

Saak No 234/85 TPA

EMILY ELIZABETH MELK

APPELLANT

and

THE STATE

RESPONDENT

J J F HEFER JA

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between

EMILY ELIZABETH MELK

APPELLANT

and

THE STATE

RESPONDENT

CORAM : RABIE ACJ, JOUBERT, HEFER, JJA, BOSHOFF et  
STEYN, AJJA.

HEARD : 14 SEPTEMBER 1987.

DELIVERED : 30 NOVEMBER 1987.

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J U D G M E N T

HEFER, JA :

The African National Congress (the "A N C")

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is an unlawful organization as defined in the Internal Security Act No 74 of 1982. In terms of sec 56(1) (c) of the Act any person who, without the consent of the Minister of Law and Order, is in possession of

"any publication published or disseminated by or under the direction or guidance or on behalf of any unlawful organization"

shall be guilty of an offence.

The discovery in appellant's possession of a book bearing the title "Island in Chains" led to her appearance in a regional court, charged with contravening sec 56(1) (c). She pleaded not guilty. In a statement handed to the court her defence was set out in the following terms :

"7. In my defence, I state that I did not know, nor did I have reason to believe that it was unlawful to possess a copy of the said publication.

8. I state further that I deny that the publication was published, or disseminated by, or under the direction, or guidance, or on behalf of the African National Congress."

On both the issues thus raised, the court found against the appellant. She was convicted and the conviction was subsequently confirmed on appeal to the Transvaal Provincial Division, which, however, granted the appellant leave to appeal to this court.

The judgment in the court a quo was not reported but the court's interpretation of sec 56(1) (c) and its views on the form of mens rea required for the contra-

vention.....4

vention thereof appear from S v Mabitselo 1985(4) S A 61 (T). (Mabitselo's appeal was heard on the same day and by the same judges who heard the appellant's appeal and the two cases were argued together). I mention the interpretation of sec 56(1) (c) and the form of mens rea required for its contravention since these were the two matters with which the regional court and the court a quo were mainly concerned. The section is aimed at the possession of any publication published or disseminated by or under the direction or guidance or on behalf of an unlawful organization. "Island in Chains" was alleged by the State to have been published or disseminated on behalf of the A N C and, in order to decide whether this was indeed

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the case, the meaning of "on behalf of" in sec 56(1)

(c) first had to be ascertained. Both courts construed

the words as meaning "for the benefit" or "in the in-

terest " or "to the advantage of" and found, on this

construction, that the book had been published or dis-

seminated on behalf of the A N C. The question of mens

rea then arose. The regional court held (and the court

a quo agreed) that mens rea in the form of culpa was suf-

ficient. Its actual finding on the type of mens rea

which the appellant had, will be dealt with at a later

stage.

The conviction was challenged in this court

on.....6

on four alternative grounds. I shall deal with them in the sequence in which they were presented.

The main submission related to the interpretation of the words "on behalf of" in sec 56(1) (c). I referred earlier to the trial court's interpretation of the words in question. It derived from a passage in the judgment of INNES CJ in De Visser v Fitzpatrick 1907 T S 355 at p 363 where it was said that

"(the) popular meaning of those words is that everything done for a man's benefit or in his interest or to his advantage is a thing done on his behalf. On the other hand, the more legal view is that they mean something done by a man's representative or agent."

Whereas the trial court adopted the so-called popular meaning, appellant's counsel contended for the "legal"

interpretation....7

interpretation by submitting that a publication is published or disseminated on behalf of an unlawful organization as contemplated in sec 56(1) (c), not when it serves the interest or is for the benefit or to the advantage of the organization, but when it is published or disseminated by its agent or by someone (like an independent contractor) engaged or "sponsored" by the organization.

The recent decision of this court in S v Moloi and another 1987(1) S A 196 (A D) disposes of this submission. In that case BOSHOF AJA, in whose judgment two other members of the court concurred, approved of the judgment in Mabitselo's case (supra) and adopted the very interpretation of "on behalf of" in the context of sec 56(1)

(c) which appellant's counsel sought to avoid. Faced with this difficulty appellant's counsel took a curious course. He was unable to refer us to any error in the judgment which could have a bearing on the decision arrived at therein; he had no answer to BOSHOF AJA's reasoning to the effect that "on behalf of" in the English text of sec 56(1) (c) has to be reconciled with "ten behoewe van" in the Afrikaans text; that, according to several well known dictionaries, "ten behoewe van" is not capable of any meaning other than "in the interest of" or "to the advantage of" or "for the benefit of", and that a reconciliation between the two texts can only be effected if "on behalf of" is interpreted as synonymous

with.....9

with the English expressions which I have just used.

Thus, without suggesting any reason why the decision

should not be followed, appellant's counsel asked

us to consider the question afresh. It is difficult,

to say the least, to differ from a decision of this

court which all the ingenuity of counsel could not

fault. I am unable to find any reason for doing so.

I agree with the reasoning and decision in Moloi's

case and the main submission can, accordingly, not be

sustained.

The alternative submissions were advanced on the basis of the correctness of the trial court's interpretation of sec 56(1) (c). The first two may conveniently

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be discussed together. By way of introduction mention should be made of the fact that the magistrate based his finding that "Island in Chains" was published or disseminated in the interest or for the benefit or to the advantage of the A N C entirely on his own perception of the tenor of the book. Appellant's counsel submitted that such a finding could not be made in the absence of evidence to show what the interests of the A N C are. What is lacking, so he argued, is evidence relating to the aims and objectives of the organization. He submitted, moreover, that the tenor of the book alone is not such that a finding could be made that it would serve the interests of the A N C or that the latter would reap any benefit or advantage.....11

advantage from its publication and dissemination. These submissions are without substance. Any publication which seeks to advance the cause of an organization, whether it be by enlisting popular support or by engendering sympathy for it or by extolling the justness of its cause, obviously serves the interests of the organization, whatever its interests may be; such a publication is plainly for its benefit and to its advantage. And "Island in Chains" is precisely such a publication. It was written by Indres Naidoo, a member of the A N C, with the assistance, according to the foreword, of Albie Sachs, "a lawyer who was himself imprisoned and banned in South Africa". Naidoo, so the reader is informed in the foreword, was "one of the

first volunteers for Umkhonto we Sizwe, 'Spear of the Nation', the armed wing of the African National Congress". Caught in the act of attempting to blow up certain railway installations, he was arrested, tried and sentenced to ten years' imprisonment, the best part of which he served on Robben Island. After his release he left the country and told his experiences to Sachs. It is said in the foreword that he and Sachs then "grouped the themes into chapters, and so produced this book. It is a narrative of one of the central episodes of recent South African history, the story of an island in chains, the story of resistance as seen through the eyes of one who lived through it all for ten years". It is unnecessary to describe Naidoo's narra-

tive.....13

tive of his experiences from the time of his arrest to the time of his release, in this judgment. A description of the message which the book conveys, appears in the foreword (written by Francis Meli, the Director of External Publicity of the A N C). It reads as follows:

"This book is the voice of struggle, the voice of the oppressed, the voice of the future. It expresses what is embodied and crystallized in our slogans : 'Amandla Ngawethu', 'Maatla Kea Rona', 'Power to the People' : -----It simply means 'Mayibuye i Afrika' - we are determined to seize power. It is a declaration of confidence in our just cause -----."

In order to confirm the accuracy of this description I shall refer to only one passage in the book where Naidoo tells of an incident when he met members of the Black

Consciousness Movement in what he calls a "transit cell".

It reads as follows :

"They want to find out if the rumours they have heard about the Island are true and how they should conduct themselves when they get there. So we tell them that some of the hard times and terrible suffering have passed because of our struggles, and we stress that there is only one way to get through, and that is to remember, each and every day, that they are political prisoners fighting for a just cause, that they must always stand together and never lose sight of their goal. We remind them that the people of South Africa, and of the world, will always be standing by them, that they will never be forgotten, however isolated they might feel, and that we are confident that the A N C will continue the fight and bring victory to the people of our country."

There can be no doubt whatsoever that this book

serves.....15

serves the interest of the A N C or that it is to the advantage or for the benefit of the organization.

What remains for consideration is the question of mens rea in the context of the appellant's statement that she "did not know, nor had reason to believe that it was unlawful to possess a copy of the said publication". The magistrate ruled that culpa on the part of the possessor may constitute the mental element of the offence of being in possession of a publication in contravention of sec 56(1) (c), and in effect found that the appellant ought to have known that it was unlawful to possess a copy of "Island in Chains" .

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The question is whether his ruling on the sufficiency of culpa is correct.

The magistrate ruled and counsel who argued the appeal were in agreement that sec 56(1) (c) does not impose so-called strict liability. In the absence of clear indications to the contrary in the Act, the presumption against an intention to impose that kind of liability must prevail (S v Arenstein 1964(1) S A 361 at p 365) and I agree with the magistrate that mens rea is an element of the offence.

There is no indication in sec 56(1) (c) of the form of mens rea required but, as BOTHJA JA stated in Arenstein's case (at p 366) :

".....it .....17

".....it is clear that

'negligence may constitute sufficient proof of mens rea even in cases where negligence is not the gist of the offence charged, if there was a duty on the part of the person charged to be circumspect.....'

- per CENTLIVRES JA in R v H supra at p 130.-

The degree of blameworthiness required for a culpable violation of a statutory prohibition or injunction must in the first place be sought in the language used by the law-giver ..... and in the absence of any words expressly indicating the particular mental state required, the degree of mens rea must depend on that foresight or care which the statute in the circumstances demands."

See also S v Jassat 1965(3) S A 423 (A D), S v Qumbella

1966(4) S A 356 (A D), S v Marais 1971(1) S A 844 (A D)

at p 851, S v Oberholzer 1971(4) S A 602 (A D) at p 612.

According to these decisions culpa may be sufficient if

it appears that a high degree of circumspection or care

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is demanded for the observance of a statutory prohibition or injunction. Whether that is so depends upon the intention of the legislature.

Sec 56(1) (c) appears in an Act which, according to its long title, was passed to provide for the security of the State and the maintenance of law and order and for matters connected therewith. A large variety of matters, all related somehow or other to the security of the State or the maintenance of law and order, are provided for in different parts of the Act. For present purposes reference need only be made to some of the provisions relating to unlawful organizations..

If the Minister of Law and Order is satisfied

that.....19

that the activities of an organization endanger or are calculated to endanger the safety of the State or the maintenance of law and order, he may declare it an unlawful organization. (Sec 4(1).) One of the effects of such a declaration is that no-one may thereafter take part in the activities of the organization or carry on in its direct or indirect interest any activity in which it was or could have engaged (sec 13(1) (a) (iv)); or advocate, advise defend or encourage the achievement of any of its objects (sec 13(1) (a) (v)). What the legislature sought to achieve by these measures is clear. A declaration in terms of sec 4(1) will not necessarily bring about the discontinuance of the activities of the organization.....20

organization. For that reason sec 13(1) (a) (iv) was introduced. The legislature deemed it necessary, moreover, to prevent the propagation of the achievement of the organization's objectives. To that end it introduced sec 13(1) (a) (v).

Sec 56(1) (c) could only have been intended to bolster secs 13(1) (a) (iv) and (v). Although it is conceivable that the kind of publication at which it is aimed was considered to be so harmful or potentially harmful that no-one should even be allowed to possess it, it is more likely that the prohibition was intended as an impediment to the continuation of an organization's activities after a declaration in terms of sec 4(1) and to

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the propagation of the achievement of its objectives.

The section thus forms part of the legislature's scheme

to combat these evils, for the protection of the State

and for the maintenance of law and order. One is temp-

ted to say, therefore, that a high degree of circumspec-

tion is required for the observance of the prohibition

and, applying the principle stated in the cases mentioned

earlier, that culpa on the part of the possessor of a pro-

hibited publication is sufficient to justify his convic-

tion for contravening sec 56(1) (c). The problem pre-

sented by the present case cannot, however, be solved in

this way. A closer look at the section is required in

order to discover what it entails.

What is prohibited therein is the possession (without the Minister's consent) of any publication published or disseminated by or under the direction or guidance or on behalf of (in the sense explained earlier) an unlawful organization. The complexity of the description of a prohibited publication becomes apparent immediately. To identify a publication as a prohibited one may in many cases prove to be extremely difficult if not impossible. This problem is aggravated by the fact that no unlawful organization and no-one acting in its interests will openly disseminate publications, the possession of which is prohibited, and will much rather resort to covert measures to spread its philosophy or to advance

its.....23

its aims. "Island in Chains" was printed, published and reproduced by reputable companies in England. Nothing is known about the manner in which it was disseminated, nor is it known by whom this was done. It is for this very reason that the State could only allege and prove, by reference to the contents of the book itself, that it was published and disseminated on behalf of the A N.C. And in many cases the contents of the publication will not be so revealing. "Island in Chains" is a crude example of A N C propaganda but in other publications the approach may be more subtle. Indeed, any publication published or disseminated by or under the direction or guidance of an unlawful organization - even a religious treatise

or a textbook on the industrial law - is prohibited.

It will often be wholly impossible to know or even to suspect that it may not be lawfully possessed, or to find out whether it may.

Every prohibited publication is, moreover, related in sec 56(1) (c) to an unlawful organization.

As mentioned earlier, an organization is declared to be an unlawful one. The declaration is published in the Gazette. Although many of these organizations are probably known to the average South African, others undoubtedly are not. Appellant's counsel supplied us with a list containing the names of some of them. The list includes some well known names. It also includes the names

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of "Dance Association", "S A A Football League", "Football Club", "Football League", "Educational and Cultural Advancement of the African People in S A" and "Zimele Trust Fund". Personally I have never heard these names before and I am sure that many others share my ignorance.

What is more important, is that the names suggest nothing - at least not what the activities of these organizations are. If I were to receive a book openly published by the "S A A Football League" I would, unless its contents are as revealing as the contents of "Island in Chains", not have the faintest suspicion that it was published by an organization which has been shown to the Minister's satisfaction to have been engaged in activities endangering

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the safety of the State or the maintenance of law and order. I would not know, nor would I have reason to suspect, that I have in my possession a publication prohibited in terms of sec 56(1) (c).

Viewed in the context of the question under discussion viz whether negligent violations of the prohibition in sec 56(1) (c) have been penalized, the problem now becomes clear. Negligence implies inter alia lack of reasonable foresight - in this case lack of reasonable foresight of the possibility that a publication may be a prohibited one. From what I have said, the difficulty to foresee such a possibility must be apparent. It is clear that, in cases where a publication

cannot.....27

cannot, by reference to its contents or to extraneous circumstances, be identified as a prohibited one, there can be no foresight that it may be. It is clear too that there is a very real likelihood of such cases occurring. Publications which are identifiable as prohibited ones are not without difficulty either. The question is: by whom are they supposed to be identifiable? If the so-called objective test of negligence is applied, as it generally is, the court hearing a case brought for an alleged contravention of sec 56(1) (c) will be called upon to answer this question according to its own objective assessment of the reasonableness of the accused's failure to identify the publication; and in doing so, it will

not take the accused's personal capabilities into account. (S v Ngubane 1985(3) S A 677 (A D) at p 687);

the unsophisticated and uneducated shepherd will be treated no differently from the professor and no heed will be taken of the "widely differing standards of culture, education and social awareness of the various groups of persons to whom, as citizens of South Africa, this Act applies." (per FANNIN J in S v Naidoo 1974(4) S A 574 (N) at p 576). On the magistrate's construction of sec 56(1), (c) such an inequitable result must have been intended by the legislature. I find that difficult to accept. (On that construction the same result would follow if an accused were to raise by way of defence his ignorance

of the prohibition (cf S v de Blom 1977(3) S A 513 (A D)).

I find it equally difficult to accept that that was intended).

Taking everything into account, I have come to the conclusion that the legislature did not intend to demand the high degree of circumspection for the observance of the prohibition which is required for an inference that culpa on the part of the possessor of a prohibited publication is sufficient to justify his conviction. I am fortified in this view by the fact that statutory prohibitions against the possession of certain articles or substances have always in the past (except in one case) been interpreted in such a way that knowledge was required on the part of the possessor that

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what he has in his possession, is the prohibited article or substance. It was said in S v Smith 1965(4) S A 166 (C) at p 171 that

"(t)he weight of this authority is undoubtedly in favour of the general proposition that, where a person is charged with the contravention of a statutory provision which prohibits the possession of certain articles except under special circumstances or under the authority of a permit, mens rea, in the sense of the accused person knowing that he has in his custody or under his control the forbidden article, is normally an essential ingredient of the offence....." (My italics)

(To the authorities referred to by the learned judge, may be added S v Mdeleleni 1975(2) S A 682 (C), S v Cowley 1976(1) S A 376 (E), S v Lombard 1980(3) S A 948 (T) and S v Ngwenya 1979(2) S A 96 (A D). After the passing

of the Act there were others.) In S v Goncalves 1974

(2) S A 1222 (NC) culpa was held to be sufficient for

the unlawful possession of certain drugs. But the cor-

rectness of the decision was doubted (cf S v Lombard

(supra) at p 951-2 and the judgments of FANNIN J and

VAN HEERDEN J in S v Naidoo (supra)). The legislature

could hardly have been unaware that this was the state

of the law and, had it been the intention to create in

sec 56(1) (c) yet another offence entailing the posses-

sion of an article but with a different form of mens rea,

it is unlikely that it would not have been expressly or

at least clearly stated.

I have accordingly come to the conclusion

that.....32

that mens rea in the form of culpa on the part of the possessor of a prohibited publication is not sufficient to justify his conviction on a charge of contravening sec 56(1)(c). The magistrate found that the appellant "could, and should have realized, as a reasonable member of society that her possession of the book was unlawful". In the absence of a finding that she knew that her possession was unlawful or foresaw that it might be, the conviction cannot be sustained.

The appeal is upheld and the conviction and sentence are set aside.

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J J F HEFER JA.

RABIE ACJ                   )  
JOUBERT JA                ) CONCUR.  
STEYN AJA                 )

EMILY ELIZABETH MELK

Appellant

and

THE STATE

Respondent

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

EMILY ELIZABETH MELK

Appellant

and

THE STATE

Respondent

Coram: RABIE, A C J , JOUBERT, HEFER, JJ A , BOSHOFF et

STEYN, A JJ A

Heard: 14 September 1987

Delivered: 30 November 1987

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J U D G M E N T

BOSHOFF, A J A :

I have had the privilege of reading

-----the...../2 -----

the judgment of my Brother Hefer and respectfully agree with his reasoning and conclusions on the points raised in this appeal except those relating to the form of mens rea necessary for a contravention of section 56 (1)(c). I respectfully also do not agree that the appeal should succeed.

The appellant, a 19 year old nurse at the Baragwanath Hospital in Johannesburg, was on 28 September 1983 found in possession of a book "Island in Chains", which, judging from its contents, was published to foster the interests of the African National Congress (ANC). She was charged in the regional court with a contravention of section 56 (1)(c) of the Internal Security Act,

no 74 of 1982, hereinafter referred to as the Act, which

provides as follows:

"56(1) Any person who -

(a) ...

(b) ...

(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, subject to the provisions of subsection (2)

... be guilty of an offence and liable on  
conviction -

(i) ...

(ii) in the case of an offence referred to  
in paragraph (c) ... to imprisonment  
for a period not exceeding three years.

(2) No person shall be convicted for an offence  
referred to in subsection (1)(c) ... if he satisfies  
the court that as soon as practicable after having  
become aware of being in possession of a publi-  
cation referred to in that subsection, he  
took reasonable steps to report the fact of

his being so in possession of such publication  
to a police officer, or to deliver the publication  
in question to a police officer."

She pleaded not guilty and handed in the  
following statement in terms of section 115 of the  
Criminal Procedure Act, no 51 of 1977:

- "1. I admit I had in my possession, during the period  
August 1983, until 27 September 1983, a copy of  
a publication entitled 'Island in Chains',  
hereafter referred to as the publication. The  
said publication was authored by Indres Naidoo  
and Albie Sachs. Published by Penguin Books  
Ltd, Harmondsworth, Middlesex, England. Type-  
set by Rowland Phototypesetting Ltd, Bury St  
Edmunds, Suffolk. Reproduced, printed and  
bound in Great Britain by Cox and Wyman Ltd,  
Reading.
2. The publication was first published in 1982.
3. The copyright in the said publication is held  
by Albie Sachs.

4. I admit that the African National Congress is an unlawful organisation as defined in the Internal Security Act 74 of 1982.
5. I admit that I did not have the consent of the Minister of Law and Order to possess the said publication.
6. I consent to the admission set out in paragraphs 1, 4 and 5 above, being recorded as such, in terms of Section 220 of Act 51 of 1977.
7. In my defence, I state that I did not know nor did I have reason to believe that it was unlawful to possess a copy of the said publication.
8. I state further that I deny that the publication was published, or disseminated by, or under the direction, or guidance, or on behalf of the African National Congress."

When she was arrested on 28 September 1983

she made a statement to sergeant Reynecke of the security

branch of the South African Police of which the material

portions read as follows:

"On 1983/09/28, I was taken to the offices of the Security Police, at Protea, Soweto. Sergeant Reynecke showed me two books — the other book, with the title, 'Island in Chains', by Prisoner 885/63. He asked me to explain how I came into possession of these books. The book titled, 'Island in Chains', is a book I bought while I was visiting Botswana in August 1983. I covered the book with a cover of newspaper, so that the book should not be damaged. Both of these books were found in the room of Jolly. I frequently used her room when she is not there. The book — 'Power to the People', was amongst my nursing books — I cannot remember where I put the other book, but I did bring it into her room. I have read the book, 'Island in Chains', but I did not know that these books were banned. I have nothing further to say in this regard. The book 'Island in Chains', I brought in, openly from Botswana to South Africa. Nobody at the Customs gate told me that it was a banned book."

She at first denied that she had made the

statement...../7

statement voluntarily for the obvious reason that her defence was going to be that she had only read pages 15 to 71 of the book (the pages that do not so specifically refer to the ANC as the other pages) and that she did not tell Reynecke that she had read the whole book as alleged by him. The magistrate ordered a trial within the trial on this point but before her cross-examination was concluded her counsel indicated to the court that she no longer disputed that the statement was voluntarily made. The statement was then handed in by consent.

When the case for the State was concluded her counsel closed her case without calling any evidence.

The magistrate was called upon to decide, inter alia, whether the appellant had the necessary mens rea when she possessed the book.

The magistrate found that mens rea in the form of culpa was necessary for the possession of the book to render the possession an offence under the subsection and inferred culpa from the appellant's failure to explain:

- "a) Why she had first denied having voluntarily made the statement in which she admitted having read the book, and thereafter, formally admitted that the statement was voluntarily made.
- b) Why she indicated in her plea explanation that she only read pages 15 to 71 of a book

which...../9

which disclosed nothing about the ANC, whilst it can be inferred from her statement to the police that she read the whole book.

- c) Why she found it necessary to cover the book generally known as a 'paperback' book, with a newspaper cover.

In respect of the last mentioned point the magistrate stated that he was well aware that she had explained to the police that she covered the book to protect it against damage, but, according to the magistrate, that was not the only possible reason in view of the statement which appeared on the back cover which statement he had quoted earlier in his judgment.

The magistrate consequently found the appellant guilty of a contravention of the subsection.

The question of the form of mens rea required was argued on appeal in the Transvaal Provincial Division (Kirk-Cohen J and Human A J).

The identical question was also raised in another case which came before the same court and the two cases were argued together. The court in the other case held that culpa was the required form. It is reported as S v Matsibelo 1985(4) SA 61(T). Applying the finding in that case to the facts of the present case, Human AJ, who delivered the judgment of the court, dismissed the appeal and concluded his judgment as follows:

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"It is clear in my view that this was a publication of the ANC and was disseminated on behalf of the ANC and the magistrate was therefore perfectly correct in coming to the conclusion that she had mens rea in the form of either dolus or culpa.

She admitted that she read the whole book and therefore, in my view, must have known that this was an unlawful publication. She therefore had mens rea either in the form of dolus or culpa."

The learned judge is with respect not correct in saying that the magistrate found that she had mens rea in the form of either dolus or culpa.

On appeal in this court, Mr Marcus, for the appellant, argued that the court a quo erred in finding that mens rea in the form of culpa was necessary for the offence created by the subsection and erred further

in finding that the appellant possessed the necessary  
mens rea.

We are here concerned with a statutory offence.

The general rule is that actus non facit reum nisi mens  
sit rea, and that in construing statutory prohibitions  
or injunctions, the legislature is presumed, in the  
absence of clear and convincing indications to the con-  
trary, not to have intended innocent violations thereof  
to be punishable. Indications to the contrary may be  
found in the language or the context of the prohibition  
or injunction, the scope and object of the statute, the  
nature and extent of the penalty, and the ease with which the  
prohibition or injunction could be evaded if reliance

could be placed on the absence of mens rea, S v Arenstein

1964(1) SA 361 (A) 365C-D, S v Ngwenya 1979(2) SA 96 (A)

99 i.f.-100A. If there are no indications to the

contrary mens rea is an essential element of the offence.

Ordinarily the legislature contemplates dolus (wil-

fulness or intentional wrongdoing) and such dolus

must relate to all the elements of the offence. Since

dolus is not colourless in our law, the concept includes

knowledge of the unlawfulness of the act. Where the

onus is on the State to prove all the elements of an

offence, it must consequently also prove dolus with its

component of knowledge of the wrongfulness of the act,

S v Ngwenya (supra) 100A.

It is again a matter of construction along the same lines as mentioned before whether the legislature contemplated mens rea in the form of culpa (negligence, carelessness or thoughtlessness) as the necessary mens rea.

According to the subsection any person who, 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, is guilty of an offence.

The essence of the offence is the concept of being "in possession of any publication"

of the kind mentioned in the subsection.

In ordinary legal parlance the word "possession" does not mean detention or custody or mere intentional physical control. In our law "possession" ordinarily connotes intentional physical control (detentio) with, at least, the qualification that it is for one's own purpose or benefit (animo sibi habendi), S v Brick 1973(2) SA 517 (A) 582G-H. In principle this mental element which is necessary to convert physical control into possession is distinct from the guilty state of mind constituting mens rea. It is apparent from the provisions of subsection (2) of section 56 that the legislature used the word "possession" in this legal sense. It envisages

the position of a person being in possession of a publication and then becoming aware of the fact that the publication is one referred to in subsection (1)(c) of section 56. It follows from all this that a person may be in possession of a publication without knowing or realizing that it is of the prohibited kind and not be guilty of an offence. Furthermore the wording of the subsection also implies that the consent of the Minister can be obtained for the possession of a publication of the kind referred to therein. This postulates that there is knowledge of the true nature of the publication. It does however not appear from the provisions of the Act in what circumstances such consent can be obtained. These instances are strong indications that the legislature does not intend absolute, or more correctly strict, liability which excludes mens rea as

an element of the offence.

It does not appear from the language used in the subsection what form of mens rea is intended. It is consequently necessary to resort to the other

considerations...../17

considerations which may show what the legislature intended.

According to the long title of the Act, it was passed to provide for the security of the State and the maintenance of law and order, and to provide for matters connected therewith. The Minister may, subject to certain provisions (which relate to a factual report and a recommendation) by notice in the Gazette declare an organization unlawful if he is satisfied, (a) that the organization engages in activities which endanger or is calculated to endanger the security of the State or the maintenance of law and order, or (b)(i) that the organization professes, by its name or otherwise to be

an organization for propagating the principles or promoting the spread of communism, (ii) that the purpose or one of the purposes of the organization is to propagate the principles or to promote the spread of communism, (iii) that the organization engages in activities for the achievement of any of the objects of communism, (c) that the organization is controlled, directly or indirectly by an organization referred to in (a) and (b) above, or (d) that the organization carries on or has been established for the purpose of carrying on, directly or indirectly, any of the activities of an unlawful organization, sec 4(1). The word "communism" has, according to the definition in section 1, a very wide

meaning. Unless the context otherwise indicates, it means any doctrine, ideology, or scheme, (a) which is based on, has developed from or is related to the tenets of certain named communists or of any other recognised theorists and which aims at the establishment of any form of socialism or collective ownership, (b) which aims at the establishment, by means of a class or group polarization of the community and the subsequent assumption of power by a particular class or group, of a despotic form of government under which one political party, group or organization only is recognized and all others are eliminated or prohibited, or (c) which aims at bringing about any political, economic, industrial or

social change within the Republic in accordance with the  
directions or under the guidance of or in co-operation  
with any foreign government or any foreign or interna-  
tional institution or organization whose purpose or one  
of whose purposes (whether professed or not) is to bring  
about the establishment within the Republic of any  
economic or social system as contemplated in (a) above  
or any form of government as contemplated in (b) above.

It is plain from the provisions of section 13  
that the legislature intended to completely eliminate an or-  
ganization and all traces of it once it has been declared  
unlawful. No person shall, for instance, 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 that date, sec 13(1)(a)(iv).

Indeed, no person shall carry, be in possession of or display anything whatsoever indicating that he is or was at any time before or after the commencement of the Act an office-bearer, officer or member of or in any way associated with the unlawful organization, sec 13

(1)(a)(ii). No person shall advocate, advise, defend or encourage the achievement of any of the objects of the unlawful organization or objects similar to the objects of such organization, or perform any other act of whatever nature which is calculated to further the

achievement of any such object. Subsection (1)(a)

of section 56 makes it an offence to act in contra-

vention of any one of these injunctions. In this way

the legislature can prevent persons who are within the

reach of the law, i e persons whose identity is known

and who find themselves within the jurisdiction of the

courts, from in any way keeping an unlawful organization

or any of its objects alive.

The purpose of the legislature can, however,

be defeated if and when an organization can manage to

survive and its survival is aided and fostered by

means of publications published or disseminated by

persons who are not within or subject to the jurisdiction

of the courts or who are protected by anonymity. The legislature manifestly intended to overcome this difficulty by means of subsection (1)(c) of section 56 by prohibiting the possession of such publications. Furthermore, a person becoming aware of the fact that he is in possession of such a publication must take reasonable steps to notify the police of his possession or to hand the publication to the police to avoid being prosecuted. In order to cast the net as widely as possible, a wide meaning is given to the word "publication" in section 1, namely, any newspaper, magazine, pamphlet, book, handbill or poster, and includes for the purposes of the subsection, any record

or other object in or on which sound has been recorded  
for reproduction.

It should not be overlooked that the objection  
to the kind of publications contemplated in the subsection  
is not only due to the material contained in them but  
also, and perhaps equally important, to the fact that  
they keep the unlawful organization alive and in the  
minds of the people.

It follows, therefore, that the subsection  
is an important and essential part of the legislative  
scheme to effectively eliminate an unlawful organization  
and to prevent it and its objectives being kept alive

so as to constitute a threat to the security of the State and the maintenance of law and order.

The effectiveness of the subsection is seriously impaired if dolus is an element of the offence created by it because of the relative ease with which it can be evaded. In a criminal prosecution the State will have to establish dolus and its component consisting of knowledge that the publication is of the kind of which its possession is unlawful, beyond a reasonable doubt. If an accused person should rely on the defence that he was unaware that the publication was of the prohibited kind he escapes liability if from all the circumstances it can be inferred that there exists

a reasonable possibility that he did not know, S v De Blom 1977(3) SA 513 (A) 532E-G. It suffices if he subjectively did not know and it is immaterial whether his ignorance was reasonable or not. An objective test does not come into it at all. Whether a person was really ignorant of the prohibition or was so ignorant that he did not know of the possibility of the existence of such a prohibition, could scarcely be determined by any evidence accessible to others. It relates exclusively to what was in his mind.

Thus, having regard to the scope and object of the Act, the context of the subsection, the nature and extent of the penalty and the ease with which the

subsection could be evaded if reliance could be placed on the absence of dolus, the inference is ineluctable that the legislature requires a high degree of circumspection and care on the part of persons finding themselves in possession of a publication which could possibly be of the kind referred to in the subsection. The failure to exercise that degree of circumspection or care constitutes the negligence necessary for a culpable violation of the subsection, S v Arenstein (supra) 366 B-H. In a criminal prosecution in such a case a defence of absence of knowledge that the publication is of the prohibited kind which may not be possessed, can succeed if there is a reasonable possibility

that the accused person cannot be juridically blamed,  
that is to say, that, as far as the circumstances are  
concerned, it is reasonably possible that he exercised  
the required degree of circumspection and care to ap-  
prise himself whether or not it was lawful for him to  
be in possession of the publication, S v De Blom  
(supra) 532F-G.

His ignorance of the prohibition will excuse  
him from liability if his ignorance was in the circum-  
stances reasonable. The test of reasonableness is  
the degree of care and skill which a reasonable man  
would exercise under the circumstances. The test can  
never be disentangled from the facts. The reasonable

man according to R v Mbombela, 1933 AD 269, 272 is

"the man of ordinary intelligence, knowledge and prudence".

This objective test has to be applied in all cases where

negligence is an ingredient of the offence. It is

also applied in cases of self-defence and compulsion

S v Goliath 1972(3) SA 1 (A) 11E-G.

Parliament is well aware of the diverse and  
disparate nature of the various sections of the community  
and their widely different standards of culture, educa-  
tion and social awareness and laws are generally  
speaking made to apply to all criminally responsible  
persons. Difficulties do arise in applying the ob-  
jective test of negligence and that accounts for the

fact that there is sometimes a tendency to personalize negligence or to advocate a subjective test, but as far as our law is concerned the proper test is an objective one. In statutory offences where negligence is an essential ingredient, the objective test must be applied with its unfortunate inherent disadvantages. This is particularly so where it cannot be substituted with the subjective test of dolus which would render the statutory prohibition or injunction ineffective.

The security of the State and the maintenance of law and order are of such great importance to the citizens of the Republic that it is reasonable to suppose that it is well known or relatively easily

ascertainable...../31

ascertainable that organizations, which have and propagate policies and objectives which are of the kind referred to in the Act which tend to threaten the security of the State and the maintenance of law and order, are not tolerated and are by law prohibited.

Publications of the kind referred to in the subsection should in the majority of cases be easily identifiable because it would normally appear from the publication itself or its contents whether it is published or disseminated by or under the direction or guidance or on behalf of an unlawful organization. As indicated above, the significance of the prohibition is that it is intended to prevent the survival of an

unlawful organization and any publication published or disseminated by it or under its direction or guidance is prohibited whether it is a religious treatise or any other kind of innocent intellectual writing. It is not allowed in any way to have any kind of existence.

It is in my respectful view inappropriate and otiose to refer to [ ] other statutory prohibitions of [ ] possession of certain articles or substances in order to ascertain how the question of mens rea was dealt with. It was, with respect, correctly pointed out by Corbett J (as he then was) in the case of S v Smith 1965(4) SA 166 (C), after stating at p 171 what is quoted by my Brother Hefer in his judgment, that in a

number of the cases establishing the prohibition which was quoted, the court failed to distinguish clearly between the mental element necessary to establish custody or possession, as the case may be, and the mental element constituting mens rea.

On the facts of the instant case, the appellant had read the book "Island in chains" and from its contents it should have been obvious to her that it was published and disseminated in the interest or for the benefit of the ANC, an unlawful organization. The subsection requires her to exercise a high degree of circumspection and care. Her plea was that she did not know that it was unlawful to possess the book.

She did not give evidence and there was no evidence

before the court which indicated or suggested that

her absence of knowledge was reasonable in the circum-

stances in which she found herself. The trial court

was in the circumstances entitled to convict her.

In the result I would dismiss the appeal.

ACTING JUDGE OF APPEAL