But a short while ago, you agreed that you didn't leave on the Tuesday but on the Wednesday? ---- My Lord, the details, I think the counsel did not quite understand it because I said that the journey was only postponed once on a Thursday and then we actually left on a Tuesday. I still remember the date; it was on the 22nd, my Lord."

In fact, the 22nd was a Monday. When this was pointed out to Radise he replied:

"Well my Lord, I still remember it was the 22nd. It was the 22nd the day when we left, my Lord, on the Tuesday."

Radise also stated that he had not informed his parents that he was proceeding to Swaziland to continue his studies. He also learnt on the journey that none of his friends had done so. He gave a somewhat confused explanation for his failure to take his parents into his confidence. Radise stated that he was unaware of the fact that he required "documents" in order to cross the borders between the Republic and foreign countries...../21

countries. It was put to him that appellant's evidence would be that he was brought under the impression that Radise and his friends were a group of musicians proceeding to Swaziland in order to attend a festival which was to take place in the vicinity of Mbabane during the Christmas season. This was denied by Radise. It was, further, denied by Radise that the conversation was mainly concerned with music. It was put to him that a defective brake drum caused appellant to park his car close to the Oshoek border gate with the intention of obtaining a replacement the following morning. Radise denied this. He also stated that, contrary to his expectations, he was arrested on 25 February 1977 when he sought to re-enter the Republic at the Oshoek border post. He did not enquire from the police why they were arresting him. They wanted to know from him who the person was that had conveyed him to Swaziland during November of the previous year. He told them that appellant had done so. He was told by them to make

"a straightforward statement". Radise was recalled by the Court after appellant had given evidence in his defence. The purpose of the recall related to evidence given on behalf of the State by Samuel Mdluli. It is, therefore, more convenient to deal with it after setting out a summary of Mdluli's evidence.

Mdluli gave evidence about a conversation between himself and appellant on the Tuesday afternoon before the journey to Swaziland commenced. In his evidence-in-chief he testified as follows:

1. "Did he at any stage tell you that he was going to Swaziland? ---Yes, he told me that.
Tell us about that conversation between you and the accused?---I had just come in from town where I had gone to buy town. I found him at the garage waiting for me. His car had been panelbeated, I panelbeated his car already, all what remained was the spraying. There was some money which was still outstanding. I told him that I would only spray after I received it. When I arrived he told me that he did not have any money on him but he had a trip to Swaziland,

and...../23

and when he returned he would have money for me, on his return he will have money, and that I should help them to spray the car. I asked him 'Who are you taking to Swaziland'. He then showed me 5 boys who were sitting under the shelter there at the garage. As I looked at them I recognized one as a person I knew.

Who did you recognize? --- Lucas is the name."

2. "MR. VAN JAARSVELDT: Yes, please continue? --- I then wanted to know from the accused what does that man, the man I have just identified now, want in Swaziland, I know he is not a Swazi, he is a Mosuthu. "I know him, he came here to this place and joined my club. Let us go to them, let me introduce you to them'. When we got to them I said 'these are the people who I have to transport'. I then said I do not know the others. The person I have just identified was trying to introduce me to the others and then accused said 'These people say they are tired, they are going for training in Swaziland'. After I heard that I did not want to hear anything further.

Did the accused say what kind of training? --- Guerilla and something.

And did the accused receive his car later? --- Yes."

It is clear from the following evidence
given under cross-examination that Lucas and the other

passengers were present when the above-mentioned conversation took place:

"Now in your presence the accused said - or rather, the accused said to you in the presence of Lucas and the other boys that they were going to Swaziland for training in guerilla warfare? --- Yes.

And did he whisper it in your ear or did he say it in such a way so that the other - that Lucas and his friends could hear? ---He spoke in a tone that anybody could hear who was in the vicinity, because it was the 5 boys, myself and the accused.

Did anyone protest at this suggestion, this statement of the accused? ---No."

Mdluli stated that he knew about the festival which was to take place in Swaziland, and was aware of the fact that Shabalala was connected with it "in some way or another." He was also aware of the fact that appellant was also "included". Further, still under cross-examination, Mdluli testified as follows:

"MR BIZOS: People who were going to take part in that festival, not as spectators but as participants, singers, musicians, caterers, were they making arrangements from the end of November to be ready for this big festival in December? --- Yes.

You see, because I am going to suggest to you that you are not telling His Lordship the truth when you say the accused told you he was taking these young people out for training in guerilla warfare? --- He told me that they say they are going out to training.

COURT: To train? ---Yes.

Did he use the words guerilla warfare or is that what you understood by training? --- He said they were going to be trained as soldiers. I said guerilla warfare, and he said yes.

MR BIZOS: Why did you want this clarification? What do you know about guerilla warfare? --- I did not want him to explain in full, he merely told me that they were going to Swaziland to be trained and that thereafter they would leave for Tanzania to be trained. Then when they are from Tanzania they will come back as guerillas.

Now we are getting a little bit more than you told us originally. We will deal with it piece by piece. Was the going to Tanzania mentioned in the presence of the 5 young people? --- Yes, they were present.

And the fact that they were going to get training in guerilla warfare in Tanzania, was that mentioned in the

presence of the 5 young people? --- They were present, yes.

Did any one of them protest? --- No, the way I saw them they were just eager to leave.

They were eager to leave, all of them? --- Yes.

Including Lucas? --- Yes, Lucas was also there."

Under cross-examination Mdluli also referred to an occasion when he met Radise in Swaziland during December.

As to what was discussed on that occasion, Mdluli testified as follows:

"And were you told by the police that they suspected Lucas of going out of the country for military training? --- I told them that Lucas and his four friends came to me and told me that the accused were to transport them to Swaziland, and to make sure to attend there. When I got to Swaziland in December I found Lucas there, in the district, not in town, on the farms, not in town. I asked him, seeing that he knows nobody here. He said 'we are waiting the plane which would leave on 4th January to Tanzania'.

He had plans of going to Tanzania when you met him in Swaziland? --- Yes.

MR BIZOS cross-examines: You told us that you met Lucas in Swaziland?

COURT: Well he has told a whole story about that. Carry on from there....?

--- Yes.

MR BIZOS: Were you in any way responsible

in persuading him to try and come back?
--- No, because I had nothing to do with him, I did not want to take it upon my shoulders. And secondly he did not ask me that he wanted to come back.

In January when you saw him ...

COURT: Did he say he saw him in January? Lucas told him that he was going to leave on the 4th January.

MR BIZOS: I beg Your Lordship's pardon, I was confused with the date. When you saw him and he told you that he would leave on the 4th January, did he show any unhappiness about it? ----Me?

No, Lucas? --- No, he was friendly and open and told me that they were leaving on the 4th."

In answer to a question put by the Court, Mdluli said that Radise told him that "he was amongst a group which was due to leave on the 4th". On further questioning by the Court, he said:

"Did he say what he was going to go to Tanzania for? ---No, he did not mention that, he merely said he was amongst the group which was going to leave on the 4th.

Didn't he say he was going to leave for training? --- He did not mention it, he did not say it in so many words, but the way they had told me, that is the conclusion I came to, that they were going for training."

Mdluli was also cross-examined about the circumstances in which he came to make a statement to the police. The following questions and answers were recorded:

"Did you know that they had the information when you were making your statement, from someone that the accused had taken Lucas out of the country for the purposes of military training? --- Is the question whether they had information that I knew about that?

Yes? --- The way I was interrogated it only meant that they had information, but I did not know.

It was made clear to you that they had information that you had knowledge. Was it not said to you that it was not right for you to keep quiet about that knowledge that you had? --- It was said that I should say everything I knew about Lucas and Mbube, otherwise if I did not, I would be detained where such people are being kept, in custody, until I come out with the whole truth I know of.

At that stage did you decide that rather than you being detained, you will make a statement? --- Not only to make a statement but to come out with the whole truth."

The following question and answer were also recorded:

"What I am suggesting to you is that during those 5 hours at the police station, you must have known what sort

of statement would get you released
from ; would not get you detained? --- Yes

After Mdluli had concluded his evidence,
the learned trial Judge intimated that he intended re-
calling Radise. After appellant had given evidence,
Radise was recalled by the Court a quo. He stated that
he met Mdluli in Swaziland during December. As to the
conversation between them, he testified as follows:

"Did you talk to him? --- Yes, I did.

Where was he when you spoke to him? ---
I was at a shop.

What were you doing at the shop? ---
To buy some food.

And what did you say to him? --- I
told him that I had seen Lucky Ngema
there. It is a person, Lucky Ngema.

What else did you tell him? --- I
told him that he had left with the others
to Tanzania.

Did you tell him that Lucky Ngema had
left for Tanzania? --- Yes.

Did you say to him that you were
going to Tanzania? --- No, I did not.

Weren't you going to go to Tanzania
by aeroplane on the 4th January last
year? --- No, I never went.

I know you didn't go, but were you
not supposed to go to Tanzania on the
4th January? --- No, I did not have to go.

Nobody suggested you should go to
Tanzania on the 4th January? --- In the
camp there was a group which was to

leave on the 4th January.

Were you not to be one of them? ---
No, I would not go.

He has given evidence and he told me that at that shop you spoke to each other and you told him that you were due to leave Swaziland on the 4th January for Tanzania? --- Then I would assume that he did not quite understand me, because what I told him was there was a group due to leave on the 4th January, seeing that other groups had already left."

Concerning Mdluli's evidence as to what was discussed when appellant obtained the motorcar at his workshop on Tuesday (the 23rd), Radise testified as follows:

1. "Then there is something else. When you went to Swaziland - when the accused first went to his panel-beating works or shop, did the accused not say on that occasion to him that you, your group, your group of friends, were going to Swaziland for training, in your presence? --- No, he did not say that."
2. "You already told His Lordship that the accused did not say to Kalake in your presence and in the presence of your friends, that he was taking you to Swaziland because you were going to receive training? --- We got to the garage and at this garage the accused had a conversation

with this coloured. It was then that this Kalake gave permission that accused could take and use the car. And that was all? --- Yes, that is all, He took the car and we left."

Ephraim Shabalala was called to give evidence on appellant's behalf. He was apparently a "very substantial business man in Soweto", who owned a supermarket, a garage and a cinema. He stated that he had not been approached by the police to make a statement. He denied Radise's evidence that he (Shabalala) had suggested to appellant that the passengers should wear Zulu tribal clothing. In cross-examination he testified as follows:

MR VAN JAARSVELDT: I want to put it to you that you indeed suggested to the accused that he should take these people and that he should in a way disguise them by buying Zulu tribal clothes for them? --- Ever since these riots there are always police on my premises because it is where they buy their food and I never made such suggestions to the accused, and he himself too would not have been brave enough to come and tell me all about that, knowing that the police were available."

I do not propose setting out appellant's evidence in any detail. The substance of his evidence may be summarised as follows:

1. On Thursday morning (the 18th) the tallest of the group approached him, and enquired from him where Shabalala was. Upon being informed by appellant that Shabalala was out of town, he appeared to be "perturbed", because as he said, he and others required conveyance to Swaziland to prepare for the festival. Appellant understood that this tall person was a band leader. Appellant informed him that he would be able to convey them, provided they could pay the fare of R50. This was agreed to, and it was arranged to meet later that afternoon.

2. Later that afternoon he met all the passengers and explained to them that the latter part of the week was a busy period for him and that it would be convenient to undertake the journey on the following Tuesday.

3. As arranged, they met on the Tuesday. They proceeded to Mdluli's workshop, where he obtained his motorcar which was to be used on the journey. He denied Mdluli's

evidence that he had said that he was aiding Radise and the other passengers in their purpose to undergo military training outside the Republic. Because a wheel drum appeared to be defective, he arranged to depart on the following day (Wednesday).

4. During the Wednesday afternoon the group left for Swaziland. Appellant stated that he was unaware of the fact that the group's real intention was to leave the Republic in order to undergo military training.

5. Appellant denied Radise's evidence about what was discussed on the journey. According to him they discussed modern music.

6. He admitted that when they stopped in Bethal, a van had also stopped there. He denied, however, that the occupants were young men; they were elderly people. He did not see the van again.

7. He admitted that the journey ended at a spot which was one or two km. from the Oshoek border post. He was experiencing trouble with a rear wheel brake-drum. It

was his intention to sleep there and to hitch-hike back to Ermelo (a distance of some 126 km.) the following morning to obtain a second-hand drum. After discussing the matter with his passengers, he fell asleep. When he woke up the next morning, his passengers had disappeared. He denied that he had in any way assisted them to cross the border, or that he had given them money. In fact, he stated, he had been paid R30 by them after they had left Bethal. The next morning, after having obtained a second-hand wheel drum, he returned to Johannesburg.

It is a convenient stage to refer to the learned trial Judge's assessment of the credibility of the principal witnesses who testified before him on behalf of the State and the defence respectively. As to their demeanour, he stated:

"There is in fact nothing in the demeanour of any witness in this case including the accused, which assisted me in any way whatsoever to evaluate their evidence".

In the absence of demeanour as a factor indicative of the probative worth of the evidence given by witnesses, a

court must of necessity rely to a greater degree on other factors such as, e.g., the intrinsic worth of their evidence tested in the light of the probabilities and the extent to which corroborative evidence lessens the risk of error in accepting as truthful the evidence of witnesses testifying on behalf of a party upon whom the onus of proof rests. In addition, a court may properly have regard to the credibility of the accused and of the witnesses who testify on his behalf in determining whether guilt has been established beyond any reasonable doubt. In the ultimate result, it is not simply a choice between two conflicting versions, because neither might be the truth. A positive finding is required that, for adequate reasons, the State version is true beyond any reasonable doubt, and that of the accused, false. The mere fact that an accused has not testified, or has given evidence ~~found to be untruthful, does not by itself justify a~~ finding that the State version must, therefore, be accepted as the truth.

It would appear from the judgment that Radise made a favourable impression on the Court a quo.

It is stated in the judgment: "Radise certainly never struck me as dishonest or inventive in the witness box".

As to the Shabalala incident the learned Judge a quo stated: "I don't think he invented the Shabalala incident".

It was held, albeit as a speculative possibility, that Shabalala had referred to the need to wear "Zulu garb" in "some playful or jocular way - the kind of innocent thing that a busy man like Shabalala might not even be able to recall because of its insignificance, after a year, because it was just simply an isolated incident". It was, further, stated:

"At all events, nothing sinister attaches to this incident at all from the point of view of the accused's guilt in this case. Radise was merely telling the full story as he saw it and clearly at that stage in his story he never suspected anything of the kind and neither was his suspicion aroused by what Shabalala said."

The learned Judge a quo found Mdluli to be "an excellent witness". In dealing with the conflicting evidence given by him and Radise regarding (1) what was said by appellant to Mdluli on the Tuesday afternoon as to the purpose of the journey to Swaziland and (2) the conversation between Radise and Mdluli when they met in Swaziland during December 1976, the learned Judge a quo stated the following:

"More important is the conflict between Radise and Mdluli about the accused's communication to the latter regarding the purpose of the trip within Radise's hearing. Radise is not a sharp or bright person. Mdluli makes it plain that he did not want to hear more about these plans and it is possible that very little was in fact said about it by the accused and that Radise, who gave the impression that he was not greatly interested in the talks which the accused had with Mdluli, might have missed that part as well as other parts even of their conversation to which both Mdluli and the accused deposed, in some sort of absentminded way. How often does it not happen in one's own experience that when one is with a group of people and there is much talk going on in which

one is not greatly interested that one misses out on huge portions of it. Another possibility, which I bear in mind, is that Radise was indeed prepared to undergo military training and only changed his mind much later and that he does not now want to admit his initial involvement. I don't think, however, that there is more than a remote chance of it being the case. As I have said, he did not strike me as that kind of witness. That this was indeed said by the accused to my mind is without doubt. Mdluli is an excellent witness and just about the only suggestion that could be made about his credibility was that he might be getting his own back on the accused because the latter refused to introduce him to some well-connected lady sounded very hollow indeed. He said that ever since the riots in Soweto, which occurred about six months before this incident, it 'has become commonly known that people were leaving to undergo such activities', and if he and the accused knew each other rather well, which seems to be the position, there is no reason why the accused should not have told him what he was doing in the context of their conversation on that day. The apparent contradiction between Mdluli and Radise regarding their meeting in Swaziland is of slight importance. Radise did tell him that some other named acquaintance was among a group that was going to Tanzania and Mdluli might have understood that this

implied that Radise was also one of that group."

After dealing in detail with the version of the appellant, the learned Judge a quo concluded that appellant's "evidence is generally unsatisfactory" and that it "bristles with puzzling features". Certain aspects of appellant's evidence were held to be "palpably false". The learned Judge a quo made no adverse comments regarding Shabalala as a witness.

On appeal before this Court, it was submitted by appellant's counsel that the learned Judge a quo erred in his evaluation of appellant's evidence. The argument on appellant's behalf did not impress me and I find it unnecessary to consider it in detail. But that, as I have already indicated, is not the end of the matter. It must, however, not be overlooked that appellant's defence involved an admission of the fact that he had aided Radise and his group to proceed to Swaziland. He was unable to deny that they had in fact proceeded to Swaziland in order to undergo military training. His defence

concerned the crucial issue whether he had aided them well knowing what the true purpose of the journey was. It is not an uncommon occurrence that in such circumstances, an accused resorts to falsehood in the mistaken belief that it might render his version more acceptable to the trial Court. Furthermore, having regard to the findings of the Court a quo, it would appear that in the following respects the appellant's version might reasonably possibly be true:

(1) That he did not in any way procure, instigate or encourage any member of the group to proceed to Swaziland in order to undergo military training outside the Republic.

(2) That he was approached on the Thursday morning by one of the group with a request that he should provide conveyance to Swaziland.

(3) That he was to be paid for his services. As to this, appellant's evidence derives some measure of support from Mdluli's evidence that appellant mentioned to him that he would be paid for the trip and

that he would be able to make a payment of money to Mdluli in respect of work to be done by him on appellant's return from the trip to Swaziland.

(4) That appellant did not aid Radise and the others by rendering financial assistance to them to enable them to travel from the Swaziland border to Mbabane. As to this it must be borne in mind that Radise stated in his evidence that although he had no money in his possession, his friends possessed money.

It follows from what has been set out above, that on the State's case, it is at least reasonably possible that appellant could only have become associated with the group, and have acquired knowledge of the purpose of the trip, for the first time on the Thursday morning. In my opinion, the Court a quo may well have overlooked the fact that its findings give rise to certain improbabilities in the State's case. On the assumption that appellant and his passengers were strangers to each other prior to the Thursday, it is a matter for some surprise at least,

that they would without any real reason take appellant into their confidence as to the purpose of their criminal adventure. It is, furthermore, somewhat surprising that appellant should have associated himself with that adventure and with the enthusiasm and zeal attributed to him in Radise's evidence.

I next deal with the evidence of Radise and Mdluli, and the finding by the Court a quo that they were both credible and reliable witnesses in all material respects. As I have already indicated, Radise's version was that he joined his friends on the trip to Swaziland in the belief that they were all concerned in furthering their education, and that it was only after the party had left Bethal and were on their way to Ermelo that he gathered from the trend of the conversation that his friends intended to undergo military training outside the Republic. In this regard, the Court a quo stated that it bore in mind the "possibility" that Radise was indeed prepared from the outset to undergo military training "and

only changed his mind much later and that he does not now want to admit his initial involvement". The learned trial Judge remarked: "I don't think, however, that there is more than a remote chance of it being the case." It must be borne in mind that the State called Radise as a witness on the basis that his evidence might show that he was guilty of a contravention of section 2(1)(b) of the Terrorism Act. He was, however, not discharged from prosecution at the conclusion of the trial because, so it would seem, his evidence did not in the opinion of the Court a quo, disclose any contravention by him of the provisions of the Terrorism Act. Nevertheless, I am of the opinion that his evidence required to be scrutinised with the same degree of caution as that which is usually applied in the case of an accomplice. In my opinion, the Court a quo clearly erred in not finding it highly probable that Radise undertook the journey not only intending to further his education but also to undergo military training outside the Republic. I say this for the following reasons:

(1) At the time Radise was invited to join the group who admittedly intended leaving the Republic to undergo military training, he was staying in the home of Hosia Mohamme, to whom he was related. The persons who broached the question to him of furthering his education outside the Republic, were also relatives of Hosia. I find it difficult to believe that the plan to leave the Republic in order to undergo military training was not discussed with Radise.

(2) Radise did not inform his parents that he was leaving for Swaziland. If his only purpose in leaving were to have been to pursue his studies, one would have expected him to have told his parents about his plans.

(3) Radise was present on the Tuesday on the occasion when appellant allegedly told Mdluli that Radise and the other passengers were leaving for Swaziland in order to undergo military training. In the light of Mdluli's evidence, I find it difficult to accept that.

Radise might have "missed" parts of the conversation "in some sort of absentminded way". On Mdluli's evidence, if accepted, Radise must have heard what was being discussed. In cross-examination, Mdluli gave evidence as follows:

"Now in your presence the accused said - or rather, the accused said to you in the presence of Lucas and the other boys that they were going to Swaziland for training in guerilla warfare? ---Yes.

And did he whisper it in your ear or did he say it in such a way so that the other - that Lucas and his friends could hear? --- He spoke in a tone that anybody could hear who was in the vicinity, because it was the 5 boys, myself and the accused.

Did anyone protest at this suggestion, this statement of the accused? ---No."

(4) On the assumption that Radise only heard about the true purpose of the journey after they had left Bethal, his explanation for his subsequent conduct in entering Swaziland and remaining there for some three months before returning to the Republic is, to say the least, suspect. Mdluli's evidence as to what was discussed when he met Radise in Swaziland during December

also casts doubt on the truthfulness of Radise's evidence that he at no time intended leaving the Republic in order to undergo military training. The learned Judge a quo sought to resolve the contradiction between the evidence of Mdluli and that of Radise on the basis of a possible misunderstanding. In my opinion, Mdluli's evidence is inconsistent with the possibility of a misunderstanding on his part. I quote the following passages in the evidence of Mdluli given under cross-examination:

1. "And were you told by the police that they suspected Lucas of going out of the country for military training? --- I told them that Lucas and his four friends came to me and told me that the accused were to transport them to Swaziland, and to make sure to attend there. When I got to Swaziland in December I found Lucas there, in the district, not in town, on the farms, not in town. I asked him, seeing that he knows nobody here. He said 'we are waiting the plane which would leave on 4th January to Tanzania/.

He had plans of going to Tanzania when you met him in Swaziland?--- Yes."

2. "When you saw him and he told you that he would leave on the 4th January, did he show any unhappiness about it? -- Me?

No, Lucas? --- No, he was friendly and open and told me that they were leaving on the 4th."

In answer to a question put by the Court, Mdluli stated:

"We stopped at a store where we wanted some cold drinks. I parked my car there. As I came out of the shop I found him standing next to the car. I said 'yes, what do you want here'. That is where I started asking him seeing that he knew nobody there, he also agreed that he knew nobody there, he said he was amongst a group which was due to leave on the 4th."

(5) On the assumption that Radise never had any intention of undergoing military training, it is difficult to understand why he did not tell Mdluli about his predicament when they met in Swaziland and ask him for assistance in order to return to the Republic. Prior to his leaving for Swaziland, Radise had known Mdluli for some 4 months.

In my opinion, therefore, the learned Judge a quo misdirected himself (1) in holding that the contradiction between Radise and Mdluli regarding their

conversation in Swaziland was of "slight importance" only, and (2) in holding that the possibility that Radise set off on the journey to Swaziland with the intention of undergoing military training was but a remote one. In my opinion, a proper evaluation of Radise's evidence leads to the conclusion that he was probably untruthful in denying that he undertook the journey with that purpose in mind.

In so far as the so-called Shabalala incident is concerned, the Court a quo, in dealing with the contradictory evidence given by Radise and Shabalala in regard thereto, held that the details of the conversation revealed nothing of a sinister nature and that Shabalala may well have forgotten the incident when he gave evidence a year later. It is, no doubt, possible that Shabalala may have forgotten the incident when he gave evidence. If the conversation did not make any impression of a sinister nature on Radise, why was it mentioned at all? In this regard, it appears that on more than one occasion

in his evidence Radise by means of veiled suggestions shrewdly sought to create the impression that appellant assisted numerous other persons to leave the Republic. I would have hesitated to find positively that Radise's evidence about the Shabalala incident was a truthful account of what had taken place.

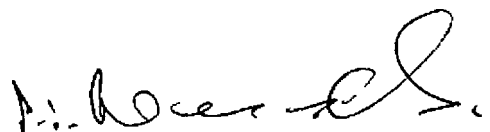
In my opinion, the learned Judge a quo failed to approach Radise's evidence with the degree of caution which the circumstances required. I am satisfied that he erred in making a positive finding that Radise did not appear to be dishonest or inventive in the witness box. There is no real corroboration of Radise's evidence on the crucial issue concerning appellant's knowledge of the true purpose of the journey, save possibly that indirectly furnished by Mdluli's evidence. Radise, however, did not support Mdluli's version, and the latter's evidence thus stands by itself in regard to the conversation between him and appellant. It may well be asked why Mdluli should have invented the conversation? It was

suggested that Mdluli may have been annoyed because of appellant's alleged refusal to introduce him to some well-connected lady in Soweto. Be that as it may, I am of the opinion that the circumstances in which Mdluli came to be called as a witness cannot be overlooked. He was approached to make a statement to the police at a time of unrest in the black townships. He appreciated that the police probably had knowledge of his association with appellant and Radise and that he had released appellant's motorcar for the purpose of the journey to Swaziland. It appears from Radise's evidence that he was well aware of the fact that he could be detained under the provisions of the Terrorism Act if he had information about terrorist activities and that such detention would be prejudicial to his business interests. He also stated in further cross-examination that he knew "what sort of statement" would safeguard his position in regard to his possible detention. Moreover, the contradiction between his evidence and that of Radise cannot be brushed aside on

on the mere basis that it was possible that Radise may not have heard what Mdluli and appellant were discussing.

For the foregoing reasons, I am convinced that in all the circumstances the evidence led on behalf of the State was not of a sufficiently credible and reliable nature to justify a finding of guilt beyond any reasonable doubt. In coming to this conclusion, I have given due weight to the unsatisfactory nature of the evidence given by appellant in his defence.

In the result, the appeal is upheld and the conviction and sentence are set aside.


P. J. WESSELS, J.A.

HOFMEYR J.A.)
TRENGOVE A.J.A.) Concur.
