

Bib. 104/86

Case no 45/85

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IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

LAZARUS MMOLEDI Appellant

and

THE STATE Respondent

Coram: RABIE CJ, JANSEN JA et GALGUT AJA.

Heard:

Delivered:

15 September 1986.

02 September 1986

J U D G M E N T

RABIE CJ:

The/.....

The appellant was charged in a regional magistrate's court in Johannesburg with a contravention of sec. 13(1)(a)(iv) of the Internal security Act, No. 74 of 1982 (count 1) and sec. 56(1)(c) of the same Act (count 2). The two sections read as follows:

"13. (1) As from the date upon which an organization becomes an unlawful organization by virtue of a notice under section 4(1) or (2) or, for the purposes of paragraph (a) of the definition of 'unlawful organization', as from the date of commencement of this Act -

(a) no person shall

.....

(iv) in any way take part in any activity of the unlawful organization, or carry on in the direct or indirect interest of the unlawful organization, any activity in which it was or could have engaged at the said date."

"56. (1) Any person who -

.....

(c) without the consent of the Minister,
is in possession of any publication
published or disseminated by or under
the direction or guidance or on
behalf of an unlawful organization;

.....

shall..... be guilty of an
offence.....".

It was alleged in count 1 that the appellant
had during the period June 1982 to August 1982 wrongfully
and unlawfully taken part in the activities of the African
National Congress ("the ANC"), which was an unlawful
organisation, or carried on in the direct or indirect
interest of the ANC certain activities in which it was
or could have engaged at the date of the commencement
of the Act, "to wit by playing a recorded cassette

containing/.....

containing ANC propaganda and/or the principles, ideals or objects of the said ANC to others." In count 2 it was alleged that the appellant possessed, during the aforesaid period, a publication, to wit a recorded cassette, "published or disseminated by or under the direction or guidance or on behalf of an unlawful organisation, to wit the African National Congress."

The appellant initially pleaded not guilty to both counts, but in the course of the trial he changed his plea on count 2 to one of guilty. The Magistrate convicted him on both counts and, taking the two counts as one for the purposes of sentence, imposed a sentence of 4 years' imprisonment.

The appellant appealed to the Transvaal Provincial Division against his conviction on count 1 and/.....

and against the sentence imposed on him in respect of counts 1 and 2. The appeal was heard on 9 August 1983.

It was dismissed in toto, but the appellant was on the same day granted leave to appeal to this Court. He was released on bail pending the outcome of the appeal.

The appeal record was not filed with the registrar of this Court until 5 March 1985, i.e. about 19 months after leave to appeal had been granted by the Transvaal Provincial Division. It appears from the appellant's application for condonation of the late filing of the record that the inordinate delay was due to the failure of his attorney to ensure that her articled clerk, whom she had instructed to attend to the appeal,

complied/.....

complied with the rules of this Court relating to the lodging of records of appeal.

As to the question of condonation, there is not only the fact of the long delay, as referred to above, but also the consideration that the appeal against the conviction on count 1 has, in my opinion, no prospect of success. I would, in the circumstances, not have been disposed to grant the condonation sought, were it not for the fact that the sentence which the Magistrate imposed was, as will be indicated below, an incompetent one, which needs to be altered. Condonation must perforce be granted.

I shall deal with the question of the sentence after briefly discussing the appeal against the conviction on count 1.

The/.....

The appellant, as stated above, pleaded guilty to count 2, i.e. to being in possession of a cassette, "published or disseminated by or under the direction or guidance or on behalf of an unlawful organisation, to wit the African National Congress."

The cassette contains, in the main, a recording of a speech made by the president of the ANC, Oliver Tambo, on 8 January 1980 on the occasion of the 68th anniversary of the founding of the ANC. The speech is preceded by some chanting in Zulu, which commences with the words (as translated into English) "Where does it echo? Where does it echo? Our sticks, we smell it, where does it echo? Kill the wizards, kill the wizards/.....

wizards, we say kill the wizards, we say kill the wizards", and ends with the words "... spear of the nation (Mkhonto we Sizwe), we, we of the spear are prepared to kill them, the boers." The speech begins against the background of machine-gun fire, and is addressed to "Fellow-countrymen and comrades in arms". In his speech the speaker tells, briefly put, of the achievements of the ANC and its military organisation, Mkhonto we Sizwe (which is referred to as "the heroic people's army"), since 1970; of the ANC'S "militant struggle"; of its rejection of "all so-called reformist solutions of South Africa's problems ("peaceful change", the speaker says, "can never liberate us"), and of its aim to overthrow "the enemy",

i.e./.....

i.e. the South African government (which is said to be a "fascist white minority regime"); and he urges his audience to "unite", to support Mkhonto we Sizwe "in the intense battles that lie ahead", and to "embark on mass action to remove the Botha regime from power."

The recording ends, as it commences, with chanting in Zulu and an exhortation to "kill the wizards".

The evidence shows that the appellant played the cassette to at least four people on four different occasions, and there can be no doubt that in so publicising the aims and achievements of the ANC, and in so broadcasting the ANC'S call to listeners to join with it and Mkhonto we Sizwe in their struggle to overthrow the South African

government/.....

government, the appellant carried on an activity "in the direct or indirect interest" of the ANC.

It was contended on the appellant's behalf that a court cannot find that an activity was carried on in the direct or indirect interest of an organisation unless it be proved that the activity was advantageous to the organisation, and that there was no such proof in the present case. I do not agree with this argument.

The offence consists in carrying on an activity in the direct or indirect interest of an unlawful organisation, and it is not required that such activity should actually benefit the organisation. It was also contended that it was not proved that the appellant had the necessary mens rea to constitute the offence. The State did not

prove/.....

prove, it was submitted, that the appellant intentionally performed an act with the intention that it should be in the direct or indirect interest of the ANC. The appellant's evidence was, I should state, that he played the recording to others because he regarded it as "entertainment". The Magistrate disbelieved the appellant and rejected his evidence, and found that he played the recording for an "ulterior purpose". I am in no way persuaded that the Magistrate was wrong. One would have to be extremely naïve to give any credence to the appellant's explanation for his having played the recording to others.

I turn now to the question of sentence.

The maximum sentence permissible in the case of a contravention of sec. 13(1)(a)(iv) of the Act is 10

years' /.....

years' imprisonment, and, in the case of a contravention of sec. 56(1)(c), 3 years' imprisonment. As stated above, the Magistrate took counts 1 and 2 as one for the purpose of sentence and sentenced the appellant to 4 years' imprisonment. This is a longer term than the Magistrate was competent to impose in respect of count 2, and it can, accordingly, not be allowed to stand. The State conceded that a Court is not competent to impose a globular sentence on multiple charges which is in excess of its jurisdiction in respect of any one of the charges. See S. v. Van Zyl 1974(1) S.A. 113(T) at 114 D-F; S. v. Ngobe 1978(1) S.A. 309 (NC) at 310 i.f. It was contended on the appellant's behalf that the Magistrate misdirected himself in finding that a total

period of 4 years' imprisonment was warranted in respect on the two counts on which the appellant was convicted and, also, that such a period of imprisonment is so excessive that it ought to be reduced by this Court.

I do not think that the Magistrate was guilty of any misdirections, and I am also not persuaded that the total period of imprisonment on which he decided should be reduced. I would accordingly set aside the sentence imposed by the Magistrate and substitute therefor a sentence of 3 years' imprisonment on count 1 and 1 year's imprisonment on count 2.

The result of the appeal is as follows:

- (1) The appeal against the conviction on count 1 is dismissed.

(2)/.....

(2) The sentence imposed by the Magistrate

 is set aside and there is substituted therefor

 a sentence of 3 years' imprisonment on count

 1 and 1 year's imprisonment on count 2.

P J RABIE
CHIEF JUSTICE

JANSEN, JA
 Concur.
GALGUT, AJA