11

155/76

LEGAL AID.

G.P.-S. S. 668.

# In the Supreme Court of South Africa
# In die Hooggeregshof van Suid-Afrika

( APPELLATE DIVISION).
AFDELING).

**APPEAL IN CRIMINAL CASE.**
**APPÈL IN STRAFSAAK.**

V MAKUNGU + OTHERS
**Appellant.**

*versus/teen*

STATE
**Respondent.**

*Appellant's Attorney* HEUNIS & VAN REENSBURG *Respondent's Attorney*
*Prokureur van Appellant* *Prokureur van Respondent*

*Appellant's Advocate* N M. FULLER *Respondent's Advocate* P J Breytenbach
*Advokaat van Appellant* *Advokaat van Respondent*

*Set down for hearing on* 13-11-1976
*Op die rol geplaas vir verhoor op*

(NPD)

341

Coram: Wessels, Jansen JJA. et Galgut AJA.

Fuller: 9.h45 – 11h40
12h30 – 12h35

Breytenbach: 11h40 – 12h30

C.A.V.

The Court answers the first question of law reserved in favour of the accused. Since

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the matter between:

VIKINDUKU MAKUNGA & SEVEN OTHERS.....Appellants

and

THE STATE.....Respondent

Coram: Wessels, Jansen, JJ.A., et Galgut, A.J.A.

Heard: 12 November 1976

Delivered: 1 December 1976

J U D G M E N T

WESSELS, J.A.:

The appellants (to whom I shall hereinafter collectively refer to as the accused, or, individually by the numbers assigned to them at the trial) appeared in the Natal Provincial Division before Didcott, J., and two assessors on the following charges:

Count 1.....2/

Count 1: A contravention of section 7(1) read with sections 156 and 172 of Proclamation No. R195 framed under the provisions of section 24 of Act 38 of 1927 and published in Government Gazette (Extraordinary) No. 1840 dated 8 September 1967 (Regulation Gazette No. 839) and further read with Act 19 of 1891 (Natal);

in that: upon or about the 30th day of December, 1975, and in or near the Ngengeni Area, in the district of Msinga, the accused, being Bantu, participated in an assembly of armed men held without authority.

Count 2: A contravention of section 32(1)(a) of Act 75 of 1969, alternatively, a contravention of section 2 of Act 75 of 1969;

in that: at the time and in the area as aforesaid, the accused unlawfully possessed a machine

gun.....3/

gun, to wit, an F.N. automatic rifle or any part thereof.

alternatively: in that at the time and in the area as aforesaid, the accused unlawfully possessed a firearm, to wit, an F.N. automatic rifle.

Count 3: A contravention of section 2 of Act 75 of 1969 in that: at the time and in the area as aforesaid, the accused unlawfully possessed the following arms: two .303 rifles, a combination .22 and .410 shotgun, one .32 revolver, one .22 revolver and one .22 pistol.

Count 4: A contravention of section 36 of Act 75 of 1969 in that: at the time and in the area as aforesaid, the accused unlawfully possessed ammunition, to wit, fourteen .22 bullets, six .32 bullets, thirty-three .303 bullets and thirteen

7.62 bullets.....4/

7.62 bullets, without being in lawful possession of an arm capable of firing the said ammunition.

It was, further, averred in the indictment that counts 2 - 4 were also to be read with sections 1, 39 and 40 of Act 75 of 1969. In the judgment of the Court a quo, the Arms and Ammunition Act (the abovementioned Act No. 75 of 1969) is referred to as "the Act". I shall do likewise in this judgment:

At the conclusion of the trial, the following verdicts were entered:

Count 1: All of the eight accused were found not guilty and discharged.

Count 2: Main charge: All of the eight accused were found not guilty and discharged.

Alternative charge: Accused No. 6 was found guilty; the remaining accused (nos. 1, 2, 3, 4, 5, 7 and 8) were found not guilty and discharged.

Count 3.....5/

Count 3: Accused nos. 1, 2, 3, 4, 5, 7 and 8 were found guilty; accused no. 6 was found not guilty and discharged.

Count 4: All of the eight accused were found guilty. In the case of accused no. 6, the finding of guilt related only to the unlawful possession of thirteen 7.62 bullets, whilst in the case of the remaining accused, their conviction related to the other ammunition listed in the indictment.

After hearing evidence in mitigation of sentence, Didcott, J., stated that he proposed treating all the counts as one for the purpose of sentence. In the case of accused nos. 1, 2, 3, 4, 5, 7 and 8, a sentence of two years imprisonment was imposed on each one of them. Accused no. 6 was sentenced to two years imprisonment. In addition, he was fined the sum of five-hundred rand or, in default of payment, to a further twelve months imprisonment.

Thereafter.....6/

Thereafter, at the instance of the State, Didcott, J., reserved the following three questions of law for consideration and determination by this Court, namely:

"Whether the facts decided by the Court a quo, some of which were found to have been proved and the rest of which, having been rebuttably presumed, were found not to have been disproved, necessarily led to the conclusions of law, which the Court a quo should therefore have accepted, that:

(i) as alleged in the indictment under the first count, the accused had collectively comprised, and each of them had participated in, an 'assembly of armed men' for the purposes of Proclamation R.195 of 1967;

(ii) as alleged in the indictment under the second and third counts, all of the firearms specified therein had been possessed for the purposes of Act 75 of 1969 by each of the accused;

(iii) as alleged in the indictment under the second count, the F.N. rifle specified therein was either a 'machine gun' or a 'part thereof' for the purposes of Act 75 of 1969."

In addition.....7/

In addition, (a) accused nos. 1, 2, 3, 4, 5, 7 and 8 were granted leave to appeal to this Court against,

(i) their convictions on counts 3 and 4, and

(ii) the sentences imposed on them in respect of those counts; and

(b) accused no. 6 was granted leave to appeal to this Court against the sentence imposed upon him as a result of his conviction on the alternative charge under the second count and the fourth count.

The following is a summary of the relevant factual background. During the evening of 30 December 1975, constable Usher and several other members of the South African Police were on patrol duty in the Ngengeni area. At about 11 p.m. they arrived at a kraal which consisted of a number of huts. While the other policemen were occupied at one hut, constable Usher approached a second hut on his own. It was in darkness, but the door was slightly ajar.

The constable.....8/

The constable pushed the door open and shone his torch inside. His evidence as to what happened thereafter, is summarised as follows in the judgment of the Court a quo:

> "The eight accused were lying on the floor, apparently asleep. Cst. Usher noticed the F.N. rifle standing against the wall. Accused No. 6 then rose to a kneeling position and began to reach for the F.N. rifle, which was not far from him. Cst. Usher ordered him to lie down and not to move. The command was obeyed. Cst. Usher entered the hut and seized the F.N. rifle. The beam from the torch in turn illuminated the two .303 inch rifles and the weapon combining a rifle barrel with a shotgun barrel, which were inside the hut and at various points alongside its wall. Cst. Usher told all the accused to remain lying where they were. They did so. Cst. Usher shouted for assistance, and Sgt. Blandy and Cst. van Noordwyk arrived. Cst. Usher collected the weapons that he had seen and handed them to Sgt. Blandy, who remained on guard in the vicinity of the door. Cst. Usher then searched the hut. He found two canvas bags. One contained thirteen .303 inch cartridges and four .22 inch cartridges. Inside the other were eight .303 inch cartridges.

A holster.....9/

A holster containing a toy pistol was also discovered. Each accused in turn was told to and did stand up, whereupon Cst. Usher searched him. Cst. Usher found three 7.62 millimetre cartridges in one of the pockets of the trousers worn by accused No. 6. Nothing was otherwise discovered when the accused were searched. But, beneath a sleeping mat where some of the accused had been lying, Cst. Usher noticed a lump. The removal of the mat revealed the .32 inch revolver, which was also seized. The accused were arrested and bound. Cst. Usher took a blanket from the hut. Outside the hut he wrapped the weapons in the blanket. The accused were taken to the police station. So were the weapons in the blanket and the bags of ammunition."

The evidence given by the accused is summarised as follows in the judgment of the Court a quo:

" Some of the accused gave fuller evidence than others. But each told substantially the same story. It was this. During the night of the 30th December 1975 all of them were indeed together in the hut, where they were asleep until Cst. Usher's arrival and entry awoke them. He searched them in turn. After other policemen had joined him,

they were.....10/

they were arrested, bound and taken to the police station. The hut belonged to and was ordinarily occupied by accused No. 8. The other accused lived elsewhere, but not far away. The evening had been spent by all eight of them in one another's company. They had visited various kraals, drinking liqour and dancing at each. Their festivities had ended in the hut of accused No. 8, where they had arrived together and had eventually decided to sleep because they were weary. They had therefore settled themselves in the hut for the night, but in somewhat different positions from those shown by Cst. Usher's plan. At no time was any firearm or ammunition in the hut. They saw the firearms and ammunition now before court, but at the police station and not until they had arrived there. On the way to the police station they noticed that Cst. Usher was carrying a rug which appeared to have objects inside it. But they did not then know what the objects were or where Cst. Usher had obtained them. He had certainly not taken them, or even the rug, from the hut. Each accused adamantly excluded the possibility that, unbeknown to him, all or some of the firearms and ammunition had been in the hut. Each insisted that the entire interior of the hut had been lit by a paraffin lamp until it was extinguished when they all settled down to sleep. It was inconceivable, so he

said.....11/

said, that he could have failed to see any firearm or any bag of ammunition if it had in fact been there. Accused No. 6 specifically denied that he had reached for the F.N. rifle or for anything else. He also denied that Cst. Usher, when searching him, had found any cartridges."

The Court a quo accepted the evidence of constable Usher as to what he had observed and found in the hut, and rejected the conflicting evidence of the accused as false beyond any reasonable doubt. It was not contended (rightly so in my opinion) by Mr. Fuller, who appeared for the accused both in this Court and in the Court a quo, that the latter Court erred in accepting the constable's evidence and rejecting that of the accused. I must add, though, that the Court a quo did not reject the evidence of the accused as to the circumstances leading up to their gathering and sleeping in the hut where they were found by constable Usher.

I shall.....12/

I shall later in this judgment refer to additional facts when I come to deal with the contentions of counsel in regard to the questions of law reserved at the instance of the State and the appeal by the accused against their convictions and sentences.

First question of law reserved.

This question of law arises from the acquittal of all the accused on count 1 of the indictment, and relates more particularly to the interpretation of section 7(1) of the abovecited Proclamation No. R 195. The reasoning of the Court a quo (consistent with the presiding Judge's interpretation of the section in question) which led to the acquittal of the accused, appears from the following passages in the judgment:

> " We shall assume for the purposes of this judgment that, even if one lacks a weapon oneself, one may nevertheless aptly be said to participate in an 'assembly of armed men' when one joins other men who do have weapons. We shall also

assume.....13/

assume that, to be described as 'armed', a man need not be seen actually clutching or carrying a weapon, provided that one is near at hand and sufficiently under his control or influence to be associated with him. What we have supposed is essential to the case for the prosecution. One of the accused was probably without a weapon, but one does not know who he was; and there is nothing to establish that, at the time relied on by Mr. Breytenbach, the others were in physical contact with the firearms which were also in the hut. That is not however the end of the matter.

It seems to us that, before a group can be called an 'assembly of armed men', two additional facts must be proved. The first is that there was some or other purpose behind the gathering, and that it was not simply a chance and casual encounter. The second is that the bearing of arms was, not coincidental, but necessary or relevant to that purpose, or at the least connected with it in some way. One cannot readily conceive, for example, that commuters at a bus stop or in a railway carriage could be stamped as an 'assembly of armed men' merely because they were together fortuitously and happened for their own individual reasons to have knives hidden in their pockets. It would surely be straining language even more to say of any of them that, by means of his presence there, he was 'participating' in an 'assembly of armed men'. (cf. S. v. Arenstein, 1964 (4) S.A. 697 (N) at p. 701 E - H).

The State.....14/

The State has failed to prove why the accused and the firearms were together in the hut. When account is taken of the quantity of the weapons and their type, it may be thought somewhat unlikely that the sole purpose of the accused in being there was to drink liquor and to dance, as they all insisted, and nothing more sinister. But the defence bore no onus in this connection. It was for the State to disprove the defence's explanation for the gathering. We find ourselves unable to conclude that the falsity of that explanation has been demonstrated beyond reasonable doubt, or to exclude the possibility that, aware of the general unrest in the area and conscious of the danger of an attack on him at any time, each accused with a weapon was armed because that was how he went about as a matter of course. It is true that the accused cannot successfully answer the charge by saying that they formed themselves into an 'assembly of armed men' for protection. But that has not been suggested. The question is whether they constituted an 'assembly of armed men' at all. They did not, according to our view, unless there was some connection between the purpose of the gathering and the bearing of arms; and there was not if the weapons were in the hut for the reason that we have postulated. It was, in any event, for the State to prove the purpose of the gathering and its connection

with the.....15/

with the presence in the hut of the weapons. Unable to accomplish this by pointing to evidence, all that it can do is to rely upon surmise."

The Proclamation in question was promulgated in the Gazette in both official languages, and the English as well as the Afrikaans text thereof was signed by the Acting State President. Section 7(1) of the English text reads as follows:

"Any Bantu who shall participate in an assembly of armed men held without authority or who shall directly or indirectly promote or assist in any such assembly shall be guilty of an offence, whether or not such assembly leads to a breach of the peace or other offence."

The Afrikaans text thereof reads as follows:

"Enige Bantoe wat deelneem aan 'n byeenkoms van gewapende manne byeengeroep sonder magtiging of wat sodanige byeenkoms direk of indirek bevorder of daarby help, is aan 'n oortreding skuldig, hetsy sodanige byeenkoms tot 'n verstoring van die vrede of 'n ander oortreding lei al dan nie."

A comparison.....16/

A comparison of the phrase in the English text "participate in an assembly of armed men held without authority" with the corresponding phrase in the Afrikaans text, namely, "deelneem aan 'n byeenkoms van gewapende manne byeengeroep sonder magtiging" gives rise to difficulty. (My underlining). In the context in which the word "byeengeroep" is used in the Afrikaans text, it seems to me that it more appropriately refers to an assembly of armed men which was "called, convoked, called together or summoned". See, Tweetalige Woordeboek (Bosman, Van der Merwe en Hiemstra), s.v. "byeengeroep". On the other hand, if regard is had to the context in which the word "held" is used in the English text, it seems that the Afrikaans text could more appropriately have been framed in the following terms: "Enige Bantoe wat deelneem aan 'n byeenkoms van gewapende manne gehou (wat plaasvind) sonder magtiging....." In my opinion the Afrikaans text

unambiguously.....17/

unambiguously refers to an assembly of armed men which takes place because the men comprising the assembly were called together or summoned to attend such an assembly. The English text does not in express terms require that the assembly was held because the men attending it were called together or summoned to attend it, for it to constitute an assembly of armed men within the meaning of section 7(1). To this extent, the two texts would appear to be conflicting. In so far as the English text is concerned, I would remark that whilst it is conceivable that an "assembly of armed men" may be fortuitously constituted without any prior calling together or summoning, it would probably more often take place as a result of some prior call for such an assembly to take place. It is to be noted, furthermore, that the individual Bantu who participates in the assembly of armed men does not require authority to do so. He only commits an offence if the holding of the assembly has not been authorised.

In my opinion.....18/

In my opinion, the legislator probably contemplated that if it were intended to hold an assembly of armed men, authority to hold it would first be obtained by the person who intends to hold such an assembly. Having obtained authority to hold the assembly, the person or persons who applied therefor would then call together or summon persons to participate in the assembly. In my opinion, therefore, the legislator, though not expressing it in clear terms in the English text, intended to refer to an assembly of armed men held pursuant to a calling together of the participants. On this approach the conflict between the two texts would be resolved. It must, also, be borne in mind that we are concerned with a penal provision. In my opinion, the judgment of this Court in Rex v. Alberts, 1942 A.D. 135 applies in this case. At p. 140 of the report, De Wet, C.J., stated the following:

"The Regulations.....19/

> "The Regulations have been duly promulgated in both official languages and both versions have the force of law. They are of a penal nature and a citizen is entitled to consult either version in order to ascertain what his duties and obligations are. That being so, it seems to me it is the duty of the Court, if possible, to adopt an interpretation which both versions are capable of. In the present case we have to deal with penal provisions, the English version of which is capable of bearing a wide meaning while the Afrikaans version is only capable of a restricted meaning. Under those circumstances I think we must adopt the restricted meaning of the Afrikaans version."

In the present case, too, I am of the opinion that the English text is capable of a wider meaning and that the Afrikaans text is capable only of the more restricted meaning above referred to. The latter meaning is, therefore, to be adopted in this case. It is undesirable and unnecessary to attempt to determine the exact limits of this more restricted meaning.

I revert to.....20/

I revert to the facts of this case. I assume that if there is evidence which establishes that a group of armed men were gathered together at a particular spot, it might, depending on the circumstances, furnish *prima facie* proof of the fact that they were participating in the holding of an assembly of armed men. In this case, however, the evidence of the accused as to how they came to be present in the hut on the night in question, was not rejected as false by the Court *a quo*. It appears from that evidence that they did not gather together in the hut because they had been summoned or called upon to do so in order to assemble as a group of armed men. The evening had been spent by all eight of them in one another's company. They had visited various kraals, drinking liquor and dancing at each. Their festivities had ended in the hut of accused no. 8, where they had arrived together and had eventually decided to sleep

because.....21/

because they were weary. It is, of course, so that they (or at least 7 of them) were armed. It is, however, clear from the evidence that in the area in question adult males arm themselves when they move about, either singly or in a group.

I am of the opinion, therefore, that on the facts found by the Court a quo the conduct of the accused (or any one or more of them) did not constitute a participation by them in an assembly of armed men within the meaning of section 7(1) of the Proclamation in question. They were, therefore, correctly acquitted. The first question of law is accordingly answered in favour of the accused. It is not necessary to consider whether Didcott, J., was correct in holding that before a group could be said to be an "assembly of armed men", the evidence would have to establish, firstly, that there was some or other purpose behind the gathering and, secondly, that the bearing

of arms.....22/

of arms was, not coincidental, but necessary or relevant to that purpose, or at the least connected with it in some way. I would observe, though, that it is difficult to conceive of circumstances in which an assembly would be held without there being some or other purpose behind the calling of the meeting. I also take it that in calling a meeting it must be intended that the assembly should be attended by armed men, or, at the least, that a number of the participants should bear arms.

Second Question of Law Reserved.

This question arises from the finding of the Court a quo "that each accused has shown by a preponderance of probability that he did not possess all of the firearms, or indeed more than one of them, and that he likewise did not possess all of the ammunition". In my opinion, and irrespective of the question whether or not it was

justified.....23/

justified on the evidence, the finding is one of fact, and does not give rise to any question of law in the form in which it was reserved by the presiding Judge. The question, therefore, does not require determination by this Court. Nor is it necessary to consider the point in limine taken by counsel for the accused in respect of this question, namely, that a question of law adverse to an accused cannot be reserved at the instance of the State where there has been a conviction.

Third Question of Law Reserved.

This question relates to the finding by the Court a quo that the F.N. rifle referred to in count 2 was not a machine gun or any part thereof within the meaning of section 32(1)(a) of the Act. This finding led to the acquittal of accused no. 6 on the main charge under count 2 and his conviction on the alternative charge. In this regard two distinct, but related, questions of law arose

for determination.....24/

determination by the presiding Judge. The first question involved the interpretation of the words "machine gun.....or any part thereof" in the section in question. The second question was whether, on the facts found by the Court a quo, the F.N. rifle was a "machine gun" or "any part thereof" within the meaning of section 32(1)(a) of the Act. The presiding Judge concluded that the words "machine gun" were capable of both a wider and a more restricted meaning, that, having regard to the penal nature of section 32(1)(a) of the Act, the more restricted meaning had to be given to the words in question and that, having regard to the facts found by the Court a quo in regard to the mechanism and capabilities of the F.N. rifle, the rifle in question was neither a "machine gun" nor "any part thereof" within the meaning of section 32 (1)(a) of the Act.

Section 32(1)(a).....25/

Section 32(1)(a) prohibits the possession by any person of "any cannon, machine gun or machine rifle or any part thereof" except under the authority of a permit issued by the Minister of Police. None of the words underlined by me is defined in the Act, and the expressions "cannon", "machine gun" and "machine rifle" must, therefore, be given their ordinary grammatical meaning in the context in which they are used in the Act in question. It is to be noted that the firearms referred to in section 32(1)(a) may only be possessed under the authority of a permit issued by the Minister of Police. Other firearms, falling within the definition of "arm" in section 1 of the Act, may lawfully be possessed if a licence for such possession is issued by the Commissioner of Police.

Dictionary.....26/

Dictionary meanings of the word "machine gun" are not wholly consistent. In Webster's Third New International Dictionary, the expression "machine gun" is defined as follows:

> ".....an automatic gun firing smallarms ammunition that has a cooling device which permits delivery of sustained fire for relatively long periods and a highly stable mount which permits fire over masks and friendly troops."

This dictionary also distinguishes between a "machine gun" and an "automatic rifle" by defining the latter as follows:

> ".....a rifle capable commonly of either semi-automatic or full automatic fire and designed to be fired without a mount."

The Oxford English Dictionary (the revised edition of which was published in 1961) defines a "machine gun" as follows:

> ".....a mounted gun which is mechanically loaded and fired, delivering a continuous fire of projectiles."

The expression.....27/

The expression was defined in similar terms in the 1933 edition of that dictionary. The current (1973) edition of the Shorter Oxford English Dictionary defines a "machine gun" as:

> ".....a mounted gun which is mechanically operated, delivering a continuous fire."

In the Concise Oxford Dictionary of Current English, the 6th Edition of which was published during this year (1976), the expression "machine gun" is given the following meaning:

> "mounted gun mechanically loaded and fired, delivering a continuous fire."

On the other hand, Funk and Wagnall's Standard Dictionary published in 1959, defines "machine gun" as follows:

> ".....an automatic gun that discharges small-arms ammunition in a rapid, continuous fire."

The dictionaries which I have consulted do not contain a definition of the expression "machine rifle". In the Afrikaans text of the Act, the word "wapen" is defined as "'n ander vuurwapen as 'n kanon of masjiengeweer, en ook....." I.e., the expression "masjiengeweer" covers both a "machine gun" and a "machine rifle".

In so far as the expression "masjiengeweer" in the Afrikaans text is concerned, the following meanings

appear.....28/

appear in three dictionaries that I have consulted.

HAT (Verklarende Handwoordeboek van die Afrikaanse Taal) - published in 1970 - gives the following meaning thereto:

> "Outomatiese geweer waarmee baie skote vinnig na mekaar afgevuur kan word."

In the Afrikaanse Woordeboek (Terblanche en Odendaal), the following meaning is given to "masjiengeweer":

> ".....snelvuurgeweer, outomatiese repeteergeweer waarmee baie skote snel na mekaar afgevuur kan word."

In the Kernwoordeboek van Afrikaans (De Villiers, Smuts en Eksteen) the expression "masjiengeweer" is defined simply as "'n outomatiese snelvuurgeweer".

The following elements seem to be common to the various dictionary meanings of the expression "machine gun" (or "masjiengeweer") which I have set out above, namely, that it is a firearm which (1) is mechanically loaded and

fired.....29/

fired (i.e., it operates automatically) and (2) delivers a continuous fire of projectiles. Such a firearm would, so it seems to me, be covered by the abovequoted definition of "automatic rifle" in Webster's Third New International Dictionary which, as has been pointed out above, draws a distinction between such a firearm and a "machine gun".

The English text of the Act was signed by the State President, and in section 32(1)(a) reference is made to both a machine gun and a machine rifle, i.e., two different types of firearms. Neither expression is defined in the Act, nor are there any indications therein as to precisely what firearm the legislature had in mind in referring to a "machine gun". In the Arms and Ammunition Act, 1937 (No. 25 of 1937) - the whole of which was repealed by the Act - the word "arm" was defined as meaning "any firearm other than a cannon, machine gun or machine rifle....." Section 1(1) of the 1937 Act provided that

no person.....30/

no person shall, "except on behalf of the Government of the Union.....possess -

(a) any cannon, machine gun or machine rifle or any part thereof;"

The lastmentioned Act contains no definition of the expressions "machine gun" or "machine rifle". Its terms furnish no assistance in this case.

The State led expert evidence as to the mechanism and functional capabilities of various types of automatic firearms designed to deliver a continuous fire. They were Sgt. G.K. Lazar, a member of the South African Police who, apart from being a Springbok shottist, stated that he was fully "conversant with the mechanics and working of all types of firearms", and Sgt. G.E. Peggs, an armourer in the South African Defence Force. In reply to a question put by the presiding Judge, Sgt. Peggs said:

"Well.....31/

"Well a machine gun is a mounted object-gun. More stability."

In reply to further questions put by the presiding Judge, Sgt. Peggs testified as follows:

" You see I think we are all having a lot of difficulty in this case with the notion of a machine gun which the Act in question refers to without defining. Is the term machine gun much used these days to describe modern weapons or is it a rather old fashoined term that really describes a rather old fashioned kind of weapon? -- We still call it a machine gun, meaning a mounted weapon. We don't class the Rl - this weapon here - or the carbine or the Sten in that category but it can be used as a machine gun.

Could you give me some examples of typical machine guns in the sense that you have used it, that is to say the mounted type of gun? -- Mounted, you get the Bren machine gun, the MAG machine gun...

These are both mounted are they? -- They are mounted. You get the Vickers machine gun, which is...

This is a heavy machine gun isn't it? -- No it is the same calibre as the...

Yes. -- You get the ,50 Browning which is also a machine gun, that's a very heavy one, ,50 calibre.

And these.....32/

And these four examples you have given are they all mounted? -- All mounted. And there is another one, too, you get the heavy barrel, R1, which is almost mounted and is classed as a machine gun.

Did you say heavy-barrelled? -- Heavy barrel, yes.

I wonder if you could tell us something about the magazine mechanisms of these typical machine guns. Does the Bren use a magazine or a belt of cartridges? -- The Bren uses a magazine.

And how many cartridges does the magazine hold? -- Well they used to hold 30. They now hold 20.

So it can only fire a short burst before one has to change magazine? -- Yes, once the magazine is empty then she won't fire any more.

And the MAG? -- The MAG is belt fed.

And how many cartridges are there per belt? -- Well you can take any amount.

So you can fire a much longer burst with the MAG? -- That is correct.

And the Vickers Browning are they belt-fed as well? -- They are also belt-fed, yes.

So leaving aside for the moment a Bren is it fair to say that one of the features of the typical machine gun is that one can fire reasonably prolonged bursts because one feeds the weapon that enables one to do that? -- Yes.

But the Bren.....33/

But the Bren is an exception. There you can only fire a very short burst without re-loading? -- That is correct.

And the magazine for EXHIBIT 1 the type of FN rifle before Court, how many cartridges does that hold? -- 20.

So it has that similarity with a Bren, if you were to use it as an automatic weapon you would be able to fire a burst of the same duration with each weapon? -- That is correct.

The previous witness said as I remember that if you were to use the FN on automatic it would heat up very quickly, the barrel would heat up very quickly? -- It would, yes, even if you fired it on single shots, after five shots your barrel is pretty hot too.

Is the Bren any different from this, or is the Bren designed for rapid and prolonged fire in circumstances that will cause heat and less wear? -- The barrel of the Bren is thicker than the R1.

Is it cooled in any way the barrel? -- No, it is only air cooled.

Does this mean that the Bren is better designed than the FN for prolonged automatic fire? -- I would think so, yes, M'Lord."

In his evidence-in-chief Sgt. Lazar described the mechanism of the F.N. rifle (Exhibit 1) as follows:

"Now you said.....34/

" Now you said that it may be an automatic or semi-automatic rifle, EXHIBIT 1? -- That is correct, M'Lord.

Can you explain to the Court why you say that? -- First of all it has a magazine which can take 20 rounds of ammunition. If you look at the side of the rifle it has a - we have a safety pin here which if put on to the 'R' position...
DIDCOTT, J.: 'R'? -- There is an 'R' marked on the rifle. The 'R' stands for 'Repeat'. The rifle is then loaded and fired. The trigger mechanism is just pulled and released, pulled and released, and every time the trigger is pulled a shot will go off. It loads itself automatically.

Oh, it is like an automatic pistol. -- That is right.

But you have to pull the trigger separately to fire each shot? -- That is correct, M'Lord. Each shot is fired individually.
BY MR. BREYTENBACH: Sergeant, is that what you mean by 'semi-automatic'? -- That is semi-automatic.

Yes? -- We come back to the pin on the side. This has a small pin which stops this lever from going completely around.
DIDCOTT, J.: The lever you are referring to is what you described as the safety lever earlier? -- That is correct, the one that you pull from 'Safety' to 'Repeat'.

It has got.....35/

It has got a small pin which stops it from continually going round to a position marked 'A' on the rifle. 'A' which is 'Automatic'. Now if that pin is removed - it is quite easily removed, too, M'Lord, just by knocking it you can remove it, it falls back inside - and that lever then being brought round to the 'A' position, this rifle then when loaded and by depressing the trigger would fire all 20 rounds without stopping, it would continually fire all the rounds until all the rounds were disposed of in the magazine.

So by knocking this pin you can then - you knock the pin so that it no longer obstructs... -- That is correct...

... the lever and then you push the lever to the 'A' position to achieve this result? -- That is correct.

How do you knock the pin? -- You can knock it out with anything you like, M'Lord. It can be knocked with a hammer or a stone, something sharp. It is just to remove the obstruction, that is all it is.

It is not something you can do manually though? -- No, you have got to use something to knock it out.

And then once knocked out is it gone forever? -- Well then it has gone, yes.

Yes. -- It has got to be replaced then to stop it from going around.

So it is not a situation where you convert this rifle from semi-automatic into automatic and back again. Once you have

knocked it out.....36/

knocked it out it has now become permanently an automatic rifle? Unless you have got some way of putting a pin back again? -- No, M'Lord, no. If you - this lever...

Yes, I understand with the pin out you can still put the lever back to semi-automatic. -- Semi-automatic or automatic. It can be used in either way. The latest ones they are making haven't got this little pin in, so it can just - it just works ordinarily, the R.1.

BY MR. BREYTENBACH : Sergeant, to make EXHIBIT 1, do you need any further parts? -- No, you don't need anything else. Everything is on the rifle. It is actually an automatic rifle. Just because of the small obstruction it cannot be used automatically. It is an automatic rifle as it is here."

The following questions and answers were also recorded while Sgt. Lazar was giving evidence-in-chief:

"MR. BREYTENBACH CONTINUES EXAMINING THE WITNESS:

Sergeant, if EXHIBIT 1 is placed on 'Automatic' and fired in that way, how will you describe EXHIBIT 1? -- I would describe it as a machine gun.

What do you understand by that term, 'machine gun'? -- A machine gun is a gun which fires continuously without intervention. There is no time lapse between the firing of shots. They go off rapidly in succession.

DIDCOTT,J.: .....37/

DIDCOTT, J.: Mr. Breytenbach, I notice no objection from Mr. Fuller, but I'm at the moment not certain that this evidence is admissible. Can I perhaps ask the sergeant this: does the term 'machine gun' have a special meaning to those people who are intimately concerned with firearms which is different from or more particular than its ordinary meaning as understood by the man in the street? -- That is correct. The meaning is when a firearm is a machine gun it fires continuously, whereas an automatic firearm is also a type of machine gun but it cannot fire continuously.

No, no, I understand what you say a machine gun is but the first question we have got to establish is whether the word 'machine gun' is to be interpreted according to its ordinary meaning assisted by dictionaries, if there are dictionary definitions, or whether it is a specialised term that has got a special meaning? You'll understand that there are many technical terms.-- Yes.

Which you and I would not understand - if an engineer used them he would have to explain to us what they meant; if a doctor used them he would have to explain to us what he meant by them. I know that the word 'machine gun' is a word in common use and in that sense not a technical word, but it may be that to those who

are concerned.....38/

are concerned - as you are - with fire-arms that it has got some special meaning for you that it doesn't have say for Mr. Breytenbach or me. -- I wouldn't say so, M'Lord, not any particular or any special meaning - but just as I have explained it that is what a machine gun is. There is nothing special about it really - the meaning of the word."

In response to a question put by the presiding Judge, Sgt. Lazar stated:

"M'Lord, a machine gun in today's terms you can carry around. You can carry around a machine gun today. It doesn't have to be mounted any more. Because the FN, LMG, the light machine gun which we carry around is a machine gun, is just as effective a weapon as any mounted weapon you can use."

He further said:

"M'Lord in my career I have never used the term machine gun. That is something that we never use. We talk about an 'automatic'."

After having had regard to the various dictionary meanings of the expression "machine gun" and the expert

evidence.....39/

evidence of Sgt. Lazar and Sgt. Peggs, the Court a quo concluded as follows:

> " What emerges from all this as open to criticism is, neither the dictionaries nor the witnesses, but the legislature's choice of an expression which, nowadays at least, lacks a certain and precise meaning. It is far from clear that the F.N. rifle before us, firing or ready to be fired automatically, is appropriately classifiable as a 'machine gun'; and in a case like this, when there is a real doubt about the sense in which the legislature used words, the narrower rather than the wider of the alternative meanings must be preferred. We therefore conclude that the F.N. rifle before us is not a 'machine gun' for the Act's purposes."

After giving the question careful thought, I remain unpersuaded that the Court a quo erred in its conclusion. If regard is had to the authoritative English language dictionaries referred to above, it would appear that the expression "machine gun" is more appropriately related to a mounted automatic firearm that discharges ammunition in a rapid continuous fire. For that reason, so it would

appear.....40/

appear, the ammunition of the typical machine gun is belt-fed. A mount is provided to give it greater stability. The ammunition for the F.N. rifle is fed from a magazine which holds 20 rounds. On automatic operation, the magazine is emptied in less than a second. It appears from the evidence that even if single shots are fired, great heat is generated in the barrel after the firing of some 5 or 6 shots. It follows that if a burst of 20 shots were to be fired great heat would be generated. There would inevitably have to be some pause between the firing of bursts. Whereas the typical machine gun is designed to deliver a "continuous fire", it appears that the F.N. rifle is designed to fire in bursts with some interval between each burst. The wider meaning contended for by the State might well bring an automatic pistol within the ambit of section 32(1)(a). I would add that, having regard to advances in the field of

firearm technology.....41/

firearm technology, the circumstances of today do indicate that it might well be advisable so to define an "arm" for the purpose of the Act that it excludes all types of automatic rifles.

It follows from what has been set out above that the F.N. rifle in question is neither a "machine gun" nor a "part thereof" within the meaning of section 32 (1)(a) of the Act. The third question of law reserved is accordingly answered in favour of the accused. It is, accordingly, not necessary to deal with the point in limine raised by Mr. Fuller.

The Appeals of the accused.

I propose to deal, firstly, with the appeal of accused nos. 1,2,3,4,5,7 and 8 both against their convictions on the third and fourth counts and the sentences imposed upon them as a result of such convictions.

I have already set out the facts relevant to the convictions of the accused on the third and fourth counts.

Quite apart.....42/

Quite apart from the effect of the presumption provided for by section 40(1) of the Act, the evidence established that accused no. 6 was in possession of the F.N. rifle and the ammunition for it. The Court a quo also held it established by a preponderance of probabilities that no one of the eight accused possessed more than one firearm and that they did not jointly possess all the ammunition listed in count 4. Accused no. 6 having been found guilty of the possession of the F.N. rifle and the ammunition for it, the resultant position was that there remained 7 accused and the remaining six firearms listed in count 3. In addition, a toy pistol was also found in the hut.

Section 40(1) of the Act provides as follows:

> "Whenever in any prosecution for being in possession of any article contrary to the provisions of this Act, it is proved that such article has at any time been on or in any premises, including any building, dwelling, flat, room, office, shop, structure, vessel, aircraft or

any part.....43/

> any part thereof, any person who at that time was on or in or in charge of or present at or occupying such premises, shall be presumed to have been in possession of that article at that time, until the contrary is proved."

It was not disputed that the hut in which the accused were found sleeping during the night in question was "premises" within the meaning of section 40(1). Nor was it disputed that the eight accused were in the hut at the relevant time.

It was common cause between counsel that the onus resting on the accused could be discharged by a preponderance of probabilities, and that in considering the question whether or not such onus has been discharged, the court is not restricted to a consideration of the evidence given by the accused - it is entitled, indeed obliged, to consider all the relevant evidence.

It was contended by Mr. Fuller in argument before the Court a quo that accused nos. 1,2,3,4,5,7 and 8 had

established.....44/

established by a preponderance of probabilities that no one of them possessed the F.N. rifle or the ammunition for it. It was, furthermore, established that no one of them possessed more than one of the remaining articles found in the hut (i.e., 6 firearms and a toy pistol). It followed, so it was contended, that it was established that one of the seven accused was in possession of the toy pistol, and since that accused remained unidentified, none of the abovementioned seven accused could be convicted. The contention was rejected by the Court a quo, and rightly so in my opinion. Counsel's contention would undoubtedly have been sound if the onus to prove possession of any one firearm by any particular accused rested on the State. In my opinion, however, the Court a quo adopted the correct approach in the light of the provisions of section 40(1) of the Act, i.e., there was an onus on each one of the seven accused to establish

by a .....45/

by a preponderance of probabilities that he was not in possession of any one of the six firearms found in the hut. In my opinion, no one of the accused succeeded in discharging that onus. The mere fact that on the evidence it was probable that one unidentified accused was in possession of the toy pistol is wholly insufficient to discharge the onus which rested on each one of the seven accused. It follows, in my opinion, that the appeal of the seven accused against their conviction on count 3 cannot succeed. The same reasoning leads to the conclusion that their appeal against their conviction on count 4 can, likewise, not succeed.

I shall deal with their appeal against the sentences imposed upon them after disposing of the appeal of accused no. 6 against the sentence imposed upon him as a result of his convictions on the alternative charge under the

second count.....46/

second count and the fourth count respectively. The presiding Judge treated the two counts as one for the purposes of sentence, and sentenced accused no. 6 as follows: Two years imprisonment and, in addition, a fine of R500 or, in default of its payment, to a further 12 months imprisonment. In granting leave to appeal to accused no. 6, the presiding Judge remarked as follows:

> " The two offences of which accused No. 6 was convicted were treated as one for the purposes of punishment, and for them he was sentenced to be imprisoned for two years and to pay a fine of R500 or, in default of its payment, to be imprisoned for a further period of twelve months. He is, in my view, bound to succeed in an appeal against that sentence, unless of course either the second or the third reserved question of law is answered in the affirmative. I say this because, since imposing the sentence, I have discovered that, to the extent of the order for imprisonment for twelve months if the fine was not paid, it was incompetent. Section 39 (2) (b)(i) of the Act prescribes a maximum punishment for each of the offences of which accused No.6 was convicted of imprisonment for two years or a fine of R1000 or both. Section 336(1) of Act 56

of 1955.....47/

of 1955 empowered me, when fining him, to add a sentence of imprisonment in default of the fine's payment. But the proviso to that Sub-section, which I regrettably overlooked, prohibited a sentence of imprisonment for periods which in their aggregate exceeded the statutorily authorised maximum. I am sure that, if I had realised this, I would not have imposed the fine. It never struck me as conceivable that accused No.6, apparently a humble peasant, could pay it. I had in mind that his effective sentence would be one of imprisonment for three years.

Once the sentence imposed on accused No.6 is reduced, as it no doubt must be if his acquittals on the third count and on the main charge under the second count are undisturned, the sentence of the other seven accused should perhaps be reconsidered. The two offences of which they were all convicted were likewise taken together for the purposes of punishment, and each of them was sentenced to be imprisoned for two years. The unlawful possession by accused No.6 of the F.N. rifle was regarded by me as distinctly more serious than the unlawful possession by any other accused of no more than one of the less lethal weapons that remained. If the other seven accused emerge unscathed from the proceedings before the Appellate Division, it may be thought appropriate to preserve the differentiation in punishment by a corresponding reduction in their sentences."

The presiding.....48/

The presiding Judge, for the reasons set out by him in the abovequoted passage, correctly granted leave to accused no. 6 to appeal against the sentence imposed upon him. The order that he be imprisoned for an additional twelve months if the fine is not paid, was incompetent. (See R. v. Moyage & Others, 1958(3) S.A. 400 (A.D.) at p. 415 D - H). Having regard to the remarks of the learned Judge with regard to the fine imposed upon accused no. 6, I propose to give effect to his recommendation that the reference in his order to a fine be struck out.

In the result the appeal is allowed, and the order of the presiding Judge is altered to read: Accused no. 6 is sentenced to two years imprisonment.

I revert to the appeal by accused nos. 1,2,3,4,5,7 and 8 against the sentences imposed upon them as a result of their convictions on counts 3 and 4. The accused

were all.....49/

were all first offenders, and some of them were young persons, namely, accused no. 2 (17 years), accused nos. 4,5 and 6 (20 years) and accused no. 8 (22 years). The Court had before it the report of a probation officer in regard to accused nos. 2,4,5 and 6. The probation officer recommended that they should receive corporal punishment and be placed under probation. As to this, the learned Judge remarked:

> "I regard this as wholly inappropriate. I think that the suggested punishment of these four accused does not take sufficient or indeed any account of the seriousness of this offence. It is very usual for Courts to treat young offenders who have no previous convictions, especially one as young as 17 as accused No. 2 apparently is, as leniently as possible, and if possible to try and avoid gaol sentences for such persons. But, as always, everything must depend upon the facts of the particular case. In this case young men, I am told by defence counsel, in order to prove their adulthood apart from any other reason, have embarked upon a course of conduct which in my view is most serious. They must be treated like men. I do not propose to treat any of them as juveniles."

After dealing.....50/

After dealing fully with the personal circumstances of the accused, the learned Judge remarked as follows:

"But I am quite satisfied that the public interest, in relation to an offence of this kind, is by far the greatest consideration. When I talk of the public interest, I am thinking primarily of the interests of the people, the unfortunate people, who live in the area of Msinga. I am thinking of the deplorable situation of which I have been told, where murders and hut-burnings are being committed constantly, and where there is apparently an alarmingly large supply of highly lethal weapons available which are in fact being used. It is true, as Mr. Fuller says, that there is nothing to show these particular accused were about to embark upon an aggressive expedition with their firearms. The Court must take some account of the plight of someone who is afraid that he will be shot to death and feels that he has no adequate means to protect himself. On the other hand when people take weapons to protect themselves, weapons of this kind, the situation becomes a vicious circle. As we have heard from the police as witnesses today, the weapons that are used to defend people today are used for reprisal raids tomorrow.

Defence.....51/

> Defence becomes counter-attack, reprisal leads to a counter-reprisal, and so the vicious circle continues. I want to make it plain that I am not finding it a fact that these particular accused were plotting a reprisal or were likely to have committed a reprisal. I must accept that they may very well have had these weapons for solely defensive purposes without plotting a reprisal. But the point that I have in mind is this: that unless the Court treats this kind of offence seriously and does whatever it can do to stamp out the possession of weapons of this kind in Msinga then, if not they, then other people who might start off with weapons for defensive purposes have them readily at hand to use for reprisals. If in other words the idea is allowed to go abroad that people will be treated very leniently as long as they have weapons for defensive purposes, then the vicious circle cannot be broken, or is going to be more difficult to break. The truth of the matter is that the possession of firearms of this kind cannot be tolerated for any purpose whatsoever."

In my opinion, it has not been shown that the presiding Judge has in any manner misdirected himself or committed any irregularity in imposing the sentences in question. Although the sentences are no doubt severe, it

must not.....52/

must not be overlooked that the learned Judge, correctly so in my opinion, treated both counts as one for the purposes of sentence. In the circumstances of this case the sentences, though severe, are not so startingly inappropriate as to warrant interference by this Court. This conclusion would normally result in the dismissal of the appeal. However, I propose giving effect to the recommendation of the presiding Judge, that, if the sentence of accused no. 6 is altered, the sentences imposed on the abovementioned seven accused should be reduced. The offences of which they were found guilty are less serious than the offence in respect of which accused no. 6 was convicted, which involved the possession of a highly lethal firearm. In their case, I am of the opinion, that a sentence of eighteen months imprisonment would be appropriate.

To sum up:

1. The first.....53/

1. The first question of law reserved is answered in favour of the accused.

2. Since the second question reserved is not one of law, but of fact, no answer is required to be given by this Court.

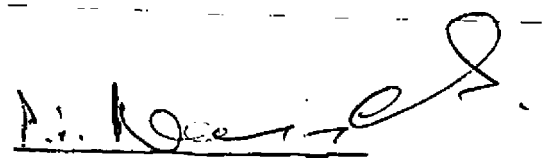
3. The third question of law reserved is answered in favour of the accused.

4. (1) The appeal by accused nos. 1,2,3,4,5,7 and 8 against their convictions on counts 3 and 4 is dismissed.

(2) The appeal by the aforesaid seven accused against the sentence imposed upon each of them is allowed, and the sentence imposed by the presiding Judge is altered in the case of each of them to one of eighteen months imprisonment.

5. The appeal.....54/

5. The appeal by accused no. 6 against the sentence imposed upon him as the result of his convictions on the alternative charge under the second count and the fourth count is allowed to the extent that that part of the order imposing a fine of R500 or, in default of its payment, twelve months imprisonment, is set aside.



Jansen, J.A. )
Galgut, A.J.A.) concur.