

[TRANSLATION]

**STATE v. EBRAHIM**  
**Supreme Court of South Africa (Appellate Division)**  
**26 February 1991**

Before Joubert, Acting Chief Justice, Van Heerden, M T Steyn, F H Grosskopf, Judges of Appeal, and Nicholas, Acting Judge of Appeal.

M T STEYN, Judge of Appeal.

**Introduction**

This appeal concerns the question whether the trial court had jurisdiction to try the appellant. . . .

**The Facts**

The following facts are undisputed. The appellant is a South African citizen by birth. In 1962 he became a member of...the military wing of the African National Congress (ANC). In 1964 he was convicted of several acts of sabotage and sentenced to 15 years imprisonment. He served his sentence on Robben Island and was released in 1979. Thereafter he was restricted by executive order to the magistrate's district of Pinetown in Natal. In 1980 he fled to Swaziland while the restriction order was still in force. . . .

In December 1986 the appellant was forcibly abducted from his house in Swaziland by two black men who informed him that they were members of the South African Police. He was bound, blindfolded and gagged and taken across the border into South Africa. Once across the border he was met by a group of armed white men who drove him by car to Pretoria. They questioned him about the activities of the ANC from which he inferred they were members of the security police. This opinion was endorsed by the fact they were permitted to pass through an army road blockade without search or questioning. In Pretoria the leader of his abductors made radio contact with an unidentified person. He was then transferred to another vehicle.

At about this time Brigadier Jan Cronje, head of the security branch of the South African Police in the Northern Transvaal, was informed by radio that the appellant was in Pretoria. He arranged for appellant to be brought to police headquarters where he was handed over to Cronje and other senior police officers. When appellant complained that he had been abducted from Swaziland one of these officers said that his alleged kidnapping was "purely of academic interest" as he was now in South Africa. He was thereupon formally arrested by Brigadier Cronje in terms of section 29 of the Internal Security Act 74 of 1982.

The appellant was later charged with treason. In his application for release, referred to above, the appellant submitted that his "abduction in Swaziland took place with the authority and knowledge of the South African Police or other agents of the South African state". The South African Police denied that the appellant was abducted by members of the South African Police or that the police had anything to do with the abduction. The appellant's alternative allegation that his abductors were agents of the South African government was left unanswered by the police.

There was no suggestion made in the application that the government of Swaziland protested to the South African government over appellant's abduction.

**Factual Basis for the Judgment**

In the light of the above denials by the police it must be accepted that the South African Police were not involved in any way in the abduction. It is, however, highly likely that the abductors were agents of the South African state. All the circumstances surrounding the abduction point very strongly to an involvement of the state in the abduction. This is confirmed by the failure of the police to disclose the

identity of the abductors to the court despite the fact that their identity must have been known to the police. The appeal must therefore be decided on the basis that the appellant was abducted by agents of the South African state. 'Agents' in this context means persons acting under the authority of some state agency. The world-wide phenomenon, which has become pronounced since World War II, of secret state action by means of a variety of agencies, has also occurred in the Republic of South Africa. (Indeed it is so well known that judicial notice may be taken of it.) The manner in which the appellant was abducted provides a clear indication of the involvement of such an agency. State involvement in such action is not dependent on knowledge and approval by the highest authority in the state. The conduct of modern state affairs requires the delegation of decision-making to lower levels in the administration. When action is authorized and executed at such a lower level, the state is involved and responsible for the consequences, even if such action is not permitted by the highest state authority. This applies also to the conduct of the security agencies of the administration. The abduction of the appellant was clearly the work of one or other of these agencies, excluding the police.

## **The Issue**

The effect of the abduction on the competence of the trial court to try the appellant must now be considered.

Appellant argues that the abduction was a violation of the applicable rules of international law, that these rules are part of our law, and that the violation of these rules deprived the trial court of competence to hear the matter. Mr Mahomed SC (assisted by Mr Kennedy) summed up his argument as follows:

"It will be submitted that, having regard to all the facts, the appellant was not amenable to the criminal jurisdiction of the Court a quo, alternatively that if such jurisdiction in fact existed in theory, the Court a quo had a discretion as to whether the appellant should be tried and should, in the exercise of that discretion, have refused to exercise its jurisdiction in circumstances where there had been a fundamental breach of those rules of acceptable behaviour which govern the comity of nations."

In Nduli and others v. Minister of Justice 1978 (1) SA 893 (A) this court decided that where the accused were abducted from Swaziland by members of the South African Police in breach of orders from their commanding officer, the South African state was not responsible and accordingly there was no violation of international law. Consequently the trial court was not deprived of its competence to try the accused. In that case, as in the present case, the accused were formally arrested in South Africa. In the present case, as I have already indicated, the factual basis is that the appellant was abducted from Swaziland to South Africa by persons who were not police but who acted under the authority of some state agency. The ratio decidendi and the conclusion reached by this court in the Nduli case is therefore not applicable to the present case.

## **The Legal Question**

The first question to be decided in the present case is not what the relevant rules of international law are, but what those of our own law are. To answer this question it is necessary to examine our common law on this subject. (The South African common law is Roman-Dutch law, comprising principles of Roman law and Germanic custom, as developed in the seventeenth and eighteenth centuries by the writings of jurists and the decision of the courts in Holland and its associated provinces in the United Netherlands. It has been strongly influenced during the past two hundred years by the English common law. Editor).

### **Roman Law**

According to Digest 2.1.20:

"Paul Edict book 1: One who administers justice beyond the limits of his territory may be disobeyed with impunity."

Digest 1.18.2 furthermore provides:

"Paul Sabinus book 13: The governor of a province has authority only over the people of his own province, and that only while he is in the province. For the moment he leaves it, he is a private citizen. Sometimes he has power even in relation to non-residents, if they have taken direct part in criminal activity. For it is to be found in the imperial warrants of appointment that he who has charge of the province shall attend to cleansing the province of evil men; and no distinction is drawn as to where they may come from."

(Translations by Alan Watson in the most recent translation of The Digest of Justinian, University of Pennsylvania Press, 1985, vol 1, pp 42, 34-35.)

This limitation on the legal powers of Roman provincial governors and lawgivers is understandable and was unavoidable in the light of the great number of provinces comprising the Roman Empire in classical times, with their ethnic and cultural diversity, and their different legal systems which the politically pragmatic Romans allowed to remain largely in force in their conquered territories. Until late in the history of the Roman Empire certain provinces were controlled by the Senate and others by the Emperor. Intervention by one province in the domestic affairs of another was a source of potential conflict. In order to maintain sound mutual relations, a practice developed among provincial governors relating to the arrest and extradition of offenders. This appears from Digest 48.3.7 (Watson's translation, vol 4, p 801).

"Macer Duties of Governor Book 1: It is customary for the governors of provinces in which an offence has been committed to write to their colleagues (in whose provinces) the perpetrators are alleged to live, requesting that they be returned along with those who are to prosecute them: this is also laid down in a number of rescripts."

Legal force was given to this practice in one of the later decrees (Novellae Constitutiones) of Emperor Justinian (Nov 134 c 5).

#### "Chapter V

#### Persons Guilty of Crime Shall be Summoned by Means of Lawful Edicts.

When any one of the criminals whom we have just mentioned conceals himself, or leaves the province in which he has committed the offence, We order the judge to call him into court by the publication of lawful edicts, and if he does not obey, the judge shall proceed in the manner prescribed by the laws. If it should be ascertained that the guilty party is living in some other province, We order the judge of the district in which the offence was committed to notify the judge of the province in which the delinquent resides, by means of a letter, to arrest him on his own responsibility and that of his court, and to send the accused to him. When the judge who has received a public letter of this kind fails to do what We have stated, and his court does not surrender the criminal, or if it does not execute the orders given it, We decree that the said magistrate shall pay a fine of three pounds in gold, and his court an equal amount. If, induced by a desire for gain, a judge, or any officer of his court, does not arrest a person of this description, or if, after having arrested him, he does not deliver him up, he shall, after conviction, be deprived of his office, and sent into exile."

(Translation by S P Scott The Civil Law vol 17, p 141. A M Press Inc Reprint 1973).

It is inconceivable that the Roman authorities would recognize a conviction and sentence, and allow them to stand, when they were the result of an abduction of a criminal from one province on the order or with the co-operation of the authority of another province. This would not only have been an approval of illegal conduct, and therefore a subversion of authority, but would also have threatened the internal inter-provincial peace of the Empire.

#### Roman-Dutch Law

(...)

For a proper understanding of Roman-Dutch law on this subject it is necessary to recall the structure of the political system in the Netherlands. The Republic of the Netherlands (1581-1795) was a commonwealth of seven sovereign provinces, each with its own legislature and courts. The international sovereignty of the Republic vested in the States-General which had power over foreign affairs, defence etc.

One of the foremost Roman-Dutch jurists was Johannes Voet (1647-1713), a Professor of Law in the University of Leiden. According to Voet in his Commentarius and Pandectas 48.3.2:

"So far however must the limits of jurisdiction be observed in seizing a person accused of crime that, if the judge or his representative pursues him when he has been caught in the judge's own area and has taken flight, he nevertheless cannot seize or pursue further than the point at which the accused has first crossed the boundaries of the pursuer. A judge is regarded as a private person in the area of another, and thus he would in making an arrest in that area be exercising an act of jurisdiction on another's ground, a thing which the laws do not allow."

(Translation by Percival Gane The Selective Voet (1957) vol 7, p 331).

In support of this view Voet invoked the work of the sixteenth century Spanish jurist Gomezius (Antonio Gomez) who in his Commentariorum Variarumque Resolutiones Juris Civilis 3.9.5 stated that a judge might not order or effect the arrest of a criminal in another's territory and that if this was done the arrested person was to be immediately released. By citing Gomezius on this subject, Voet clearly endorsed this rule for the purposes of Roman-Dutch law.

Roman-Dutch jurists who give support to the above rule are:

- (1) Antonius Matthaeus II (1601-1654) Tractatus de Criminibus 48.14.1.3.
- (2) Dionysius Godefridus van der Keessel (1738-1816) Praelectiones ad Jus Criminale 48.3.2.
- (3) Johannes van der Linden (1756-1835) Supplementum to Voet's Commentarius ad Pandectas cited in Gane The Selective Voet vol 1, p 296, note (b).
- (4) Pieter Bort (1615-1674) Tractaat handelende van Arresten 3.3.4, 15.
- (5) Berlichius (Mathaeus Berlich 1586-1638) Conclusiones Practicabiles (part 1, concl 74, nn 54-55).

From the repeated exposition and acceptance of the above rule in its different forms it is clear that the unlawful removal of a person from one jurisdiction to another was regarded as an abduction and as a serious breach of the law in Roman-Dutch law.

A further question is whether a conviction and sentence following such an abduction, in the jurisdiction to which the person was abducted, had any legal validity in Roman-Dutch law. In other words, did the court before which the abducted person was brought to trial have the competence to try him? One would expect that it was not competent for the same reasons advanced in respect of the Roman Empire. Furthermore it would have been pointless to have a strict prohibition on the violation of territorial sovereignty if it could be simply ignored without any adverse consequences in the ensuing legal proceedings. On account of the strictness of the prohibition, and the reasons upon which it was premised, one might have expected that there would have been few attempts to violate it. One such case, which occurred in 1662, was that of Jan Guillam Bonaarts who, after being properly tried in one jurisdiction (Brabant), moved to another (Eisch) before execution of sentence. The Attorney-General of Brabant initiated extradition proceedings but then dispensed with this process and ordered his abduction from Eisch. He was returned to Brabant where the court ordered the execution of his sentence. An opinion given by two Dutch lawyers at the request of the States-General was that both the abduction and the subsequent court order were invalid. In effect this meant that the court of Brabant had no jurisdiction to issue an order for the execution of the sentence of the abducted Bonaarts. (See Hollandsche Consultatie part 5, cons 97.)

It is therefore clear that in Roman-Dutch law a court of one state had no jurisdiction to try a person abducted from another state by agents of the former state. The question must now be considered whether this principle is also part of our present law.

### **South African Law**

Our common law is still substantially Roman-Dutch law as adjusted to local circumstances. No South African statute grants or denies jurisdiction to our courts to try a person abducted from another state and brought into the Republic of South Africa. Statutory rules dealing with arrest and jurisdiction contained in section 39 of the Criminal Procedure Act 51 of 1977 and section 19 of the Supreme Court Act 59 of 1959 are not in conflict with the rules of Roman-Dutch law described above. There is likewise no decision of our courts that these rules are not part of our law.

The judgments dealing with the effect of abduction from another state on the jurisdiction of our courts to try an abducted person are based either on facts that differed materially from the present or failed to consider the question in the light of the common law. In Abrahams v. Minister of Justice 1963 (4) SA 542 (C) the applicant applied for habeas corpus on the ground that he was abducted from Bechuanaland (as Botswana was then known) by members of the South African Police and taken to Gobabis in South West Africa (now Namibia) where he was duly arrested. Relying on the authority of R v. Robertson 1912 TPD 10 and R v. Officer Commanding Depot Battalion, Colchester: Ex parte Elliot [1947] 1 All ER 373, the court decided that where a lawful arrest took place within a state's own borders the circumstances under which the accused was brought into the state were irrelevant.

In Robertson's case it was argued that a person who had been unlawfully arrested in Natal and brought to the Transvaal could not be subjected to extradition proceedings in the Transvaal in answer to an extradition request from Britain to stand trial in Scotland. The argument was dismissed by the court as follows:

"The applicant was brought into the Transvaal. Whether he was brought here legally or illegally, this Court has nothing to do with: as a fact he was brought here, and thereafter he was arrested, on the 10th October, on a valid warrant which had been issued in Scotland, and which in my opinion was duly endorsed. That being so, it is not necessary to go into the other points which have been raised" (at 12-13).

The principles of the Roman-Dutch law were not raised in either argument or judgment in this case. The case is also distinguishable from both Abrahams' case and the present case on the facts.

Elliot's case was also an application for habeas corpus. It concerned a deserter from the British army who was arrested by British military police in Belgium and brought back to England to be tried by a court martial. The case was decided according to the principles of the English common law. It is consequently not relevant and was also not relevant in the Abrahams case. Similar considerations apply to the later English case of R v. Plymouth Magistrate's Court and others: Ex parte Driver [1985] 2 All ER 681 (QB).

In S v. Ramotse (unreported judgment of the Transvaal Provincial Division of 14 September 1970) the accused, an ANC soldier, was abducted from Botswana by Rhodesian soldiers, taken to Rhodesia, and handed over to the South African Police. He was then formally arrested in South Africa. His argument that the court had no jurisdiction to try him as a result of his unlawful arrest in Botswana was rejected on the basis of the Abrahams and Elliot cases. The principles of our common law were not raised in the judgment and there is no mention of any Roman-Dutch authority. That decision is therefore of no value for the purposes of this judgment.

In my opinion therefore the above considered rules of Roman-Dutch law are still part of our law.

## **Evaluation**

Several fundamental legal principles are contained in these rules, namely the protection and promotion of human rights, good inter-state relations and a healthy administration of justice. The individual must be protected against illegal detention and abduction, the bounds of jurisdiction must not be exceeded, sovereignty must be respected, the legal process must be fair to those affected and abuse of law must be avoided in order to protect and promote the integrity of the administration of justice. This applies equally to the state. When the state is a party to a dispute, as for example in criminal cases, it must come to court with "clean hands". When the state itself is involved in an abduction across international borders, as in the present case, its hands are not clean.

Principles of this kind testify to a healthy legal system of high standard. Signs of this development appear increasingly in the municipal law of other countries. A telling example is that of United States v. Toscanino 500 F 2d 267, to which Mr Mahomed referred us. The key question for decision in that case was formulated as follows:

"In an era marked by a sharp increase in kidnapping activities, both here and abroad . . . we face the question as we must in the state of the pleadings, of whether a Federal Court must assume jurisdiction over the person of a defendant who is illegally apprehended abroad and forcibly

abducted by Government agents to the United States for the purpose of facing criminal charges here" (at 271).

The Court refused to follow the decisions of Ker v. Illinois 119 U.S. 342 (1888) and Frisbie v. Collins 342 U.S. 519 (1952) for the following reasons:

"Faced with a conflict between the two concepts of due process, the one being the restricted version found in Ker-Frisbie and the other the expanded and enlightened interpretation expressed in more recent decisions of the Supreme Court, we are persuaded that to the extent that the two are in conflict, the Ker-Frisbie version must yield. Accordingly we view due process as now requiring a court to divest itself of jurisdiction over the person of a defendant where it has been acquired as the result of the Government's deliberate, unnecessary and unreasonable invasion of the accused's constitutional rights. This conclusion represents but an extension of the well-recognized power of federal courts in the civil context to decline to exercise jurisdiction over a defendant whose presence has been secured by force or fraud" (at 275).

The order made by the court was in the following terms:

"The case is remanded to the district court for further proceedings not inconsistent with this opinion. Our remand should be construed as requiring an evidentiary hearing with respect to Toscanino's allegations of forcible abduction only if, in response to the Government's denial, he offers some credible supporting evidence, including specifically evidence that the action was taken by or at the direction of United States officials. Upon his failure to make such an offer the district court may, in its discretion, decline to hold an evidentiary hearing" (at 281).

The idea providing the foundation for this rule of American law appears in the following passage:

"As the Supreme Court has repeatedly made clear, the exclusionary rule has nothing to do with the fair determination of the guilt or innocence of the accused. It represents a judicially-created device designed to deter disregard for constitutional prohibitions and give substance to constitutional rights. Mapp v. Ohio 367 U.S. 643. In the words of Justice Holmes, to allow the Government to benefit illegally from seized evidence, "reduces the Fourth Amendment to a form of words" Silverthorne Lumber Co v. United States 251 U.S. 385 (1920). The philosophy behind the rule and possible broader application of the basic principle underlying it was best described by Justice Brandeis in an oft-quoted passage from his dissenting opinion in Olmstead v. United States 277 U.S. 438 (1928), which we have only recently invoked again, see United States v. Archer 486 F 2d 670, 674-5 (2d Cir 1973):

'The Court's aid is denied only when he who seeks it has violated the law in connection with the very transaction as to which he seeks legal redress. Then aid is denied despite the defendant's wrong. It is denied in order to maintain respect for law; in order to promote confidence in the administration of justice; in order to preserve the judicial process from contamination.

Decency, security and liberty alike demand that Government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the Government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means -- to declare that the Government may commit crimes in order to secure the conviction of a private criminal -- would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.'

277 U.S. at 484-5.

Society is the ultimate loser when, in order to convict the guilty, it uses methods that lead to decreased respect for the law. See United States v. Archer (*supra* at 677).

Thus the Court's decisions in Rochin and Mapp unmistakably contradict its pronouncement in Frisbie that 'due process of law is satisfied when one present in court is convicted of crime after being fairly apprised of the charges against him and after a fair trial in accordance with constitutional procedural safeguards'. The requirement of due process in obtaining a conviction is greater. It extends to the pre-trial conduct of law enforcement authorities" (at 273-274).

To this the court added:

"Drawing again from the field of civil procedure, we think a Federal Court's criminal process is abused or degraded when it is executed against a defendant who has been brought into the territory of the United States by the methods alleged here. Cf Commercial Mutual Accident Co v. Davis 213 U.S. 245 (1909); Fitzgerald Construction Co v. Fitzgerald (*supra*). We could not tolerate such an abuse without debasing "the processes of justice" (at 276).

This idea is to a large extent apparent in the rules of our own law.

### **Conclusion**

The following statement of Daniels J in his judgment in the lower court is therefore wrong:

"I am satisfied upon the authorities referred to that even if the applicant, therefore, was captured in violation of public international law, such seizure by the South African State or by an agent of the State acting with its knowledge and connivance in Swaziland, would not impair this Court's jurisdiction. This view appears to me to be in accordance with the internationally accepted approach and one which has been consistently applied and followed in South African Courts" (1988 (1) SA at 1004).

This court did not go so far in Nduli and nor did the Transvaal Court in Ramotse. The learned Judge's statement is contrary to the applicable rules of our common law; and the Abrahams case was wrongly decided in the light of these rules.

It follows that, according to our common law, the trial court had no jurisdiction to hear the case against the appellant. Consequently his conviction and sentence cannot stand.

The following orders are therefore made:

- (1) The appeal succeeds.
- (2) The appellant's conviction and sentence are set aside.

Joubert, Acting Chief Justice, Van Heerden and F H Grosskopf, Judges of Appeal, and Nicholas, Acting Judge of Appeal, concurred.