

PETER THABO MOLOI

1st Appellant

JACOB MASHEGO

2nd Appellant

and

THE STATE

Respondent

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

PETER THABO MOLOI

1st Appellant

JACOB MASHEGO

2nd Appellant

and

THE STATE

Respondent

Coram: Trengove, Viljoen, Jacobs, JJ A , Galgut

et Boshoff, A JJ A

Heard: 15 May 1986

Delivered: 23 September 1986

J U D G M E N T

BOSHOFF A J A :

On the 8 th November 1982, in his room

in...../2

in Diepkloof Johannesburg, the first appellant, after having been arrested handed over to the police a cassette tape which he had in his possession. The cassette was a tape recording of an interview which one Nick Hans had with Mr Oliver Thambo, the president of the African National Congress (ANC).

On the same day at about 14h30 the police found the second appellant in the crowded Bar of the Diepkloof Hotel where he was with 4 friends drinking beer and playing a tape recording of music and speeches. They arrested him for being in possession of the cassette tape and playing the tape recordings in the presence of all the persons present in the Bar.

The two appellants were charged in the regional court, Johannesburg, on two counts of contravening the provisions of the Internal Security Act No 74 of 1982 (the Act).

The ANC having been declared an unlawful organization in terms of Proclamation 119 of 1960, is an unlawful organization under the provisions of the Act.

On count one the appellants were charged with contravening section 13(1)(a)(iv) read with sections 56(1)(a) of the Act in that they took part in an activity of an unlawful organization, or carried on in the direct or indirect interest of the unlawful organization any activity in which it was or could have engaged at the date on which the organization was declared an unlawful organization.

On count two they were charged with contravening section 56(1)(c) read with section 56(1)(ii) of the Act in that they without the consent of the Minister of Law and Order wrongfully and unlawfully had in their possession publications to wit, cassette tapes, published or disseminated by or under the direction or guidance or on behalf of an unlawful organization.

In reply to a request for further particulars to count one the State alleged that the activities in which the appellants had taken part or had carried on were advocating, promoting, advising, defending or encouraging the achievements of any of the objects or objects similar to the objects of the ANC.

Both appellants pleaded not guilty. At the conclusion of the case the first appellant was found not guilty on count 1 and convicted on count two.

The second appellant did not give evidence on his own behalf and it was conceded by Mr Kuny, who then appeared for him, that the cassette tape which was found in his possession and which he had played in the Bar of the Diepkloof Hotel contained recordings which prima facie were issued on behalf of the ANC. The magistrate found that the recordings were intended amongst other things to canvass support and sympathy for the ANC, to create a particular climate, to promote the objects of the ANC and to break down the existing system. The magistrate

consequently...../6

consequently convicted the second appellant on both the counts.

First appellant was sentenced on count two to two years imprisonment of which 1 year was conditionally suspended for 5 years.

Second appellant was sentenced, on count one to 5 years imprisonment of which 2 years were conditionally suspended for 5 years, and on count two to 1 year imprisonment which was to be served concurrently with the sentence imposed on count one.

The first appellant appealed against his conviction and sentence and the second appellant appealed against

his...../7

his conviction on the first count and the sentences imposed on both counts. On appeal to the Transvaal Provincial Division Myburgh AJ, with whom Goldstone J concurred, dismissed the appeal of both the appellants except for the appeal of the second appellant against the sentence on the first count which sentence was reduced to 3 years imprisonment of which 1 year was conditionally suspended for 5 years. Leave to appeal to this court was granted to the first appellant in respect of his conviction and sentence and to the second appellant in respect of the sentences imposed on both counts.

Section 56(1)(c) of the Act in respect of which the appellants were convicted 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 organization",

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

In the regional court the first appellant disputed that he was ever in possession of the cassette
tape in question or that he knew anything about it. The
regional court rejected his evidence and found that he
was in possession thereof and had handed it over to the
police and also that he knew what was recorded on the tape.

This/9

This finding was not challenged in the court a quo and is not being challenged in this court.

It is not disputed that the cassette tape is a publication by virtue of the definition of "publication" in section 1 of the Act and that the first appellant did not have the consent of the Minister of Law and Order, the relevant Minister in terms of section 1 of the Act, to be in possession of the cassette tape.

Since the first appellant had denied that he was ever in possession of the cassette there is no evidence as to how he came to be in possession of it. The very fact that he was in possession of it is at least prima

facie...../10

facie evidence that it was published or disseminated by the person or persons who either made the tape recording of the interview with Mr Oliver Thambo or caused it to be made.

In the Afrikaans text which was signed by the State President the words "uitgegee of versprei word" are used for the words "published or disseminated".

There is no direct evidence that it was published or disseminated by or under the direction or guidance or on behalf of the ANC and the prosecution in this regard had to rely on (a) the nature and subject matter of the interview that was recorded and the fact that the interview was with the president of the ANC, and (b) the nature and objectives of the ANC as a revolutionary organization

and...../11

and the methods employed by it to achieve its objectives
as explained by Mr De Vries a lecturer in Political Science
at the Rand Afrikaans University. Mr De Vries has a
M A degree in Political Science and has made a special
study of the activities of revolutionary political groups
in South Africa including the ANC. He studied and analysed
a transcription of the cassette tape against the background
of the ANC as a revolutionary political organization and
in his report on the transcription and also in his evidence
in the regional court expressed the view that the cassette
tape was published to promote the achievement of the
objects of the ANC. He was able to show the nature and
the objectives of the ANC and the methods employed by it

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to achieve those objectives from the official publications of the ANC and speeches made by Mr Oliver Thambo as the president thereof.

The regional court found that in the interview in question the objectives and the deeds of the ANC were propagated in such a way that the ANC could benefit thereby, the ANC was venerated and the existing system which prevails in South Africa together with the leaders was denigrated. According to the regional court it was manifest that the cassette tape was published for the benefit of the ANC and thus "on behalf of" the ANC within the meaning of the words in section 56(1)(c) of the Act. The regional court thus convicted the first appellant.

On appeal in the court a quo Myburgh AJ in dismissing the appeal held that the words "on behalf of " suggested some form of agency and came to the conclusion that, judging from the words used in the interview, the cassette tape was published on behalf of the ANC itself and to promote support for it. The learned judge dealt with the matter as follows:

"Mr Oliver Thambo being the president of the ANC can surely be regarded at least as an agent of the ANC and what he does in this interview is clearly to promote a publication on behalf of the ANC through Nick Hans. The very fact that the interview was tape-recorded proves beyond doubt that he was hopeful that his words would be heard by as big an audience as possible. That was his very purpose of recording this

interview...../14

interview on the tape recorder. That he succeeded in his efforts as understood by me, is proved by the fact that this recording actually found its way into the possession of the first appellant. I must draw attention to the fact that the words "on behalf of " clearly suggest some form of agency. In this case we are concerned with the president himself who is about his business to promote his organisation. But I think the meaning of the words "ten behoewe van" in the Afrikaans version which was signed, has this meaning:

'Ten behoewe van: tot voordeel van,
ten bate van.'

That this document was for the benefit of the ANC is beyond dispute, but I do not want to be involved in resolving the difference between the Afrikaans text and the English text. If one merely looks at the beginning of the tape recording in my view the matter is resolved. It appears on page ⁽¹⁸²⁾ 163. We do not know who speaks, but there is

a voice at the beginning of the cassette which says the following:

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

Then the first question is asked by the speaker:

'Mr Thambo, have the South African authorities been able to subvert the ANC to a degree that its usefulness as an instrument to overthrow the Pretoria Government has been blunted.'

Then he gives the answers and it is a long interview which according to the very tenure thereof is to gain support for the ANC to overthrow what is called the Pretoria Government. Further it is said that the ANC has called on the people to fight, to resist, to attack and 'let us change our own country

into the kind of society we want it to be'. From the wording that I have quoted it is in my view beyond dispute that this document was a document issued according to the very wording thereof on behalf of the ANC and in terms of the section to disseminate information about the ANC itself and to promote support for it.

On the facts before us, therefore, the point raised as not having been issued on behalf of the ANC, is void of any merit and I need not deal with the matter any further."

Goldstone J in a concurring judgment said:

"I would only make clear my own view that with regard to the conviction of the first appellant, the opening words

which...../17

which My Learned Brother quoted from the tape recording indicate to me beyond a reasonable doubt that the cassette in question was published or disseminated under the direction or guidance or on behalf of the African National Congress. It is therefore not necessary in their case to decide whether the words in the Afrikaans version 'ten behoewe van' should be given a wide or narrow meaning."

In this court Mr Mahomed on behalf of the first appellant challenges the correctness of the conviction in the regional court mainly on the ground that the evidence does not establish that the cassette tape was published or disseminated "by or under the direction or guidance or on behalf of the ANC."

He is to a very large extent relying on the

dictionary meaning of the words "under the direction of", "under the guidance of" and "on behalf of" and the circumstances in which interviews are ordinarily held and the general practice of conducting interviews with political leaders. He however does not refer to the manner in which this particular interview was conducted, the subject matter of the interview and the manner in which the subject matter was presented. Since the cassette tape itself is evidence in the case it is proper and convenient, first of all, to refer to the transcription of it. The opening words are:

"Comrade Oliver Thambo, president of the
tested vanguard movement in South Africa,

the...../19

the African National Congress, is interviewed by Nick Hans, on the situation in our country. Listen to the voice, representative of all exploited and oppressed in South Africa."

Questions are then asked by the interviewer to afford Mr Oliver Thambo an opportunity to elaborate on the part played and still being played by the ANC in the struggle for liberation in South Africa. Questions put to him are dealt with by Mr Oliver Thambo in substance in the following way. Referring to the usefulness of the ANC as an instrument to overthrow the South African Government, he said that over the years the ANC had developed tremendous strength and a powerful presence in the country, gained

immense...../20

immense support from their people and internationally,
and its own striking power had increased. Major problems
had been resolved and it was on the way to taking the
offensive against the South African regime. The recent
operations particularly with respect to the explosions
at various oil depots about the country were testimony
to that and in a way this could be seen as only the beginning.
He then dealt with the strategy of the ANC, (a) to topple
the South African regime in the light of the fact that
neighbouring African States had become independent, and
(b) to transform the character of the South African Society.

When asked what his reaction was to the "current
useful unrest dissidence that is being manifest", he

said...../21

said that it was inevitable that there should be unrest, the life their people were leading in their own country was unbearable, it was a life of violence in a state of perpetual violence, the violence of the whole oppressive system and so the people seek to destroy that system. He then referred to what he termed areas of injustice and concluded that there was no answer to this apart from the people taking their own destiny into their own hands and changing the system. According to him it could be changed because they had seen the system collapse in Africa.

When asked about the short-term objectives of the ANC and selected sabotage he replied that he did not know whether he could reveal what to expect except that the

people of South Africa reckoned that the hour of freedom and liberation for them had come. The ANC had called on the people to fight with everything they have and on all fronts wherever they are; at all levels to challenge and to oppose injustice, to demand what was their due and grow from strength to strength in unity. One of the weapons at the disposal of their people was Mkhonto We Sizwe.

It was the pride of the people and the only thing they had; for the first time they could answer back and so they had to develop the strength of the army, its power, its striking capacity, its effectiveness. Mkhonto We Sizwe would also attack on all fronts, they would attack everything, they would simply mount and intensify the offensive because the

moment of their liberation was at hand; there was nothing to wait for. The continued sabotage of economic targets under which oil depots and refineries could be classified was not the limit. The ANC urged all people, whether they be church people, workers on the labour front, the youth, the students, the mothers of that nation, the workers on the farms and those in the reserves to join forces and to act together and that was in fact happening. Actions involved scholars, peoples, students, professors, churchmen, workers, everybody, the whole nation. Therefore they were moving in the direction in which they would in fact be engaging the forces of repression and oppression and exploitation on all fronts. Oliver Tambo referred

to...../24

to the positive contribution of persons like Dr Motlana and Percy Qoboza as being useful to the aims of the ANC.

According to him the aims of the ANC were the aims of the oppressed, the exploited in South Africa, the victims of racism and of all right thinking South Africans.

When the ANC therefore said that their people should fight wherever they were, in whatever sphere they were involved, they had to oppose this system, they had to advance the cause of their own liberation actively in concrete forms.

According to him the statements of Gatsha Buthelezi ran counter to the positions of the ANC. No African should assist the oppressor and the repressor. No Black should join the South African Police or the South African Army.

As far as white South Africans were concerned he said that it was the role of the ANC to employ every means to draw their attention to the need for a very different type of society in South Africa. It was relying on the international community in its own area of action to bring this lesson home. This was why it had called for the isolation of South Africa.

In this interview Mr Oliver Thambo certainly discusses the aims, objects and deeds of the ANC and the strategy and methods employed by it to achieve the objectives, but it is done in such a way as to encourage listeners who are members of the so-called oppressed, repressed and exploited people of South Africa to regard the ANC and its

members as their representatives and to assist them in whatever they do or advocate to be done to achieve their liberation. In fact he urges all people, whether they are workers on the labour front, the youth, the students, the mothers of their nation, the workers on the farms and those in the reserves to join forces and act together.

Moreover in the introductory statement to the interview listeners are called upon to listen to the voice of the president of the tested vanguard movement in South Africa, the ANC, representative of all exploited and oppressed in South Africa.

To this extent it cannot be said that the interview is of the kind which is ordinarily held with political

leaders on the radio or published in the newspapers. It was clearly held and recorded on tape for the sole purpose of publishing it to serve the interests of the ANC. If regard is had to what is sought to be achieved by the publication of the cassette tape, it is difficult to imagine who other than the ANC would have had any real interest in the publication thereof.

This may be so but does it prove that the cassette tape was published or disseminated by or under the direction or guidance or on behalf of the ANC?-

The words that fall for consideration are "by", "under the direction of", "under the guidance of", and

"on behalf of". In the Afrikaans text which was signed by the State President the words "deur", "onder voorskrif van", "onder leiding van" and "ten behoewe van" are used.

According to the dictionaries the words "by" and "deur" both signify "medium, means, instrumentality and agency." The words "under the direction of" and "onder voorskrif van" refer to the action or function of directing: of instructing how to proceed or act aright; authoratative guidance, instruction; management, administration. The words "under the guidance of" and "onder leiding van" indicate the action of guiding, leadership, direction.

The words "by", "under the direction of" and "under the guidance of" according to their dictionary meanings therefore require some active participation by the ANC in the publication or dissemination of the cassette tape.

The fact (a) that the cassette tape was prima facie published or disseminated, and (b) that its contents could only have served the interests of the ANC give rise to an inference that it was published or disseminated by or under the direction or guidance of the ANC itself but that is not the only possible inference. Another possible and in the circumstances conceivable inference is that an independent sympathiser of the cause of the ANC could have arranged for the interview to be held

with Mr Oliver Thambo, could have had it tape-recorded for publication or dissemination and thereafter could have had it published and disseminated in which event the ANC itself would not have had active participation in its publication or dissemination. The evidence does not exclude this lastmentioned possible inference.

The regional court however found that the cassette tape was published or disseminated "on behalf of the ANC" within the meaning of this phrase in the context of section 56(1)(c) of the Act. In coming to this conclusion the regional court relied on the meaning of the phrase "ten behoewe van" in the Afrikaans text of the Act. According to the Verklarende Handwoordeboek van die

Afrikaanse Taal of Odendaal, Schoonees, Swanepoel, Du Toit,

Booyesen s v "behoewe" the expression "ten behoewe van"

means "tot voordeel van, ten bate van". The regional

court consequently in effect held that when regard is had

to the subject matter of the cassette tape it was manifest-

ly published or disseminated for the benefit of or to

the advantage of the ANC. On this construction of the

phrase "ten behoewe van" and consequently also of the

phrase "on behalf of" no participation by the ANC in the

publication or dissemination of the cassette tape is

necessary.

Mr Mahomed contends to the contrary that par-

ticipation by the ANC is necessary on the correct meaning

of the phrase "on behalf of" in the context of the section.

According to him there are two possible meanings to be

assigned to the phrase. The first meaning is the wider

meaning which would include an act in the interests of

or to the advantage of somebody else but performed without

his authority. The second is a narrow meaning which

confines the application of the phrase to cases where the

publication is done by a representative or agent of another

person. The distinction between the two concepts is

explained by Innes CJ in the case of De Visser v Fitzpatrick

1907 TS 355 at p 363:

"The popular meaning of those words
is that everything done for a man's
benefit or in his interest or to his

advantage...../33

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. The counsel who have so ably argued this case appeared 'on behalf of' their respective clients, as their representatives or agents. If A signs a bill for and on behalf of B, he signs that bill purporting and having the power to represent B, that is, as B's agent. The question remains, in what sense are the words 'on his behalf' to be taken here - in the wide and general sense, or in the narrow and legal sense?"

See also Lind v Spicer Bros (Africa) Ltd

1917 AD 147 at p 151; SA Warehousing Services Pty Ltd

and others v British Insurance Co Ltd 1971(3) SA 10(A)

at p 20.

This distinction also appears from the dictionary meaning of the phrase. The Oxford English Dictionary

Vol 1 s v "behalf" gives the two meanings to the phrase.

The first is the notion of official agency as meaning

"on the part of (another), in the name of, for, instead

of"; the second the notion of interposition in the

sense of "in behalf of" and meaning "in the interest

of, as a friend or defender of, for the benefit of".

In the 1978 Sixth Impression of The Concise Oxford

Dictionary s v "behalf" the phrases "on or in

behalf of" are used interchangeably, both meaning

"in the interest of (person, principle, etc), as repre-

sentative of".

The phrase "ten behoewe van" as used in the Afrikaans language seems to have only one meaning.

According to the official Woordeboek van die Afrikaanse Taal Vol 1 s v "behoewe" it means "tot voordeel van, ten bate (dienste) van". The Verklarende Afrikaanse Woordeboek, Kritzinger, Labuschagne, Pienaar, gives the meaning as "ten bate of ten dienste van, tot voordeel van". The Kernwoordeboek van Afrikaans, De Villiers, Smuts, Eksteen gives the meaning "tot voordeel van, in belang van".

It is trite law that in the construction of statutes the ordinary meaning of the words used must be adhered to, unless that meaning is at variance with the intention of the legislature to be collected from the

statute or leads to some absurdity or repugnance. The ordinary meaning of the phrase "on behalf of" conveys the notion of official agency which the phrase "ten behoewe van" in the Afrikaans signed text does not. They however both include the notion of interposition, meaning "in the interest of, for the benefit of".

Section 35 of the Republic of South Africa Constitution Act, no 110 of 1983 provides for an English and Afrikaans copy of every statute (one of which shall be signed by the State President) to be enrolled of record in the office of the registrar of this court, and also that such copies are conclusive evidence as to the provisions of every such law and that

"in case of conflict between the two
copies so enrolled that signed by
the State President shall prevailed."

Because both phrases have the common meaning
of "in the interest of, for the benefit of" they are
capable of reconciliation on the basis of their common
meaning and there is thus no question of a conflict
between the two of them. The common meaning is conse-
quently to be regarded as conveying the intention of
the legislature, see New Union Goldfields Ltd v Com-
missioner for Inland Revenue 1950(3) SA 392(A) at
p 406 C-H as followed in the case of S v Moroney 1978(4)
SA 389(A) at p 407H-408D.

Mr Mahomed in effect argues that the phrase "ten behoewe van" in the context of the section and in the light of the scope and purpose of the Act should have the meaning which conveys the notion of official agency which requires participation by the unlawful organization in order for the publication or dissemination to fall within the terms of section 56(1)(c). In support of this contention he relies on the provisions of sections 13(1)(a)(iv) and 56(1)(o) where the phrases "in the direct or indirect interest" and "for the direct or indirect benefit of" (and "direk of indirek ten voordele van" and

"tot regstreekse of onregstreekse voordeel van" in the Afrikaans text) are used. According to him the legislature would have used such all embracing and comprehensive phrases if it intended to exclude participation by the unlawful organization in section 56(1)(c).

In my view this example and the scope and purpose of the Act do not support the contention. As the long title of the Act shows, 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.

If the Minister is satisfied, for instance, that any organization engages in activities which endanger or are calculated to endanger the security of the State

or the maintenance of law and order or that the purpose or one of the purposes of any organization is to propagate the principles or to promote the spread of communism, he may by notice in the Gazette declare that organization to be an unlawful organization (sec 4(1)). One of the consequences of such a declaration is that no person shall 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 date of the declaration (sect 13(1)(a)(iv)). The Minister may by notice in the Gazette prohibit all persons, for instance, who, at any time before or after any organization has been

declared..../41

declared to be an unlawful organization, were or are
office-bearers, officers or members of that organization,
from (i) being or becoming office-bearers, officers
or members, (ii) making or receiving any contribution
of any kind for the direct or indirect benefit, or
(iii) in any manner taking part in any activity, of
any particular organization or any organization of a
nature, class or kind specified in such notice (sect 22(1)).

Any person who in contravention of a notice under section
22 is or becomes an office-bearer or officer or a member
of, or makes or receives any contribution of any kind
for the direct or indirect benefit of, or participates
in any manner in any activity of any organization, is

guilty...../42

guilty of an offence (section 56 (1)(o)).

It is apparent from these sections that the phrases "in the direct or indirect interest of" and "for the direct or indirect benefit of" are used in a totally different context and do not throw any light on the meaning of the phrase "ten behoewe van" or even "on behalf of" for that matter. What the sections however do show is that it was the intention of the legislature to ensure that its enactments and the steps taken thereunder for the security of the State and the maintenance of law and order, are rendered as all embracing and effective as possible.

This intention is also apparent from the use

of the words "by", "under the direction of", "under the guidance of" and "on behalf of" in the sense of "ten behoewe van" in section 56(1)(c).

In the case of S v Mabitselo 1985(4) SA 61 (T) at p 65, Kirk-Cohen J inferred this intention from the use by the legislature of the words "published or disseminated".

Mr Mahomed also argues that if participation by an unlawful organization is not required then any person in possession of foreign or local publications which publish an article with or without the knowledge or consent of the unlawful organization, and which on a reasonable construction thereof, might be to the ad-

vantage...../44

vantage or benefit of the organization, would commit an offence. That of course does not state the position correctly. The offence will only be committed on these facts if the publications were published or disseminated in the interest or for the benefit of the unlawful organization. The publications which Mr. Mahomed has in mind in this hypothetical instance cannot be said to have been published or disseminated in the interest or for the benefit of the unlawful organization. If however they should be publications published or disseminated for the benefit of the unlawful organization, the person in possession thereof and being aware that they were so published or disseminated may in terms of section 56(2) not be convicted

of an offence if he took reasonable steps to report the fact of his being in possession of such publications to a police officer, or to deliver them to a police officer.

It follows from all this that the contentions of Mr Mahomed cannot be sustained and that the regional court was correct in holding that the first appellant was in possession of the cassette tape published or disseminated "on behalf of" an unlawful organization within the meaning of the phrase "on behalf of" in section 56(1)(c).

The appeal against the conviction of the first appellant on count two consequently cannot succeed.

In the appeal against the sentences it is

convenient first of all to deal with the sentences imposed on the second appellant. He was in possession of a cassette tape with ANC revolutionary songs and speeches praising violence and calling upon the people to use armed force to overthrow the Government and the social order. On the 3rd October 1982 he played the cassette tape in the presence of a friend until his mother asked him to stop. On the 8th October 1982 he was with friends in the Bar of the Diepkloof Hotel and left to fetch the cassette tape which he then proceeded to play in the crowded Bar. Mr Mahomed argues that the people in the Bar were under the influence of liquor and not interested in the music and speeches on the cassette tape. The

second appellant did not give evidence in the regional court and did not explain how he came to be in possession of the cassette tape and why he played it in those circumstances. The fact remains that there were people in the Bar who joined in the singing when some of the songs were being played. According to Mr De Vries, the lecturer in Political Science, it is part of the strategy of the ANC to publish and disseminate tape recordings on cassette tapes to promote the achievement of the objects of the ANC. Revolutionary songs are used to "legitimize" revolutionary violence, to create a revolutionary atmosphere and to mount support for the ANC. It is conceivable that a place like a Bar where people gather and often

like to sing may be a suitable place to play these recordings so that they can get to know and sing these revolutionary songs. People in a crowd and under the influence of liquor are usually more irresponsible than sober people and more susceptible to this kind of incitement.

He is 25 years old and has never been in fixed employment. He left school in standard 9 and according to his mother had to return to school which he never did. He in the meantime had an accident and is troubled with his leg in which he has a metal pin. He has a number of previous convictions for offences including malicious injury to property, robbery and trading in

liquor without a licence. The regional court disregarded these previous convictions since it was of the view that they related to offences of a kind different to the two in respect of which it had to sentence him.

On the first count, for taking part in an activity of the ANC or carrying on an activity in the direct or indirect interest of the ANC by playing the ANC cassette tape with the revolutionary songs and speeches in the Bar in the Diepkloof Hotel, he was sentenced to 5 years imprisonment of which 2 years were conditionally suspended for 5 years. In terms of section 56(1)(i) of the Act he was liable to imprisonment for a period not exceeding 10 years.

On the second count for possessing this cassette tape which was published or disseminated by the ANC, he was sentenced to 1 year's imprisonment which was to be served concurrently with the sentence on the first count.

In terms of section 56(1)(ii) of the Act, he was liable to be imprisoned for a period not exceeding 3 years.

It appears from the judgment of the court that the sentence on this count was ordered to be served concurrently with the sentence on the first count because the court was of the view that there was some relationship between the two counts since it was the cassette tape

that...../51

that he had in his possession that he played in the Bar.

On appeal to the Transvaal Provincial Division the court interfered with the sentence imposed on the first count on the basis that it was unduly severe and also because of the state of intoxication of the persons in the Bar when the cassette tape was being played, and reduced the sentence to 3 years imprisonment of which 1 year was conditionally suspended for 5 years.

It is trite law that the determination of a sentence in a criminal matter is pre-eminently a matter for the discretion of the trial court. In the exercise of this function the trial court has a wide discretion

in deciding which factors it should in its opinion allow to influence it in determining the measure of the punishment; R v S 1958(3) SA 102(A) at p 106B. This court will not readily differ from the trial court in its assessment either of the factors to be had regard to or as to the value to be attached to them. Where, however, the dictates of justice are such as clearly to make it appear to this court that the trial court ought to have had regard to certain factors and that it failed to do so, or that it ought to have assessed the value of those factors differently from what it did, then such action by the trial court will be regarded as a misdirection on its part entitling this court to

consider...../53

consider the sentence afresh, see S v Fazzie and others

1964(4) SA 673(A) at p 684 A-C. The word misdirection

predicated in this context means an error committed

by the trial court in determining or applying the facts

for assessing the appropriate sentence. As the essential

inquiry in an appeal against sentence is whether the trial

court in imposing it exercised its discretion properly

and judicially, a mere misdirection is not by itself

sufficient to entitle this court to interfere with the

sentence; it must be of such a nature, degree, or serious-

ness that it shows, directly or inferentially that the

trial court did not exercise its discretion at all or

exercised..../54

exercised it improperly or unreasonably. Such a misdirection is usually and conveniently termed one that vitiates the trial court's decision on sentence, see

S v Pillay 1977(4) SA 531 (A) at p 535 D-G.

The regional court took into account all the relevant factors and considerations in sentencing the second appellant and Mr Mahomed has not been able to show that it misdirected itself in any way in exercising its discretion. The Transvaal Provincial Division on appeal reduced the sentence on the first count and it is not necessary for this court to express any view in that regard. It suffices to say that as far as the sentences on both counts are concerned Mr Mahomed has also not shown

that they are shockingly inappropriate or such that they could not reasonably have been imposed, see S v M 1976(3) SA 644 (A) at pages 648 H to 650 F.

The first appellant was in possession of the cassette tape with the recording of the interview with Mr Oliver Thambo and which was published or disseminated to promote the achievements of the objects of the ANC, a revolutionary political organization. One of the objects was to overthrow the regime and the current social system by force with armed violence. The regional court found that he had kept this cassette tape in his room and that there was no indication that he had made it available to other persons or that he had the intention

of so doing and sentenced him to 2 years imprisonment of which 1 year was conditionally suspended for 5 years.

The first appellant is 24 years old and has a clean record. He is a qualified school teacher and was employed by the Church of the Province of Southern Africa as an assistant secretary up to the time of his arrest. His father is a priest and is attached to the Cathedral of St Mary in Johannesburg. He was previously a director of mission for the diocese of Johannesburg. Rev Davies, a director of the department of admission of the aforementioned church, had known the first appellant since January 1981 and described him as a well-intentioned and well-meaning person. He expressed the belief that

the first appellant had a very good and sound upbringing in his family home and that if he went to prison he would be open to the influence of bad elements in prison.

It will be observed that the first appellant, although he was convicted on the same count as the second appellant, was given a more severe sentence than the second appellant. The question arises whether this court can interfere with his sentence on the ground of this disparity.

It has already been pointed out by this court that, though uniformity of sentences, that is of sentences imposed upon accused persons in respect of the same

offence, or in respect of similar offences or offences of a kindred nature, may be desirable, the desire to achieve such uniformity cannot be allowed to interfere with the free exercise of his discretion by a judicial officer in determining the appropriate sentence in a particular case in the light of the relevant facts in that case and the circumstances of the person charged, S v Reddy 1975(3) SA 757 (A) at pp 759 H- 760A; S v Scheepers 1977(2) SA 154 (A) p 158 F-H.

In the case of S v Jackson 1976(1) SA 437 (A) at p 439 A-B, Botha JA refers to the principle that sentences can be set aside and corrected on appeal only if they are vitiated by misdirection or irregularity or

if they are, having regard to all the relevant circumstances of the case and of the accused persons, disturbingly inappropriate, but not by reason only of the fact that they are not in conformity with the sentences imposed upon the other accused persons. He then proceeds as follows:

"Dit is slegs waar die gebrek aan een-vormigheid in die opgelegde vonnisse willekeurigheid aan die kant van die regterlike amptenaar openbaar dat 'n hof moontlik op appèl sou kan ingryp, soos bv waar daar 'n gebrek aan een-vormigheid in die vonnisse is wat opgelê is aan persone wat ten opsigte van dieselfde misdryf saam aangekla en veroordeel is, ondanks die feit dat die tersaaklike omstandighede met betrekking tot die onderskeie veroordeeldes redelikerwys dieselfde is."

In the case of S v Giannoulis 1975(4) SA

867 (A) at pages 871 A-873 H, Holmes JA reviews judicial pronouncements over the past 60 years on the question of disparity of sentences and extracts the following therefrom:

"1. In general, sentence is a matter for the discretion of the trial court. Disparity in the sentences imposed on participants in an offence (whether tried together or in separate courts) will not necessarily warrant interference on appeal. Uniformity should not be elevated to a principle, at variance both with a flexible discretion in the trial court and with the accepted limitation of appellate interference therewith.

2. Where, however, there is a disturbing disparity in such sentences, and the

degrees...../61

degrees of participation are more or less equal, and there are not personal factors warranting such disparity, appellate interference with the sentence may, depending on the circumstances, be warranted. The ground of interference would be that the sentence is disturbingly inappropriate.

3. In ameliorating the offending sentence on appeal, the Court does not necessarily equate the sentences: it does what it considers appropriate in the circumstances."

The cassette tapes which the appellants possessed in contravention of the Act were published or disseminated for the purposes of the ANC to promote the achievements of its objects which are directed against the security of the State and the maintenance of law and order.

The penalty provided in the Act is a period of imprisonment not exceeding 3 years and the regional court correctly regarded their offence as serious. The first appellant lied to the court and denied that he ever possessed it. The second appellant did not give evidence. Both appellants thus failed to explain the circumstances in which they came to be in possession of the cassette tapes. The second appellant used his cassette tape by playing it in the Bar of the Diepkloof Hotel for which act he was sentenced. The regional court rightly or wrongly related the possession of the cassette tape to the playing of it and consequently took into account the sentence imposed for playing it when he imposed

appellant especially when punishment has to be assessed to meet the deterrent, preventive, reformative and retributive ends of criminal justice.

The regional court had regard to the different circumstances personal to the appellants and it is difficult to know from the reasons for sentence to what extent the fact that the second appellant was also sentenced for playing the cassette tape which he had in his possession influenced it to impose the kind of disparate sentences it did despite the unequal personal circumstances of the appellant.

In any event, as has been mentioned above,

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the trial court had a wide discretion in deciding which factors it should in its opinion allow to influence it in determining the measure of the punishment of the respective appellants and this court will not readily differ from it in its assessment either of the factors to be had regard to or as to the value to be attached to them. The essential inquiry is not whether the sentences were right or wrong but whether the trial court in imposing them exercised its discretion properly and judicially.

Mr Mahomed has not been able to show that the regional court misdirected itself in any way or acted unreasonably or arbitrarily. Having regard to the

personal circumstances of the first appellant and the fact that he was convicted in respect of an offence created by the legislature in the interest of the security of the State and the maintenance of law and order for which it has provided a relatively severe sentence, it cannot be said that the sentence imposed on the first appellant was in the circumstances disturbingly inappropriate.

In all the circumstances the order that I would made is that the appeal against the conviction and sentence of the first appellant on the second count and the sentences imposed on the second appellant on both the first and the second counts is dismissed.

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the matter of:

PETER THABO MOLOI First Appellant

and

JACOB MASHEGO Second Appellant

versus

THE STATE Respondent

Coram: TRENGOVE, VILJOEN, JACOBS, JJA, BOSHOF, et GALGUT, AJJA.

Date of Hearing: 15 May 1986

Date of Judgment: 23-9-1986

J U D G M E N T

GALGUT, AJA:

I have had the benefit of reading the judgment of BOSHOF AJA. There is no need for me to set out the facts. I will only set out sufficient to facilitate the reading of this judgment. I agree that the appeal by the

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first appellant against his conviction fails. I do, however, find it necessary to set out my reasons for deciding that the conviction is in order.

The charge sheet refers to "cassette tapes". What was found in first appellant's possession was a tape recording which according to its content is a record of an interview given by Oliver Tambo, the head of the African National Congress ("ANC"). I shall refer to it as "the cassette". He was found guilty of possessing this cassette in contravention of sec. 51(1)(c) of the Internal Security Act No 74 of 1982.

The opening words of the cassette are significant.

They read:

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

/ It.....

It must be accepted, as stated in the cassette, that it was Oliver Tambo's voice to which the hearers were enjoined to listen. Oliver Tambo was thus a party to the recording. The fact that what was said therein was recorded in a cassette and that listeners were exhorted to listen to the voice of the President of the ANC, leads to the inference that it was intended for publication and dissemination. That inference is strengthened by the fact that it is then found in the possession of a person who was not party to the interview. It is further strengthened by the fact that that person does not explain how he came to be in possession thereof. These facts lead to only one inference, viz. that the cassette was prepared for publication and dissemination and was in fact published and disseminated.

The evidence that Oliver Tambo is the President and head of the ANC is very significant. As was said by GOLDSTONE J in his judgment in the Court a quo the opening words in the cassette indicate -

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sette was used to achieve this purpose demonstrates that the intention was to publish and disseminate its contents.

The whole purpose of recording the interview was to convey the message contained therein to listeners. I pause to say that a cassette prepared for this purpose has many advantages. It is small and can be carried without being seen. It can be easily hidden. It can be played to small audiences in confined places.

The offending cassette was found, amongst other cassettes, in the possession of first appellant. In the absence of any explanation from him it must be accepted that it became available to him, a member of the public. Hence there was publication.

I turn now to consider the sentence imposed on first appellant. It was urged on his behalf that it was disturbingly inappropriate not only on the ground that it was too

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I turn now to consider the sentence imposed on first appellant. It was urged on his behalf that it was disturbingly inappropriate not only on the ground that it was too

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severe but also on the ground that there is a disturbing disparity between the sentences imposed on first and second appellants in respect of this offence.

For ease of reference I repeat the relevant facts in the case of each of the appellants.

1. First appellant was 29 years old; he is a qualified teacher; he was, at the time of the offence, employed by the Church of the Province of Southern Africa; Reverend Davies of that Church, who had known first appellant for some time, described first appellant as a well-intentioned and well-meaning person; he expressed the view (something of which all courts are aware) that if sent to prison the appellant would be open to the influence of bad elements.
2. First appellant owned several cassettes. The trial Court found that there was no indication

/ that.....

that he had played or made the offending cassette available to other persons or that he had intended to do so.

3. First appellant is a first offender. The fact that he is a law-abiding citizen must be stressed.
4. Second appellant is 25 years old and has never been in fixed employment.
5. Second appellant played his offending cassette in the presence of a friend at his home on 3 October 1982. His mother asked him to stop doing so. Thereafter on 8 October he left the bar of the Diepkloof Hotel to fetch the cassette from his home; he returned and played the cassette in the crowded bar.
6. Second appellant has a number of previous convictions for offences including robbery, malicious injury to property and trading in liquor without

/ a licence.....

a licence. These offences are not related to the present offence. They do however show that second appellant is not a law-abiding citizen.

Over the years courts of appeal have set out various principles by which they are guided when asked to alter a sentence imposed by a trial court. Many of these cases and the principles are set out in the judgment of HOLMES JA (in which JANSEN and RABIE, JJA, concurred) in S v Giannoulis, 1975 (4) SA 867 (A). At p 868 the learned Judge says:

- "1. In every appeal against sentence, whether imposed by a magistrate or a Judge, the Court hearing the appeal —
 - (a) should be guided by the principle that sentence is

'pre-eminently a matter for the discretion of the trial Court';

and
 - (b) should be careful not to erode such discretion: hence the further principle that the sentence should only

/ be.....

be altered if the discretion has not been

'judicially and properly exercised'.

2. The test under (b) is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate."

At pages 871 to 872 the learned Judge refers to many of the cases that have dealt with the principles applicable when disparate sentences were considered on appeal. The effect of these cases is, when persons are jointly charged with the same offence, that uniformity of sentences is desirable; that this does not mean that the desire for uniformity should interfere with the exercise by the judicial officer of his discretion in determining the appropriate sentence in the light of the particular facts of the case and of the personal circumstances of the person charged. See in this regard S v Reddy 1975 (3) SA 757 (A) at 759 H.

HOLMES JA in the Giannoulis case at p 873, after

/ reviewing.....

the reviewing/many cases, stresses that disparity in sentences will not necessarily warrant interference on appeal and goes on to say —

- "2. Where, however, there is a disturbing disparity in such sentences, and the degrees of participation are more or less equal, and there are not personal factors warranting such disparity, appellate interference with the sentence may, depending on the circumstances, be warranted. The ground of interference would be that the sentence is disturbingly inappropriate.
3. In ameliorating the offending sentence on appeal, the Court does not necessarily equate the sentences: it does what it considers appropriate in the circumstances."

What is to be deduced from the cases set out above is that where accused are jointly charged with a particular offence and their participation therein is equal and their personal factors do not warrant discrimination, then disparity in the sentences warrants interference on appeal.

/ The.....

The appellants were jointly charged. They each possessed a prohibited cassette. The second appellant possessed it with the intention to play it to listeners. As we have seen he in fact carried out that intention and for that he was separately charged. As was found by the trial Court there was no suggestion that the first appellant intended to play his cassette to any listener. Hence the latter's possession was certainly not more blameworthy than that of second appellant.

Second appellant never had fixed employment: he had two previous convictions for which he was given cuts with a light cane. In addition he had two previous convictions for robbery in which he used a knife and stabbed his victim. For one of these he was sentenced to two years imprisonment. For the other he was sentenced to four years imprisonment which was suspended on appropriate conditions. First appellant was in permanent employment, had

/ no.....

no previous convictions and generally conducted himself as befits a decent citizen. The evidence is that he handed over the cassette, together with other innocent cassettes, to the police when they came to his home. He denied in Court that he had possessed the offending cassette. This lie should not in my view tell too heavily against him.

The sentence imposed on first appellant on the charge of possession of the cassette (i.e. count 2) was 2 years imprisonment of which 1 year was conditionally suspended for 5 years. Second appellant on that charge was sentenced to 1 year imprisonment which was to be served concurrently with the sentence on the other charge of which he was found guilty.

One can readily understand that first appellant feels aggrieved because he was punished more severely than second appellant in respect of the same charge.

/ I am.....

I am of the view that the disparity in the sentences warrants interference on the ground that the sentence imposed on the first appellant is disturbingly inappropriate. I pause to say that I have not overlooked the fact that second appellant was also found guilty on count 1 of contravening sec. 13(a)(iv) of the Internal Security Act. The sentence for that offence was altered by the Court a quo to 3 years imprisonment for which 1 year has been suspended. However that may be, his sentence of 1 year on count 2, i.e.. contravening sec. 56(1)(c) is to run concurrently with the sentence on count 1.

It follows from what has been said above that this Court is entitled to, and should, interfere with the sentence imposed on first appellant. In so doing this Court must impose a sentence which it thinks is appropriate in the circumstances. Regard must be had to the fact that the magistrate found that there was nothing to suggest that

/ the.....

the first appellant intended playing the cassette to any listeners; that the first appellant is a first offender; that his personal circumstances showed him to be a well-behaved and respected citizen. In all the above circumstances it is my view that the first appellant should not be sent to prison but should be given a suspended sentence. The sentence I would impose in his case is a sentence of 1 year's imprisonment suspended for 5 years on appropriate conditions. Hence the order in this appeal is as follows:

- A. The appeal by first appellant against his conviction is dismissed.
- B. The appeal by first appellant against his sentence is upheld. The sentence imposed by the trial Court is set aside and there is substituted a sentence of 1 year's imprisonment which is suspended for 5 years on condition that he is not found guilty of contravening sec. 51(1)(c) of Act 74 of 1982 committed during the period of suspension.
- / C. The.....

C The appeal by second appellant against
his convictions and sentences is dismissed.

O. GALGUT.

TRENGOVE JA Concurs.

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IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter of:

PETER THABO MOLOI First Appellant

and

JACOB MASHEGO Second Appellant

versus

THE STATE Respondent

CORAM: TRENGOVE, VILJOEN, JACOBS, JJA, BOSHOFF et GALGUT, AJJA

DATE OF HEARING: 15 MAY 1986

DATE OF JUDGMENT: 23 SEPTEMBER 1986

J U D G M E N T

VILJOEN, JA

I have/.....

I have read the judgments of both my colleagues Boshoff and Galgut AJJA. In my view the appeals by the two appellants against their convictions fail on the grounds set out in both judgments. I agree, therefore, with both judgments as far as the appeals against the convictions are concerned. As far as the sentences are concerned I agree that the appeal by the second appellant against his sentences should be dismissed but I agree with Galgut AJA that the appeal by first appellant against his sentence should be upheld, that the sentence imposed by the trial Court should be set aside and that a sentence of 1 year's imprisonment which

is/.....

is suspended for 5 years on condition that he
is not found guilty of contravening s 51(1)(c)
of Act 74 of 1982 committed during the period
of suspension, should be substituted.


JUDGE OF APPEAL

JACOBS, JA - agrees