

IN THE MAGISTRATES COURT
FOR THE DISTRICT OF EKURHULENI NORTH
HELD AT KEMPTON PARK

CASE NO: D803/2016

DATE: 2017-06-02

THE STATE

versus

PAUL O'SULLIVAN

Accused 1

RECORD OF PROCEEDINGS

PRESIDING OFFICER:

MR NEL

ON BEHALF OF THE STATE:

MR MOLOTSHWA

ON BEHALF OF THE DEFENCE:

MR LE ROUX

INTERPRETER:

MR NKAHLE

VOLUME 1 (PAGE 1- 10)



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STATE V PAUL O'SULLIVAN

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COURT PROCEEDINGS ON 2 JUNIE 2017

[09:26]

COURT: Mr Molotshwa you may proceed.

PROSECUTOR: Thank you Your Worship. Your Worship may I call the matter of the state versus Paul Robert O'Sullivan. The case number is D803/2016. The date is the 2nd of June 2017. The presiding officer is Mr Nel, prosecutor JJ Molotshwa, interpreter Mr Nkahle and for the defence is the advocate F Roux.

Your Worship the matter was postponed to today so that the Honourable Court may give judgment on the application in terms of
10 Section 174 of the Criminal Procedure Act brought by the accused.
Thank you.

JUDGMENT

It is indeed as Mr Molotshwa for the state said, that the matter was postponed until today for the court to give judgment on the accused's request for his dismissal in terms of Section 174 of the Criminal Procedure Act.

The appearances is already place on record by Mr Molotshwa. The court is going to proceed with judgment.

On the 5th of July 2016 the accused pleaded not guilty on six counts of contravening Section 26(b) Act 88 of 1995. The accused
10 allegedly used his Irish and English passports along with his South African passport to enter and exit the Republic of South Africa in order to avoid his coming and going to and from South Africa to be detected.

This is a simplified explanation of the essence of the charges against the accused person Mr O'Sullivan.

The accused who became a South African citizen through naturalisation is also Irish citizen and a holder of a British passport.

He was arrested on the 1st of April 2016 just after he boarded a flight and was then taken to Pretoria where he was held in custody for a while and later brought to Kempton Park police cells.

20 He then appeared on the 4th of April 2016 and was later released on very strict bail conditions. Why Mr O'Sullivan was taken to Pretoria Police Station is beyond my understanding, but only the police who arrested him would know why. It is in any case the duty of the court to concern itself with this matter.

Advocate Roux informed the court that accused would exercise

his right to remain silent and that his defence would be disclosed during the cause of the trial.

The state then started with reading of the evidence and the following persons testified; Kenneth Ndou, Imikaya Cicil Malalaza, Bonele Katlako and Monicili Nkopa.

These four witnesses all are South African policemen and one working for the Department of Home Affairs. They testified during the course of the state's case.

10 During cross-examination advocate Roux literally wiped the floor with these witnesses and I am going to... I am not going to elaborate on the quality of the evidence as I have done so on a previous occasion during the application for the relaxation of the accused's bail conditions.

My impression of them as poor witnesses did not during the course of the trial further changed. At this point I would also like to mention that the behaviour of the witnesses and the demeanour of them was also a matter of concern for the court.

20 Furthermore also the conduct of the investigating officer and other police officials that was involved in this matter, especial with... special reference on the last appearance of the accused in this court when their conduct boarded on an act of contempt of court and in that regard I refer to the issue surrounding the handing over of Mr O'Sullivan's passports.

During the cause of the trial advocate Roux put the accused's defence to all the witnesses. The defence are that the accused was

unaware that his conduct was an offence and furthermore that due to threats made against him by a very well-known person by the name of Radovan Krejcir, caused him to do his travels abroad in the manner that he did, is incidentally constituted the crime of contravening Section 26(b) Act 88 of 1995 as it was amended.

After the closing of the state's case advocate Roux brought this application for the dismissal of the accused in terms of Section 174 of the Criminal Procedure Act.

During this application advocate Roux admitted and handed up
10 a written arguments in support of his oral submissions to the court. Also well supported by relevant case law.

His arguments deals specifically with the two legs of the accused defence in this matter and he set it out quite well in his argument. I will in short refer to it during the course of this judgment.

He argued that offences that the accused was charged with, could only be committed with a required intention or *dolus* and that... and he then elaborated on this.

Accused must have the will directed towards the commission of the act or causing a result. This required component is that the
20 accused must have acted with a required knowledge of unlawfulness of the existence of the circumstances mentioned in the definitional elements of the relevant crime and in the knowledge of or foresight of the unlawfulness of the act. To put it plainly the accused must have intended to act unlawfully.

During the course of cross-examination it was put to the

witnesses that the accused was unaware of the provisions of Section 26(b) of the act and could not being reasonable aware of it.

No one was ever charged with it in terms of... charged in terms of this specific article and furthermore some of the witnesses did themselves not even know about the existence of the offence contained in this act.

During his address and also in his heads of argument advocate Roux refer to the well-known reported case of the *State vs Blom* 1977 (3) SA 513 (A).

10 Before this case was decided the law was that it was not an excuse not to know the law. The court is not going to elaborate on the decision. I think that advocate Roux clearly explained it during his address to this court.

This resulted in or the *Blom* case... the *Blom* case result this specific problem in our law with regards to the set requirement of *dolus*.

Advocate Roux on page 4 of his heads of argument is summed up in a very concise manner what the case law in this regard today is that genuine ignorance or mistake of the law is invariably ...[indistinct]
20 *mens rea* in respect of the unlawfulness element and hence excludes liability.

I would further also like to refer to pages 6 of his heads of argument with special reference to paragraph 14, 15 and 15.1 of his heads or argument. It states that;

“an accused position is of course very different

from a person in a particular sphere of activity in relation to Section 26(b) as he is not a person trained or skilled or working in immigration.”

Then he goes furthermore and I quote from his heads of argument;

“Moreover not one of the policeman who gave evidence knew about the existence of Section 26(b) before the trial, although some of them then initially attempted to state that they knew about the provisions of Section 26(b).”

10 However it appeared clear in cross-examination that they were similarly unaware of the existence of Section 26(b) as I have said earlier in my judgment.

The accused did not have an intention to act unlawfully. He could not have known that he was acting unlawfully as no steps had ever been taken before to enforce Section 26(b) criminally.

And furthermore advocate Roux also referred to a certain decided matter, the case of *S vs L* 1991 (2) SACR 329 (C) on page 9 and 10 paragraphs 28 and 29, which supporting his arguments.

20 “On the second leg of the accused’s defence it is not that the accused is in any event did not act unlawfully and did not have the intention to act unlawfully as he had to protect himself against the known threats against his life.”

In this regard it was extensively supported with proof during the course of cross-examination and also forms part of the record. It was

put to the state witness that accused had received death threats from a certain well known or a certain person well known through the media. The court said Mr Krejcir that also... who made use of corrupt policeman to assisted him.

It is also a well-known fact that this specific individual namely Mr Krejcir is already convicted on a number of very serious charges and may I add to it that he is for the last couple of years a frequent visitor to our specific court here in Kempton Park in criminal matters as well as a long drawn out extradition hearing, that has been going
10 on for quite a number of years now.

For each and every occasion the courts are to be swept by the bomb squad and arrangement has to be made for extra armed security supplied by the police force because of the security risk that his appearance posed to the courts and its personnel when he appears.

In this regard I would say that this part... this point in the arguments forwarded by the defence and in the defence of the accused is not something that should be disregarded as not serious or as a poor excuse and that in the... and that the accused in light of the
20 seriousness of that... of what this person's threat posed, had to take steps to protect himself.

This had resulted that the accused did make use of his passports to travel undetected in a manner that he did.

Finally advocate Roux also referred to the case of the *State vs Lobaka* Central Court of Appeal decision and that it should apply in

this case and that the accused in light thereof should be granted his request for dismissal in terms of Section 174.

That concluded his address to the court. Thereafter the matter was postponed to afford the state opportunity to prepare arguments opposing the request from the defence for Mr O'Sullivan's dismissal.

On re-appearing the state was not ready to continue with due to a High Court application that was brought in the North Gauteng division of the High Court by Mr O'Sullivan against a number of respondents, amongst them advocate Molotshwa which caused the
10 matter to be postponed for a further period of time.

Then finally on the 8th of March this year advocate Molotshwa delivered his written heads of argument and also orally argued and opposed the dismissal of the accused in terms of Section 174 of the Criminal Procedure Act.

He also went about quoting various case law and argued passionately opposing the request by the defence for the dismissal of the accused.

What is however disturbing to the court was his argument that there was evidential burden on the accused to adduce evidence that
20 he did not have the intention to contravene the legislation.

I must say this there is no burden upon the accused or any accused to prove anything. The burden of proof is always on the court... always on the state to prove their case beyond reasonable doubt in criminal matters.

In conclusion having considered the oral evidence lead by the

state and the value thereof the demeanour of the witnesses before and during the trial which is also a fact that it must be considered by a court when considering an application in this regard.

I found and I have said it in previous occasion, also in this judgment that I am still of the same opinion about the evidence that was led by the state that it was of a very poor quality, by lack of a better word by the court.

The accused defence is... was placed before the court during cross-examination, was also supported by evidence of evidential material and the witness's in essence could not contradict this.

In accordance with the decided case of the *State vs Lobaka* 2001 (2) SACR the accused is entitled to his dismissal on all the charges against him. He cannot assist the state in bringing the case any further.

Therefore it is court's judgment that the accused is entitled to his dismissal in terms of Section 174 Act 51 of 1977 and it is so ordered.

MR ROUX: As the court pleases.

MR MOLOTSHWA: As the court pleases.

COURT ADJOURNS [09:50] - - - - - [09:51] **COURT RESUME**

STENOGRAPHER: On record.

PROSECUTOR ADDRESSES COURT: Your Worship the state intends to appeal against the decision of this court for giving him in the application for the discharge of the accused in terms of Section 174 and Your Worship we intend to bring an application for leave to appeal.

10 I am not sure Your Worship if the court would like us to arrange a date now when that application will be made or should we approach the court after the application has been prepared and ready for presentation to the court.

COURT: It depends on you. I will be available any date from the 1st of July.

MR LE ROUX ADDRESSES COURT: I think what we can do, if I may. I would like to see the notice and we have this sort of co-operation that we know that we can approach the court together to arrange a date and maybe for Mr Erasmus and once Mr Molotshwa and
20 preparing, once he has filed that, we just ask for the matter that we maybe then approach you and if Mr Erasmus has to arrange a date, that is going to be for hearing.

COURT: Yes you can do that.

PROSECUTOR: I think that will be proper Your Worship.

COURT ADJOURNS

[09:53]