IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the appeal of:

DEON JEAN DU PLESSIS ..... appellant

versus

THE STATE ..... respondent

Coram: CORBETT JA, TROLLIP et VAN HEERDEN AJJA.

Date of hearing: 5 March 1981

Date of judgment: 31 March 1981

J U D G M E N T

CORBETT JA:

The appellant is a journalist by profession. At the time of his trial, in the Witwatersrand Local Division, he was 28 years of age and held the position of assistant editor to a news bureau known as the Argus Africa News Service (the "AANS"). He was indicted in the Court below

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on five counts of having contravened certain provisions of the Official Secrets Act, 16 of 1956, as amended, and on one count of having contravened a provision of the Defence Act, 44 of 1957, as amended. He was found guilty and sentenced in respect of all six counts. On application to the Judge a quo (F.S. STEYN J) he was granted leave to appeal in respect of two counts against sentence only, in respect of one count against conviction only, and, in respect of one count against conviction and sentence. In addition, appellant has made application to this Court for leave to appeal against his conviction on one other count and against his conviction and sentence on the remaining count.

At the hearing before us, and by general agreement, argument was heard simultaneously on the application and the appeal. Furthermore, counsel addressed full argument on the counts covered by the application, as if it were an appeal. In that way this Court was enabled, if it should grant the application for leave to appeal on either or both counts, to deal with the appeal immediately and without further argument.

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The charges against appellant arise from two separate occurrences: (i) the writing of a book to be entitled "Not in a Thousand Years" and the publication or communication of the manuscript thereof to certain persons, and (ii) the receipt, posession and communication of certain secret military documents. I shall briefly describe these occurrences before considering the individual charges with which the appellant was indicted.

The Manuscript

After having matriculated at a school in Johannesburg in 1968 and having completed a period of national service in the South African Army, appellant in January 1970 joined the Argus group of newspapers and started as a cadet reporter on the "Star" newspaper. He worked at various places, including a year spent in London with the Argus group's office there. Subsequently he became an accredited defence correspondent for the "Star". In April 1974, shortly after the revolution in Portugal and at the time of the ensuing decolonisation process

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in Mocambique, he was seconded to the AANS to cover events in Mocambique. About a year later he was appointed to the AANS on a full-time basis. He visited Mocambique and Angola regularly in the course of his duties as a news reporter. In October 1975 he was sent to Salisbury, in what was then Rhodesia, to take over as the Bureau chief of a sub-bureau of AANS there. He remained there until September 1978, when he returned to Johannesburg to assume, as from 1 October 1978, the position of assistant editor of the AANS.

While he was in Rhodesia a "primary area of coverage" (as he put it) from the journalistic point of view was the political situation, and in particular the war being waged against insurgent terrorists. He read as widely as he could and he made contact with, got to know and acquired the confidence of government officials and of air force, police and military personnel. It was necessary to do this in order to obtain the ~~necessary~~ background material and in order to establish sources of information. One of his "contacts"

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was a Mr Henry Ellert, a member of the Rhodesian security police. Appellant first met Ellert in Beira, Mocambique, in April 1975. After appellant's move to Salisbury he became very friendly with Ellert, on both a social and a professional basis. On the social plane Ellert and his wife visited appellant and his wife and vice versa. The Ellerts also spent holidays with appellant and his wife at a beach cottage on the Natal south coast, owned by appellant's father-in-law. Professionally Ellert assisted appellant in confirming information gained by appellant, particularly in regard to the terrorist war, and in advising him what could prudently be published. In return appellant would furnish Ellert with information, provided that it was material that could have been published.

In about the middle of 1977 appellant conceived the idea of writing a book about Rhodesia, covering the period from the unilateral declaration of independence (commonly known as "UDI") to the present and having especial reference to the war. He then started assembling material. He also had

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the opportunity from time to time to visit a war zone or the place where some significant happening had occurred. This enabled him to gain information and impressions. He told Ellert early in 1978 that he was proposing to write this book and in the course of producing the manuscript he enlisted Ellert's aid in checking or confirming information which he wished to use. Ellert's advice was also sought on what material should be included in the book and what should be discarded, for security and other reasons. He gave Ellert portions of the completed manuscript to read and Mrs Ellert typed sections of the manuscript for him.

Before leaving Rhodesia to return to South Africa and on 21 September 1978 appellant wrote a letter to the managing editor of Collins, the well-known publishers in London. The letter reads as follows:

> "ref: Completed manuscript on Rhodesia's war.
>
> Dear Sir,
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> I am a South African journalist employed as the Salisbury Bureau Chief of my company's Africa News Service: I have been here three years and am being posted back to our Johan-

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nesburg head office next month.

Over the last six months I have completed a manuscript of approximately 100 000 words tracing Rhodesia's war from its beginnings to its present ferocious scale. Much of the material has never been published before. I also have a stock of pictures, many of which have never been published either.

The entire project has been completed in secret because, obviously, some of the material is sensitive insofar as both the Rhodesian and South African governments are concerned: it is for this reason that I have chosen to write to you direct rather than deal through your South African office.

If Collins is interested in publishing such a book, which I have tentatively titled 'Rhodesian Hurricane', I would be happy to post you a detailed synopsis with a sample chapter if required. Would you please let me know whether or not you are interested as soon as possible.

In view of constitutional and other developments here, I feel that such a book would be especially timeous if published early next year."

In evidence appellant explained that the description of the work as being a "completed manuscript on Rhodesia's war" was not entirely accurate, but that it would be "rather

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foolish" to speak of a "semi-completed manuscript" and that, in any event, "by the time they had evinced interest and come back to me" the manuscript would probably have been completed. The reference in the letter to material which was "sensitive", as far as the Rhodesian and South African governments were concerned, will be adverted to again later.

Appellant stated that in reply to his letter he received a communication from "a firm called Fontana which was billed as Collins's paperback book division". His letter had been passed on to them and they expressed interest in the book. At some stage after writing his letter (it is not clear when) appellant decided that he would rather have the book published by a South African publishing house. He brought the manuscript with him to South Africa when he moved to Johannesburg at the end of September 1978 and shortly thereafter, on the advice of a colleague, he approached a Mr Jonathan Ball, the proprietor of a publishing firm at Braamfontein. Ball was given portion of the manuscript and, having looked

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at two or three chapters and on the strength of appellant's reputation as a journalist, he agreed to publish the book. On 12 December 1978 a publishing contract was signed. The whole manuscript was handed over to the publisher for editing. This was done by the firm's editor. It was also intended that the whole work should be handed over to an attorney, member of a well-known Johannesburg firm, who was an acknowledged expert in the law relating to newspapers and publications generally, in order to ensure that it did not contain anything which could not lawfully be published in either South Africa or Rhodesia. It would seem that the question of the manuscript being legally "vetted" in this way before publication was raised early on in the negotiations between appellant and the publisher. According to Ball, who was called as a State witness, at the outset appellant himself volunteered the suggestion that "the book might have to be censored severely" and was anxious that legal advice be taken. This was confirmed by appel-

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lant, who deposed to having told Ball that there were "probably contraventions of the Defence Act or what looked to me like contraventions of the Defence Act".

The publishing agreement also contained a provision entitling the publishers to remove any passage or statement in the work "which in the PUBLISHER'S discretion or on the advice of their legal advisers may be considered objectionable or to be actionable at law". Ball also stated that from time to time the firm's editor, as she worked through the manuscript, told him that he "should look at it closely before publication".

In fact the manuscript never reached the legal adviser because on 14 April 1979, and while the publisher was still in the process of editing the work, it was seized by the security police. At that stage Ball informed the police that two copies of the manuscript had been sent overseas to the publisher's agents in London and New York. Steps were subsequently taken for the recall of these copies.

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The Secret Documents

After his return to South Africa and early in 1979 appellant paid a visit, in his professional capacity, to South West Africa. It was at the time of a visit by a delegation from the United Nations Organization. Appellant went to Windhoek to familiarize himself with the situation there; met various "military people and political people, security people", including the head of the SWA Command of the Defence Force; and subsequently wrote a number of articles with a bearing on the war in South West Africa. After his return to Johannesburg he was asked to address a gathering of cadet reporters, working for the Argus group, on the political issues in South West Africa. One of the cadet reporters at the lecture was a Mr W J Beaumont. Beaumont had recently completed a two-year period of national service in the Army. About 18 months of the service was as a signals operator in Grootfontein and Windhoek, South West Africa. While thus engaged Beaumont (unauthorisedly kept a

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number of documents containing recorded Army signals of a secret nature. After his discharge, he returned to Johannesburg, bringing these documents with him. He still had them in his posession at the time when he attended appellant's lecture.

There is some conflict between the evidence of Beaumont, who was called as a State witness, and appellant as to how precisely it came about that Beaumont actually met and spoke to appellant and handed the secret documents over to him. The conflict is not important. It is at least common cause that after the lecture Beaumont approached appellant and asked him whether he would be interested to see some documents on South West Africa. Appellant indicated interest and a few days later Beaumont came to his (appellant's) office and handed over a file containing the secret signals. From what was said on that occasion it became clear to appellant that the file contained secret military documents.

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Beaumont told appellant that after having read them, he should destroy them.

Appellant read the documents, over a couple of days, realised that he could not write anything on the basis of the information contained in the documents, put them in a folder in a bag in which he kept most of his personal documents and left them there. Shortly after this and at about the beginning of February 1979 Ellert and his wife and family came to Johannesburg. They stayed with appellant at his home for about two days and then the two families went off together to spend a holiday at the holiday house on the Natal south coast. The Ellerts arrived on a Sunday and they all left for the coast on the following Tuesday. On the Sunday evening a discussion took place which resulted in Ellert being shown certain of the secret documents. I shall deal later with the question as to exactly what happened and what Ellert was shown. Ellert asked whether he could copy the documents or take notes, but appellant

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refused permission for this. The folder of documents was returned to appellant who put them back in his bag. The following day, while appellant was absent from the house, Ellert secretly took the documents out, photographed them and then put them back in the bag. Appellant had no knowledge until the time of his arrest that Ellert had done this.

On their return from holiday at the end of February appellant burnt most of the documents in his garden, keeping a few in which he was particularly interested. These he destroyed in a similar manner, after having re-read them, some weeks later. In the meanwhile Ellert returned to Rhodesia. The photographic film was developed and printed. Ellert then handed them over to a Superintendent Rogers of the Rhodesian CID. It is to be inferred that information regarding these documents was passed on to the police in South Africa by their counterparts in what was then Zimbabwe Rhodesia, for a Zimbabwe Rhodesian police officer partici-

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pated in the interrogation of appellant at the time of his arrest and, furthermore, Superintendent Rogers attended his trial and assisted in the prosecution by extending authority to Ellert to reply to certain questions, the answering of which might otherwise have constituted a contravention of the Official Secrets Act of Zimbabwe Rhodesia.

I turn now to the individual charges preferred against appellant.

Counts 1 and 2

Count 1 related to the receipt of the secret documents (which were 32 in number) from Beaumont, it being alleged that appellant did so knowing, or having reasonable grounds to believe, at the time when he received them, that the documents were communicated to him in contravention of the provisions of the Official Secrets Act, 16 of 1956, as amended ("the Act"), and that appellant thereby contravened sec 3 (3) of the Act.

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Count 2 related to the retention of the secret documents, the charge being that appellant had in his possession or under his control the documents referred to in count 1, which had been obtained in contravention of the Act, and that he wrongfully and unlawfully retained these documents in his possession or under his control when he had no right to do so or when it was contrary to his duty to do so, thereby contravening sec 3 (1)(c) of the Act.

Appellant pleaded guilty to count 2, but not guilty to count 1 on the ground that count 2 overlapped count 1. In doing so he admitted receiving and retaining the 32 documents in question. The trial Court rejected the plea of overlapping and found appellant guilty as charged on both counts. STEYN J nevertheless took counts 1 and 2 together for purposes of sentence and imposed a punishment of 18 months imprisonment, of which a period of 12 months was suspended on certain conditions. Leave to appeal was granted by the trial Judge against the sentence only.

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In setting forth his reasons for the imposition of this sentence the trial Judge, having referred to appellant's receipt and retention of the stolen signals, stated the following:

> "Not only the legal duty, but clear moral duty of the accused was to have returned these signals to the South African Defence Force or the South African Police immediately upon discovery of their nature, together with the disclosure of the identity of the person who had unlawfully removed these documents from the South African Defence Force. Accused failed to carry out this clear civic and moral duty because he was vitally curious to acquaint himself with the contents of these documents and in order to safeguard the informant who is also employed as a cadet reporter on the Star. The personal criminal intent of the accused is naturally mitigated by the fact that his conduct was motivated to some extent by a desire to protect a colleague and as a journalist to protect his source of secret information.
>
> Upon careful consideration of the reaction of accused to the weight of his personal loyalty and professional loyalty, I have come to the conclusion that the act of preferring his particular group's loyalties above the obligation to serve the interests of good order and safety of the State, is no mitigating factor but in fact an aggravating

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> factor. The service to and subjection to other group loyalties in preference to the obligation to comply with all laws, directed at the maintenance of safety and good order in the State, is the very seedbed from which organized crime and revolution grows. On counts 1 and 2 the requirement to impose a sentence which will have an effective deterrent effect on others is of overriding importance, although this sentence must remain in proportion to the accused's moral blameworthiness and must maintain some parity with the sentence imposed on the National Serviceman mentioned, in another Court."

The reference in the last sentence of this quotation to maintaining "parity" with another sentence relates to the sentence imposed on Beaumont. Prior to appellant's trial Beaumont had been convicted in the Johannesburg regional court of contravening the Act by reason of his unauthorised dealings with the 32 documents in question and had been sentenced to 18 months imprisonment, which sentence, it is common cause, was wholly suspended. In view of the substantial difference between the two sentences (appellant received an effective gaol sentence of six months), the learned trial Judge's reference to the need to maintain parity is not entirely clear.

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In my view, although Beaumont was a much younger and a less experienced person than appellant, he committed by far the more serious offence. It was he who purloined the documents, in breach of his duties as a member of the Defence Force, brought them back with him to Johannesburg and on his own initiative offered and gave them to the appellant. He knew all along the importance of the documents and their secrecy rating. Appellant, on the other hand, played a mere passive role as far as the receipt of the documents was concerned. There is no evidence to show that he knew or had any reasonable grounds to believe that the documents were secret signals until they were actually handed over to him; and it was only some time later when he perused the contents of the file that he became aware of the exact nature of the documents. It is, of course, appellant's retention of the documents for a period of approximately one to two months, once he knew what they were, that constitutes the serious aspect of his unlawful conduct. Naturally, in this connection the communication of certain documents to Ellert must be disregarded for that formed the subject of a separate

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charge (count 3).

Accordingly, I am of the opinion that, in so far as the trial Judge aimed at achieving a rough parity between Beaumont's sentence and that imposed on appellant, the actual sentence meted out to appellant tended to have the opposite effect. I also find it significant that the trial Judge did not mention in his reasons the fact that appellant was merely the passive recipient of the documents. This, to my mind, is a strong mitigating factor, which should have weighed with the Court a quo. The omission of any mention of this in the trial Judge's fairly comprehensive reasons for sentence suggests that he overlooked or did not give due weight to this factor.

The trial Judge's reasons for sentence, as quoted above appear to revolve mainly round the Court's understanding of appellant's reasons for not having handed over the documents to the authorities, immediately upon discovering their nature, and for not having disclosed the identity of the person who

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purloined them. In two consecutive sentences (see the quotation above) appellant's motivation in this regard is described alternatively as a mitigating factor and as an aggravating factor; and it is not clear to me why the trial Judge ultimately preferred the latter characterization. Be that as it may, I do not think that the personal and professional loyalty alluded to by the trial Judge is of prime relevance.

It is true that appellant's moral and legal duty, once he discovered the true and serious nature of the documents, was immediately to hand them over to the authorities, but had he done so no offence, certainly as regards sec. 3 (1)(c) of the Act, would, of course, have been committed. His failure to do so cannot in itself be an aggravating factor. The reason why he did not do so appears with reasonable clarity from his evidence: he was vitally interested, from the professional angle, to see what the documents contained. He said he did not realize that in taking the documents he was committing an unlawful act. He realized the documents were

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"...things one shouldn't flash about, but a natural realization of an unlawful act never entered my mind".

Under cross-examination, however, he conceded that he "assumed" that he was not entitled to be in possession of the documents and that he should not be "caught with" them. Furthermore, in response to a question by the prosecutor as to why he did not hand the documents over to the Defence Force, appellant gave two reasons: (i) reluctance to get Beaumont into trouble and (ii) his curiosity to see what the documents contained. Nevertheless, reading the evidence as a whole, and taking a realistic view of the position, it does not appear to me that the thought of handing over the documents and reporting Beaumont to the authorities ever crossed his mind at the time. He wanted to read the documents and he did so. Beaumont asked him to destroy the documents, once he had done so, and he did just that. The conflict between appellant's sense of moral and legal duty to the State and his feelings of loyalty to his fellow journalist, so stressed

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by the trial Judge, did not, in my view, actually occur. And, in any event, even if it did, I cannot agree that it constitutes an aggravating circumstance.

For these reasons I am of the opinion that the Court a quo approached the question of sentence on these counts upon an incorrect basis and that it, therefore, behoves this Court to reassess the position. It is true that the offences committed by appellant, particularly that of retaining possession of the documents, are of an inherently serious nature. Secret State documents cannot be allowed to be bandied about in this way. On the other hand, appellant's motive in receiving and retaining the documents, as described above, was not a particularly evil one; nor was it one which involved the likelihood of the interests of the State being endangered. The documents themselves, though for the most part secret and no doubt "sensitive" - to use a term favoured by the witnesses - were to some extent dated, in the sense that they covered the period November 1977 to September 1978. Nevertheless,

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as Major-General Ralston, a State witness, pointed out, in enemy hands the information could definitely have been harmful to South Africa. Appellant had no intention of allowing the documents to fall into enemy hands, as is evidenced by his destruction of them. Generally, I think, it is correct to say that, if one tries to visualize a conspectus from the point of view of seriousness, of possible contraventions of these provisions of the Act, those committed by appellant would fall at or near the least blameworthy end of the scale.

As to the personal circumstances of the appellant, his age, profession and the facts concerning his journalistic career have been stated. As a journalist he is highly regarded by his superiors and has a good reputation for diligence, his ability to make contacts and his objectivity. He has no previous convictions. He is married but has no children. He stated in evidence that he much regretted what he realized, in retrospect, had been

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"tremendously foolish" conduct. Shortly after his arrest appellant made a full and frank statement before a magistrate, covering all aspects of the episode concerning the secret documents.

Taking everything into account I do not think that these counts call for an effective gaol sentence. The appeal against sentence in respect of counts 1 and 2 is accordingly allowed, the sentence imposed by the trial Court is set aside and the following sentence is substituted:

> "9 months imprisonment, wholly suspended for 3 years on condition that appellant is not convicted of a contravention of sec. 3 of the Official Secrets Act, 16 of 1956, as amended, committed during the period of suspension".

/ Count 3 .....

Count 3

Count 3 consisted of a main charge, laid under sec 3 (2)(a) of the Act, and an alternative charge, based on sec 3 (1)(a) of the Act. Both charges related to the alleged communication of the contents of the 32 secret documents to three persons, viz. appellant's wife, his father and Ellert. During the trial the State appears to have concentrated on the communication to Ellert and it was on the basis of such a communication that the trial Court convicted appellant on the main charge. Only communication to Ellert need, therefore, be considered.

At the trial appellant pleaded guilty to the alternative charge, but not guilty to the main charge. He received a sentence of six months imprisonment, wholly suspended for five years on certain conditions. Leave to appeal was refused by the trial Judge. Application is made for leave to appeal against conviction, on the basis that it should have

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been a conviction on the alternative charge, and against sentence. The essential enquiry is, therefore, whether appellant's conduct, about which there is little factual dispute, constituted a contravention of sec 3 (2)(a), as contended by the State, or of sec 3 (1)(a), as contended by appellant.

The relevant portions of these two subsections read as follows:

> "(2) (a) Any person -
>
> (i) who has in his possession or under his control any sketch, plan, model, article, note, document or information which relates to munitions of war or any military, police or security matter; and
>
> (ii) who publishes it or directly or indirectly communicates it to any person in any manner or for any purpose prejudicial to the safety or interests of the Republic; and
>
> (iii) who, at the time of such publication or such communication knew or should reasonably have known that such sketch, plan, model, article, note, document or information related to munitions of war or a military, police or security matter,
>
> shall be guilty of an offence..... "

/ "(1) .....

" (1) Any person who has in his possession or under his control any secret official code or password, or any sketch, plan, model, article, note, document or information.... which has been.... obtained in contravention of this Act .... and who -

(a) communicates the code, password, sketch, plan, model, article, note, document or information to any person, other than a person to whom he is authorized to communicate it or a person to whom it is in the interests of the Union his duty to communicate it:

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shall be guilty of an offence ..... "

It is not disputed that appellant had in his possession or under his control the 32 documents in question and that these documents and the information which they contained (i) had been obtained in contravention of the Act (in terms of sec 3 (1)) and (ii) related to military matters (in terms of sec 3 (2)(a)(i)). It was conceded, too, on appellant's behalf, that certain of the information in the documents was "communicated" to Ellert, within the meaning of that word as used in sec 3 (1)(a) and in sec 3 (2)(a)(ii). (I shall later consider this meaning and also exactly what,

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according to the evidence, was communicated.) It was not contended by appellant that Ellert was a person to whom he (appellant) was authorized to communicate the information or that Ellert was a person to whom it was, in the interests of the Republic, his (appellant's) duty to communicate the information. It was thus common cause that a contravention of sec 3 (1)(a) had been committed by appellant: hence the plea of guilty to the alternative charge. It was contended, however, that appellant's conduct did not satisfy a further requirement of sec 3 (2)(a)(ii), viz. that the information was communicated "in any manner or for any purpose prejudicial to the safety or interest of the Republic": hence the plea of not guilty to the main charge. The fundamental issue on this count is whether or not this further requirement was satisfied.

I turn now to the relevant evidence. Some of this has already been referred to. There are slight differences between Ellert's version and that of the appellant. According

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to Ellert, on the night of their arrival at appellant's home and in the course of conversation appellant showed him some papers, which appellant indicated would be of some interest to him. He (Ellert) gave the papers "a very cursory glance" and, after being told that he could not make notes or copy the documents, handed them back to appellant. In evidence he stated that he could not then "recall the exact nature" of the documents. He added —

> "The documents were in the form of papers and some of them were in Afrikaans, some in English, and after Mr du Plessis had indicated certain caution, I returned the documents to him without further examination".

Appellant's version of this episode was rather more specific and detailed than Ellert's. He stated that on the evening in question he and Ellert were discussing South West Africa. Ellert was interested in appellant's reaction to his recent visit there. In the course of this conversation appellant remarked that Unita (a guerilla movement operating in neighbouring Angola) was "short of arms or something like

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that". Ellert asked appellant how he knew this. Appellant replied by showing Ellert the top document in the folder containing the secret signals, which apparently supported appellant's statement. The evidence proceeds -

> "And having shown him that document, what was his....?-- Well, he then looked (sic) the folder and looked at the first and flipped through them, rippled through them, and he said 'can I copy these' and I said no, and he said 'can I take notes' and I said no, leave that, I am going to dispose of it anyway. He then gave over the folder without further questions and I put it back in this bag, rolled up."

I have already described how the following morning Ellert secretly took possession of the documents and photographed them.

What then was communicated to Ellert? The relevant dictionary meaning of the word "communicate" is "to impart (information, knowledge, or the like); to impart or convey the knowledge of, inform a person of, tell" (Oxford English Dictionary); "to make known; inform a person of; convey

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knowledge or information of" (Webster's Third International Dictionary). The Act was signed in English. In the Afrikaans version the corresponding term is "openbaar". The meanings given to this word, when used as a verb, by the Verklarende Handwoordeboek van die Afrikaanse Taal are: "laat ken, onthul; vertoon, laat sien; bekend maak; rugbaar maak". It may be that "openbaar" is a word with a slightly wider connotation than "communicate", but, when applied to a subject-matter such as "information" (as distinct from, e.g. a "sketch", "plan", "model", "article", "note" or "document"), it would mean imparting, conveying knowledge of, informing a person of, such information. It is in that sense that I think "communicate" (and "openbaar") should be interpreted when applied to "information" in the context of sec 3 of the Act.

It is to be noted that both the main charge and the alternative charge aver the communication of the contents of the 32 secret documents. In my view, the evidence does not establish more than the communication of the contents of

one of these documents, viz. the one dealing with Unita. Ellert's own evidence is completely vague. There is no indication that the "cursory glance" which he gave the documents resulted in knowledge of the contents of any of them being imparted to him; and he has no recollection of the contents. On the other hand, it is to be inferred from appellant's evidence that Ellert saw and read the top document relating to Unita. As to the rest, he merely "flipped through them" and this does not indicate that knowledge of the contents was imparted to him. The folder was then taken from him by appellant.

The trial Judge did not analyse this evidence in his judgment. He merely found that appellant had communicated "part of the Defence Signals" to Ellert. It is not clear to which part his finding referred. Before us counsel for the State argued that appellant had communicated all the 32 documents to Ellert in that (a) on the Sunday night he had placed Ellert in a position to read all the documents, and/or (b) he had negligently allowed Ellert to have access to the documents on the following day. In this regard he emphasized

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that sec 3 (2)(a)(ii) speaks of a person who "directly or indirectly communicates". I cannot accede to these arguments. As I have said earlier, conceptually "communicate" involves the actual imparting of knowledge. This would clearly include the case where the accused deliberately made documents available to another and thereby enabled the latter to read them and to acquire knowledge of their contents; but I do not think that it includes the case where documents are handed over, but taken back before the other person can read them, as happened in this case. As to the photographing of the documents the following day, it is true that in this way Ellert did acquire knowledge, or at any rate the means of gaining knowledge, of the contents of all the documents. Yet it is clear that appellant did not intend to make the documents available to Ellert in this way. On the contrary, the evidence shows that on the previous evening he had refused to give Ellert permission to copy the documents or make notes. I very much doubt whether in terms of sec. 3 of the Act an

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omission to take steps to prevent another acquiring knowledge of the contents of documents in one's possession can be held to constitute a communication of such contents, but even if it can, such omission would have at least to be a negligent one in order that the necessary element of mens rea should be present (see S v Marais, 1971 (1) SA 844 (AD), at p 851 B - E). I am not satisfied that such negligence was proved. Ellert was a close friend of appellant's and over the years there had been built up between them a relationship of mutual trust. In the circumstances appellant could not reasonably be expected to have foreseen the possibility that Ellert might, in breach of that relationship of trust, surreptitiously and in appellant's absence abstract the documents and photograph them. I shall, accordingly, proceed on the basis that the only communication, direct or indirect, which was proved to have taken place vis-a-vis Ellert, was a communication of the contents of the "Unita document".

I come now to the further question as to whether this information was communicated in a manner or for a pur-

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pose prejudicial to the safety or interests of the Republic, so as to bring the appellant's conduct within the ambit of sec 3 (2)(a). This subsection, in its present form, was introduced, by way of substitution, by sec 10 of Act 102 of 1972. Prior to this amendment (and subsequent to an earlier amendment by sec 10 of Act 101 of 1969) sec 3 (2)(a) did not contain a provision equivalent to subpara. (iii) of the present subsection. Otherwise it was virtually identical to the present subsection. In its then-existing form the meaning of sec 3 (2)(a) - and more particularly of the words "in any manner or for any purpose prejudicial to the safety or interests of the Republic" - had been considered by this Court in the case of S v Marais (supra). It was there pointed out (by WESSELS JA at p 851 H) that the manner and the purpose indicated two aspects of communication from which prejudice to the safety or interests of the Republic could result. As regards "manner" (in the Afrikaans version "wyse") WESSELS JA had the following to say (at p 849 G):

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> "Die vraag, of die 'wyse' waarop die openbaarmaking geskied het tot nadeel van die veiligheid of belange van die Republiek strek, is van bloot feitlike aard, en die beantwoording daarvan verg n beoordeling volgens objektiewe maatstaf of die 'wyse' van openbaarmaking in al die betrokke omstandighede die laakbare strekking gehad het, ongeag die doel waarmee openbaarmaking geskied het."

The judgment also contains a discussion (apparently of an obiter nature) of the "purpose". In this connection reference was made to a decision of the House of Lords, Chandler and Others v Director of Public Prosecutions (1964 AC 763), in which the interpretation of the words "for any purpose prejudicial to the safety or interests of the State", appearing in sec 1 (1) of the English Official Secrets Act, 1911 (which until the passing of Act 16 of 1956 was operative in South Africa, see Rex v Vorster 1941 AD 472), was considered. Reference may also usefully be made to S v Nieswand (1973 (3) SA 584 (R.AD)), a decision of the Appellate Division of Rhodesia concerning the meaning of the words "for any purpose

/ prejudicial....

prejudicial to the safety or interests of Rhodesia", as they appear in sec 3 of the Rhodesian Official Secrets Act, 1970.

Having had regard to the views expressed in the judgments in these cases, I think that the following propositions may be stated in regard to the words "for any purpose prejudicial to the safety or interests of the Republic", as they appear in sec 3 (2)(a)(ii) of the Act:

(1) A man's purpose exists only in the mind; and consequently the enquiry as to the purpose for which a communication was made is necessarily a subjective one. Only the man himself can give direct evidence of his purpose, but in addition inferences can be drawn from his conduct and from the circumstances generally.

(2) On the other hand, the question whether the purpose, thus determined, was prejudicial to the safety or interests of the Republic is one which must be objectively considered, having regard to all the relevant facts and circumstances.

/ (3) .....

(3) A person may make a communication with more than one purpose in mind. He may, for example, have an immediate purpose and an ultimate purpose. It would be no answer, if his immediate purpose be found to be prejudicial to the Republic, for him to say that the ultimate purpose was not prejudicial, or was even beneficial, to the Republic; and vice versa.

In regard to the proof of an accused's purpose in relation to a communication falling under sec 3 (2)(a), an important provision is sec 8 (2) of the Act. The relevant portion of this reads:

> "If in any prosecution under this Act upon a charge of..... communicating anything for a purpose prejudicial to the safety or interests of the Republic, it is proved that it was..... communicated by any person other than a person acting under lawful authority,..... it shall, unless the contrary is proved, be presumed that the purpose for which it was..... communicated, is a purpose prejudicial to the safety or interests of the Republic."

This presumption clearly operates in favour of the State

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and means, in effect, that once an unauthorized communication in terms of, inter alia, sec 3 (2)(a) has been proved, the onus is upon the accused to show that the purpose of the communication was not a prejudicial one; and, failing such proof, a presumption of prejudice prevails (cf S v Nieswand, supra, at p 587 C - G). The standard of proof required of the accused would be proof upon a preponderance of probability (cf. Rex v Vorster, supra, at pp 482-3; S v Nieswand, supra, at p 588 A).

Finally, it is clear that the requirements of sec 3 (2)(a)(ii) are satisfied if either the manner in which or the purpose for which the communication was made, was prejudicial to the safety or interests of the Republic.

In appellant's case the actual communication related to the contents of what I have termed "the Unita document". This document was never actually identified in evidence. Prints of the photographs taken by Ellert of the secret documents were handed in at the trial as exhibits, but counsel

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for the State was not able to say whether the document in question was amongst these and, if so, which it was and what it contained. And, I may add, many of these prints, as they appeared in the appeal record, were totally illegible. All that one is able to deduce from the evidence, therefore, is that there was a statement in this document relating to the arms needs of Unita. The evidence shows that at the time when this somewhat innocuous statement was communicated there was a friendly and cooperative relationship between the government of the Republic and that of Rhodesia (or Zimbabwe Rhodesia, as the country was by then called) and that Ellert was a police officer in the employ of the government of Zimbabwe Rhodesia. While the contents of this document, so far as proved, might conceivably prove prejudicial to the interests of the Republic if communicated to an enemy of this country (and even there I have considerable doubts), I cannot think that there was anything prejudicial in communicating it to a person such as Ellert, a man whom he knew well

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and trusted. And, after all, the communication took place in the course of general conversation in the privacy of appellant's home; and appellant allowed Ellert only to read the document, but not to copy it or take a note of it. I, therefore, conclude that in so far as the state case rested on the manner in which the information contained in the Unita document was communicated, it failed to establish the required prejudice.

As regards purpose the boot was, so to speak, on the other leg: the appellant had to show that the purpose was not a prejudicial one. In my opinion, he succeeded in discharging the onus which rested upon him. There is no reason to doubt appellant's version of what occurred. From this it appears that he showed and allowed Ellert to read the Unita document (and thereby communicating the contents thereof to him) on the spur of the moment in order to substantiate a particular remark made by him in the course of conversation. There was, so far

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as I can see, no deeper or more complex or sinister purpose than this and, objectively speaking, I do not think that this could be regarded as being a purpose prejudicial to the safety or interests of the Republic.

In this regard the finding of the Court a quo was as follows:

> "I find that the disclosure to Mr Ellert was calculated to inform a member of the Secret Service of another State of the contents of official secrets of this State. I hold that the publication of secret notes and documents to any foreign secret service except by a specific Government authority or by virtue of the operation of a treaty, or formal alliance in war, is publication in a manner prejudicial to the interests of the Republic. It is not necessary to argue on evidence or speculate that other or further disadvantageous results for this State will flow or might flow from the disclosure of State secrets to a foreign secret service. The disclosure per se is prejudicial to the State whose official secrets have been so disclosed to another State without due authority. I therefore conclude that the accused is guilty on the main charge of count 3 and not only on the alternative as pleaded by him."

/ It.....

It is not clear from this passage what documents and what official secrets the learned trial Judge found to have been disclosed to Ellert. The finding suggests a far wider disclosure, or communication, than, in my opinion, is warranted by the evidence. At any rate, for the reasons elaborated above, I cannot, with respect, agree that the appellant's guilt on the main charge was established.

As to sentence, it is clear that the offence of which the trial Court found appellant guilty is a more serious one than that which, in my opinion, was proved in evidence. The statutory maxima for contraventions of sec 3 (1) and sec 3 (2) indicate the intention of the Legislature in this regard. Bearing in mind all the circumstances and the limited communication established in evidence, I am of the view that the sentence imposed in respect of a conviction on the main charge, viz. 6 months imprisonment, wholly suspended, is not really appropriate to a conviction on the alternative charge; and that the sentence should be altered to one of

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one month's imprisonment suspended on appropriate conditions.

For the aforegoing reasons, the application for leave to appeal against conviction and sentence is granted. The appeal itself is allowed and the conviction and sentence are set aside. There is substituted the following:

> "The accused is found guilty on the alternative charge of a contravention of sec 3(1)(a) and is sentenced to one month's imprisonment, suspended for 3 years on condition that he is not convicted of a contravention of sec 3 of the Official Secrets Act, 16 of 1956, as amended, committed during the period of suspension."

Count 4

Count 4 had reference to the manuscript which was given the title of "Not in a Thousand Years" and the letter written by appellant to the publishers, Collins, of London on

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21 September 1978. It was alleged in the indictment that the manuscript contained information on munitions of war and military matters relating to the South African Defence Force (for convenience I shall call this "the secret information"); that appellant knew or should reasonably have known this; that he was in possession of or had control over the secret information; and that in offering the manuscript to Collins appellant attempted to contravene sec 3 (2)(a) of the Act. Appellant pleaded not guilty to this count. He was, however, found guilty and cautioned and discharged. Leave was granted by the trial Judge to appeal against the conviction.

In my opinion, appellant's conduct did not amount to an attempt to publish or directly or indirectly to communicate the secret information contained in the manuscript to Collins. As was pointed out by WATERMEYER CJ in the leading case of Rex v Schoombie (1945 AD 541, at p 545-6) -

> "Attempts seem to fall naturally in two classes: (a) Those in which the wrong-doer, intending to commit a crime, has done everything which he set out to do but has failed in his purpose either through

> lack of skill, or of foresight, or through the existence of some unexpected obstacle, or otherwise, (b) those in which the wrongdoer has not completed all that he set out to do, because the completion of his unlawful acts has been prevented by the intervention of some outside agency."

To this latter class may be added the case where the completion by the wrongdoer of his unlawful acts has been prevented by his changing his mind and desisting from the actual commission of the crime (see R v B 1958 (1) SA 199 (AD) at p 203 A - G).

The problem in regard to such cases, where the wrongdoer has not completed all that he set out to do, either because he was prevented from doing so or because he desisted, is to draw the line between conduct constituting mere acts of preparation and conduct amounting to an actual attempt. As SCHREINER JA put it in R v B (supra, at p 202 E) -

> "The cases show that when a question of preparation versus attempt arises one has to ask oneself whether the accused had already commenced the consummation of the act constituting the offence or had only taken steps leading up to the stage of commencing to carry it out."

/ Various.....

Various tests and formulae have been evolved in order to answer this question, but none of them draws a clear line of distinction between preparation and the commencement of perpetration, capable of ready application in all types of case and in all circumstances. In Rex v Schoombie (supra, at pp 546-7) WATERMEYER CJ expressed his understanding of the distinction thus:

> "The expression 'commencement of the consummation' occurs in the American case Hicks v Commonwealth (19 Am. State Rep. 892), quoted by INNES, C.J., in the case of Rex v Sharpe (1903 T.S. 868) and means the beginning of the final series of acts which complete the crime. Another definition given in Hicks' case is that the act charged as an attempt 'must approach sufficiently near to the crime intended to be committed to stand either as the first or some subsequent step in a direct movement towards the commission of the offence after the preparations are made'. It seems, therefore, that in the case of interrupted crimes an attempt to commit such crime is proved when the Court is satisfied from all the circumstances of the case that the wrongdoer, at the time when he was interrupted, intended to complete the crime and that he had at least carried his purpose through to the stage at which he was 'commencing the consummation'. "

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The learned Chief Justice went on (at p 547) to point out the difficulties of determining in a particular case the precise moment at which the consummation can be said to commence and indicated certain "general considerations" which could assist in the solution of the problem. He rejected the notion that the dividing line between innocent and criminal conduct should depend entirely on the time at which the interruption occurred and indicated his preference for what has been described as a more subjective approach. He said in this connection (at p 547):

> "Consequently, if a wrongdoer has finally made up his mind to commit a crime and has taken steps to carry out his resolution, the exact moment at which he is interrupted and prevented from fulfilling his intention should not be the sole determining factor in deciding whether or not his morally wrongful act should be regarded as a crime."

(As to the use of the words "finally made up" in this dictum see the explanatory qualification by SCHREINER JA in R v B, supra, at p 203 A).

/ Clearly....

Clearly the decision in any particular case as to whether or not, at the moment of interruption or prevention, the conduct of the accused had progressed beyond the stage of preparation and constituted a commencement of the consummation must in the last resort become a factual enquiry relating to the particular circumstances of the case in which the following factors, amongst others, would play a part: whether at that stage the accused had made up his mind to commit the crime, the degree of proximity or remoteness which that arrested conduct bore to what would have been the final act required for the commission of the crime and, generally, considerations of practical common sense. I doubt whether any greater precision than this can be achieved.

The subjective element, emphasized in Schoombie's case, is a very relevant factor in the present matter. In Schoombie's case the Court was, of course, dealing with a case of prevention as a result of intervention by some outside agency. Where, however, prevention or interruption occurred

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because the person concerned, of his own volition, desisted, then, in my opinion, the relevant enquiry would be whether there was a finally formulated intention to complete the crime which persisted until the person concerned changed his mind. (Cf. R v B, supra, at p 203 A.) If that change of mind occurred before the commencement of the consummation, then the person concerned cannot be found guilty of an attempt, but if it occurred after the commencement, then there is an attempt and it does not avail the person concerned to say that he changed his mind and desisted from his purpose (see Rex v Hlatwayo and Another, 1933 TPD 441, at pp 444-5; R v B, supra, at p 203 B). In any case, to constitute an attempt, there must at the very least have been a formulated intention on the part of the accused to commit the offence.

In the present case the offence which the appellant was found to have attempted to commit was the publication or communication (direct or indirect) of the secret information contained in the manuscript to "Collins Publishers" (no doubt meaning thereby the members of the firm of Collins). From appellant's point of view the completed offence would have entailed

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the delivery of the whole manuscript, or the portion thereof containing the secret information, to Collins. In order to achieve this appellant would have had to perform a series of acts commencing with the initial approach to Collins, enquiring about publication (for it was only in pursuance or contemplation of an agreement to publish that appellant would have given the manuscript to Collins). All that in fact happened was that appellant wrote a letter (the letter of 21 September 1978 quoted above), which amounted, in my opinion, to no more than a tentative enquiry, and a reply expressing interest was received from the firm called Fontana. That was how matters stood when at some stage (the exact date is not known) appellant decided against publication overseas.

In my opinion, the evidence does not show that at any time prior to deciding against publication overseas the appellant had formed a final and definitive intention to commit the offence of publishing or communicating the secret information to Collins.

/ At .....

At some stage he obviously toyed with the idea, but that falls short of a definitive intention. Counsel for the State referred to the penultimate paragraph of the letter and stressed the offer to send a detailed synopsis and a sample chapter. But that was only to happen if Collins expressed interest and even if this should be construed as a formulated intention to do these things, it does not help the State. A synopsis would probably not contain the details constituting the secret information; nor would the sample chapter chosen necessarily contain the secret information. I, accordingly, am of the view that the appellant's conduct falls far short of an attempt because the necessary intention was lacking. In any event, apart from intention, appellant's conduct was so remote from the ultimate act required for the commission of the offence that, in my opinion, he had not commenced the consummation when he decided that he would prefer to have the book published in South Africa.

In the argument of counsel for the State, and also in the judgment of the Court a quo, the decision of this Court

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in S v Laurence (1975 (4) SA 825 (AD)) was relied on. In my view, this case is wholly distinguishable on the facts. There the accused had finally formulated an intention to commit the offence and he had also done all that it was in his power to do to secure the commission of the offence. As I have shown, the position in the present case was entirely different.

It follows that appellant ought to have been acquitted on this count. The appeal is allowed, the conviction and sentence on count 4 are set aside, and there is substituted an order of acquittal.

Count 5

The gravamen of count 5 was the publication of the secret information in the manuscript to "Jonathan Ball Publishers" (meaning presumably Mr Ball and persons employed in the firm) in contravention of sec 3-(2)(a) of the Act. At the trial appellant pleaded not guilty. He was found guilty and

/ sentenced....

sentenced to a fine of R250 (or one month) and six months imprisonment conditionally suspended for three years. Leave to appeal was refused by the Court a quo and there is before us an application for leave to appeal against conviction and sentence.

It is common cause that the secret information related to munitions of war and/or military matters concerning the South African Defence Force; that appellant had this information in his possession or under his control; and that he published or communicated it to Mr Ball and at least one member of the firm's editorial staff. On appeal, appellant raised two arguments as to why he ought not to have been convicted on this count, viz. (i) that he did not have the necessary mens rea, and (ii) that, inasmuch as the secret information was already well known at the time of the publication or communication, no prejudice to the safety or interests of the Republic was in fact caused.

In support of the argument as to mens rea, appellant's

/ counsel...

counsel stressed (a) that it was common cause that the statements in the manuscript, constituting the secret information which was the subject-matter of this count, were factually correct; (b) that appellant took particular pains to ensure that the manuscript was accurate in all respects; (c) that appellant was especially aware of the legal restrictions on the publication of military matters and anxious not to break the law; and (d) that it was an express term of the publication agreement that the manuscript be "vetted" by a legal expert before publication. It was submitted that, accordingly, appellant did not have the subjective intention to break the law and took every reasonable step to guard against committing an offence. Mens rea, either in the form of dolus or in the form of culpa, was therefore not present.

In my opinion, these submissions are fallacious. The truth and accuracy of the statements constituting the secret information does not assist appellant in any way. It is this characteristic that renders them prejudicial or potentially prejudicial. And the fact that appellant took

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pains to ensure accuracy strengthens an inference that he was well aware of the gravity of what he was doing. There is ample evidence, too, that he regarded these matters as being "sensitive". In all the circumstances it must be inferred that he either knew or suspected that it might not be lawful to publish this material. It is true that he probably was thinking of publication in the form of a book to the public at large, rather than publication or communication to the publishers, and that he may not have been familiar with the precise prohibitions laid down by law. Nevertheless, he knew enough to have realized that the legal hazards were considerable and, in my opinion, the reasonable man in his position, endowed with his professional knowledge and experience, would have appreciated that even communication of the manuscript to the publishers might be unlawful and would have checked on the position, either by consulting the statute or a relevant text-book or by taking legal advice. Appellant did none of these things. In my view, he did not act with the degree of circumspection required in the circumstances.

/ His....

His failure in this respect constitutes sufficient proof of *mens rea*. (Cf. *S v Marais*, *supra*, at p 851 B - D.)

I would just add that the arrangement to have the manuscript "vetted" before publication is, of course, of no relevance - and no defence - to a charge of having published or communicated the manuscript to the publishers.

In regard to the second argument raised by appellant's counsel, it is correct that if information is already generally well known ("alom bekend") the publication or communication thereof does not normally result in prejudice to the safety or interests of the Republic (see *R v Marais*, *supra*, at p 853 E - F). It was broadly appellant's case in the Court below, and on appeal, that the factual allegations constituting the secret information were matters which had often been canvassed in overseas newspapers and journals; that certain of these publications were available to readers in South Africa; that consequently they were matters which were well known; and that, therefore, no prejudice resulted from their publication or

communication by appellant in his manuscript.

I do not think that this line of argument is sound. In the first place, I am not by any means satisfied that, whatever was published in the press and elsewhere overseas, it amounted to the same detailed and specific information as that constituting the secret information. I do not propose to detail the secret information; nor is it necessary to do so. Clearly it constitutes secret and confidential information concerning South African munitions of war and military matters and, in my opinion, the unauthorized disclosure of these matters would, prima facie, be prejudicial to the interests of the Republic. The defence that these matters were well known, overseas at any rate, and that, therefore, their disclosure was not prejudicial, cast upon appellant at least an onus to adduce evidence ("weerleggingslas") and, in my view, he did not properly discharge this. (This is quite apart from any statutory onus based on sec 8 (2) of the Act.) Admittedly, at a certain stage during the course of

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appellant's evidence it appears to have been accepted by both counsel and by the Court that "these (referring to the secret information) are allegations that were made in the international press in different forms at various occasions". And it would perhaps be unfair to rest a decision against appellant wholly on this point. Accordingly, I would go further and point out that there was no evidence that the secret information related to matters well known within the Republic. In fact all the indications are to the contrary. Ball was not even asked whether he and his staff had knowledge of this secret information. In the circumstances I am satisfied that the communication of the secret information to Ball and members of his staff was prejudicial to the interests of the Republic.

The application for leave to appeal against the conviction on this count is, accordingly, refused. There was also an independent application for leave to appeal against sentence, but in my opinion no adequate grounds for interference with the sentence were advanced. This application, too, is, therefore, dismissed.

/ Count 6 ....

Count 6

One of the statements made in the manuscript relating to military matters was untrue. (For convenience I shall refer to this as "the untrue statement"). The statement did not figure under counts 4 and 5 but was made the subject of a separate charge (count 6) under sec 118 (1)(b) of the Defence Act, 44 of 1957, as amended. Appellant pleaded not guilty to this charge. He was found guilty of an attempt to contravene the section and sentenced to six months' imprisonment conditionally suspended for three years. Leave to appeal was granted against conviction and sentence.

Section 118 (1)(b) provides as follows:

> "(1) No person shall publish in any newspaper, magazine, book or pamphlet or by radio or any other means —
>
> (a) .....;
>
> / (b) .....

(b) any statement, comment or rumour relating to any member of the South African Defence Force or any activity of the South African Defence Force or any force of a foreign country, calculated to prejudice or embarrass the Government in its foreign relations or to alarm or depress members of the public, except where the publication thereof has been authorized by the Minister or under his authority."

With regard to the meaning of the word "publish", as used in the opening words of this section, the first meaning attributed to this word in the Oxford English Dictionary is —

> "To make publicly or generally known; to declare or report openly or publicly; to announce; to tell or noise abroad; also to propagate, disseminate (a creed or system)."

/ The.....

The meaning, "to make publicly or generally known", has been referred to as the "ordinary" meaning of the word (see e.g. State v Kiley, 1962 (3) SA 318 (T), at p 322 D; State v Laurence, 1975 (4) SA 825 (AD), at p 828 F - G).

I have no doubt that in the context of sec 118(1), this is the meaning which "publish" bears. This is made clear by the various media of publication listed in the prohibition, namely any newspaper, magazine, book or pamphlet or by radio. Clearly the concluding words, "or any other means", must be interpreted ejusdem generis.

The learned Judge a quo came to substantially the same conclusion as to the meaning of "publish" and held that publication " to a person or to a firm or to a limited number of people cannot be publication in terms of the Act". He

/ nevertheless...

nevertheless held (i) that the untrue statement constituted a statement or rumour relating to an activity of the South African Defence Force, which was calculated to prejudice or embarrass the Government in its foreign relations (see sub-paragraph (b) of sec 118 (1)); and (ii) that appellant's conduct constituted an attempt to publish this statement.

Finding (i) above was not challenged on appeal, but finding (ii) was. It was submitted that the evidence did not establish an attempt to publish the untrue statement. I have dealt at some length, when considering count 4, with the concept of an attempt to commit an offence. In relation to count 6 the completed crime which appellant was held to have attempted to commit was the publication, through the medium of a book, of the untrue statement. Bearing this in mind, the finding that he committed an attempt is fallible in two respects. In this case actual publication of the book was interrupted or prevented when the appellant was arrested

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and the manuscript was seized by the police. This falls, therefore, into the second of the classes of attempt mentioned by WATERMEYER CJ in Schoombie's case (supra). With regard to this class, the learned Chief Justice stated (at p 546):

> "... some writers on criminal law say that an attempt, in the legal sense, is constituted by an act, done with intent to complete the commission of a crime, forming part of a series of acts which would constitute its commission if they were not interrupted."

He went on to point out that this definition had been criticised on the ground that it afforded insufficient guidance for distinguishing preparation from attempt. Nevertheless, in my view, to constitute an attempt (a) there must have been at the time of interruption an intention to commit the completed crime, and (b) it must appear that the party concerned had embarked upon a series of acts, which had progressed beyond the preparation stage, and which if not interrupted would have led to the commission of the crime.

In my view, the evidence in this case fails to

/ establish....

establish, beyond a reasonable doubt, either of these propositions. From the testimony of Ball and appellant it is clear that the manuscript was to be submitted to a legal expert for "vetting". No doubt his attention would have been specifically drawn to what were described as the "sensitive" portions of the manuscript, which clearly included the untrue statement. Appellant's intention - and incidentally that of his publishers - was to exclude from the published book any portions which the expert advised should not be published. In all the circumstances it seems at least reasonably possible that the expert would have advised the excision of the untrue statement. That being so, I do not think that the State showed that appellant intended or, as WATERMEYER CJ put it in one part of his judgment in Schoombie's case, supra, "had finally made up his mind" to publish the untrue statement at the time when the whole process of publication was interrupted; nor do I think that it was shown that, but for the interruption, the series of acts embarked upon

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by the appellant would have led to the commission of the crime.

For these reasons I hold that the evidence did not establish an attempt by appellant to contravene sec 118 (1)(b) of the Defence Act. The conviction and sentence on count 6 are, therefore, set aside and an order of acquittal is substituted.

Finally, in regard to the case as a whole, I must point out that the trial in the Court a quo was held in camera. At the conclusion of the trial an order was made by the trial Judge in regard to the copies of the manuscript and the trial record. This order stands. On the application of counsel for the State, and there being no objection by counsel for appellant, the hearing of the appeal was held in camera and an order was made in terms of sec 154 (1) of the Criminal Procedure Act, 51 of 1977, prescribing what at that stage could be published in regard to the appeal. In formu-

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lating this judgment I have avoided reference to any factual details which might be prejudicial or embarrassing to the State. There is no reason, therefore, why this judgment should not be given in open court. It follows that the judgment, or any portion thereof, may be published. As regards the remainder of the appeal record, however, an order will be made in terms of section 154 (1) directing that it may not be published.

To sum up the result generally, the following order is made:

(1) As to counts 1 and 2, the appeal against sentence is allowed, the sentence imposed by the trial Court is set aside and the following sentence is substituted:

> "9 months' imprisonment, wholly suspended for 3 years on condition that appellant is not convicted of a contravention of sec. 3 of the Official Secrets Act, 16 of 1956, as amended, committed during the period of suspension".

/ (2) .....

(2) As to count 3, the application for leave to appeal against conviction and sentence is granted. The appeal is allowed and the conviction and sentence are set aside. There is substituted the following:

> "The accused is found guilty on the alternative charge of a contravention of sec 3 (1)(a) and is sentenced to one month's imprisonment, suspended for 3 years on condition that he is not convicted of a contravention of sec 3 of the Official Secrets Act, 16 of 1956, as amended, committed during the period of suspension".

(3) As to count 4, the appeal is allowed, the conviction and sentence are set aside and there is substituted an order of acquittal.

(4) As to count 5, the application for leave to appeal against conviction and sentence is refused.

/ (5) .....

(5) As to count 6, the appeal is allowed, the conviction and sentence are set aside and there is substituted an order of acquittal.

(6) It is ordered, in terms of sec 154 (1) of Act 51 of 1977, that no portion of the appeal record or of the proceedings on appeal (including counsel's heads of argument) shall be published. This order shall not apply to the judgment of this Court on appeal, the whole or any portion of which may be published.

M M CORBETT

TROLLIP AJA)
VAN HEERDEN AJA) Concur.