CRG.

IN THE SUPREME COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION)

Delivered:

BARRETT TYESI versus THE STATE.

CLOETE, J :

The appellant in this case was convicted by a Regional Magistrate of contravening section 3 (1) (a) (iv) read with section 11(c) and 11 (i) of Act No. 44 of 1950 as amended, and further read with sections 1 and 2 of Act No. 34 of 1960, as amended, and Proclamation 119 of 1960, 83 of 1961, 67 of 1962, 31 of 1963 and section 14 of Act No. 37 of 1963.

It was found that he had wrongfully and unlawfully taken part in the activities of an unlawful organisation, namely the African National Congress, and in doing so had done so in the direct or indirect interest of that organisation. The Magistrate imposed a sentence of three years imprisonment, which is the maximum laid down by the Act. The accused has appealed against this sentence and this Court has on appeal reduced the sentence to imprisonment for a period of one year. I shall now set out the reasons for this alteration to the sentence.

The facts show that the appellant, who is the

conductor of a Bantu choir, on one occasion led his choir at a concert which was held to raise funds for the African National Congress. The choir were not the only performers at this concert and they sang several songs, some of which were African National Congress songs. The appellant's role at the concert was that purely of a conductor of the choir. The facts show that the appellant was a man 43 years of age with no previous convictions. He had been expelled from the African National Congress at some time previously but notwithstanding this fact had knowingly taken part in this concert for the benefit of that organisation.

The facts show also that at the time of his conviction the appellant had been in custody for a period of 16 months. The Magistrate states that he took these factors into consideration but found that the appellant's crime was of so serious a nature that he should impose the maximum sentence prescribed.

It seems to me that the Magistrate has imposed a sentence in this case which in all the circumstances is so severe that no reasonable Court could have imposed it. In effect the Magistrate has not given due consideration to the fact that the appellant has been in custody for a period of 16 months. He has referred in this connection to the

decision of this Court in Ntongane & Another vs. The State (unreported) where it is stated that an important factor to be taken into account when sentence is passed on an accused person is the fact that he has been in custody for some time before trial. In dealing with this issue the Magistrate states :-

> "Die maksimum straf wat hierdie Hof kan oplê is gevangenisstraf van 3 jaar. Die beskuldigde is al 16 maande aangehou, maar die oortreding waarvan die beskuldigde skuldig bevind is, is in my sienswyse, so ernstig dat al gee ek volle gewig aan die feit dat hy lank aangehou is, dan voel ek nogtans dat die omstandighede nie sulks is dat ek in hierdie besondere saak toegewings moet maak vir die feit dat die beskuldigde so lang aangehou is nie."

An examination of the circumstances attendant upon the commission of the crime does not justify the conclusion that the crime was so serious that the fact that the accus ed was in custody for a period of 16 months should be discounted for the purposes of sentence.

The Magistrate has found as an aggravating feature of the offence the fact that the appellant had of his own free will acted in the manner alleged in the charge. This has essentially to be the position in every case charged under the section in question and can hardly be said to be

an aggravating feature. Then he has found that the organisation assisted was of an evil and pernicious nature. This can be said of nearly all unlawful organisations at which the legislation is aimed.

The Magistrate has also found that the appellant acted as he did in contravention of the section in spite of the fact that he had been expelled from the organisation. This factor in itself or in combination with the other circumstances cannot be regarded as sufficient to translate the offence into the category of the most serious charge.

It is trite law as laid down in numerous decisions of our Courts that the maximum penalty is intended for the worst offences of the class for which the punishment is provided. (See Gardiner and Lansdown (6th Ed.) Vol. 1 at p. 569 et seq. and the authorities there cited."

It is clear that far worse instances of the same class of offences as in this case may come before a regional court. The circumstances disclosed in this case do not elevate the accused's crime into a degree of seriousness which merits the imposition of the maximum penalty.

For these reasons the sentence was altered as I have mentioned above.

/.....Page 5.

J.D. CLOETE.

JUDGE OF THE SUPREME COURT.

JENNET, J.P. :

I agree.

A.G. JENNET.

JUDGE PRESIDENT OF THE SUPREME COURT.