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IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

ACHMAD CASSIEM FIRST APPELLANT

and

YUSUF PATEL SECOND APPELLANT

and

THE STATE RESPONDENT

CORAM KUMLEBEN, GOLDSTONE JJA et KANNEMEYER AJA

HEARD 6 SEPTEMBER 1993

DELIVERED 27 SEPTEMBER 1993

J U D G M E N T

KUMLEBEN JA/...

KUMLEBEN JA:

The appellants were two of seven accused persons who stood trial in the regional court of the Northern Transvaal. A number of counts featured in the charge sheet, twenty-four in all, relating in the main to alleged contraventions of certain sections of the Internal Security Act 74 of 1982 (the "Act") . Not all the accused were charged with every offence. The case against the first and second appellants, who were accused nos 6 and 7 at the trial, was restricted to counts 20 to 24 inclusive. They were acquitted on counts 20, 22 and 24.

The regional magistrate decided in his judgment, without prior reference to the legal representative of the appellants or the prosecutor, that the allegations in counts 21 and 23 ought to have been incorporated in a single count. Having consolidated them, he found both appellants guilty on

count 23 "incorporating count 21" and failed to enter a verdict of not guilty on the latter count. There is no need to comment on the propriety of this rather novel course of action since the correctness of the conviction on count 23 can - and counsel were agreed should - be decided without any reference to count 21.

As a result of their conviction on count 23, the appellants were sentenced to 6 and 5 years imprisonment respectively. The appellants prosecuted an appeal before Daniels and Swart JJ in the Transvaal Provincial Division of the Supreme Court. Their appeals were dismissed and leave to appeal against the convictions and sentences was refused. However, on petitioning this court the necessary leave was granted.

During the course of the lengthy trial the bulk of the evidence led by the State related to

offences the other five accused were alleged to have committed. It involved the calling of numerous witnesses, the most material of whom were accomplices. They testified inter alia to the participation of those accused in the activities of the Pan Africanist Congress.

The regional magistrate in his judgment listed comprehensively the facts he found proved relating to the four counts on which the appellants stood trial. I, however, need only recount, with some comment in parenthesis, those facts that have a bearing upon count 23 and are not disputed in this appeal. They are the following:

1. The PAC at the time of the trial had been declared an unlawful organisation in terms of s 4 of the Act. (This banning order has since been withdrawn.) One of the objects of the PAC was to commit acts of violence and sabotage aimed at the

overthrow of the State authority in the Republic (the "Government"). Accused no 1 was a member of the high command of the PAC and accused no 2 was one of its executive members.

2. A Muslim organisation, known as Qibla, existed and operated in the Western Cape. The first appellant was its leader and the second appellant a member of its executive body. In addition the following members of Qibla feature in the record: Messrs Hanief Sayed, an organiser, Abdul Hamid, Latief and Dawood Parker, as members.

3. From the various publications of Qibla which were handed in as exhibits, it was plain that one of its objects corresponded to that of the PAC referred to in paragraph 1 above and to that extent the two organisations had a common objective and were allies. For instance, in one publication of Qibla it was proclaimed that:

> "When a tyranical government, like the one governing this country [the RSA] restricts or even tries to nullify the oppressed people's options they tend to forget that the final choice is ours.
>
> All those who assist Apartheid, whether by acts of omission or commission must suffer the same fate as the architects of Racism."

And in a later publication it was said:

> "The struggle in Azania against the conquerors and oppressors is a Jihad because Allah not only permits us to fight them but also commands us to expel the conquerors and oppressors from the land of the conquered and oppressed which they have dominated by every possible means. Furthermore, we are commanded in the course of our Jihad to kill the conquerors and oppressors."

(There are passages in these publications consistent with the Jihad, the liberation struggle, having a wider mission, but it is also clear that in the pamphlets the struggle pertinently and locally refers to the overthrow of the Government.)

4. Hamid attended a Qibla meeting at the

Gatesville Civic Centre in the Cape Peninsula which was addressed by Sayed. Drawing on the biblical analogy of the thraldom of the Israelites under Pharoah, he told the meeting that the Government was the oppressor of the Muslim community in South Africa. After the meeting Hamid told Sayed that he wished to become involved in the struggle and gave him his telephone number. About a week later he was contacted by Sayed and was instructed to come to his shop where he, sayed, would take him to meet a "certain person". He complied and the two of them were taken to the office of the first appellant. Hamid waited in the passage whilst Sayed went into the office and spoke to the first appellant. He, with Sayed, later came into the passage and Hamid and the first appellant introduced themselves to each other by name. The former said that he wished to "contribute towards the struggle". The further

conversation was perfunctory. The first appellant simply asked him what work he did and whether he was married. Hamid left with Sayed who said before they parted that Qibla would "be sending him to Iran for Islamic studies". (This episode I shall refer to as the "Gatesville incident".)

5. At the end of July 1985 Hamid was called into Sayed's office. He found five other persons there and they were told by Sayed that they would be going to Iran for Islamic studies "as well as some light arms training" for a period of some four months from September 1985 to December 1985. Sayed added that if in the interim they had any trustworthy friends who could be recruited to accompany them, they were to let him know. The three months' training of those recruited would be on a trial basis with the prospect of a further two years' training abroad. In November Hamid made some enquiries about

the delayed departure and was told by Latief Parker that the Libyans had contributed one million US dollars for the struggle and that Muslims might receive training in that country. In December 1985 he left the country with his wife and others. In Gaberone they again met up with Sayed and Latief Parker and they were placed in the care of a PAC member, Mr Ebraim Desai. He confirmed that they would be going to Iran, but if the war prevented this, to Libya. From Botswana they went to Harare. There another PAC official, Mr Mkwanazi, told them that on account of the war in Iran, Libya would be their destination instead for their military training.

6. In about January 1986 a PAC member and Sayed took him to the Holiday Inn in Harare. Three other PAC members joined them. They went to a room in the hotel where they found Dawood Parker and the

second appellant. There was some discussion about which of the recruits would be going to Libya and it was remarked that some of them from this country had proved to be undisciplined. The second appellant said "they [Qibla] in future when any South Africans came to Zimbabwe, they must be sanctioned by Qibla before the PAC accepts them." (This meeting became known as the "Harare Holiday Inn incident".)

7. The further peregrinations of Hamid need not be related in any detail. He was appointed the leader of about a dozen recruits. In Tripoli, after being met by PAC personnel, they were instructed in the use of explosives and landmines. In January 1987 they returned with the intention of entering the RSA "to recruit people for training .. . and the other mission was to hit soft targets". This did not materialise. Soon after entering Bophuthatswana in February 1987 they encountered a police patrol. They

were arrested and explosives, fire-arms and PAC literature were found in their possession.

8. The State witness, Mr Chauke, was a PAC member and also had a spell beyond the boundaries of the RSA. On his return he was instructed by accused no 1 to go to Johannesburg to collect some "luggage", (a code word for fire-arms) destined for the Cape. Chauke was supposed to approach one Shabier and introduce himself by using certain passwords. He was arrested before he could carry out this commission. The police, with the necessary information from Chauke, used the State witness Mr Sephadi to approach Shabier on 12 April 1986. Lieutenant Zeelie supervised the operation. Sephadi addressed Shabier using the passwords and Shabier reacted responsively. He was arrested. At the time of this operation a woman was present in the shop of Shabier. She later handed over a letter, exhibit BJ, to Zeelie written

by the second appellant. It reads as follows:

"Dear Brother Shabier,

I have to apologiese for not meeting you before I left. I tried to contact you but you were out most of the evenings.

I have met with brothers down there and there is a definite interest by them towards the Islamic Revolution line. Although some have different ideas and views.

My proposal is that we operate on three levels:

(a) Administrative Unit.
(b) Educational & Cultural units.
(c) Security unit (Underground).

I feel that we could start with an educational unit in Riverlea, Fordsburg and Lenasia. The Fordsburg crew to be contacted is the Gaibee's in Mint Rd. Let Riedwaan address them as well as Solly Sayed from the gym. Once this is structured we can think of establishing an Admin unit. The security unit you will have to take personal responsibility of.

You can expect a contact to be made with you. Your code name will be used (George) . His name will be 'Ben'. This is in connection with storage.

Salaam to All.

Yusuf" It was common cause that the second appellant was the author of this letter. This episode was referred to as the "shabier incident".

Section 54(1), on which count 23 was based read at the time of conviction as follows:

"(1) Any person who with intent to -

(a) overthrow or endanger the state authority in the Republic;

(b) achieve, bring about or promote any constitutional, political, industrial, social or economic aim or change in the Republic;

(c) induce the Government of the Republic to do or to abstain from doing any act or to adopt or to abandon a particular standpoint; or

(d) put in fear or demoralise the general public, a particular population group or the inhabitants of a particular area in the Republic, or to induce the said public or such population group or inhabitants to do or to abstain from doing any act,

in the Republic or elsewhere-

(i) commits an act of violence or threatens or attempts to do so;

(ii) performs any act which is aimed at causing, bringing about, promoting or contributing towards such act or threat of violence, or attempts, consents or takes any steps to perform such act;

(iii) conspires with any other person to commit, bring about or perform any act or threat referred to in paragraph (i) or act referred to in paragraph (ii), or to aid in the commission, bringing about or performance thereof; or

(iv) incites, instigates, commands, aids, advises, encourages or procures any other person to commit, bring about or perform such act or threat,

shall be guilty of the offence of terrorism and liable on conviction to the penalties provided for by law for the offence of treason."

The trial court found the appellants guilty of a contravention of this section on a twofold basis. This appears from the following passage in the judgment:

"[the First Appellant] was at all relevant times a leader of QIBLA and [the Second Appellant] a member of the executive of management [sic]. I have already concluded that QUIBLA is a subversive organisation with unlawful aims, that is the overthrow or the endangering of the State authority in South Africa. They have therefore in law formed a conspiracy with each other and other members to commit the contemplated offence. As a result I am entitled to hold that everything done by one of the conspirators in the furtherance of the common purpose is evidence against each and all of the parties concerned ... [emphasis supplied].

The only reasonable inference in all the circumstances is that people were being recruited by QIBLA for training abroad and to be infiltrated into the Republic of South Africa again to overthrow or to endanger the State authority in the Republic. On this basis they [the First and Second Appellants] are convicted of terrorism in contravention of section 54(a)(i) [section 54(1)(a)(i) of the Act], but they are also guilty of terrorism on the basis that they conspired with other members of QUIBLA, an organisation with an unlawful aim, that is the overthrowing or the endangering of the State authority by violent means. I refer to S v Alexander & Others quoted earlier. They are therefore also guilty in terms of section 54(a)(iii) [section 54(1)(a)(iii) of the Act]".

As to the conviction based on paras (a) and

(i) of s 54 there is no evidence to prove that either of the appellants committed any act of violence and it was common cause that their mere membership of Qibla could not render them criminally liable for any such act as conspirators or in any other capacity. For this reason, quite correctly in my view, Mr Dicker, who appeared for the respondent before us, did not seek to justify the conviction on this ground.

The second ground remains the disputed one: whether the conviction ought to be upheld with reference to para (iii) in s 54(1), which in turn to an extent incorporates paras (i) and (ii). Recasting para (iii) in its widest terms, it can be read thus:

> "Any person who [with one of the specified intents] conspires with another to bring about any act which is aimed at contributing towards an act of violence, shall be guilty of the offence of terrorism."

17 The question is whether a conspiracy falling within the compass of paragraph (iii) has been proved. Counsel were agreed that the answer depends on the correct interpretation to be placed upon the three incidents to which I have referred, each considered in the context of the relevant background facts and subsequent events as summarised above.

Turning first to the Gatesville incident involving the first appellant, the facts set out in paragraph 4 above clearly establish that the "struggle" that Hamid was inspired to join by becoming a member of Qibla was against the Government as the oppressor and that he knew from the outset that his recruitment was for military training with a view to returning to the Republic to be involved in subversive military operations. His visit to the office of the first appellant it is true was an

enigmatic one, consistent with his being "given the once over" for some reason by the leader of Qibla. As stated in the conclusion of paragraph 4 above, when Hamid and Sayed parted after the interview at the office, the latter told him that Qibla would "be sending him to Iran for Islamic studies". If Islamic Studies are taken to refer to some future scholastic or non-military activity this purpose is wholly inconsistent with what had gone before, and with the reason why Hamid decided to take part in "the struggle". (It may be that "Islamic studies" were code words for military training but this does not emerge from the evidence.)

During cross-examination the distinction between Islamic studies and military training became diffused - at least, according to the record, in the mind of Hamid. This appears from the following questions and answers:

"And not to put too fine a point to it in the foyer of the Civic Centre at Gatesville, you were recruited by Hanif Sayed then. — I would not say I was recruited. I volunteered.

Well, you told His Worship, that you said, I would like to make a contribution. — Yes.

That is what you have said to Hanif Sayed? — That is correct.

And he, in effect said, you have come to the right man? — He took my name and my phone number down.

Then the next thing that really is important to you is that you then I believe that you are led to believe that you are going to Iran for Islamic studies. — That is correct.

Now, are you a Moslem? —That is correct.

Are you a good Moslem? — I should imagine so.

Faithful? — Yes.

Do you believe? -- Yes.

Well, are you a waivering, doubtful believer ? -- No, I do not have, my faith is quite strong.

So you are a devoted Moslem? -- That is correct.

Have you always been so? — Not always.

And at the time that you volunteered to make a

contribution to Hanif Sayed, were you then a devoted Moslem? -- That is true.
And what was your motivation in going to make an offer to contribute. Was it the welfare of the moslem community that you had at heart? — Not really, it was the welfare of the oppressed people.

Who are the oppressed people? — The majority of the Blacks.

So when you went to make this offer and you volunteered to Hanif Sayed, you were not worried about the fact that your children were not being educated due to the boycotts. You then decided that you wanted to help the oppressed Blacks? — That is right.

Are you sure about this? -- That is correct. So you had no intention of trying to benefit your own community or your own family. — Well the mere reason for my going for Islamic studies was because revolution and studies, Islamic studies is hand in hand and it was sort of an education process where I would be able to conscientise the community, that is the Moslem community, that is the way I saw it.

You used that word earlier, I am afraid I, it is a new word to me, is it conscientise? — Yes.

What does that mean, to arouse the conscience? — Yes.

It is a brand new word. I do not know it. Anyway, you say, are we to take this evidence

now as final, that this was purely altruistic that you wanted to help the oppressed Black majority? -- That is right.

And you say that the initial idea was no more than to go to Iran and pursue Islamic studies? -- That is correct.

Now, correct me that, are Islamic studies the studies of Islam as a way of life? -- That is right.

Had you done or completed any Islamic studies in the Republic of South Africa? -- Not really, all I did was study the Koran.

Right. So you then would have been quite happy at that stage to leave straight away and go off to Iran and do Islamic studies. -- That is correct.

And how long was this before you actually left the Republic, this first decision was taken that this is what you were going to do when Hanif Sayed told you this? -- After we had the meeting with Hanif Sayed, that was some time end of July.

July 1987? -- 1985.

1985, I am sorry, 1985. Then you actually left when? -- We only left on 6 December 1985.

Now, so there were some four months. -- That is right.

> Between that decision to go for Islamic studies and actually leaving. Now did anything change inside the Republic about the objectives or your journey north, before you actually left? -- No.
>
> No. So is your evidence then, would it be correct to say that right up until the day you left South Africa, in December 1985, the sole intention was to go to Islam to follow Islamic studies. -- That is true.
>
> And no other objectives? -- No other objectives."

In argument before us Mr Gauntlett, who appeared for the appellants, strongly relied on this quoted passage taken from the cross-examination of Hamid. Counsel pointed out that he was a State witness, that this portion of his evidence is unambiguous and therefore submitted that "to follow Islamic studies" must be accepted as the true reason for his leaving the country. On this evidence, so he argued, it followed that as a reasonable possibility the first appellant and Sayed arranged for him to proceed to Iran for innocent study purposes; or

alternatively with the broader objective of concentrating on studies which would enable him to advance the cause of Islam world-wide. On either basis, so the argument ran, the first appellant cannot be said to have conspired with Sayed or anyone else for an unlawful purpose within the meaning of the Act. Despite the ipsi dixit of Hamid contradicting his earlier evidence, which one must concede remains unexplained, this submission does not survive scrutiny in the light of all the relevant facts. As pointed out, the whole purpose of Hamid's recruitment at Gatesville, and his visit to the first appellant was to implement his decision to take part in the armed struggle against the oppressor, the South African Government, and to make the necessary arrangements for him to do so. Hamid had no other or wider objective in mind. There was an element of secrecy involved in that he was told that he would

meet "a certain person" which is not consistent with an innocent mission. In these circumstances at what point and for what reason - one may ask - was the objective tacitly changed to "Islamic studies" before they reached the office of the first appellant? There are further questions lacking any satisfactory answers. It was suggested by counsel in argument that the initial recruitment might have been for Hamid to go to Iran for Islamic studies, but when this could not eventuate as a result of the war in Iran, he was then persuaded by others to go to Libya for a very different kind of tuition. However, as mentioned in paragraph 5 of the summary of facts, Hamid was told in Harare by the PAC member Ebraim Desai that they would be going to Iran but, if this was not possible on account of the war there, they would be going to Libya. This was obviously an alternative locality for military training and not

for Islamic religious instruction. There is nothing in his evidence to suggest that by the time this change of venue took place his reason for leaving South Africa had also changed. Furthermore, it must be remembered that from the time he left this country his companions were not students and what is more those who supervised their journey and arranged their accommodation were active members of the PAC and Qibla, who were interested in the training of persons for subversive military operations in South Africa and not in any other form of instruction.

The inescapable conclusion on the consideration of all the relevant facts is that before and at the time of the interview with the first appellant, Hamid knew the true purpose of his recruitment, as envisaged and arranged by the first appellant and Sayed jointly, though perhaps with the involvement of others as well.

On this finding Mr Gauntlett did not dispute that the two of them, first appellant and Sayed, had conspired within the meaning of paragraph (iii) of s 54(1) . I might add that even if it could be said - unrealistically as I see it - that these two men had misrepresented the position to Hamid (that is to say, that at the time they interviewed him, they brought him under the impression that he was being sent for non-military Islamic studies) this would not alter the nature of their conspiracy or make them any the less liable.

As regards the second appellant, complicity in a conspiracy with other Qibla members is proved beyond any doubt by the Holiday Inn Harare and the Shabier incidents, considered singly or jointly. His remark at the former incident amply demonstrates his involvement in the recruitment and training to the same extent and with the same intent as the first

appellant. The letter to Brother Shabier cannot, as counsel submitted, be given an innocent connotation. Even if such an interpretation can be placed on the reference to "Administrative, Educational and Cultural Units" - which I doubt - the last paragraph of the letter spells out quite clearly the involvement of this appellant which falls within the provision of s 54(1) paragraphs (a) and (iii).

At a certain stage in the argument before us, the question arose whether the allegations in the charge sheet with reference to count 23, as amplified, cover the findings of fact on which the State now relies and which, as I have found, were proved. The charge sheet alleges that the appellants acting in the furtherence of the objectives of Qibla and with the intent stated in paragraphs (a) to (d) of s 54(1) committed one or more of the acts particularised in that part of annexure A relating to

this count. The annexure avers inter alia that the appellants conspired with "Qibla en/of sy lede" and the annexure expressly incorporates, not count 21, but the amplificatory facts relating to this count as well. These in turn include the averments that:

> "In die uitvoering van bogenoemde doelstelling het Qibla en sy lede en aktiewe ondersteuners gesamentlik en/of afsonderlik die volgende dade verrig: nl.
>
> (1) die werwing van persone in die Republiek van Suid-Afrika of elders om Qibla te ondersteun en/of by Qibla aan te sluit.
>
> (2) die ontplooiing van persone in die Republiek van Suid-Afrika met opdragte vir die pleeg van dade van oorlogvoering, terrorisme, sabotasie en/of ondermyning."

It is thus clear that the charge sheet embraces the facts on which the conviction ought to be founded.

As to sentence, as appears from the reasoning of the regional magistrate in the passage

quoted earlier in this judgment, the convictions of the appellants by the trial court were in the first place incorrectly based on the conclusion that they had contravened paragraph (a) read with paragraph (1) of the Act. As leading figures in Qibla, they were held to have been guilty of a far greater involvement in the subversive activities of Quibla and in the promotion of its subversive aims as reflected in the documents and with reliance on certain other evidence. However, it is conceded that their convictions can only be justified on the far more limited footing of their participation as conspirators in the three incidents. Mr Dicker for this reason agreed that the sentences ought to be substantially reduced. Furthermore, when considering sentence afresh, one must bear in mind that there is no evidence that their limited involvement and recruitment resulted in any actual act of violence:

in fact, as we know those plans were frustrated before they could be fulfilled.

Towards the end of the debate on the substitution of a reduced sentence, a further issue was raised. Ordinarily a sentence is determined on the basis of facts and circumstances existing at the time it is imposed; and a court on appeal in altering a sentence, does not have regard to any other. It is nevertheless proper in exceptional circumstances to take supervening facts into account. Thus in S v Marx 1989(1) SA 222(A) it was said at 226B - C:

> "Vonnis word bepaal na aanleiding van feite en omstandighede wat ten tyde van vonnisoplegging bekend is. Slegs in uitsonderlike gevalle kan feite wat eers na vonnisoplegging bekend word op appel in aanmerking geneem word."

However, the restricted and uncontroversial nature of such evidence in that case ought to be noted: the

subsequent fact was that a co-accused had received a lighter sentence than the appellant after the latter had been convicted and after his sentence, the subject of the appeal, had been imposed. This question has- also been discussed by the then Rhodesian Appellate Division in S v Drummond 1979(1) SA 565 (R,A) 565. Macdonald CJ at 569 D - G said:

> "An appeal Court for obvious reasons is most reluctant in deciding on sentence to take into account facts that have only come into existence since the conclusion of the trial. Generally speaking, it is for the executive in the exercise of the prerogative of mercy to give effect to any such facts. The rule, however, is not inflexible. See S v Watungwa 1976(2) RLR 158 and S v Seedat 1977(2) SA 686 (RA) ; 1977(1) RLR 102. This court will in exceptional circumstances take into account facts which have arisen since the trial. The fact that an appeal Court is at large on the question of sentence for other reasons is not in itself to be regarded as an exceptional circumstance justifying the departure from the general rule. But the fact that it is at large and must in any event reconsider the question of sentence will make it more receptive of an argument that, in reconsidering sentence, fact which have come into existence since the trial should also be

> taken into account. Since this is the position of this Court in this appeal, the matters which have arisen since the trial should in my view be regarded as constituting 'exceptional circumstances' as envisaged in the cases mentioned above. There is no compelling reason in the particular circumstances of this case why this Court should pass responsibility for the ultimate decision to the executive".

Counsel were requested to submit further written argument relating to this question and the appellants' counsel was asked to state the further facts which in his submission ought to be taken into account. Mr Gauntlett, in his written heads of argument, listed the following: "Section 54(1) of the Internal Security Act has been repealed." This is not so: paragraph (d) of s 54(1) only has been deleted by s 9(a) of Act 126 of 1992 and the erased intent referred to in that paragraph was never the basis of the conviction. "The Pan Africanist Congress [has been] unbanned". Mr Dicker agreed that

one could take judicial cognisance of this fact. But this is not per se a relevant consideration relating to the sentence of the appellants. Whether the PAC was banned or unbanned, or even whether it existed or not, has no bearing on an appropriate sentence for the appellants' conspiracy to recruit and train Qibla members with a view to subversive activity and the overthrow of the State authority. Such conduct would continue to be a serious offence as long as the Act has not been repealed, and probably in any event under the common law, whatever government is in authority in this country - past, present or future. "Extra-parliamentary political activity [is] allowed without the erstwhile constraints of security [emergency] regulations promulgated under the Public Safety Act [No 3 of 1953]". This is correct but my previous comment applies: the conspiracy for which the appellants are to be sentenced was a

contravention of the Act not of any emergency regulation since repealed. "Changed social awareness in relation to the imposition of sentence." There is no elaboration of this somewhat umbrageous submission. I take it to refer to the political and social injustices arising from racial discrimination which prompted the commission of the offence. That some of them have since been removed is not the pertinent consideration. It is the. fact that they existed at the time of the sentence that can and ought to be taken into account as a mitigating circumstance.

Thus the question of the recognition of subsequent circumstances in the result does not arise in this appeal.

In the judgment on sentence the personal circumstances of each appellant were thus stated:

"Accused 6 [the first appellant]: He is 42

> years of age, married and the father of four dependent children. He is a self-employed draftsman. His business collapsed as a result of his detention since 2 May 1986. He admitted two previous convictions. The first one is dated 2 December 1964 when he was sentenced to five years' imprisonment on two counts of sabotage. 11 July 1985, 1 month imprisonment, suspended for one year on certain conditions, for failing to comply with an order in terms of Section 56 of Act 74 of 1982. I take notice of the previous convictions, but they were for obvious reasons not really be a strong factor in deciding on an appropriate sentence.
>
> Accused 7 [the second appellant]: 36 years of age, married and has one dependent child. He is a self-employed clothing salesman. He is in detention since 13 May 1986 and he has no previous convictions."

These facts, together with the other circumstances to which I- have been referred, satisfy me that in the case of each appellant a reduced sentence of imprisonment of two years would be appropriate. Since the first appellant was in custody serving his sentence from 28 October 1988 to 22 February 1991 when he was released on bail pending

the outcome of this appeal; and the second appellant was in custody serving his sentence from 28 October 1988 until 28 December 1990 when he was released on parole, the sentences of imprisonment now to be substituted have already been served.

The appeals of both appellants are allowed in part. The convictions are confirmed but the sentences are reduced to two years' imprisonment in the case of each appellant.

M E KUMLEBEN
JUDGE OF APPEAL

KANNEMEYER AJA – Concurs

J U D G M E N T

GOLDSTONE JA

I have had the privilege of reading the judgment of Kumleben JA. I am in full and respectful agreement with all but two aspects thereof. These are:

1. The correctness of the conviction of the first appellant; and

2. The relevance of subsequent circumstances with regard to sentence.

The issue on the merits is whether the guilt of the first appellant was established by the State beyond a reasonable doubt. The first appellant did not testify in his own defence. The question is thus whether the facts proved by the State established a prima facie case against the first appellant. As pointed out by Kumleben JA that depends on the correct interpretation to be placed upon the Gatesville incident considered in the context of the background facts and subsequent events summarised in his judgment.

More specifically, was it established that the first appellant conspired with Sayed or Hamid to arrange for the latter to receive military training abroad in order to take part in the armed struggle against the South African Government.

with respect, I have difficulty with the finding that Hamid knew from the outset that his recruitment was for military training with a view to

returning to the Republic to be involved in subversive military operations. The evidence of Hamid himself, who was the only relevant State witness, does not support that conclusion. There is no warrant for assuming that the only manner in which QIBLA recruited or deployed its members in furtherance of the struggle was by sending them abroad for military training. In any event, even if he did have that intention, he said no more to the first appellant than that he wished to "contribute towards the struggle". He had no other contact at all with the first appellant.

In my opinion, the Gatesville incident, even in the context of the background facts, does not justify the reasonable inference that the first appellant, jointly with Sayed, envisaged and conspired to send Hamid for military training. If it did justify that inference it would have as a consequence that every QIBLA recruit who received military training did so in pursuance of such a

conspiracy. The meeting between Hamid and the first appellant took the matter no further. There was no suggestion that the first appellant was required to or did approve of the recruitment of Hamid. No general conspiracy between the first appellant and Sayed or any other person was established by the State. Indeed, on the count based upon such a general conspiracy the appellants were acquitted by the trial court.

It follows, in my view, that having full regard to all of the evidence, the Gatesville incident was insufficient to establish, even prima facie, the conspiracy contended for by the State.

I would therefore uphold the appeal of the first appellant and set aside his conviction and sentence.

It remains to consider the question of the relevance in this case of taking into account supervening facts. The appellants were convicted for participating

in or organising subversive military operations against the South African Government. Their motive for doing so was the racial oppression and racial discrimination practised against black South Africans. It is a well known and notorious fact that subsequent to their activities the same Government against which their activities were aimed has frequently and publicly admitted the failure of the apartheid system. That same Government has repealed substantially all of the laws upon which that system was founded and is today sponsoring legislation designed finally to introduce a non-racial and democratic form of government. Consistent with this policy the Government has granted indemnities to thousands of persons who had taken up arms against it whether within or without the borders of the Republic. The aforegoing facts, in my opinion, undoubtedly constitute exceptional circumstances which substantially

bear on the moral blameworthiness of the activities of the second appellant.

The reduced sentence imposed on the second appellant in terms of the judgment of Kumleben JA has already been served by him. Taking into account the aforementioned supervening events. I do not consider that two years' imprisonment is an inappropriate sentence and I respectfully concur with the order made in that regard.

R J GOLDSTONE

JUDGE OF APPEAL