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Case No 516/87
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IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

Between:

EZRON TSIETSI MENZE Appellant

- and -

THE STATE Respondent

Coram: HEFER, VIVIER et STEYN JJA.

Heard: 9 March 1989.

Delivered: 21 March 1989.

J U D G M E N T

VIVIER JA.

VIVIER JA :-

The appellant was convicted in the Regional Court at Johannesburg on a charge of possessing a certain cassette tape recording ("the cassette") in contravention of sec 56(1)(c) of the Internal Security Act 74 of 1982 ("the Act"). He was sentenced to 18 months' imprisonment of which 9 months was suspended for 5 years on certain conditions. On appeal to the Witwatersrand Local Division the Court confirmed the conviction but set the sentence aside and instead suspended the whole of the said period of imprisonment. With the leave of the Court a quo the appellant now appeals to this Court against his conviction.

At the trial the appellant admitted that he had been found in possession of the cassette. He said that he had

received /

received it about six weeks earlier through the post from an unknown person and that he had listened to it and knew its contents. According to its contents the cassette is a recording of an interview given by Oliver Tambo, the President of the African National Congress ("the ANC") to one Nick Hands. The appellant also admitted at the trial that the ANC was an unlawful organisation for the purposes of sec 56(1)(c) of the Act and that he did not have the necessary consent to be in possession of the cassette.

Section 56(1)(c) of the Act provides that 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 organisation"

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shall, subject to the provisions of certain subsections which are not relevant for present purposes, be guilty of an offence.

The word "publication" is defined in sec 1 of the Act as "any newspaper, magazine, pamphlet, book, hand-bill or poster, and includes, for the purposes of section 56(1)(c), any record or other object in or on which sound has been recorded for reproduction" (my emphasis).

No evidence other than the production of the cassette and a transcript thereof was led before the Court of first instance in proof of the fact that Oliver Tambo was indeed the person interviewed, or that he was the president of the ANC or what the nature, aims and objectives of that organisation were. The State relied solely in this regard on the presump=

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tion created by sec 69(4) of the Act, which provides as

follows :-

- "(4) In any prosecution for an offence in terms of this Act or in any civil proceedings arising from the application of the provisions of this Act, any document, book, record, pamphlet or other publication or written instrument -
- (a) which has been found in or removed from the possession, custody or control of the accused or any party to the proceedings or of any person who was at any time before or after the commencement of this Act an office-bearer or officer or a member or an active supporter of an organization of which the accused or the said party is alleged to be or to have been an office-bearer or officer or a member or an active supporter;
- (b)
- (c)
- and any reproduction of such document, book, record, pamphlet, other publication or written instrument, shall be admissible in evidence against the accused or the said party to the proceedings, as the case may be, as prima facie proof of the contents thereof."

Section 56(1)(c) of the Act is aimed at the possession, without the necessary consent, of any publication published or disseminated by or under the direction or guidance or on behalf of an unlawful organisation. The State's case was that the cassette was published or disseminated on behalf of the ANC.

In S v Moloi and Another 1987(1) SA 196(A) which also concerned a charge under sec 56(1)(c) of the Act, this Court appears to have dealt with a cassette tape recording of the identical interview which was recorded in the present case. BOSHOFF AJA, who delivered one of the judgments of this Court, interpreted the words "on behalf of" in the context of sec 56(1)(c) as bearing a wide meaning such as "in the interest of" or "to the advantage of" or "for the benefit of" as opposed

to a more restricted meaning requiring some official agency, and found that the cassette in question had been published or disseminated on behalf of the ANC. In a separate judgment, GALGUT AJA found it not necessary to deal with the dictionary meaning of the phrase "on behalf of". He regarded the opening words of the cassette in question, which are identical to those in the present case, as significant. They read :-

"Comrade Oliver Tambo, president of the tested vanguard movement in South Africa, the African National Congress, is interviewed by Nick Hands, on the situation in our country. Listen to the voice, representative of all exploited and oppressed in South Africa."

Without referring to the presumption in sec 69(4) of the Act the learned judge said (at p 221 J) that it must be accepted that it was Oliver Tambo's voice to which the

listeners /

listeners were enjoined to listen. He also regarded the evidence that Tambo was the president and head of the ANC as significant, and expressed his agreement (at p 222 C-D) with the view of GOLDSTONE J in the Court a quo that the opening words indicated beyond a reasonable doubt that the cassette in question was published or disseminated under the direction or guidance or on behalf of the ANC. After adding that the whole contents and tenor of the recording confirmed that view, GALGUT AJA went on to say the following at p 222 D-F :-

"Even if it were suggested that someone simulated Oliver Tambo's voice and that he was not party to the interview, there would, nevertheless, be no doubt that the cassette was published or disseminated on behalf of the ANC. My reasons for this conclusion are as follows. Such authors of the cassette would only have used the name Oliver Tambo (and possibly simulated his voice) to lend credence to what is said therein. The whole purpose of so

doing/.....

doing would be to give emphasis to what is said in the rest of the cassette. That would be done to further the aims of the ANC."

TRENGOVE JA concurred in the judgment of GALGUT AJA and VILJOEN and JACOBS JJA agreed with both judgments as far as the appeals of the two appellants against the convictions were concerned.

The interpretation of the phrase "on behalf of" in sec 56(1)(c) in Moloi's case was confirmed by this Court in S v Melk 1988(4) SA 561 at 574 D-H. In the latter case one of the issues was whether a certain book written by Indres Naidoo, a member of the ANC, which had been found in the possession of the appellant was published or disseminated on behalf of the ANC. Dealing with the contention advanced on behalf of the appellant that without evidence relating to

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the aims and objectives of the ANC the Court could not find that the book in question served the interests of the ANC or that its publication and dissemination would be to the advantage or for the benefit of the ANC, HEFER JA said the following at p 575 A-C :-

"These submission are without substance. Any publication which seeks to advance the cause of an organisation, 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 organisation, whatever its interests may be; such a publication is plainly for its benefit and to its advantage."

In the light of the decisions of this Court in the cases of Moloi and Melk, supra, Mr Joseph, who appeared on behalf of the appellant, did not pursue the contention in his written heads of argument that the words "on behalf of" in

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the sub-section should be restrictively interpreted as connoting the notion of knowledge by or agency of the unlawful organisation.

In my view the decisions in these two cases make it unnecessary to deal with the sole contention advanced by Mr Joseph before this Court. Mr Joseph submitted that the presumption created by sec 69(4) of the Act does not apply to a cassette so that there was consequently no evidence before the trial Court that Oliver Tambo was a party to the interview or that he was the president of the ANC. For the same reason, he contended, there was no evidence relating to the aims and objectives of that organisation. Without such evidence, Mr Joseph submitted, it could not be shown that the cassette was published and disseminated in the interest of the ANC or for its benefit or to its advantage. Even assuming that such evidence /

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evidence was lacking, the passages from the judgments in the cases of Moloi and Melk, which I have quoted above, provide the complete answer to Mr Joseph's submission. He did not advance any reason why this Court should take a different view from what is said there. The interview recorded on the cassette in the present case clearly seeks to advance the cause of the ANC by explaining and praising its achievements, its strategies and its noble and just cause, so that, whatever its true aims and objectives may be, its interests are served by the publication and dissemination of the cassette. Such a publication is clearly for its benefit and to its advantage. And even if the person interviewed was in fact not Oliver Tambo, his name was clearly used to lend credence to what is said, so that there would, nevertheless, be no doubt that

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the cassette was published or disseminated on behalf of the ANC or to its advantage and for its benefit.

Although the appellant's conviction should be upheld for the reasons which I have given, I, nevertheless, proceed to deal with Mr Joseph's submission that the presumption in sec 69(4) of the Act does not apply to a cassette.

Mr Joseph's submission, as I understood it, was that the words "or other object in or on which sound has been recorded for reproduction" in the definition of "publication", which would clearly include a cassette, were deliberately omitted in sec 69(4) because the Legislature, although it intended to create an offence under sec 56(1)(c) in respect of a cassette, did not intend the presumption in sec 69(4) to apply to a cassette. Mr Joseph suggested that the

reason why the Legislature did not intend the presumption to operate in a prosecution for the possession of a cassette in contravention of sec 56(1)(c) was that it was so easy to falsify or forge a cassette.

I am unable to agree with the interpretation contended for by Mr Joseph. In the first place the definition of "publication" in sec 1 of the Act includes, "for the purposes of section 56(1)(c)" a cassette. That must mean, in my view, for all purposes of sec 56(1)(c), thus also for a prosecution under sec 56(1)(c), and not merely for the limited purpose of creating an offence under that sub-section. Secondly, the interpretation contended for by Mr Joseph would mean that the word "publication" in sec 69(4) must be given a restricted meaning different to that in the definitions

clause or that it is tautologous if a cassette or similar object, not being "any document, book, record, pamphlet or other written instrument" was intended to be excluded from sec 69(4). In my view there is no justification for giving the word "publication" in sec 69(4) a meaning different to the one contained in the definition clause. I agree with the Court a quo that the interpretation advanced by Mr Joseph would lead to a strained construction which could never have been the intention of the Legislature. I am accordingly of the opinion that the presumption in sec 69(4) applies to the present case and that the cassette and the transcript thereof were admissable in evidence against the appellant as prima facie proof of the contents thereof. In the absence of gainsaying evidence the trial Court was,

in my view, perfectly correct in finding that the State had proved both the identity of the person interviewed and the contents of what he said concerning the aims and objectives of the ANC. Mr Joseph correctly conceded that once that was proved the cassette was published or disseminated on behalf of the ANC.

For these reasons the appellant was, in my view, correctly convicted. The appeal is dismissed.

W. VIVIER JA.

HEFER JA)
STEYN JA) Concur.