IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

Date: 2: and 20 May2005

UNREPORTABLE Case number :A2850/03

In the matter between

RICHARD ROUGET APPELLANT

and

THE STATE RESPONDENT

Regulation of Foreign Military Assistance Act 15 *of* 1998. *R100 000 fine, in the circumstances, not appropriate in the light of the appellant's financial position.*

Van Rooyen AJ

[1] Appellant, after a plea of guilty, was convicted in terms of section 2 of the Regulation of Foreign Military Assistance Act, Act 15 of 1998. He was sentenced to pay RI00 000 or 5 years imprisonment if he could not pay the fine or any of the down payments; plus imprisonment of 5 years which was wholly suspended subject to the appellant's not being convicted of section 2 again for deeds committed during the said five years.

[2]The appellant recruited persons for mercenary military assistance to the Government of the Ivory Coast against dissidents in October 2002. He also provided logistical support and equipment to the group so recruited. The persons recruited were offered a three month contract and, according to their expertise, were contracted as pilots or infantry soldiers. The South African

pilots were to provide military training for the armed forces of the Ivory Coast under the command of a Mr J. The South African contingent was provided with an official invitation from the government of the Ivory Coast so that no visa requirements had to be complied with. The SA troups were involved in battle and the appellant joined them. The SA troups were to be paid Euros 6000 per month. Approximately Euros 340 000 were also paid by the Ivory Coast Government for equipment. On the advice of appellant some of the South Africans left in early December and the rest left by January 2003. The military support of appellant and others, however, continued.

[3] The learned regional magistrate rightly held that the offence was a serious one. He referred to section 198(b) of the Constitution which forbids South Africans from taking part in armed conflict which falls outside the legitimate security services described in Chapter 11 of the Constitution Act, Act 108 of 1996. He regarded deterrence as very important in the sentencing of offenders. The appellant had placed the international interest of South Africa at risk. There was also substantial personal gain involved. The court took into consideration that appellant was a first offender and that he had pleaded guilty and that this, to a certain extent, was an extenuating circumstance.

At the stage of sentencing the court a quo asked what amount appellant had with him. He had R20 000. The Court ordered that he pay the R20 000 forthwith and the balance of R80 000 at a rate of R5000 per month for 16 months.

[4] On appeal it emerged that the R20 000 was lent to appellant by a friend and that appellant could not afford the fine. To finance this appeal, he

conducted a hunting safari in Mozambique. The fine was argued to be harsh. Undue accent was also placed on the deterrent effect of the fine.

[5] The following guidelines should, *inter alia,* be considered when sentencing a person:

(1) A balance must be struck between the interests of the community, the nature and seriousness of the crime and the personal circumstances of the accused.[1]

(2) Punishment should not be approached with anger,[2] but from a perspective of justice and may never be cruel, inhuman or degrading[3]• The term of imprisonment may also never be excessive.

(3) When the interests of the community are considered it is not what the community demands that should determine the sentence but what the informed, reasonable member of that community believes to be a sentence that would be just.[4]

(4) A sentence would, accordingly, not necessarily represent what the majority in the community demands, [5] but what serves the public interest and not the wrath of primitive society. [6]

1 S *v Zinn* 1969(2) SA 537(A).

2 S *v Smith en Andere* 2002(1) SACR 188(T); S *v Opperman* 1997(1) SACT 285(W); S *v De Kock 1997(2)* SACR 171(T); S *v Noemdoe* 1993(SACR 365(W); S *v Thonga* 1993(1) SACR 365(W); S *v Rabie1975(4)* SA 855(A) at 866D; S *v Zinn* 1969(2) SA 537(A).Compare Van Zyl *Justice and Equity in Cicero (1991).*

3 S 12(1)(e) of the Constitution Act 108 of 1996.

4 S *v Mhlakaza and Another* 1997(I) SACR 5 15(SCA) at 518. 5

S *v Makwanyane* 1995(2) SACR 1 (CC) at par[87]-[89].

(5) A term of imprisonment often reaches a peak, after which the meaning thereof declines. Excessively long terms of imprisonment accordingly do not necessarily address the problem. A term should never be so long that it destroys the accused emotionally. [7]

(6) Personal suffering[8] and sincere remorse as to what he or she caused, is relevant. [9]

(7) Personal circumstances of the appellant must also be considered and balanced against the interests of the community and the need for deterrence. In this process retribution also plays a role. Rehabilitation in prison is also an ideal which should be considered. Given the over-crowded circumstances of our prisons, this ideal might not always be realizable.

(8) Alternatives to imprisonment must be considered in so far as these alternatives are made possible by the Legislature. [10]

(9) Punishment also serves the purpose of deterrence of the accused and other would-be wrongdoers. The specific wrongdoer must, however, not be punished more severely than he or she deserves, merely

6 S v *Du Toit* 1979(3) SA 846(A) at 858.

7 Wrongdoers "must not be visited with punishments to the point of being broken." - per Holmes JA in S v *Sparks and Another* 1972(3) SA 396(A) at 41 OG; also compare S v *Skenjana* 1985(3) SA 51 (A).

8 See the authorities quoted in S v *Malan 2004(1) SACR 264(1).*

9 S v *De Vries* 1995(1) SACR 662(T).

10 S v *Visser* 2004(1) SACR 342 (SCA).

because the lengthy sentence acts as a lightning conductor for the wrath of the community. [11] Such an approach could mean that a specific wrongdoer is subjected to a sentence which is heavier than the sentence that he or she deserves, and that would be unacceptable. [12]

(10) In conclusion the following dictum of Holmes JA is particularly significant: [13]

> "Punishment should fit the criminal as well as the crime be fair to society, and be blended with a measure of mercy according to the circumstances .... While not flinching from firmness, where firmness is called for, (a Judge) should approach his task with a humane and compassionate understanding of human frailties and the pressures of society which contribute to criminality. It is in the context of this attitude of mind that I see mercy as an element in the determination of the appropriate punishment in the light of all the circumstances of the particular case."

[6] I agree that the offences set out in the Act are serious offences. South African mercenaries cause serious embarrassment for the South African government. What seems to be adventure, can turn sour for the mercenaries who often join with enthusiasm and soon thereafter discover that what would seem to have been adventure was nothing less than disaster, for them and their families. I accordingly agree that mercenary activities must be discouraged and that the sanctions imposed must

11 E.g. S *v Chapman* 1997(3) SASV 1 (SCA).

12 See Skeen" Effective judicial thundering from up on high or a mere brutum fulmen? Deterrent sentences in criminal cases." 1998 *SAJCJ242.*

13 S *v Rabie* 1975(4) SA 855(A) op 862G en 866E; S *v Du Toit* 1979(3) SA 846(A) at 858A.

demonstrate that clearly. The recent R3 million rand paid as a fine by Sir Mark Thatcher for what was admitted to have been unknowing involvement in military activities in an African state, is a good example of the kind of fines which could be appropriate, depending on the . circumstances.

[7]The appellant was quite open with the court as to his involvement; facts which would have been almost impossible to prove were admitted and, although I am not convinced that the appellant demonstrated full remorse for what he had done, his plea of guilty with the disclosure of his basic involvement, should count in his favour. The fact that. the men fought on the side of the government of the Ivory Coast is not an extenuating circumstance, although the appellant might have thought so. The aim of the legislation is to prohibit foreign military activity without the permission of the SA Government - whether it be on the side of a foreign government or dissidents.

[8] I believe that the personal circumstances of the appellant were not fully brought to the notice of the court a quo and that a re-evaluation of the fine would be appropriate. The appellant is self employed and, according to his affidavit in his application for condonation, he also conducts hunting safaris. He was a first offender. In the circumstances

the R100 000 fine is too harsh. Reference to personal circumstances should not only be paid lip-service to. The five year imprisonment suspended sentence for a first offender, would seem to be a reasonably strong personal deterrent. Since the appellant earned fees for his involvement, a fine must, however, also be imposed even if he finds it hard to pay the amount. The appellant is also entitled to some compassion as a result of his forthright admission of the offence and his willingness to convey the basic facts to the court. In arriving at the conclusion as to the fine I have considered other fines imposed. They range from the R3 million which was recently paid by Sir Mark Thatcher to R 70,000 for persons of an obviously more moderate income. A fine of R75 000 would seem to do justice to deterrence and the personal circumstances of the appellant.

[9] I propose the following order:

The appeal as to sentence succeeds partly in so far as the fine is concerned. The fine of R100 000 is reduced to R75 000. This order as to the fine substitutes the order of the court a quo as to the fine on the day of sentence. Since we have been informed that the appellant has paid the R100 000 from money lent to him by a friend, the order as to installments, which would have been proposed, falls away.

J W C van Rooyen .....
Acting Judge of the High Court

Acting Judge of the High

J Els.....1 agree. It is so ordered

Judge of the High Court

17 May 2005