IN THE SUPREME COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION)

JOHN PATI AND TWELVE OTHERS

versus

THE STATE

JUDGMENT :

Kannemeyer AJ.

The thirteen appellants in this matter were all charged before a regional Magistrate with four contraventions of Act No. 44 of 1950.

The first count alleged a contravention of Section 3(1) (a) (i) of Act No. 44 of 1950 read with Sections 11(c) and 11 (m) (i) thereof and further read with Sections 1 and 2 of Act No. 34 of 1960, and proclam. 119 of 1960. 83 of 1961, 67 of 1962, 31 of 1963 and Section 14 of Act No. 37 of 1963 and further read with Section 22 of Act No. 93 of 1963. The gravamen of this count is that during the period 8th April, 1960 to 30th November, 1964 the appellants became or continued to be members of an unlawful organization; namely the African National Congress, also known as "Umkonto we Sizwe" or "Spear of the Nation" All the Appellants were convicted on this chanteand each was sentenced to undergo two and a half years imprisonment.

The second count alleged a contravention of Section 3 (1) (a) (iii) of Act No. 44 of 1950, read with the other enactments and proclamations mentioned above, it being alleged that during the period 8th April, 1960 to 30th November, 1964 all the appellants contributed or solicited subscriptions to be used directly or indirectly for the benefits of the African National Congress. All the Appellants were convicted on this count and each was sentenced to undergo one and a half years imprisonment, except for appellant no. 11 who was sentenced to one years imprisonment.

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The third count alleged a contravention of Section 3 (1) (a) (iv) of Act no. 44 of 1950 read with the other enactments and proclamations mentioned in that during the period 8th April, 1960 to 30th November, 1960 they took part in the activities of the African National Congress. Again all thirteen appellants were sentenced to one and a half years imprisonment each, except for appellant No 11 who was sentenced to one years imprisonment.

Fourthly they were charged with a contravention of Section 11 (e) read with Sections 11(i) and 3 (1) (a) (iv) of Act No. 44 of 1950, it being alleged that they allowed their houses to be used for the purposes of activities of the African National Congress during the same period as alleged in the other counts, namely between 8th April, 1960 and 30th November, 1960. All the appellants with the exception of no. 11, Enoch Ndongeni, were convicted on this count and each of the twelve so convicted on this count was sentenced to undergo one and a half years imprisonment.

An appeal was noted against these convictions and sentences. The grounds of appeal as originally noted, are as follows :

"(a) The convictions were against the weight of the evidence in that in considering the evidence given for the State and that given by the accused, the Court erred in finding that the evidence for the State was true beyond reasonable doubt and that the evidence given by each of the accused could not be reasonably true.

(b) The evidence for the State was of such a vague and general nature that having regard to the nature and position of the State witnesses, the Court should not have found that such evidence, having regard to the evidence given by each of the accused, established the guilt of the accused beyond reasonable doubt.

(c) The sentences imposed are excessive in the circumstances."

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At the hearing of the appeal application was made to add two further grounds namely ..... ~~Notice of Amendment, dated 19th August, 1965....~~

"(d) In regard to accused no. 2 in particular, and all the other accused in general, the conviction on all four counts is bad by reason of the Magistrate having failed to allow the Defence to prove the reference Book of accused No. 7 in order to establish his alibi.

(e) The Magistrate erred in finding that the State witnesses ALEXANDER MBANE, LIONEL MBANE and PAGAMILE NJIKELANA corroborated each other, in view of the numerous discrepancies between the versions given by these witnesses, and failed to approach their evidence with that degree of caution as is required by law."

It is clear that the ground (e) is hardly a new ground but rather an elaboration of grounds (a) and (b). The Attorney-General, however, objected to the new ground (d) but it was ~~argued~~ agreed that a decision on this objection would be appropriate after the nature of the argument encompassed thereby had been heard.

The State relied on four witnesses. The first was a Bantu Detective-Sergeant Attwell Gazo, who is attached to the Security Branch. He deposed to the fact that in June 1961, June 1962, May 1963 and April 1964 he picked up pamphlets that had been broadcast in various of the Bantu areas of Port Elizabeth, including Kwazakele and which he identified as being pamphlets supporting the aims of the African National Congress. The remaining three State witnesses, Alexandria Mbane, Lionel Mbane and Pagamile Njikelana all admit to having been members of the African National Congress and to having been associated with its activities during the period in question. Their evidence, which will be analysed later, identifies the several appellants as having been associated with them in these activities and they are clearly accomplices.

All...../

All thirteen appellants gave evidence and all denied association with the African National Congress during the period covered by the charges.

In his judgment the Magistrate accepted that the case of each accused should be considered individually. Having accepted the evidences of the accomplices he goes on to say; " Die ontkennings van die beskuldigdes word verwerp. Dit is nie my voorneme om hulle getuienis op te som nie. Die tyd is nie daarna nie en die Hof vind dit nie nodig nie. So 'n opsomming sou ten minste twee na drie ~~wil~~ wre verg as dit behoorlik gedoen moet word. As dit gedoen moet word dan sal die Hof dit op 'n later geleentheid ~~moet~~ wel doen...." He then goes on to mention one ground of criticism which is applicable to some of the accused, namely their evidence that they had never heard of the African National Congress. He then mentions certain aspects unfavourable to the acceptance of the evidence of accused nos. 11 and 5. There is however, no reason given for the rejection of the evidence given by each individual accused. The Magistrate had a further opportunity to remedy this defect in his Judgment in that the orignal grounds of appeal filed stated, inter alia, that he had erred "..... in finding that the evidence for the state was true beyond reasonable doubt and that the evidence given by <u>each</u> of the accused could not reasonably be true." and that "....the Court should not have found that such evidence (i.e. the State evidence) having regard to the evidence given by <u>each</u> of the accused established the guilt of the accused beyond reasonable doubt." Confronted with these grounds, he replied however, that he had nothing to add to his original judgment.

It is clear that when a judicial officer rejects the evidence of a witness he should give his reasons for so doing!

REX ...../

REX vs. Belinsky - 1925 363 at 366-67

Garsangie vs Smith - 1954 (3) SA 15(O)

REX vs. de Klerk - 1958 (2) SA 588 (S.W.A.)

The fact that no reason is given does not, of course, mean that this Court must necessarily accept the evidence so rejected, because it may, in the light of the case as a whole be unsatisfactory, improbable or unacceptable. However, when the Judicial Officer gives no reason for the rejection of witnesses, the Court on appeal is faced with the burdensome task of analysing the evidence so rejected - in this case the evidence of thirteen different accused persons - and determining whether the rejection was proper.

I proceed therefore to consider the evidence of the State witnesses and that of the several accused to determine whether their evidence was in fact correctly rejected by the Magistrate.

The first accomplice called by the State, Alexandria Mbane was patently a most unsatisfactory witness. Whether this was because of reluctance on his part, induced by fear or possibly a desire to confuse the issues as a result of the admitted policy of members of the African National Congress to give false evidence, it is not possible to say. The Magistrate accepted his evidence in so far as it was corroborated by other State witnesses. There can be no doubt that he was most unsatisfactory as a witness and his confusion in the identification of Accused no. 5 and his insistence that this accused was at the meeting held in May 1960 while the other two accomplices say that this accused did not attend this meeting shows his unreliability. His failure to identify accused no. 5 by name is even more startling. He identified this accused as a person who had attended meetings but could not give his name. When it was put to him that this accused had been his next door neighbour he admitted this fact and the fact that he knew he

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was Philepot Mfekotho but excused his earlier lapse by saying that Philepot had grown a beard since he last saw him . The suggestion that he could recognise the bearded Philepot as a person who had attended meetings clean shaven but could not recognise him as his erstwhile next door neighbour only has to be stated to be rejected. His insistence that there had been a hundred per cent attendance at weekly meetings over the years and his suggestion that children became members of the African National Congress at birth, a suggestion that is based on the fact the one of the accused had named her child after a leading Russian Statesman ~~leads~~ leads one to the conclusion that his evidence can not be relied upon. He does, in certain regards give evidence supported by the other two accomplices but in my view it would be dangerous to make corroboration of their evidence in that of Alexandria. Nor is it necessary to do so. These two witnesses Lionel Mbane and Pagamile Njikelana corroborate each other in detail. One factor impresses me particularly in this regard, Lionel first stated that accused no. 5 was at the May 1960 meeting but later, while still giving evidence in chief, he corrected this statement and it is clear that he did so without any suggestion that he was incorrect, having been put to him. Pagamile also says that no. 5 accused was not at this meeting and one is impressed by this willingness on Lionel's part to correct a mistake he had made. These two witnesses impressed the Magistrate and he was justified in holding that they corroborated each other. He fully appreciated the test to be applied & applied it properly in approaching their evidence.

Their evidence can be shortly summarised as follows. They were both members of the African National Congress. They belonged to Zone 9 of that organization in Kwazakele, Port Elizabeth. They say that all of the accused were members of the organization and members of this zone. They

depose to weekly meetings on Tuesdays held at the houses of the various members. They can not recall these meetings in detail, and were they able to do so one would suspect their credibility. However, they state that members of the zone attended these meetings and that they took place at various times at the houses occupied by all the accused save for accused no. 11, who lives with his mother, Acc. no. 13 at whose house meetings were held. It seems clear that all the accused on this evidence attended these meetings, on Tuesdays, at some time or other. However there are four meetings that were of a special nature and which they recall clearly. These were held in May, 1960, June 1961, and another a week thereafter and finally one towards the end of 1961. They depose to all the accused's presence at these four meetings save for the first one which was not attended by accused no. 5, though the others were there. They depose to the payment of subscriptions by the accused, the attendance by them at "tea parties" and concerts in aid of the funds of the African National Congress. They also mention the distribution of pamphlets, but this aspect, I shall deal with later how these witnesses identify all the accused as participating in the unlawful activities alleged. They were satisfactory witnesses, corroboration existed and the Magistrate accepted the evidence given by them. What then of the defence evidence ?

The evidence given by the accused may be divided into certain categories. There are those who claim that they know nothing of the African National Congress and never belonged to it; into this category fall Accused No. 6, no. 7, no. 8, no. 9, no. 10, no. 11, no. 12 and no. 13. They all deny ever having been members, or having attended any meetings or having had anything to do with the organization. Most of these accused deny even having heard of its existence though some admit having heard of isolated meetings before

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the period covered by the charges. Then there are those who admit having been members, but claim to have severed their association with the organisation prior to the banning thereof. The evidence of these accused must be considered individually. No. 1 accused admitted having been a member but claims to have ceased his membership since the African National Congress was declared an unlawful organization. He says that when it was banned ...."we couldn't carry on... the organization was banned." He also says he never attened a meeting after April, 1960. In cross examination it is clear that he has no knowledge of dates and years. Later he claimed that he had ceased membership a year prior to the banning. No. 2 accused admitted that he was a member up to 1958 but claims that a business he started in 1956 or 1957 had grown to such proportions in 1958 that he had to resign in order to give his full time to it and was thereafter so engrossed in this activity that he did not even hear that the organization had been banned. This business was that of an unlicenced purveyor of groceries and was carried out after hours at his house. He also claims to have been in Engobo in the Transkei in July, 1961 and says that it was thus not possible for him to have been at the meeting held in that month. An attempt was made to obtain his reference book which he claimed would establish his alibi. The book was not produced apparently as it was ruled that any entry therein would be hearsay. However, Mr. Kapire, for the appellants did not urge that this was a misdirection on the Court's part but merely suggested that had this book been produced, it may have cast doubt on the state evidence implicating this appellant and indirectly the identification of the other appellants. As there is nothing to suggest that the nature of the alleged entry was reference to it, and the fact that it was endorsed to at Engobo seems to be no more than an attempt by this appellant to corroborate himself and in the absence of any

EVIDENCE...../

evidence from the person making the endorsement seems to take the matter no further.

No. 3 accused admits membership from 1952 until 1958. He claims that in December 1957 he had his armband, a band of membership, removed by one Jawa, the "Volunteer - in - chief" He did not know the reason for this, but was subsequently brought before a committee which accused him of inebriety and dereliction of duty as administrative chairman and removed him from office. He claims that, dissatisfied with this action he thereafter took no further part in the organizations activities and from then he claims to have known and heard nothing of its activities. His attitude is that he was disgruntled and wanted nothing further to do with the organization.

No. 4 accused admits to having been a member from 1952 until 1955 and says he then started making buckets and baths in his spare time and says that this activity so engrossed him that he had no time for other activities other than... "at times buying liquor."

Accused no. 9 falls into a category of his own. He denies ever having been a member of the African National Congress but admits having attended one meeting in 1952 since when he claims to have known nothing about it.

What approach must this Court then adopt when faced with the evidence of Lionel and Pagamile on the one hand, evidence accepted by the Magistrate, and the evidence of the thirteen accused rejected by him without giving any reason on the other. Clearly it is incorrect to approach the matter on the basis that the State witnesses have been found satisfactory and that therefore the evidence given by the several accused is to be rejected. One must rather consider the evidence of the several ~~accused in the light of the probability of the case. In the light of the evidence of the~~ accused in the light of the totality of the evidence of the case. If on all the evidence there is a reasonable...../

reasonable possibility that the evidence given by the accused is true, then their defences can not be rejected. (Cf. R. vs Hlongwane 1959 (3) SA 337 (A.d) at 341)

Applying this test, I come to the conclusion that these accused who denied knowledge of the African National Congress can not ask this Court to believe their evidence. The suggestion that anyone who has lived in the Bantu areas of Port Elizabeth during the last five years has no knowledge of the African National Congress is so fanciful that I can not accept evidence of such a nature when viewed in the light of all the evidence in this case. In my view the Magistrate was entitled to accept the evidence of the accomplices rather than that of these accused, who are nos. 6 to 13. Some of these accused were actually shown to be untruthful, and in this regard the evidence of accused no. 13 in regard to her sons age, and the evidence of the son, accused no. 11, in the same regard is clearly ~~fake~~ false.

Accused no. 5 admitted having heard of the African National Congress and its banning, but he was most unsatisfactory in explaining his knowledge of the organization's "stay at home" policy. He denied having read it in one of the pamphlets but said he had done so in "the English Paper" However he had earlier said he could not read English and his attempt to avoid the effect of this statement ~~are~~ was most inconvincing and I am satisfied that the Magistrate had good grounds for rejecting his evidence and accepting in preference thereto that of the State witnesses.

What of accused nos. 1 to 4 ? Here a further consideration is whether Lionel Mbane who joined the organization at Kwazakele in 1959 and Pagamile who joined in 1952, may not have correctly identified the accused as members, and have remembered seeing them at meetings, but in giving evidence in 1965 and being asked to recall events of five

YEARS...../

five years previously, may have confused the dates and have mentioned these accused as having been present because they remember seeing him at meetings and taking part in activities prior to the 8th April, 1960 If this is possible, then the evidence of these appellants to the effect that they had ceased membership prior to that date, might reasonably possibly be true, unless it is rejected on some other ground.

Considereing their evidence it is significant that no. 2 claims to have ceased membership in 1958 as does accused no. 3 while accused no. 4 claims to have ceased membership in 1955. Only no. 1 accused was possibly active on his own admission up to 1960. Thus these three namely nos. 2, 3, and 4 claim to have ceased membership prior to Lionel becoming a member and if this is true then he would not have seen them at any meetings. There is another aspect. The State witnesses say that at the meeting in May 1960 it was announced that the organization had been declared unlawful and that thereafter, in order to avoid detection, meetings were held on what was called a "rotary" system, i.e. at the homes of the various members in rotation. Thereafter this procedure was adopted and the regular Tuesday meetings were held at the houses of all the zone members including those of the accused with the exception of no. 11 who had no home. If this evidence is accepted, then the danger that the State witnesses are correct in their identification but at fault about the period during which these of the appellants who were members played an active part is removed. The question none the less remains whether the Magistrate was justified in accepting the State witnesses in preference to these four accused. No. 1 was clearly unsatisfactory as to when he ceased his membership; his evidence in this regard has been mentioned above. No. 2 accused and no. 4 accused were clearly unconvincing in their

SUGGESTION...../

suggestion that their part time occupations were so demanding that they ceased membership and that thereafter they took no interest in the organization. In the light of the evidence as a whole the Magistrate was, in my view, entitled to reject their evidence and accept that of the Smate against them.

This leaves the question of accused no. 3. His reason for leaving the organization is more convincing than that given by the other accused who claim to have left it, but his attitude of complete indifference towards the organization after he had been removed from office is difficult to believe. Living in the area in which he had worked as a member, it is inconceivable that he would know nothing of what happened after he claims to have left the organization. One would imagine that thereafter, he would either still have an interest in its affairs or have been so antepethetic towards it that he would have heard of its banning and the arrest of many of his erstwhile comrades. The attitude of complete disinterest that he claims to have adopted is so unconvincing that I am satisfied that the Magistrate correctly rejected his evidence.

The further point remains to be considered . Considerable evidence was led to prove the distribution of pamphlets by the accused. It is clear that pamphlets were distributed and that Lionel and Pagemile were present when these were handed out for distribution by, inter alia, all the male accused. However, in my view the evidence does not specifically prove a distribution by the several accused. This fact is not one which renders the conviction under count 2 bad, for the accused did other acts which constituted taking part in the organization's activity; the attendance at the meetings is in itself such an act. However the distribution of pamphlets was obviously the most serious activity envisaged under this count and I return to consider the

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effect of the fact that distribution was not proved when I consider the question of sentence.

On the first three counts, the minumum sentence which could have been imposed was one of one years imprisonment while the maximum is ten years. On count 4 no minimum sentence is prescribed, but a maximum of three years is laid down. The accused were all rank and file members of the organization and the counts on which they were convicted overlap to a certain degree. It was of course perfectly competent to charge the accused with the four counts and there had been no splitting of charges. The fact does none the less remain that membership, attendance at meetings thereby furthering its aims, and the payment of subscriptions are all very much inter-related. In an unreported Judgment of this Court, delivered in the case of Ntongana and another vs the State, on the 5th February 1965, the Judge President recognized this overlapping and where the accused was sentenced to three years on each of the two counts, one year of the sentence on each count was suspended. However, the Magistrate recognised this close connection between the charges and instead of suspending portion of the sentence, he says he imposed a lighter sentence than he would otherwise have done. He has not said by how much he has reduced the sentences to achieve this effect, but he has clearly recognized the necessity of a special approach to sentences in cases of this nature. The distribution of pamphlets has not been proved, but the Magistrate did not, apparently take the fact of this distribution into account when sentencing the accused on count 3. It was common cause that no women distributed pamphlets, yet all the accused including the women, but with the exception of accused no. 11 were sentenced to one and a half years imprisonment on this count. Thus the Magistrate must have either

CONCLUDED..../

concluded that the distribution had not been proved, or not have considered it as an aggravating feature under this count. Thus, though the cumulative effect of the sentences is heavy, the Magistrate has not misdirected himself and the result does not create a sense of shock.

I am accordingly of the view that the appeals of all thirteen appellants should be dismissed and that the sentences imposed on them in respect of each of the four counts should be confirmed.

ACTING JUDGE OF THE SUPREME COURT.

van der Riet J.

I agree. The appeals of all thirteen appellants against their convictions are dismissed and the sentences imposed in each case are confirmed.

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JUDGE OF THE SUPREME COURT.