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IN THE SUPREME COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

In the Matter between:

NONTOMBI AGRINETT NINGIZA
ESTER STOFILE
BANDILE BEN SIVUKU
MAHLOMOLA SAMUEL MANAKE
MBOLEKWA NGENELWA
JONATHAN MHLANA — Appelants

and

THE STATE — Respondent

JUDGMENT DELIVERED THIS 28th DAY OF APRIL, 1964

DIEMONT J: The six appellants in this case were charged in the Regional Court with contravening Section 3 (1)(a)(i) read with Section 44 of 1950, as amended, and further read with Sections 2 and 1 (3)(c) of Act 34 of 1964, as amended, and Proclamation 119 of 1960 as amended by Section 22 (1) of Act 93 of 1963.

It was alleged in the charges that on the 9th April, 1960, and at Sea Point they became members of the Pan Africanist Congress, an unlawful organization, in that during the period 8th April 1960 to 10th May 1963, they were members of an organization known as Poqo.

The appellants pleaded not guilty, but were all found guilty and sentences of 18 months imprisonment in the case of appellants Nos. 1 and 2, and 3 years imprisonment in the case of the remaining 4 appellants were imposed.

The appellants have now appealed against the convictions but not against the sentences.

Both Counsel for the appellants, and Counsel for the State indicated that the appellants fell into three categories and could conveniently be considered separately. I

propose/...

propose following the same course and I will accordingly deal first with the arguments advanced for and against the two women, accused No. 1 and accused No. 2.

The case for the State against these two appellants was that they attended a Poqo meeting in a room in Bantry Bay during January or February 1963. They were informed at this meeting that they must learn the principles of medical first aid so that they could assist their compatriots who might be injured in the coming fight between members of the Pan Africanist Congress and the white people. They were taught to salute at this meeting.

Three State witnesses - Joyce Ntombizodwa Boyce, Galdys Mapongbana and Mariam Maretsane deposed to this meeting. The two appellants - Nos. 1 and 2 - on the other hand flatly denied that they had ever attended such a meeting. The magistrate stated in his response that the three State witnesses, Joyce, Gladys and Mariam, answered all questions satisfactorily and there was no reason to doubt their credibility. At the same time he conceded that he could not comment on the demeanour of the two appellants and added that they did not make an unfavourable impression in the witness box. The Magistrate also stated that he had come to the conclusion that the three state witnesses were accomplices since they had attended the same meeting as the appellants and became members of the same illegal organization.

I do not accept that these three witnesses were accomplices; it may well be that they committed a crime similar to that which the appellants are alleged to have committed, but it was not the same crime. Nevertheless, it seems to me that it was right and proper that the magistrate should have cautioned himself before accepting their evidence - unfortunately I do not think he was sufficiently cautious in the result.

Counsel for the appellants, Mr. Strauss directed our attention to a number of features which indicated that these

three state witnesses, so far from corroborating one another, contradicted each other in such a manner as to raise doubts as to the reliability of their evidence. I propose referring to some of these features.

The State laid stress on the fact that all the persons attending the meeting were taught a salute or greeting, but curiously each of the State witnesses describes a different salute. Then again it was important to establish what was said and who spoke.

The witness Joyce said that they were addressed by Mariam - she told them not to smoke, or drink, not to wear trousers and to learn first aid. The witness Gladys said they were addressed by one Ntosini - he told them they must collect funds, and that they must obtain their freedom from the whites. He also mentioned first aid. The witness Mariam told a different story; she said one Sonce presided over the meeting. He told the meeting that they must stand together in the coming fight, and they must help gather in the dead and attend to the injured.

Then again there is the question of a membership fee. Joyce insisted that they paid no subscription. Gladys and Mariam, on the other hand, claimed that they each paid 2/6 as a membership fee. There were also contradictions as to who was present at the meeting.

It was suggested by Mr. Rousseau who appeared for the State, that these contradictions could be explained if there was more than one meeting, but the evidence, although it is not very clear, indicates that there was only one meeting early in 1963 at which both appellants might have been present. If that is so I have considerable difficulty in appreciating why the 3 state witnesses give such varying accounts of this meeting. As my brother Rosenow pointed out in the course of argument, it is on fundamental issues, not merely trivial details that their evidence is at variance. I cannot escape the conclusion that the only way the defence could fairly test the evidence given by these three state witnesses was to cross examine them as to what happened at the meeting and

who/..

who was present, and who spoke. Although each witness in turn may have made a good impression in the witness box, the overall picture is unsatisfactory. The contradictions which I have mentioned leave the impression that the witnesses are confused and that their recollection may be at fault. When one bears in mind that no fault could be found with the evidence given by the appellants one is driven to the conclusion that no matter how strong a case of suspicion there may be it cannot be said that the State's allegations were proved beyond a reasonable doubt.

I come now to consider the case against the Appellants Nos. 3, 4 and 5. Here the evidence led by the State was even less impressive. The witness Dumile Ronald Manguma alleged that he was persuaded by a certain Kondila to join the Poqo organization. This cost him 25c. He attended only one meeting in November 1962 in Kondila's room at the Monastery Hospital. There were six persons present including accused Nos. 3, 4, 5 and 6. There was discussion about the making of petrol bombs and making war on the white people. Although he attended no more meetings he did go to Kondila's room with accused No. 6 on 8th April, 1963. There he again found accused Nos. 3, 4 and 5. A number of weapons were handed out, but the witness thought discretion the better part of valour and departed. He fled from Cape Town and was caught by the police a few days later at Mafeking.

Needless to say the accused Nos. 3, 4 & 5 all deny these allegations save that they admit that they were employed in the same institution, the Monastery Hospital, with Kondila. The magistrate made no adverse findings of credibility against these three accused. He said that it was not possible to cross examine them successfully as they denied generally that they had taken any part in the affair. In the result Dumile's evidence had to be weighed up against that of the three appellants. The magistrate stated that Dumile was a credible witness but that some form of corroboration was essential. This corroboration, he said, was to be found in a document, exhibit "F", which Detective Sergeant Hitchcock found in Kondila's room.

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The document is a sheet of paper in a Croxly writing pad in which 8 names appear. The writing is in pencil, and the figures "2 - 6" appear behind each name. There is evidence that Kondila is also known as "Fanti" and Fanti's name appears on the list. Dumile's surname - Manguma - also appears on the list. The magistrate goes on to state :

> "Die dokument bevestig dus Dumile se getuienis dat Kondila die inskrywing op die lys gemaak het. Speuder sersant Hitchcock getuig dat Kondila in verband met die saak gevonnis is tot 15 jaar gevangenisstraf. Dit is dus afdoende bewys dat Kondila en Dumile, wie se name op die lys voorkom, wel deeglik lede van die organisasie is. Die bevinding word versterk deur die P.A.C. se konstitusie naamlik paragraaf 3(c) waarin neergelê word dat 2/6d. die ledegeld is. Beskuldiges Nos. 3, 4 en 5 se name met dieselfde bedrae geld daarteen verskyn in die lys, wat blykbaar deur een en dieselfde persoon geskryf is. Die hof maak nie so 'n bevinding nie, want die hof kan nie optree as 'n handskrif deskundige nie, maar op die oog lyk die karakters dieselfde."

Although I agree that the handwriting appears to be that of one person, I find the magistrate's reasoning difficult to follow. Even if the names of all three appellants appear on the list - in fact No. 3's name is not on the list - how does that afford corroboration? We do not know who wrote this list, whether it is in Kondila's handwriting or whether it is the list which Kondila had when he canvassed Dumile. We do not know with what purpose the list was drawn up. The inference may well be drawn that the persons whose names appeared on the list had all paid 2/6 to join the Poqo organization - but other inferences can also be drawn. The person who drew up the list may have intended approaching each of the persons named to become members of Poqo - or it may be a list of creditors. There are obviously many inferences which can be drawn, and in the

absence/...

absence of any explanatory evidence, it is dangerous to say which inference is the correct one. In the circumstances I fail to see what reliance can be placed on this document. Nor does it seem to me that the other evidence relied on by the magistrate takes the matter any further. He points out that Dumile' claims that they discussed the making of petrol bombs and that Sergeant Hitchcock stated the petrol bombs were found in the Sea Point area. Sea Point is a large district and the fact that the police found an unspecified number of bombs at an unspecified place and time in the area really takes the matter no further. Nor does it seem to me that the Court was justified in finding that the denial by the three appellants that they ever visited Kondila's room was significant. Even if they all worked for the same employer they may be telling the truth when they claim that they were not friends and had no occasion to visit Kondila. It follows that the State's case against appellants 3, 4 & 5 was not proved beyond reasonable doubt and that they were accordingly entitled to be acquitted on this evidence.

So far as appellant No. 6 is concerned it seems to me that there is sufficient corroboration in the form of the incriminating documents found in the appellant's possession, particularly when regard be had to the palpably false explanations which he gave in court.

In the result the convictions and sentences against appellants Nos. 1, 2, 3, 4 and 5 must be set aside. In the case of appellant No. 6 the appeal fails and the conviction and sentence is confirmed.

ROSENOW J: I concur.

MR. H.S. STRAUSS
(instructed by JACK KUDO & CO.)
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