m.p.
(348/80)

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the matter between:

RENFREW LESLIE CHRISTIE — Appellant

and

THE STATE — Respondent

CORAM: RABIE, DIEMONT et CILLIÉ JJA

HEARD: 17 September 1981

DELIVERED: 6 November 1981

J U D G M E N T

DIEMONT, JA

Renfrew Christie, a student and a doctor in philosophy, was convicted in the Transvaal Provincial Division on five charges under the Terrorism Act 83 of 1967.

Various .....

Various sentences were imposed on the separate counts, constituting effective imprisonment of ten years. An application for leave to appeal against all the convictions was granted by the trial judge, ELOFF, J and the matter now comes before this Court for determination. The most cogent evidence for the State was a confession made by the appellant to a senior police officer at John Vorster Square, Johannesburg on 26 October 1979 and the greater part of the day's argument turned on the question whether this statement was freely and voluntarily made and whether it had been properly admitted in evidence in the court a quo.

Before considering the merits of the arguments on this issue, and certain other issues it is necessary to refer in some detail to the indictment. There were in all seven counts. The State alleged that Renfrew Christie, a South African citizen, was guilty on each count of contravening section 2(1)(a) read with sections 1, 2(2), 2(3), 4, 5 and 8 of the Terrorism Act 83 of 1967 (hereafter referred as the Act). In the preamble to the indictment the State alleged,

inter alia,

inter alia, that the African National Congress (the ANC) had as its object the overthrow of the lawful authority in the Republic by means of violence, that the ANC was declared an unlawful organization by proclamation, that the accused (appellant) was at all relevant times an active supporter of the ANC, that the International University Exchange Fund (the IUEF) had as one of its objects to support the overthrow of the lawful authority in the Republic by means of violence, and that the appellant intended to obtain and make available to the IUEF and/or Lars-Gunnar Eriksson and/or the ANC and/or Frene Ginwala and/or Horst Kleinschmidt information on all aspects of energy in the Republic. The appellant was therefore guilty of the following crimes:

COUNT 1 Contravening the aforesaid sections of the Act:

> 'IN THAT during the period 1978 to 23 October 1979 and in the Republic and elsewhere, to wit in Britain and/or Switzerland and/or Germany and/or other places to the State unknown, the accused unlawfully and with intent to endanger the maintenance of

law .....

law and order in the Republic or any portion thereof conspired with the IUEF and/or Lars-Gunnar Eriksson and/or the ANC and/or Frene Ginwala and/or Horst Kleinschmidt and/or persons unknown to the State to aid or procure the commission of or to commit the following act:

To obtain and make available to the IUEF and/or Lars-Gunnar Eriksson and/or the ANC and/or Frene Ginwala and/or Horst Kleinschmidt information on all aspects of energy in the Republic.'

COUNT 2 Contravening the aforesaid sections of the Act:

'IN THAT at a time and place and in a manner unknown to the State the accused did unlawfully and with intent to endanger the maintenance of law and order in the Republic or any portion thereof, acquire information regarding the region where the Atomic Energy Board regarded it seismologically safe to explode nuclear devices in the Republic and convey the said information by way of a letter dated the 7th February, 1978, to Lars-Gunnar Eriksson, the Director of the IUEF.'

COUNT 3 .....

COUNT 3 Contravening the aforesaid sections of the Act:

'IN THAT during the period 12 September 1979 to 18 September 1979 and at or near JOHANNESBURG in the district of JOHANNESBURG the accused did unlawfully and with intent to endanger the maintenance of law and order in the Republic or any portion thereof remove from the Electricity Supply Commission library at Megawatt Park, Sunninghill, a drawing entitled "General Layout - Koeberg Nuclear Power Station" drawing No. 046/401/Rv 3 and a report entitled "Public Reaction to the Introduction of Nuclear Power and the Influence of Public Relations Techniques" and attempt to transmit these documents to Frene Ginwala, an official of the ANC, by posting each in a separate envelope addressed to C Needham, 23 Waldemar Avenue Mansions, Waldemar Avenue, London SW 6, England.'

There were two alternative charges to count 3, the first alternative alleging contraventions of section 11(b) ter read with sections 1 and 12 of Act 44 of 1950 (The Internal Security Act) and of section 30B(1)(a) read with sections 1, 30(2) and 34 of Act 90 of 1967 (The Atomic Energy Act) and the second alternative alleging theft of a

document .....

document from the Electricity Supply Commission and of contravening the aforesaid sections of the Atomic Energy Act.

For reasons which will be given later in this judgment it is not necessary to set out details of these alternative charges.

COUNT 4 related to the obtaining of information and the taking of photo-copies of material in the Electricity Supply Commission library at Megawatt Park, Sunninghill. The appellant was found not guilty on this count and no more need be said about it.

COUNT 5 Contravening the aforesaid sections of the Act:

> 'IN THAT upon or about 19 September 1979 and at or near WITBANK the accused did unlawfully and with intent to endanger the maintenance of law and order in the Republic or any portion thereof commit the following act:
>
> During a visit to the Duvla Power Station he inspected the said power station and obtained information regarding the said power station with the intent of conveying it or making it available to the IUEF

and/or .....

and/or Lars-Gunnar Eriksson and/or the ANC and/or Frene Ginwala and/or Horst Kleinschmidt.'

COUNT 6 Contravening the same sections of the Act:

'IN THAT upon or about 19 September 1979 to 20 September 1979 and at or near KRIEL in the district of BETHAL the accused did unlawfully and with intent to endanger the maintenance of law and order in the Republic or any portion thereof commit the following act:

During a visit to the Kriel Power Station and the Amcoal opencast coal mine, he inspected the said power station and mine and obtained information regarding it, with the intent of conveying it or making it available to the IUEF and/or Lars-Gunnar Eriksson and/or the ANC and/or Frene Ginwala and/or Horst Kleinschmidt.'

COUNT 7 related to the acquisition of two drawings entitled "Vleidiagram, Camden Kragstasie" and "Elektriese Baan Diagram Camden Kragstasie" with intent to endanger the maintenance of law and order in the Republic. The appellant was acquitted on this count.

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The appellant pleaded not guilty on all counts and was, as I have said, acquitted on the fourth count and the last count. On count 1, the charge relating to conspiracy with the African National Congress (the ANC), the International University Exchange Fund (the IUEF) and three individuals, Lars-Gunnar Eriksson, Frene Ginwala and Horst Kleinschmidt, the trial court found that "the conspiracy with the ANC represented by Ginwala was proved and also that the accused commenced to act in terms of the conspiracy." The court found further that the conspiracy with the IUEF, with Eriksson and with Kleinschmidt was not proved beyond a reasonable doubt.

The appellant was found guilty as charged on both the second and the third counts. On the fifth and sixth counts the appellant was also found guilty but only to the extent that information was made available to the ANC.

It was conceded by Mr Engelbrecht, who appeared

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for the State, that if the statement made by the appellant to the police officer in Johannesburg was ruled inadmissible the convictions on counts 1, 5 and 6 and on the main charge on count 3 must fail. In short, the confession is the foundation of the case for the prosecution; without it little remains. Needless to say counsel for the appellant, Mr Wentzel, concentrated a heavy and prolonged attack on the admissibility of this confession. Before I come to consider the merits of his argument, I deem it necessary to refer shortly to some of the facts which are not in dispute and to some of the events which led up to the making of the controversial confession.

Renfrew Leslie Christie was at the time of the trial a man aged 30 years. He was born in South Africa, went to school in Johannesburg and after a year in the army went to the university where he distinguished himself academically. He graduated at Oxford in June 1979. His thesis on the history of electricity in South Africa earned

him .....

him the degree of doctor in philosophy. He returned to South Africa in the winter of 1979 with the avowed intention of making energy his academic speciality and to collect information for a book on the coal industry in South Africa. It is common cause that he is a man of exceptional academic ability and intellect.

On his arrival in South Africa he acquired a flat in Tamboerskloof in Cape Town and in September 1979 paid one or more vists to the Transvaal. He spent four days in the library of the Electricity Supply Commission at Megawatt Park, Sunninghill, and shortly thereafter visited Duvla Power Station, Kriel Power Station and the Anglo Power Colliery. He then returned to Cape Town.

On the afternoon of Tuesday 23 October 1979 he was unloading crockery from his motor car when several men drove up and identified themselves as policemen. They entered the flat and shortly thereafter two colonels, colonel Broodryk and colonel Goosen, both members of the

security .....

security police, arrived at the flat. The flat was searched, appellant was arrested and was then taken to the security police offices at Caledon Square in central Cape Town.

It is common cause that the appellant was interrogated by the police throughout the night from 8.30 in the evening until approximately 6.45 in the morning. It is also common cause that he remained standing throughout the period of interrogation and that, in consequence, his feet became swollen, but it is not common cause whether he stood by choice or because he was not permitted to sit down. Nor is there agreement as to whether he was being detained under section 6 of the Act or under section 22 of the General Law Amendment Act, 62 of 1966.

On Wednesday morning, 24 October 1979, he sat down and wrote out a statement, which, after it had been read by colonel Broodryk, he supplemented. He was given the choice of repeating the statement to a magistrate or a police officer who was a justice of the peace; he chose the latter.

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He was then taken to a major Acker who was a member of the fraud branch and unconnected with the matter under investigation. The written statement was handed to major Acker and signed by the appellant. This is referred to as the Cape Town statement. Thereafter he was taken to the district surgeon for examination. His feet were swollen but no signs of assault or injury were found.

On the afternoon of the following day, that is Thursday 25 October, appellant was taken by air to Johannesburg. He was accompanied by colonel Goosen who handed him over to a lieutenant Greyling at the airport. Greyling had become the investigating officer in the case and took the appellant to John Vorster Square where he spent the night. At 11 am on the following day, that is Friday 26th October, he was interviewed by a major Cronwright of the security police. Appellant told the major that he was being detained under section 6(1) of the Act, but he was informed that he was mistaken; he was being held under

section .....

section 22(1) of the General Law Amendment Act 62 of 1966. The difference was explained to appellant and the number of the section and of the Act were written down on a piece of paper and handed to him. Cronwright expressed dissatisfaction with the Cape Town statement but was interrupted by the appellant who said that he had told the police in Cape Town that he was prepared to make a further statement. Appellant was once again given the choice of talking to a magistrate or a policeman who was a justice of the peace. He chose the latter. Before being taken before a justice of the peace he was examined by a district surgeon, a Dr Steenkamp. The medical report was negative. At 2 pm on the afternoon of the same day he commenced dictating a second statement - the Johannesburg statement - to a major le Roux. Le Roux is a member of the commercial branch of the South African police and had no knowledge of the case under investigation. I shall refer at a later stage to the manner in which the statement was recorded and incidents which throw light on

whether .....

whether or not the appellant was speaking under duress. Suffice to say, that it was a lengthy statement, that it was recorded in le Roux's handwriting and that it was not completed and signed until 6.45 pm. The plaintiff was then returned to the cells.

The Cape Town statement was at no stage tendered in evidence, but the Johannesburg statement was relied on and major le Roux was called by the State to testify. The admissibility of this statement was immediately challenged and a lengthy trial within a trial followed. Major le Roux, major Cronwright, lieutenants Greyling and Botes, and the district surgeon, Dr Steenkamp, gave evidence. At this stage counsel for the appellant called on the prosecution to state whether or not an attempt would be made to prove the Cape Town statement because, he said, it was appropriate that the appellant be not called as a witness until "the whole case as to the statements was laid before the court". The prosecutor replied that he was still considering that aspect

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of the case and would decide later. After hearing further argument ELOFF, J ruled that the court was concerned only with the admissibility of the Johannesburg statement and that there was no obligation on the State to decide whether it would tender evidence on another statement and invite the court to give a ruling on the admissibility of that statement.

The trial within a trial proceeded and the appellant gave evidence at length as to the circumstances under which he was arrested and interrogated in Cape Town, as to how he came to make the Cape Town statement and as to the subsequent making of the Johannesburg statement.

After the appellant had testified the State applied for leave to lead rebutting evidence in regard to appellant's treatment in Cape Town and the effect which such treatment was alleged to have had on the making of the Johannesburg statement. The application was opposed on the ground that appellant's evidence relating to the Cape

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Town statement should have been anticipated by the State. For reasons which I shall refer to later the court granted the application and allowed the State to lead further evidence as to the events in Cape Town. Six police witnesses were called after which the court ruled the Johannesburg confession which had been tendered by major le Roux admissible. After further evidence on the merits had been heard by the court the State closed its case.

The defence called no evidence and the appellant was in due course convicted on the five counts referred to above.

Counsel for the appellant launched a four-fold attack on the admissibility of the Johannesburg confession. He submitted that the trial judge had erred in coming to the conclusion that this statement had been freely and voluntarily made on 26 October 1979 for a number of reasons which were summarised in the heads of argument as follows:

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(i) The learned judge ruled that the onus of proof was on Appellant to prove that the statement was not made freely and voluntarily and without undue influence. It is submitted that this ruling is wrong in law;

(ii) The learned Judge permitted the State to lead certain rebutting evidence after Appellant had testified during the trial within a trial and in the face of an objection to this evidence being led at all. It is submitted that this constituted a gross irregularity which caused a failure of justice and vitiated the proceedings in the Court a quo;

(iii) It was not shown beyond reasonable doubt that the statement was made freely and voluntarily and without undue influence.

(iv) The learned Judge erred in holding that the fact that Appellant was detained in terms of section 22 of the General Law Amendment Act, No. 62 of 1966, at the time of making the statement, did not constitute undue influence on Appellant.

As to the onus of proof Mr Wentzel referred to section 217 of the Criminal Procedure Act, 51 of 1977 which, he said, had altered the incidence of the onus of proof only

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in regard to confessions made before a magistrate (see S v Mkanzi 1979(2) SA 757 (T)). Where the statement was made before a police officer who was a justice of the peace the onus remained on the State to establish that the statement was made freely and voluntarily and without undue influence. He argued that the trial judge had ruled that the onus of proof was on the appellant to prove that the statement was not made freely and voluntarily. That ruling was wrong in law and was a clear misdirection. In support of his argument he cited two sentences in the judgment which read as follows:

> 'The accused claims in his evidence that his statement was not freely and voluntarily made. The onus was on the accused to prove the contrary.'

At first blush it might seem that there was some substance in the submission but a careful reading of the two sentences satisfies me that the trial judge was guilty of no more than a lapsus linguae. He stated (1) that the accused claimed that his statement was not

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freely and voluntarily made and (2) that the onus was on the accused to prove the contrary, that is, that the accused must show that the statement was freely and voluntarily made. That is an onus which no accused person would seek to discharge with any enthusiasm. Clearly what the judge intended to say was that the onus was on the State to prove the contrary. In coming to this conclusion I am fortified by another passage in the judgment in which the same mistake occurs. I quote from page 356 of the record:

> 'I now furnish my reasons for allowing the statement made to major le Roux.
> The statement sought to be proved by the accused, was made by the accused on 26 October 1979 to the witness major le Roux.'

Clearly "the accused" should have read "the State". And indeed, even Homer nods at page 129 of the record where Mr Wentzel speaks of the advantage the State would have "of hearing the accused cross-examining the accused." Certainly an unusual advantage.

That there was no misunderstanding as to

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where the onus lay can be readily inferred from the form which the proceedings took and the manner in which the evidence was presented. The reports of the argument make it clear that there was never any disagreement on the issue between counsel and the order in which the witnesses are dealt with in the judgment shows that the trial judge was under no misapprehension. If there had been confusion in his mind he would undoubtedly have referred to the amended section (217 of Act 51 of 1977) and in particular he must have considered whether the accused had discharged the onus which rests on a person who has made a confession before a magistrate (subparagraph (ii) of section 217(1)(a)).

I am accordingly not persuaded that there was any misdirection in regard to the onus of proof.

Mr Wentzel argued further that there was a misdirection in regard to rebutting evidence "which should be viewed in the light of and together with the learned judge's misdirection as to the onus of proof." He said that when the appellant first testified during the trial within a trial there was no evidence before the court regarding appellant's arrest .....

arrest in Cape Town and his treatment by the police in Cape Town. This was so notwithstanding the objection to the admissibility of the Johannesburg statement and notwithstanding it having been pertinently pointed out to the court that the events in Cape Town were causally connected to the making of the confession. Subsequent to the appellant having given evidence and in the face of objection the prosecution was permitted to lead the evidence of various police witnesses regarding events in Cape Town in rebuttal of his evidence. He said that the State could easily have adduced this evidence during its own case had it so desired. It was unfair to the appellant to allow the State to lead its evidence in this fashion; the appellant had been grossly prejudiced and this irregularity had caused a failure of justice which vitiated the proceedings. In short the appellant had not been given a fair trial. (S v Alexander and Others (1) 1965 (2) SA 796 (A) at p.809).

In deciding whether there was an irregularity

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and whether the irregularity was "of such a nature as to amount per se to a failure of justice" (The State v Moodie 1961(4) SA 752 (A)), it is important to remember that the trial judge gave two rulings. Initially (I refer to page 123 of the record) Mr Wentzel initiated the debate by stating:

> 'M'Lord, may I inquire of my Learned Friend because it affects the procedure, whether my Learned Friend is going to attempt to prove the Cape Town statement because then it is appropriate that I do not call the Accused until that is done.'

The trial judge interrupted to say that he was concerned at that stage with the admissibility of only one statement.

Mr Wentzel contended that the State was seeking to introduce the statements on an instalment basis - first the Johannesburg statement and then, after the appellant had been in the witness box, the prosecution would try and make the Cape Town statement, or statements, available by way of rebuttal. The statements were, he said, "substantially contemporaneous" .....

contemporaneous" and putting them forward on a piecemeal basis would result in the whole matter being tried twice. The trial judge rejected this argument. He ruled that he had been asked to decide only on the admissibility of the Johannesburg statement and he could not compel the State to lead evidence in support of a statement it had not tendered.

I can find no fault with this ruling.

Mr Wentzel's only criticism in this Court was that the trial judge erred in not postponing the trial until the prosecution had elected whether or not it would tender the Cape Town statements. There is no substance in that criticism. The State did not initially or, for that matter, at any later stage in the trial attempt to place the Cape Town statement before the Court. What it did was to make an application to lead rebutting evidence after the appellant had testified as to his treatment in Cape Town and the effect it had on the confession he made in Johannesburg. That application was also resisted and after hearing further argument ELOFF, J gave a second ruling. He decided, for reasons to which I shall refer, that the application be granted and that

evidence....

evidence in rebuttal could be led.

It was this ruling which came under the heaviest fire from counsel. It was, he said, a misdirection which was linked with the misdirection as to the onus of proof - an issue with which I have already dealt. He argued at some length that the ruling caused gross prejudice and violated the fundamental principles that an accused person must be given a fair trial.

The general rule is clear: In the interest of finality a party who has closed his case cannot afterwards claim the right to lead any further evidence. That rule applies, no doubt, also to a trial within a trial. But there are exceptions to the general rule and further evidence in rebuttal may be led with the leave of the court. In the exercise of his discretion the judge will ask himself whether the evidence could not by the exercise of due diligence have been led at the proper time (see HOFFMAN "S.A. Law of Evidence 2nd edition p.336). Where during the course .....

course of the defence evidence, new matter is introduced which the prosecution could not have been expected to foresee, the prosecution, at the close of the defence evidence, may be permitted to present rebutting evidence in respect of such matter. (Rex v Lukas 1923 CPD 508 and R v Limbada 1956 (1) SA 697 (N)).

Stated in its simplest terms the question which faced the trial judge was whether the accused gave evidence of fresh matter which the prosecution could not foresee (PHIPSON on Evidence 12 ed. p.1617).

One of the crucial questions which the trial court had to consider in deciding whether the Johannesburg statement was admissible was whether the appellant was acting under duress when he made the statement to major le Roux. The police officer was cross-examined at some length but there was no mention of duress save for the general question as to whether he thought it was his duty to satisfy himself that the statement was freely and voluntarily made.

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Major le Roux conceded that it was apparent from the statement made by the appellant that he was adding to a previous statement made in Cape Town, but no questions relating to that statement or the events in Cape Town were put to the witness. Nor was the Cape Town issue pertinently raised with the investigating officer, lieutenant Greyling. Major Cronwright stated that he had no knowledge of what had happened in Cape Town or what the accused had been told there; he had seen the Cape Town statement and found it to be incomplete. The other two witnesses, lieutenant Botes and Dr Steenkamp did not so much as mention Cape Town. It was only after the appellant had given evidence - some 70 pages later - that there was testimony before the court that called for rebuttal.

Allegations were made by the appellant in the witness box that could not be brushed aside. He complained that he was threatened by colonel Broodryk in language too crude to repeat here, that colonel Goosen spoke of high treason for which he could hang and he said that the colonel

also .....

also threatened to detain or arrest for interrogation a large number of his friends and acquaintances listed in his address book. These and other allegations first came to light when the appellant went into the witness box. The cross-examination of the State witnesses gave no inkling of any of these matters and the prosecution could in consequence not foresee in what respects appellant claimed to have been unduly influenced or subjected to duress. If the trial court were to arrive at the truth it was necessary that the State be given leave to lead rebutting evidence to test both the credibility and the relevancy of the appellant's allegations.

It is true that at the outset of the trial within a trial counsel for the defendant made certain general remarks. He told the Court that the two statements were "substantially contemporaneous"; that one statement flowed from the other, that the admissibility of the later statement depended on the admissibility of the earlier statement, and that "unlawful duress" was applied in Cape Town. It must

have .....

have been apparent to the trial judge that the events in Cape Town might have to be investigated but whether the one statement flowed from the other could not be ascertained then, nor at any later stage, since the Cape Town statement was never tendered in evidence. As to the unlawful duress, counsel said no more from the bar than that he would "have to tell the court about the conduct of certain police officers in Cape Town". And, as I have said, the cross-examination of major le Roux and the other Johannesburg policemen threw little light on the Cape Town picture.

In all the circumstances I cannot say that the trial judge exercised his discretion unjudicially when he ruled first that he could not compel the State to lead evidence about a statement which it had not tendered in evidence and second that after hearing the appellant's evidence, he granted the State leave to lead evidence in rebuttal. No injustice was done.

Counsel for the appellant contended further that .....

that even if the court did not misdirect itself in admitting rebutting evidence it should, none the less, have found that the State had failed to prove that the confession was made freely, voluntarily or without undue influence. He argued that the two statements were taken from appellant within such a short period of time that they were substantially contemporaneous, and that they were dependent one on the other. They were, in effect, part of the same document so that it was wrong to ignore the first and admit the second. In support of his argument counsel relied on a Scottish case - Chalmers v H M Advocate 1954 J C 66 - which was tried before LORD STRACHAN and a jury. He said that the facts in that case bore comparison with the facts in this case. A youth of sixteen was taken to a police station under suspicion of murder. After being closely questioned he broke down and made a statement which was incriminating. The statement was not tendered in evidence. Immediately after making the statement, that is some 10 minutes later, the youth was taken

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by the police to a cornfield nearby, where the purse of the deceased was found at a spot pointed out by the youth under the surveillance of the police. He was then taken back to the police station where he was interrogated further. This evidence was admitted and he was convicted. On appeal the full bench of the High Court held that the episode of the cornfield was "part and parcel of the same transaction as the interrogation and, if the interrogation and the statement which emerged from it was inadmissible and unfair the same criticism must attach to the conducted visit to the cornfield." The appeal was allowed.

I do not think that the statement made in Cape Town and the statement made in Johannesburg are "part and parcel of the same transaction". It is true that both statements were made to the police and that the appellant prefaced his second statement with the words that he would "add details to the statement already made". But neither of

those .....

those facts are conclusive. We do not know, as I have pointed out before, what was contained in the Cape Town statement. The Johannesburg statement is a lengthy document running to some 18 typed pages. It commences with events in 1968 and describes in some detail the appellant's career and relations with a member of the African National Congress, Frene Ginwala, in Europe. It tells of his return to South Africa in July 1979 and of the manner in which he came into possession of a blue print of the Koeberg Nuclear Power Station plans and other documents and how these papers were despatched secretly to the ANC under a cover address in the United Kingdom and it tells of money payments that he received and other matters. In short it is a detailed confession apparently complete in itself. It may or may not repeat matter which was contained in the Cape Town statement, but that statement is clearly severable both in time and space from the second statement. One statement was made to a major Acker in Cape Town; the other was made almost three days later to a major le Roux in the Transvaal. Naturally it is

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a question of degree depending on the facts in each case and it may be difficult to draw the line or describe in terms universally and generally applicable as to when two or more statements made to the police can be said to be "part and parcel of the same transaction" but in this case I have no doubt that the two statements did not form part of one document nor must they be seen as one confession.

Mr Wentzel argued in the alternative that what happened in Cape Town was grossly unlawful and that the police treated the appellant illegally from the time of his arrest at his flat. He had been interrogated throughout the night and had been made to stand for many hours until his feet became swollen before he made the first statement. The police knew that that statement would not be admissible in evidence and he was accordingly taken to Johannesburg where they played the charade of taking a second statement. When the appellant made the second statement he was not free of the undue influence to which he had been subjected some

days .....

days earlier. In brief the Cape Town events could not be separated from the Johannesburg events.

It is common cause that appellant was interrogated for many hours. Mr Engelbrecht contended that in principle there is no objection to protracted questioning by the police, and indeed WIGMORE gives reasons why confessions extracted after lengthy continuous interrogation in seclusion should not be excluded (WIGMORE in Evidence, 3 edition par. 851 pages 318-20). But as was pointed out by BEADLE, CJ in R v Ananias (1963 (3) SA 486 at 487) in dealing with an enquiry into persistent questioning by the police, each individual case must depend on its own particular circumstances. The form of the questions put, the manner of the interrogation, the persistent and aggressive quality of the questions, and fatique induced by persistent questioning which is calculated to break down the accused's powers of resistance - these are all factors to which regard may be had by the court. I am of the view that had the first

statement .....

statement been tendered in evidence the trial court may have looked on an all-night interrogation with jaundiced eyes and may well have excluded the statement.

It is also common cause that the appellant remained standing for some 11 hours. He says that there was no chair and that he was not allowed to sit down. The police say there were three chairs - two for the interrogators - and that he refused to sit on the third chair. They say that his manner was impudent, that at times he turned his back on them and did not answer questions but stood looking out of the window. At other times he paced up and down. Two policemen questioned the appellant between 8 pm and midnight - (lieutenant Visser and detective warrant officer van der Hoven) - and two other policemen from midnight until the early morning (detective warrant officer van Wyk and detective constable Vermeulen). The four police witnesses all denied that the appellant was instructed to remain standing. The trial judge summed up the conflicting

evidence .....

evidence on this issue as follows:

> 'Lt. Visser impressed me as an honest witness and I think that it is not unlikely that there was a chair in the interrogation room for the accused to sit on but that for reasons best known to himself he chose to face his interrogators standing up. But while the accused's evidence was unsatisfactory in the various respects discussed later in this judgment, I concluded that his story that there was no chair for him and that he had perforce to stand, might reasonably be true .....'

I shall assume in appellant's favour that he was unfairly treated, that he was made to stand all night while he was questioned, that his feet became swollen and that he became tired, and that all these circumstances induced him to speak. It has been held that an inducement which occurs some time before the making of a contested statement may nevertheless make such later statement inadmissible. Thus in R v Nhleko (1960 (4) SA 712 (AA) at p.720) SCHREINER, JA said:

'The .....

'The burden rests on the Crown to prove that any statement of the accused which it tenders was freely and voluntarily made and, if there has been violence before the statement, it must satisfy the trial Judge that the violence did not induce the statement, either because it did not have an inducing tendency in the first instance or because that tendency had in some way ceased to operate.'

And see too R v Sungayi 1964 (3) SA 761 (SR) at p.756.

I have come to the conclusion that the evidence clearly establishes in this case that the harassment to which appellant was or may have been subjected in Cape Town had ceased to operate in Johannesburg, that the confession was freely made without undue pressure and was not invalidated by the earlier inducement to speak.

I say so for the following reasons:

1. A new team of policemen took charge of the appellant in Johannesburg; they treated him with punctilious correctness. The investigating officer, lieutenant Greyling, met him at the

Jan .....

Jan Smuts Airport. His attitude was in appellant's words "in general perfectly correct". It was not suggested to lieutenant Greyling or lieutenant Botes or major Cronwright in cross-examination that they exercised any form of undue influence to extract a statement from him. Appellant did say that major Cronwright was "fairly aggressive" in the first few minutes of meeting him, but it was a vague allegation and was rightly dismissed by the trial judge. Indeed the appellant appeared to be confident and self-assured in his relations with the police. So, for example, he testified as to a conversation he had on the day after his arrival in Johannesburg as follows:

> 'Did you meet a Mr Pitout that day? --- Yes, My Lord, I was at some stage that morning when Mr Greyling was not going to be available, taken into an office with a Mr Pitout.
> A member of the Security Police? --- Yes, My Lord.
> I do not think we need a great deal of detail in that regard but what - did he talk to you at all? --- My Lord, he began a lecture, to put it .....

> it no stronger, on the necessity for telling the truth in all circumstances, and an almost philosophical diatribe on the nature of truth. By this stage I had been told by numerous policemen how it was in my interests to tell the truth and Mr Pitout's manner in lecturing me on this was and I think calculated to be offensive. I said I knew what the truth was and from the firmness of my reply he then left off the conversation'.

2. Appellant was co-operative as well. Shortly after meeting major Cronwright on the Friday morning, he was told that the statement he had made in Cape Town was unsatisfactory, and there were all sorts of things that puzzled the major. Appellant then volunteered assistance. He testified:

> '.....I interrupted him, saying that I had told policemen in Cape Town that if further details were required, I would give them and that I was prepared to make a further statement'.

These were not the words of a man acting under compulsion.

3. Later in the day when he made the statement before major le Roux he was asked the routine questions. His answers to some of the questions are illuminating. So, for example,

after .....

after stating that he had been made to stand all night so that his feet became swollen and sore, but that he had not been ill-treated or assaulted, he was asked whether any promises had been made or whether he was encouraged to make this statement. He replied:

> 'I am making this statement so that interrogation will not be unnecessarily prolonged, and so that it will not be necessary to arrest and interrogate a number of innocent parties.'

He did not say that he feared that he would be made to stand again or that he feared that he might be subjected to other molestation.

He was then asked why, if he had made a statement in Cape Town he wished to repeat the statement. His answer was, not that he was under any compulsion, but that he would add details to the statement already made. Major le Roux then asked him why he had been brought to his office and why he did not prefer making a statement before a magistrate. .....

magistrate. The answer given is candid and significant:

> 'I was brought to your office for a statement so that I could freely give my statement to a person not connected with the investigation at hand.'

But the reason he gave for not making the statement before a magistrate is less convincing. When he was given a choice in Cape Town of making a statement before a magistrate or a justice of the peace he told the court that "I virtually flipped a coin in my mind and opted for the justice of the peace." In Johannesburg he said that he had decided to follow the Cape Town procedure "to maintain consistency". The answer does not make sense. It is probable that having attended several terrorist trials as a spectator he knew full well that in terms of section 217 of Act 51 of 1977 a statement made before a magistrate was presumed to have been made freely and voluntarily. Whatever his reason may have been, it is quite clear that he had his wits about him and the answers given to the questions put to him by the justice

of the peace gave no hint of duress or police coercion.

Mr Wentzel criticised major le Roux. He said that the policeman should have asked him real questions, not a series of formal questions, and that he should have asked him much more. This criticism is unjustified. Major le Roux assured the appellant that he had nothing to fear and that if necessary, he would arrange protection against assault or irregularity. He then warned him that he was not obliged to make a statement and if he did make a statement it could be used in evidence against him. The appellant is an intelligent man; what more should he have been told to alert him to the danger of talking? The twelve questions that follow on the warning may be described as "formal" because they are printed on the form, but it does not follow that they are not "real" questions or that they can be treated as mere routine and the replies glossed over. Each question appears to have been given thought before the deponent answered it.

4. The manner in which the appellant dictated his confession

tells .....

tells its own story. I quote from appellant's evidence under cross-examination:

> 'And Dr Christie is it correct that you not only dictated this statement to major le Roux, but that at times you spelled the words for him? --- That is correct, yes My Lord.
> And at times you said: "New paragraph"? --- Yes, My Lord.
> And at times you said: "Full-stop" --- Yes, My Lord.
> Or "comma", where a comma should be --- Yes, My Lord.
> Doesn't that - everything indicate that you were completely at your ease in his office? --- My Lord, it indicates that I wanted to facilitate the process of taking the statement. The Major was clearly a civilised and educated man, there was no great need to spell words for him except that I was working in his second language. Where I came across words that might be difficult I spelled them out. It was primarily a wish to get through the statement as fast as possible, it was a long statement.
> But why then say "full-stop", "new paragraph", or "comma" where a comma should be, why not leave it .....

it to him. --- That would make it easier for him to transcribe my words.
Is that the behaviour of a frightened man or of a man who is afraid of the police? --- My Lord, in this case it was but I was not particularly frightened of major le Roux he was clearly a civilised man. His ability to protect me however I believed wrongly or rightly, to be limited and I did wish to get through the statement and make sure that it was transcribed as accurately as possible. I therefore suggested where he should put in new paragraphs.
Now as I said this dictation of yours lasted several hours. --- From 2 o'clock to something like 6.30, in the evening My Lord.
And as I understand Major le Roux correctly, is that you took your time. --- My Lord, he was writing and I would wait for him to complete a section before going on with the next one. I thought about what I was going to say. I took the time necessary to dictate a statement to someone writing it.'

Major le Roux confirmed this evidence. The appellant, he said, appeared to be completely at ease and in an elated mood ("....in 'n opgewekte luim. Heeltemal op sy gemak"). His conduct can hardly be described as that of a

browbeaten .....

browbeaten or frightened man.

5. The content of the confession also throws some light on the appellant's state of mind. It is, as I have said, a long document, but from time to time it gives glimpses of appellant's confidence, self-assurance and pride in his achievement in sending secret information abroad. Modesty is not one of his failings. He tells the police officer that he intended to write "a deep thoroughly researched economic history (of the coal industry) - comparable with anywhere in the world", that he was "well informed on energy matters both in South Africa and at a world level". He tells of posting the blue print of the plan of the Koeberg Nuclear Power Station to the ANC and then, almost flippantly, tells of the danger to the city of Cape Town and that he is not given to committing suicide:

> 'I posted them (envelopes) to the ANC fully aware of what I was doing, although if the plan of the Koeberg Power Station was to be used for a military operation I did not expect the power station to be blown up once the reactors were

critical .....

critical but rather before completion of the station, when a bomb in the pipe work could destroy the quality control so that construction could be delayed for many years. For the power station to be attacked once it was critical would be suicide for me because I live and expect to be living in my flat just across Table Bay. I am not given to suicide and I therefore did not envisage that the plan should be used in this way, although on subsequent reflection during my imprisonment it has become apparent that the plan might have been used in such a military way. There are very few nuclear power stations to my knowledge sited as close to a major city as Koeberg is to Cape Town, and the military risk of this siting has become very obvious to me during my imprisonment, although obviously I had not seen it in this way before because I chose to take up a flat in Tamboerskloof, Cape Town, from which suburb the Koeberg Power Station could be seen on a clear day.'

He appears almost anxious to speak of his achievements both as an energy expert and as a secret agent and, surprisingly, concludes his lengthy confession with an offer of more help:

'I .....

'I shall now complete the statement and sign it after many hours of dictation. If further details are required I shall make a supplementary statement in the same way.'

6. The last reason for accepting that the confession dictated to major le Roux is admissible arises out of a pertinent question which was put in argument - why, if he were not acting under compulsion or undue influence, would the appellant make a statement implicating himself so deeply?

It is probable that the answer to that question is to be found in an incident which took place a month before his arrest. He had taken the risk of posting two envelopes to an accommodation address in England. The address was given to him by Frene Ginwala, the ANC agent with whom he was working. One envelope contained the Koeberg Power Station plans, the other a confidential report on the danger to the public of nuclear power stations. These two envelopes were posted by appellant at the General Post Office in Johannesburg and on 28 September 1979 they were intercepted by a post office

official .....

official acting on the instructions of the security police. The two envelopes were addressed, not in appellant's handwriting, but with a draftsman's pen and a blue letter-stencil. After the appellant's arrest a draftsman's pen, a stencil and ink corresponding to the ink on the envelopes were found by the police in appellant's Cape Town flat.

In the witness box the appellant said that while he was being interrogated by the police at Caledon Square he caught a glimpse of envelopes in the police file and began to understand "the tactic used by the police". Colonel Broodryk on the other hand, denied that the appellant could have seen the envelopes during the night. He said it was only after appellant had written his statement that he was shown this incriminating evidence. He said:

> 'Ek het die verklaring by hom geneem en die verklaring wat hy self uitgeskryf het, gelees. Nadat ek die verklaring gelees het het ek twee bruin koeverte wat geadresseer was aan C Needham, en geadresseer was aan 'n adres in London, aan

die .....

die beskuldigde getoon. Die beskuldigde was .... (tussenbei).

Kolonel sal u net kyk na Bewysstuk BB en CC --- Dit is die twee koeverte U Edele. Ek het die twee koeverte voor hom geplaas, hy was vir 'n oomblik stomgeslaan. Hy het vir 'n oomblik sy kop laat hang en aan my gevra: Waar het jy die koeverte gekry? Ek het hom nie geantwoord nie en vir hom gesê: Ek hoop jy besef dat jy nou die waarheid moet skrywe of vertel en dat dit jou nie sal help om verder weg te skram nie. Die beskuldigde - ek het 'n oomblik by hom nog vertoef en daarna het hy weer begin te skrywe -'

It does not matter when exactly the appellant became aware that the police had intercepted his post. What is important is that by the time he sat down to dictate his confession in Johannesburg to major le Roux he had had almost three days to reflect on his position. He must by then have come to realise that the police not only knew what he had done but had proof of his underground activities. He was anxious at this stage to protect people whose names and addresses the

police .....

police had found in his note book and in particular a young woman in whose company he had been seen. In his confession he refutes the police suggestion that this young person was involved in his "secret activities" and is at pains to emphasise her innocence.

I have no doubt that the explanation for appellant's Johannesburg statement was not an aftermath of the Cape Town interrogation, but the recognition that the police knew far more than he had initially given them credit for and his resultant anxiety to protect his friends and other people from interrogation or arrest.

For all these reasons I have come to the firm conclusion that the evidence establishes that the confession was freely and voluntarily made and was not induced by events in Cape Town.

Mr Wentzel argued further that the trial judge had erred when he held that appellant's detention in terms of section 22 of Act 62 of 1966 did not effect the voluntariness

of .....

of the Johannesburg statement and did not constitute undue influence on him in the making of that statement.

Section 22 entitles any police officer with the rank of lieutenant-colonel or higher, who has reason to believe that a person is a terrorist who has committed an offence in terms of 11(b) ter of the Internal Security Act, or in terms of section 21 of the General Law Amendment Act of 1962, to arrest such person without warrant and cause him to be detained for questioning for not more than 14 days or for such further period as a supreme court judge may determine.

The appellant stated in evidence that he had been told in Cape Town during the course of interrogation that he was being held under section 6 of the Terrorism Act of 1967 and indeed he repeated that allegation in the statement made before major le Roux. The police witnesses denied this. It is common cause that whatever appellant may or may not have been told in Cape Town, he was explicitly told, both by lieutenant Greyling and major Cronwright, that he was being

detained .....

detained under section 22 and he was given a written note recording that the detention was under section 22 "for a period of 14 days" (exhibit Z).

The distinction between the two sections must not be overlooked. Section 6 of the Terrorism Act permits indefinite confinement with a considerable degree of isolation until the detainee has replied satisfactorily to all questions; these factors, it has been said, could create conditions calculated to put the detainee under pressure to make statements regardless of their truth or falsity (see Gwala and Others v The State 28 March 1980 AD unreported), whereas section 22 provides for only limited detention and does not create an obligation to speak. Section 6 is obviously the more drastic section and the likelihood of the detainee being influenced by the circumstances of his detention is far greater when he is arrested and detained under the provisions of the Terrorism Act.

It was, as I have said, made clear to the

appellant .....

appellant, both by word of mouth and in writing that he was being held under section 22. He is an intelligent man and I have no doubt that he appreciated the distinction between the two sections and that he knew full well that in Johannesburg he was being held under section 22. Despite this knowledge he continued to harp on section 6 in his evidence. So, for example, when asked whether he was in any way threatened by police officers in Johannesburg, he admitted that there was no such threat but said that he still felt under duress and referred once more to section 6. It is significant that at no time did he state positively that his temporary detention under the provisions of the General Law Amendment Act influenced him in any way to make a statement before major le Roux. However, whether he was held as a detainee under the Terrorism Act or as a detainee under the General Law Amendment Act, it was the court's duty to examine with vigilance the circumstances under which the confession was made.

The approach to evidence given by detainees

was .....

was considered by VAN BLERK, JA in S v Hassim and Others 1973 SA(3) 443 (AD) at p.454. He said:

> 'The object is the acquiring of information. But if a prosecution should ensue, the Court is not obliged to be satisfied with the evidence so acquired. The Court retains its normal power and function, which it will exercise with vigilance and scrutiny, to pronounce upon the evidence placed before it, bearing in mind, inter alia, in any particular case, the question whether the circumstances under which the evidence was obtained has affected its credibility. No hard-and-fast rule can be laid down. Each case will turn on the totality of its own particular facts and the impressions which the various witnesses make on the Court.'

Both counsel referred to a full bench judgment given in the Eastern Cape - S v Hlekani (1964(4) SA 429(E) - in which decisions in respect of statements made under statutory compulsion were reviewed. (The so-called 90 day section - section 17 of Act 37 of 1963). To enter into a critical examination of the merits of that judgment would

extend .....

extend this already long judgment to undue lengths. In any event it must be emphasised that the section with which we are here concerned, section 22, does not create a statutory duty to speak. The Court will not automatically assume that because the person concerned is being held under that section any statement he makes is not freely and voluntarily given. But at the same time the Court will recognise that there may be an element of inducement in the sense that the detainee may think that by speaking he may secure his early release. Accordingly whether he has been induced to speak and if so, why, is a question of fact to be looked at in each case. I have already alluded to the circumstances under which the appellant made his confession in Johannesburg and the reasons which prompted him to speak. I need not repeat these reasons. It is sufficient to state that there is no evidence on record which leads me to infer that the mere fact of detention under section 22 induced appellant to make a confession or exercised any undue influence over him.

Counsel .....

Counsel for appellant contended further that there had been a duplication of convictions and that in consequence one's sense of fairness was aggrieved. It was alleged, he said, that all of the acts were committed with the intention of endangering the maintenance of law and order in the Republic. Duplication of convictions had resulted inasmuch as appellant should not have been convicted both of the conspiracy (count 1) and of performing all the acts referred to in pursuance of that conspiracy (counts 3, 5 and 6).

The question of splitting of charges has exercised the patience - and the ingenuity - of the courts for many years - and, as was said recently by JOUBERT, AJA in S v Prins and Others (1977 (3) SA 807 (AD) at p.813), it is virtually impossible in our law to lay down a general inflexible test as to when there is a splitting or a duplication of convictions. Much the same was said many years ago by KOTZE, JP in Gordon v R 1909 EDC 254 at 268:

'In .....

'In our South African practice there is a tendency against what is known as the splitting up of charges, where the transaction is considered to be one and the same offence. The decisions on this point are doubtless not consistent with one another. We profess to follow the rule that, where the act or offence is in substance the same, a multiplicity of charges is not to be allowed. No general test has, however, been formulated and laid down, enabling us to say when an offence is in substance the same and when not. It is difficult, if not impossible, in view of the decided cases, to lay down a hard and fast rule which will apply with justness in every instance that has already been adjudicated upon, or which may in future arise for decision.'

The circumstances of each particular case must be examined. The charges under consideration, all relate to a contravention of section 2(1)(a) of the Act; the section provides inter alia, for two catogories of offence, (1) the commission of an act with intent to endanger the maintenance of law and order in the Republic and (2) conspiring with

any .....

any other person to aid or procure the commission of any act with intent to endanger the maintenance of law and order in the Republic.

The trial judge had no difficulty in deciding that the evidence established beyond all reasonable doubt that appellant had conspired with the ANC to make information available which would be used to strike at South Africa and accordingly that count 1 had been proved so far it related to the ANC. Once the confession was admitted there could be no criticism of that finding.

Count 3 related to the appellant's act of having removed the Koeberg Plans and a confidential report from the ESCOM library and the attempted transmission of the documents to the ANC overseas. Here too, the factual basis of the offence was proved beyond all dispute. The trial judge came to the conclusion that conspiratorial agreement with the ANC and the attempted transmission of documents were separate acts which were related

*.....to .....

> '..... to the extent that proof of the conspiracy established an intent at accomplishing the act alleged in count 3, and that proof of the act alleged in count 3 served as aid in the proof of the conspiracy, but beyond that I do not think that there was an overlapping. The act alleged in count 3 was an independent criminal act.'

I can find no fault with that conclusion.

Count 5 related to the obtaining of information at the Duvla Power Station where appellant gathered much information and made copious notes. The only reasonable inference was that this information was acquired at least partly with the intention of passing it on to the ANC. By the same process of reasoning as he applied to count 3 the judge a quo decided that a separate indictable act had been committed in pursuance of the conspiracy. Both as to time and to place and also as to its nature the act differed and was separable from the acts described in counts 3, 4 and 6. I agree.

As to count 4 - the removal of photocopies of certain pamphlets from the ESCOM library - it was held that

what .....

what the appellant did was "already largely encompassed in count 3". It would be incorrect to split the various items of information gathered in the library and to enter separate convictions in respect of each item of information. In brief it would be unfair to lay a separate charge for each document removed from the library.

Count 6 is also based on a contravention of section 2(1)(a) and relates to a visit by the appellant to the Kriel Power Station and the AMCOAL opencast coal mine where the appellant obtained information and took more notes with the intention of conveying and making the information available to the ANC. The offence is severable both in respect of time and place of commission and although it was performed in furtherance of the conspiracy the State was entitled to frame a separate charge and the trial court was entitled to convict. Accordingly I find no substance in the submission that the appellant should have been convicted on one count only namely of the commission of a number of acts in furtherance of an unlawful conspiracy.

The confession to which so much attention was given in the trial and in the argument before this Court, is irrelevant on the second count. The charge on that count is based on a letter which was written by the appellant some 18 months before the events which form the subject matter of the other counts. It is alleged in the charge that section 2(1) of the Act was contravened in that (1) at a time and place unknown to the State the appellant acquired information about the region where the Atomic Energy Board regarded it seismologically safe to explode nuclear devices in the Republic, (2) the appellant conveyed that information by way of a letter dated 7 February 1978 to Lars-Gunnar Eriksson, the director of the IUEF and (3) the appellant did so unlawfully and with intent to endanger the maintenance of law and order in the Republic.

The trial judge came to the conclusion that no conspiracy between the appellant and the IUEF had been proved, but that this charge did not necessitate proof of a conspiracy. He said the essence of the charge was that by

gathering information and by passing that information on to the IUEF the appellant was doing something with intent to endanger maintenance of law and order in the Republic. He held further that the contents of the letter was not per se sufficient to establish such an intent but that subsection (2) of section 2 of the Act assisted the State. That subsection provides that if it is proved that an accused has committed the act alleged in the charge and that the commission of that act is likely to have any of the results in the Republic set forth in paragraphs (a) to (l) of the subsection, the accused shall be presumed to have committed such act with intent to endanger the maintenance of law and order in the Republic. The reasoning adopted by the court in finding the guilt of the appellant proved was as follows:

> 'I think that in view of the established aims of the IUEF the possession of the knowledge contained in the letter under discussion was likely to have had one or more of the results mentioned in subsection 2(2). It could at least .....

least have furthered the achievement of the political aims of the IUEF and was likely to embarrass the administration of the affairs of the State. In my opinion the intent mentioned in subsection (2) must be presumed and the onus was accordingly on the accused to prove that he did not intend any of the results alleged. He chose not to give evidence and there is nothing on record which assists him to meet the presumption. I believe that his guilt on count 2 was established."

The letter on which this conviction is based is a lengthy one written by appellant from Oxford to Lars-Gunnar Eriksson on 7 February 1978 (exhibit CCC). It is headed "Interim Report: South African Research Trip" and in it the writer tells of his visits to libraries, museums and other institutions in various parts of South Africa in July - September 1977. I quote from page 2 of the letter (exhibit CCC):

"I feel particularly pleased by the research aspects of my trip. I gained access to a surprising number of confidential or little known documents, relating to the South African

economy .....

economy, to South African energy questions, to Namibia and firms operating there; to important historical papers, and above all to information relating to South Africa's nuclear programme. For example, I saw a published Afrikaans only Atomic Energy Board report, dated 1972, showing where it was seismologically safe to explode nuclear devices in South Africa "for peaceful purposes". The report advocated the most obvious place - the north-western Cape Kalahari region. In the light of the persistent denials in the press by South African Ministers, one's laughter is hard to suppress. However, why should the report be published by the South Africans, even in 1972? One has to treat it with a certain amount of caution.'

Captain Williamson, a witness called by the State and a member of the Security Branch who infiltrated the IUEF and had been employed by that body as an information officer told the court that he had a copy of the letter in his possession which he had taken from the IUEF files in Switzerland. It was signed by the appellant and addressed to .....

to Lars-Gunnar Eriksson, and he had on the latter's instructions handed a copy of the letter to Frene Ginwala. He also testified that the IUEF was an organization which supported the use of armed struggle in the overthrow of South Africa, South West Africa and Rhodesia. Apart from this letter there is no direct evidence of the nature of the association of the appellant with the IUEF nor is there evidence as to what he knew in February 1978 about the IUEF and whether he knew anything about its political aims. He made no mention of the letter in his confession and captain Williamson who was working for the IUEF in 1978 said no more than that he found the letter in the files. And, as I have previously stated, the trial judge found that a conspiracy between the appellant and the IUEF had not been proved. The court a quo relied on the presumptive provisions of section 2(2) of the Act to find that count 2 was proved, but the question is whether there is any room for the application of

the .....

the presumption until the appellant is proved to have committed the act alleged in the charge. As was pointed out by MULLER, JA in S v Essack & Another 1974(1) SA 1 (AD) at p.12:

> 'The presumption was clearly intended to serve as an aid to the State in a case where the commission of the "act alleged in the charge" had been proved but the intention with which it was committed is a matter of dispute. In the circumstances of the present case the "act alleged in the charge" against accused No. 2 in the main count was one of conspiracy. If the conspiracy charged is found to have been established, that finding in itself is, by reason of the nature of the contents of No. 1 Inkululeko and the averments in the indictment which I have already mentioned, the correctness of which was admitted on behalf of the accused, conclusive of the intent of the accused; namely one to endanger the maintenance of law and order in the Republic. And it follows that there would then be no need to invoke the presumption. If, however, it were to be found that the accused's

participation.....

> participation in the alleged conspiracy had not been established, then it cannot be said that the commission of "the act alleged in the charge" against the accused in the main count had been proved, and there would accordingly be no justification for invoking the presumption."

Did the State prove the act alleged in the charge? I think not. Count 2 alleged that the appellant acquired certain information regarding a region where it would be safe to explode nuclear devices in the Republic and conveyed such information to Eriksson by letter. The learned trial judge, having referred to the letter, held that "the possession of the knowledge contained in the letter under discussion was likely to have had one or more of the results mentioned in subsection 2(2)". But an examination of the letter shows that the appellant did not convey the information to Eriksson or the IUEF. He merely informed Eriksson that he had seen "a published Afrikaans only Atomic Supply report dated 1972, showing where it was seismologically safe to

explode .....

explode nuclear devices in South Africa for peaceful purposes". There is no other evidence on the record that the appellant at any time despatched the report or conveyed the information in his possession to Eriksson or the IUEF. Moreoever, the finding that "the possession of the knowledge contained in the letter ..... was likely to have had one or more of the results mentioned in subsection 2(2)" is a misdirection. It was the conveyance of information by appellant to Eriksson or the IUEF, not the possession of knowledge by anyone, which was the act complained of in the charge.

If the conviction was based on the mere possession of knowledge, whether or not such knowledge was conveyed to Eriksson or the IUEF, the court erred. Whether "possession" is an "act" for the purposes of section 2(1)(a) of the Terrorism Act was considered in S v FFrench Breytagh 1972 (3) SA 430 (AD) at 442 A-C.

'Reverting to para. (1) of the indictment, it may be mentioned at the outset that the nature

of .....

of the pamphlets discovered in appellant's flat is such that, had their distribution by appellant been duly proved, his conviction in relation to this paragraph would almost certainly have followed. As already indicated, CILLIÉ, JP found that, although no such distribution had been proved, appellant had nevertheless knowingly possessed the pamphlets for distribution but that in law no "act" within the meaning of sec. 2(1)(a) of the Act, had been committed. The State had of course no right of appeal against the decision of the trial court; nor did it, pursuant to sec. 366 of the Code, request that the question of law involved in the learned Judge-President's abovementioned decision be reserved for the consideration of this Court. I may, however, state, without in any way elaborating on the point, that the learned Judge-President's abovementioned conclusion on the law was in my opinion correct.'

Counsel for the appellant contended further that the court's finding that this information, even if furnished to the IUEF, was "likely to embarrass the administration of the affairs of the State" was wrong and could not be supported .....

supported by the facts. The information related to the place where it was "seismologically", that is geologically, safe to explode nuclear devices for peaceful purposes. It was information which, according to the testimony of Dr Hugo, the deputy president of the Atomic Board, was available to the public and was a summary of a scientific investigation conducted some ten years previously and which was contained in an Atomic Energy Board publication that was readily obtainable by the public. That being so it was not "likely" to embarrass any administration of any affairs of the State.

The conviction on count 2 must accordingly be set aside.

In the result the appeal against the convictions on counts 1, 3, 5 and 6 fails; the appeal against the conviction on count 2 is allowed and that conviction and the sentence on that count are set aside.

M.A. DIEMONT JA

RABIE, JA)
CILLIÉ, JA) Concur