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IN THE SUPREME COURT OF SOUTH AFRICA.

APPELLATE DIVISION.

In the matter between:

YOUSUF HASSAN ESSACK .....FIRST APPELLANT.

INDHRASEN MOODLEY. .....SECOND APPELLANT.

And

THE STATE. .....RESPONDENT.

Coram: Rumpff, Trollip et Muller, JJ.A.

Heard: 15 and 16 August 1973.

Delivered: 28 September 1973.

J U D G M E N T.

MULLER, J.A.

This is an appeal against the convictions of the appellants on a charge of contravening section 2 (1) (a) of the Terrorism Act, No. 83 of 1967.

The appellants, both Indians, appeared together with

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two other Indians, before Snyman, J., at a summary trial in the Transvaal Provincial Division. All four accused were found guilty of participating in terroristic activities as defined in the aforesaid Act. Leave to appeal in terms of section 363 (subsections (6) and (7)) of Act No. 56 of 1955 was granted to the appellants (to whom I shall hereinafter refer as accused no. 2 and accused no. 3, respectively) but was refused in respect of the other accused, i.e. accused numbers 1 and 4.

The indictment, in a lengthy preamble, contains a number of averments in support of a charge that the accused participated in a conspiracy to promote the causes and policies of certain organisations with the intent to endanger the maintenance of law and order in the Republic of South Africa. In brief these averments are that the South African Communist Party (also referred to as the S.A.C.P.)and the African National Congress(also referred to as the A.N.C.)- both of which organisations have been declared unlawful organisations under Act No. 44 of 1950 and Act No.34 of 1960, respectively,- in promoting their respective causes and policies in the Republic of South Africa, strive by violent means, or means which

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envisage violence, for the overthrow of the present Government or system of government in the Republic of South Africa. And it is further averred that, in pursuance of their said policies and aims, certain named subversive publications, in the form of pamphlets and leaflets, were issued for distribution in the Republic of South Africa, by or on behalf of the said organisations, with the intent to endanger the maintenance of law and order in the Republic. One of the documents mentioned in the indictment is a pamphlet entitled "No. 1 Inkululeko - Freedom, July 1971, Organ of the Central Committee of the South African Communist Party" (herein referred to simply as No. 1 Inkululeko). This is an extremely subversive document, containing highly inflammatory matter exhorting the Non-white people of South Africa to fight, and by force of arms to overthrow what is called in the pamphlet "The White Regime" in the Republic.

The aforementioned averments were admitted on behalf of all the accused.

A further averment in the preamble to the indictment is the following:

"AND WHEREAS one AHMED TIMOL, who was an office bearer,

member...../4

> member, agent or active supporter of the SACP and an agent or active supporter of the ANC, did wrongfully, unlawfully, and with intent to endanger the maintenance of law and order in the Republic of South Africa, or any portion thereof, and at the time and place and in the manner set out in Schedule 5 hereto, associate himself with and promote the aforesaid policies of the SACP and the ANC, or any of those policies, and associate himself with the aforesaid acts done by or on behalf of the SACP and the ANC, or any of those acts:"

In schedule 5 to the indictment (referred to in the above quoted passage) it is alleged that the said Timol was engaged in various activities in furthering the causes and policies of the S.A.C.P. and the A.N.C. in the Republic. Among such alleged activities was the distribution of subversive literature, including copies of No. 1 Inkululeko.

Inasmuch as the State sought to weave its case against the accused around the activities of Timol, and, inasmuch as the role played by him in the events which led to the present prosecution was, at least at the appeal stage, common cause, it is convenient to set out briefly at this early stage of the judgment what that role was.

Until 1966, when he left South Africa for England, Timol was a teacher at the Roodepoort Indian School in the Transvaal. He

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stayed in England for approximately 4 years, during which period he was in contact with persons who were either known communists or had communistic leanings.

When he returned to South Africa early in 1970, he again took up a teaching post at the Roodepoort Indian School. During the night of 22 October 1971 he and accused no. 1, while travelling by car near Coronationville, were stopped by the police at a routine road-block. In the boot of the car the police discovered a large number of documents which show that Timol was in communication with the Central Committee of the S.A.C.P. in England and the A.N.C. and that he co-operated closely with these organisations in carrying out the schemes which they had devised for furthering communism and revolution in the Republic.

The documents found in the boot of the car, and other documents and materials discovered by the police upon further investigation, as well as the evidence generally, clearly establish that among Timol's activities was the distribution in South Africa of subversive literature, including No. 1 Inkululeko. One of the methods of distribution was by postal delivery to individual addres-

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sees in the Republic. One of the documents produced at the trial was a mailing list containing 583 names and addresses of persons and institutions in South Africa and overseas.

The reason why Timol was not prosecuted was because of his death on 27 October 1971, some five days after his arrest, while in the detention of the police. At a subsequent inquest it was found that he had committed suicide by jumping out of a window in the John Vorster Square building.

As I have already stated, the participation by Timol in a conspiracy with the S.A.C.P. and the A.N.C., as charged in the indictment, and the performance by him of the aforementioned activities in pursuance of the said conspiracy, are not in dispute.

The charge against the accused, in what is referred to in the indictment as the "Main Count", was one of

> "Participation in terroristic activities in contravention of Section 2(1) (a) read with sections 2(2), 2(3), 4 and 5 of Act 83 of 1967, and further read with Section 263 bis of Act 56 of 1955."

And this charge was particularised as follows:

> "MAIN COUNT:
> At the times and places and in the manner mentioned

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in respect of each accused in Schedules 1 - 4; the Accused, either jointly or severally, did wrongfully, unlawfully, and with intent to endanger the maintenance of law and order in the Republic of South Africa, or any portion thereof, conspire with one another (or each of them with one or more of his/her co-accused), and/or the ANC and/or the SACP, and/or the said AHMED TIMOL, and/or the agent of the SACP referred to in paragraph 1 of Schedule 5, and/or the person (or persons) responsible for the issue of No.1 Inkululeko, and/or the leaflets entitled "The African National Congress says to Vorster and his gang", and "Sons and daughters of Africa", respectively, and/or persons unknown to the State, to aid or procure the commission of, or to commit any of the following acts, viz:

(a) to promote the cause and policies of the SACP , as set out hereinbefore:

(b) to promote the cause and policies of the ANC , as set out hereinbefore."

There was also an alternative charge under Section 2(1) (a), read with sections 2(2), 2(3), 4 and 5 of Act 83 of 1967, particulars of which were the following :

"In that at the times and places and in the manner set out in respect of each accused in Schedules 1 - 4 hereto, the Accused, either jointly or severally, and acting individually, or in concert with the said AHMED TIMOL, did wrongfully, unlawfully, and with intent to endanger the maintenance of law and order in the Republic of South Africa, or any portion thereof, commit one or more of the acts set out in respect of each of them, in Schedules 1-4 hereto."

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(It may here be mentioned that alternative charges under the Suppression of Communism Act, No. 44 of 1950, were also preferred against the accused, but, for reasons mentioned later in this judgment, discussion thereof is unnecessary for the purpose of this appeal.)

Schedule 2 to the indictment refers to accused no. 2, and Schedule 3 to accused no. 3. Inasmuch as there is no connection between the activities alleged in these schedules to have been performed by the said accused, respectively, - other than the common purpose in pursuance whereof the said activities are alleged to have been performed - the case against, and the appeal of each of the said accused, can conveniently be dealt with separately. I proceed, therefore, to deal first with the case against accused no. 2.

Omitting part thereof which refers to activities not relevant to this appeal, schedule 2 to the indictment reads as follows:

> "ACCUSED 2, Y.H. ESSACK, being a member or active supporter of the South African Communist Party, and/or the African National Congress, performed one or more of the activities set out hereunder :
>
> 1. During approximately July - August, 1971, and at Roodepoort in the district of Roodepoort and Johannesburg, in the district of Johannesburg,

Accused...../9

Accused 2 assisted in the preparation and distribution of copies of No. 1 Inkululeko in that he

(a) assisted AHMED TIMOL in assembling the pages of copies of No. 1 Inkululeko, stapling them together, placing them in envelopes, stamping the envelopes and posting them: or

(b) handled, in a manner unknown to the State, the envelopes in which copies of No. 1 Inkululeko were posted."

The evidence led on behalf of the State was that on two occasions during August 1971 envelopes containing copies of No. 1 Inkululeko were seized by the police at the post office in Bloemfontein, and that on each occasion a fingerprint of the accused was found on one or more of these envelopes. The first occasion was on 9 August 1971, when 4 such envelopes were seized. A fingerprint of the accused was found on one envelope. This envelope as well as two of the others bear the date stamp of the Johannesburg post office of 3 August 1971. The date stamp on the fourth is illegible. According to the evidence of a post office official, certain identifying marks in the date stamps on the envelopes indicate that all the four envelopes could not have been posted together. They were either posted in different pillar boxes in Johannesburg or, if posted at the same box, then at different times.

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The second occasion was on 26 August 1971, when 3 envelopes containing copies of the aforementioned pamphlet were seized. Fingerprints of the accused were found on 2 of the envelopes, which both bear the date stamp of the Johannesburg post office of 24 August 1971. The post office date stamp on the third envelope is not clear. Also on this occasion, according to the evidence, all the three envelopes could not have been posted together.

The accused admitted that the fingerprints on the said envelopes were his and that he had posted the envelopes, but told the Court that he had done so quite innocently and without knowledge of what the envelopes contained. In order to evaluate the explanation given by the accused in this connection, it is necessary to have regard to his background and his contact and association with the aforementioned Timol, from whom the accused alleged that he received the said envelopes with the request that he post them.

The accused was born on 1 May 1950 in Durban where he grew up and attended school. In 1968 he failed the matriculation examinations and started to work, first in Durban and later in Johannesburg. At the time of the alleged offence he was lodging

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with one Pahad in a flat in Orient House in Commissioner Street, Johannesburg,and was employed as a clerk in that city. He told the Court that he was not a member nor a supporter of the S.A.C.P. or the A.N.C., and never had been. Nor was he a member of any political group. Indeed he was, as he stated, not interested in politics and had only a vague idea of communism, although he and his friends did at times discuss "apartheid" which he said he could not accept as he, like many other Indians, considered it degrading and humiliating. Except for his work, he was interested only in sport and social activities. He was a member of the Dynamo's Football Club and a member of the Dynamo's Social Club. Pahad, with whom he lodged, was the treasurer of the said football club, and members of the club often gathered at Pahad's flat. The premises of the Dynamo's Social Club was near Pahad's flat and he (the accused) and other club members very often met at the club for social functions and film shows. According to the accused some of the members of the football club and other young Indians met practically every day after work on the corner of Becker and Market Streets, which is near the headquarters of the Dynamo's Football Club, "just for a

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bit of socializing before going home after work."

Accused no. 2 told the Court that he could not remember where he had met Timol for the first time, but said that it was early in 1971 . Timol, he said, was the assistant secretary of the Dynamo's Football Club. He sometimes saw him at football matches, or together with other club members at Pahad's flat, or in the afternoons at the aforementioned meeting place at the corner of Becker and Market Streets. He could recall only one occasion on which he was alone with Timol for any length of time and that was an occasion on which he, the accused, had planned to attend a film show at the Dynamo's Social Club. Timol that afternoon called at Pahad's flat, and as he had also planned to attend the film show, he invited the accused to have supper with him before the show, which the accused did.

According to accused no. 2,he had no political discussions whatsoever with Timol, although in general company "apartheid" was sometimes discussed. Timol had never discussed communism with him, nor had Timol attempted to influence him politically, or to persuade

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him to join a political party.

As to his posting of the envelopes in question, the accused explained as follows. He said that one afternoon after work, he could not remember the date but thought it was"some time in July" (1971),he was conversing socially with a group of friends at the place where they generally gathered, on the corner of Market and Becker Streets, when Timol joined the group. They continued conversing for some time, and, when the group broke up and dispersed, he and Timol walked in the direction of Timol's motor car, which was parked in Becker Street. There was some discussion between them, but the accused could not recall what the discussion was about. When they reached the car Timol got into the car and they carried on talking. Timol then asked the accused whether he had any four cent postage stamps. Timol said he needed 20 four cent stamps. The accused replied that he did not have 20 stamps and that, as the shops had already closed, there was no possibility then of obtaining stamps. The accused, however, said that he could obtain stamps for Timol the next morning, whereupon Timol asked the accused to do him a favour and post a batch of 30 or 40 envelopes, which he produced

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from the car, some of which were stamped. Timol gave the accused R1 to purchase stamps for those envelopes which were unstamped, some 20 in number. According to the accused, Timol told him that the envelopes were in connection with his "mail order business." He had on some occasion earlier in 1971, he could not remember when or where this happened, heard Timol say that he was conducting a mail order business in childrens schoolwear.

The accused explained further that he took the envelopes home that evening. He posted those that had already been stamped at a pillar box on his way to work the next morning, and kept those that were not stamped until his lunch hour when he bought the necessary stamps at the Rissik Street post office and posted them.

On another occasion, and this, the accused said, happened some two or three weeks after he had posted the first batch of envelopes, he was on his way out from Orient House, where he lived, to post a letter. It was, he said, "in the evening, about six, half past six." He saw Timol outside in the street walking in the direction of his (Timol's) motor car. Timol called out to him and asked him where he was going. He told Timol that he was going to post a

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letter, whereupon Timol asked the accused to do him a favour and post some letters for him too. The accused agreed and Timol handed him a batch of envelopes, some 20 or 30 in number. The accused then walked round the corner to a pillar box on the corner of West and Commissioner Streets. On posting this batch of envelopes the accused found, so he told the Court, that 2 or 3 envelopes were unstamped. He posted the envelopes which were stamped and returned with the unstamped envelopes to the spot where he had left Timol, but the latter had by then already departed. He kept the 2 or 3 unstamped envelopes until the next day when he bought the necessary stamps and posted them during his lunch hour.

It is therefore clear on the accused's own evidence that he posted some 50 or 70 envelopes for Timol, and the State established that such of these envelopes as were seized by the police contained copies of the pamphlet No. 1 Inkululeko. It can reasonably be assumed, and it was not disputed, that all the envelopes received by the accused contained copies of the said pamphlet. However, the accused, as I have indicated, was adamant that he was at all times under the impression that the contents of the envelopes in question were connected with Timol's mail order business and that he acted innocently and without knowledge of the real contents of the envelopes.

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For reasons which will be dealt with later, the trial Court rejected the accused's explanation and found as a fact that, when he posted the envelopes in question, the accused

> "well knew what their contents were, and his purpose was to assist and associate himself with Timol in the distribution of propaganda on behalf of the conspiracy."

On the basis of that finding, the reasoning of the learned trial Judge which led to the conclusion that the accused was guilty of the offence charged in the Main Count - i.e. participation in terroristic activities in contravention of section 2(1) (a) of the Terrorism Act - - was as follows (I quote from his judgment):

> "By posting these letters Accused 2 knowingly assisted in distributing copies of "No. 1 Inkululeko" and he associated himself with the contents thereof and with the declared policy of the S.A.C.P. He assisted, therefore, the S.A.C.P. and the A.N.C. in spreading their propaganda, aimed at paving the way for violent revolution to overthrow the Government in the Republic of South Africa. By so associating himself with this activity he became a co-conspirator and active supporter of the S.A.C.P. and the A.N.C. as alleged in the main indictment.
>
> It follows from this that all the acts done and the declarations made by the co-conspirators in furtherance of their common object are therefore admissible against him.
>
> The State relied on the presumption set out in subsection 2 (2) of the Act. In my view the State has proved that the activities which I have

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previously mentioned were likely to have the results set out in subparagraphs(e), (f) and (i) of subsection2(2).

I must now consider whether Accused 2 has discharged the duty resting on him by virtue of the presumption.

His evidence in relation to this I have already dealt with and rejected as being untrue. There is no other evidence to support him on this point. There is therefore no acceptable evidence that he did not intend any of the results set out in the subparagraphs to subsection 2(2). Consequently the presumption operates as final proof that he did the acts set out in the main count with the intent to endanger the maintenance of law and order in the Republic of South Africa or any portion thereof.

Accused 2 is therefore found guilty on the main count of the offence of participation in terroristic activities in contravention of section 2(1)(a) of the Terrorism Act."

I have difficulty in following the above line of reasoning to its conclusion. I can understand, and shall assume that, if the trial Court was correct in rejecting the accused's explanation, a matter with which I shall deal with presently, it could justifiably have come to the conclusion that, in the absence of an acceptable explanation by him (the explanation given by him having been rejected as false), the only reasonable inference was that there was indeed no innocent explanation for his conduct and that he well knew that

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the envelopes in question contained copies of No. 1 Inkululeko. And if such an inference is justified, then, in view of the contents of No. 1 Inkululeko, a highly subversive document, the conclusion could rightly and justifiably follow that, in assisting in the distribution of the said pamphlet, the accused had by his acts associated himself with the S.A.C.P. in promoting its cause and policies in the Republic of South Africa. And once that conclusion is reached, then the conspiracy charged in the indictment must be held to have been established (S.v.Alexander and Others (2) 1965 (2) S.A. 818 (C.P.D.) at p. 822 A - D) and a conviction on the main count in the indictment must follow without regard to the presumption provided for in section 2 (2) of the Terrorism Act.

The said subsection provides as follows (I quote only such parts thereof as are material for present purposes):

> "(2) If in any prosecution for an offence contemplated in subsection 1 (a) it is proved that the accused has committed or attempted to commit, or conspired with any other person to aid or procure the commission or to commit.....
> the act alleged in the charge and that the com-

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> mission of such act, had or was likely to have had any of the following results in the Republic or any portion thereof, namely ..... (the results set out in subparagraphs (a) - (l) .... the accused shall be presumed to have committed or attempted to commit, or conspired with such other person to aid or procure the commission of or to commit .... such act with intent to endanger the maintenance of law and order in the Republic, unless it is proved beyond a reasonable doubt that he did not intend any of the results aforesaid."

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" has 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

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need to invoke the presumption. If, however, it were to be found that the accused's 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. In this regard the following remark by Ogilvie Thompson,C.J., in S.v.Ffrench-Beytagh 1972 (3) S.A. 430 (A.D.) at p. 445 B, relative to the applicability of the presumption in question to a particular charge preferred against the accused in that case, namely,

> ".....having regard to the nature of the allegations charged in para (7) of the indictment, (inter alia inciting others to contravene the laws of the Republic, and to support and prepare for a revolution) no room exists for any application of the presumption."

is also apposite to the charge in the present case in so far as the main count is concerned.

In view of what has been stated above as to the law, the only matter for enquiry in the appeal of accused no. 2 is whether, as was contended by counsel for the accused, the trial Court erred in rejecting his evidence.

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The grounds for such rejection are stated concisely in the following passage in the judgment of the trial Judge:

> "The whole operation reeks with improbabilities, to an extent that I reject it as not being reasonably possible. I see accused's 2 evidence on this point as a frantic fabrication to explain his fingerprints on the envelopes containing subversive literature."

Before dealing with the specific reasons advanced by the learned Judge for his finding, it should be stated that, apart from the question of the probability or improbability of his story, the judgment contains no criticism of accused no. 2 as a witness, nor can I, upon a reading of his evidence, find any unsatisfactory features in his testimony. There is, moreover, no conflict between his testimony and that of any of the State witnesses - other than witnesses whose evidence the trial Court rejected as false.

In the lastmentioned regard I should mention that counsel for the State, in argument before us, contended that in one particular respect, namely with regard to the time when the accused had posted certain of the envelopes in question, his evidence could not be true in view of the procedure followed by the post office officials in the clearing of the post boxes in Johannesburg

as testified to by the State witness Rossouw. Without entering into a lengthy discussion, and what would indeed be an involved discussion, of the matter, I must state that I am not persuaded that the argument is sound. It proceeds from the assumption that, in the clearing of the numerous post office boxes in the city of Johannesburg, and there are a number of clearances during the course of each day, a particular box could not, for some reasons or another, have been missed out on a particular clearance. Such an assumption is not justified on the evidence.

Apart from the above observations there is the fact that the accused is not interested in politics, has not participated in political activities, nor even in political discussions other than discussions concerning"apartheid." His evidence in this regard stands uncontradicted. Moreover no incriminating documents were found in his possession, nor does his name appear (as did the names of some of the other accused) in Timol's correspondence with the S.A.C.P.

Having made the above general observations, I proceed

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to deal with the reasons advanced by the learned trial Judge for his view that there was no reasonable possibility that the accused's explanation could be true. At the outset I must explain that there does not appear to be any finding by the learned Judge, either express or implied, that the accused did not obtain the envelopes in question from Timol. It seems, as was indeed suggested by counsel for the State, that the learned Judge accepted that the accused did obtain the documents in question from Timol, but found that this happened under circumstances different from those deposed to by the accused, and indeed under circumstances in which he must have become aware of the contents of the envelopes.

The reasons advanced by the trial Judge for rejecting the accused's evidence as to the circumstances under which he came to be in possession of the envelopes in question, and as to his handling thereof, were based entirely on what the learned Judge considered to be improbabilities in the accused's testimony, and in particular the improbability, as the Judge viewed the matter, that Timol, whom he describes as " so dedicated a communist, holding so important a position in the conspiracy ", would have acted in

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the manner deposed to by the accused. In this regard the learned Judge mentions the fact that "Timol had the strictest instruction and direction from the S.A.C.P. to observe great care not to disclose his identity unnecessarily, and to be cautious in the handling of political material"; he refers, inter alia, to what he describes as "the highly secretive and cautious methods employed by Timol on other occasions", and he states that Timol "usually did take extreme precautions with his activities". In the light of these considerations the learned Judge regarded it as highly improbable that Timol would have taken the risk of entrusting the posting of such extremely dangerous propaganda material as No. 1 Inkululeko to accused no. 2, who, as the learned Judge says, was on his own evidence merely a "casual acquaintance" of Timol.

Another improbability in the accused's testimony, as found by the learned Judge, was that Timol, who was concerned with the distribution of hundreds of copies of No. 1 Inkululeko, would on the two occasions mentioned by the accused have had in his possession only a relatively small number of addressed envelopes

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containing copies of that pamphlet (on the first occasion 30 or 40 and on the second occasion 20 or 30). It was also unlikely, so the Judge reasoned, that Timol who "knew what quantity of stamps he needed when he decided on posting the letters", should on the first occasion find himself short of some twenty postage stamps, and on the second occasion be so careless as not to ensure that all the envelopes were properly stamped. The question is also posed by the Judge why Timol, if he was short of stamps on the first occasion, could not simply have kept the unstamped envelopes until the next morning, and why Timol did not, on the second occasion, himself put the batch of envelopes in the post, as he very easily could have done by simply walking round the corner to the nearest pillar box.

Concerning the accused's explanation that Timol on both occasions mentioned that the envelopes were in connection with his mail order business, the Judge states as follows:

> "I have already dealt with the strange story of Timol's mail order business. It is reasonably certain that no such business ever existed. The Police could not trace it. The use of it by Timol

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> as a subterfuge when he arranges for large quantities of envelopes to be typed by persons outside his conspiracy is quite understandable. But why have recourse to it when a casual friend is asked to post some letters? And why tell him twice?"

The judgment also contains the following comment on a particular aspect of the accused's testimony;

> "When the accused was asked where and when he had posted the envelopes, he said he did not know where he had posted them. Now apart from the fact that he had pointed out five pillar boxes to Lieutenant Van Niekerk, it seems strange that he does not know where he posted a comparatively small number of letters for a friend on two isolated occasions."

It was basically for the reasons aforestated that the trial Court considered that the accused's explanation could not be "reasonably possible".

In arguing in support of a contention that the Court a quo had erred in coming to the above conclusion, counsel for accused no.2 submitted that the learned trial Judge, in reasoning by inference as to the probabilities of the case, had not observed the cardinal rules of logic that " the inference sought to be drawn must be consistent with all the proved facts, which latter must be such as to exclude every reasonable inference from them save the

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one sought to be drawn"(S.v.Ffrench-Beytagh (supra) pp. 439 H to 440 A, and R.v.Blom 1939 A.D. 188, at pp. 202 to 203.)

The question which, at the outset, falls to be decided is, not whether this Court, if it had to consider the probabilities of the case as a court of first instance, would have come to a conclusion differing from that of the trial Court, but whether the record shows that the trial Court misdirected itself in any way in coming to the conclusion to which it did. Approaching the matter on that basis, my conclusion is that the trial Court did, in several material respects, err in its reasoning.

In the first place, I draw attention to the view of the trial Court, of which mention has been made above, that Timol was a person who was extremely cautious in his conspiratorial activities. The record, however, does not bear that out. In argument our attention was drawn to the evidence on various aspects of his activities, which evidence reveals a high degree of laxity in his methods. A number of examples can be given, but the following should suffice:

(a) He retained, and kept in his possession, all his correspondence with his conspirators in England, including letters involving codes and secret invisible writing. These letters contained the most damning evidence against him.

(b)

(b) He...../28

(b) He allowed his own typewriter to be used for the reproduction of stencils for the pamphlet: No. 1 Inkululeko and for typing names and addresses on envelopes in which subversive propaganda was distributed.

(c) He kept in his possession large quantities of subversive pamphlets including copies of No. 1 Inkululeko.

(d) When he was arrested he was found in possession of all his correspondence, copies of pamphlets and his notes, which documents disclosed all his subversive activities. These documents were lying unconcealed in the boot of his car.

As to Timol's motivations in using accused no. 2, a professed innocent person, to post the envelopes containing subversive material for him instead of doing so himself, there are several possibilities one of which emerges from the instructions received by Timol from the S.A.C.P. in England, namely that "only in exceptional circumstances must the main contact take part in physical distribution". Timol was a main contact. He may well have reasoned that, in order not to attract suspicion, other persons should be used for the posting of the envelopes. In this regard I must state that the learned Judge's description of Timol as a "casual acquantance" is, in view of what I have already stated earlier in this

judgment as to their association, not an apt description.

The disbelief expressed by the learned Judge with regard to certain aspects of the accused's evidence, namely, that Timol on two particular occasions had only a small quantity of envelopes containing copies of No. 1 Inkululeko in his possession, some of which were not stamped, whereas the evidence shows that hundreds of copies of the said documents were distributed through the post and Timol "knew that he required large quantities of stamps", can, as I see it, only arise from an assumption that all the copies of No. 1 Inkululeko would have been placed in envelopes for posting at the same time and that a large quantity of stamps would have been purchased at one time. There is no justification for such an assumption. Indeed one would expect that to avoid suspicion the envelopes would have been posted in unobtrusive quantities.

Without further evidence as to how it came about that Timol was in possession of the two batches of envelopes on the different occasions mentioned by the accused and what his initial intention was with regard thereto, one would indeed be wandering in the realm of speculation if one were to test the accused's evidence

against...../30

against what one considers would or would probably not have motivated Timol to have acted or not to have acted in a particular manner - unless of course one were to make assumptions for which there would be no justification. As an illustration of what I have just stated reference can be made to two passages in the judgment of the trial Court. The first passage has reference to the first occasion on which the accused received a batch of envelopes from Timol, and the second passage to the second occasion when a further batch of envelopes was received. These passages read as follows:

> "Why would he take the letters to post, then not do it, then ask a casual acquaintance to buy stamps for some of them and then post them. Timol must have known he could not post the unstamped letters straight away; that it would have to be done the next day. So why should he suddenly ask a casual acquaintance to do it for him? Furthermore, he knew all afternoon he would need stamps. But he waits until he is about to leave and then asks a casual friend to do it."

and

> "In any event, how did Timol get there where he was with these letters? He lives in Roodepoort. Orient House is in the centre of Johannesburg. He must have gone there in his car. He could have posted the letters himself in one or other pillar box on his way."

The ...../31

The criticism contained in the first passage rests on an assumption that Timol had the first batch of envelopes with him the whole afternoon and had set out with the intention to post them on that day, while the criticism contained in the second passage rests on the assumption that Timol, on the second occasion, brought the batch of envelopes with him from Roodepoort in order to post it in Johannesburg. There is no justification for either assumption.

In this connection the following remarks of Lord Wright in Caswell v. Powell Duffryn Associated Collieries Ltd. (1939) 3 All E.R. 722 at p. 733 appear to me to be apposite to the present situation:

> "Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. In some cases the other facts can be inferred with as much practical certainty as if they had been actually observed. In other cases the inference does not go beyond reasonable probability. But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture."

With...../32

With regard to the accused's testimony that Timol told him on both occasions that the envelopes were in connection with his mail order business, I have indicated above that the learned trial Judge expressed his disbelief thereof. I must say that I do not share that view. Timol had used that subterfuge to avoid any suspicion on the part of Miss Chotia, who was asked to type envelopes for his"mail order business". I therefore do not find it strange that he would have used the same subterfuge to avoid suspicion on the part of the accused on both occasions when he handed him a batch of envelopes of a size not used for ordinary correspondence.

There remains to be dealt with the comment of the learned Judge a quo on the accused's testimony that he could not remember at which pillar boxes in Johannesburg he had posted the envelopes received by him from Timol. It must be explained in this regard that on 11 January 1972, the accused pointed out to one of the investigating officers certain pillar boxes in the centre of Johannesburg, one of which was on the corner of Commissioner and West Streets. There is no evidence on record as to whether the

accused.../33

accused pointed out these boxes as ones which he generally uses or ones at which he did post or could have posted some ~~same~~ of the envelopes received by him from Timol. I have earlier in this judgment, when dealing with the testimony of the accused, stated that, according to him, he took the first batch of envelopes received from Timol home, kept them overnight, posted those envelopes which had already been stamped while on his way to his place of employment the next morning and the remainder during his lunch hour after obtaining the necessary stamps at the Rissik Street Post Office. He could not remember at which particular boxes either of the postings took place. Here I should mention that the accused explained that he does not always follow the same route when going to work. That may account for the fact that he could not remember where the morning posting had taken place.

With regard to the second batch of envelopes received from Timol, he testified that he posted the whole batch, save for the 2 or 3 envelopes that were unstamped, at the pillar box on the corner of Commissioner and West Streets, which was

just...../34

just round the corner from Orient House where he lived and where he had met Timol on that occasion. The remaining 2 or 3 envelopes he posted in the city during his lunch hour the next day, after obtaining the necessary stamps, but he could not remember where.

Although it may seem strange that the accused could not, according to his evidence, remember all the pillar boxes used by him for posting the envelopes received from Timol (he did, as indicated above, describe the position of one box and that box is one of those which he pointed out to the investigating officer, and the pointing out took place, as I read the evidence, before he could have known that his fingerprints had been discovered on any envelopes seized by the police), I am not prepared to say that his explanation in this regard cannot be true.

In view of what has been stated above, I agree with the contention that the learned trial Judge erred in several material respects in his reasoning which led to the rejection of the accused's evidence. In the result this Court

must...../35

must come to its own conclusion as to whether the accused's explanation can or cannot, as a reasonable possibility, be true. Having regard to the evidence as a whole, and also to the fact that there is a lack of evidence with regard to certain vital aspects of the matter - particularly as to how Timol came to be in possession of the two batches of envelopes on the occassions mentioned by the accused and as to what Timol's motivations could have been in handing these envelopes over to the accused, a professed innocent person - I do not consider that one can with justification, in the absence of any evidence to the contrary, simply reject the accused's evidence on the basis that it cannot be true.

The conclusion which I have just stated must result in a finding that the State failed to prove that the accused knew that the envelopes in question contained subversive literature, and consequently did not prove the conspiracy charged in the main count. The appeal against the conviction on that count must therefore succeed.

On appeal counsel for the State submitted that, if

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it were to be found that the offence charged in the main count had not been established, then there should be a conviction on the alternative charge under the Terrorism Act. The part of the indictment relating to the alternative charge has been cited earlier in this judgment, In essence that charge was that the accused had, with the intent to endanger the maintenance of law and order in the Republic, assisted Timol, inter alia, by stamping and posting envelopes containing copies of No. 1 Inkululeko, or that he had handled such envelopes in a manner unknown to the State.

Counsel's argument was that, inasmuch as the State had established that accused no. 2 had stamped some and posted all the envelopes received by him from Timol, which envelopes contained copies of No. 1 Inkululeko, it had, in terms of section 2 (2) of the Terrorism Act, proved the commission by the accused of "the act alleged in the charge", and that, inasmuch as the said act "was likely to have had" at least some of the results mentioned in subparagraphs(a) to (i) of the said subsection, the presumption provided for in the subsection became operative. And, so the argument proceeded, because the accused had failed to prove "beyond a reasonable doubt that he did not intend

any...../37

any of the results aforesaid", the presumption establishes his intent to endanger the maintenance of law and order in the Republic, in consequence whereof a conviction on the alternative charge must follow.

I cannot agree with counsel's contention, a contention which rests on the premise that the State proved the commission of the "act alleged in the charge". In my judgment the commission of that act was not proved because the State failed to establish that, when the accused handled the envelopes in question, he knew that they contained copies of No. 1 Inkululeko.

The charge was one of handling envelopes containing subversive literature with a particular intent as to the effect which such literature should have on the recipients thereof. In my view it is implicit in that charge that the accused knew what the envelopes contained. Without such knowledge it surely cannot be said that the accused acted with a particular intent, whatever that intent may have been, relative to the contents of the envelopes. Therefore, without proof of knowledge on the part of the accused,

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it cannot be said that the commission of the "act alleged in the charge" was proved. From which it follows that at least one of the requirements for bringing into operation the statutory presumption provided for in the subsection was not met.

In my view, it could never have been the intention of the legislature that, in a charge of the nature preferred in the present case - the handling of envelopes containing subversive literature with a particular intent - proof of the mere performance of the physical act, under circumstances which could be entirely consistent with complete innocence on the part of the person performing the act, should bring the presumption in question into operation. Indeed, if that had been the intention, the commission of many acts entirely unassociated with any intent relative to terroristic activities, would place on the accused the burden of proving beyond a reasonable doubt that he did not intend any of the results enumerated in the subsection - e.g. the posting of letters by a messenger; the posting by a casual bystander of letters inadvertently dropped by a stranger outside a pillar box, and, indeed, even the handling of letters by a post office official. (See in this regard the remarks of Ogilvie Thompson, C.J., in the Ffrench-Beytagh case

(supra)...../39

(supra) at p. 457 E to H.

It follows from what has been stated above that a conviction on the alternative charge under the Terrorism Act would not, in the circumstances , have been competent.

I mentioned earlier in this judgment that there were also other alternative charges preferred against the accused under the Suppression of Communism Act, No. 44 of 1950. Counsel for the State, however, conceded on appeal that if the State could not succeed in obtaining a conviction on the charges under the Terrorism Act, then he could not argue in support of a conviction on any of the alternative charges preferred under the Suppression of Communism Act. I need therefore not deal with the lastmentioned charges.

The consequence of what I have stated above is that the appeal of accused no. 2 must succeed.

I come now to deal with the case against accused no. 3. Like accused no. 2, he was charged with conspiring to promote the causes and policies of the S.A.C.P. and the A.N.C. in the Republic. The manner in which he is alleged to have participated in the

said...../40

said conspiracy is set out in Schedule 3 to the indictment. Omitting part thereof not material for present purposes, this schedule reads as follows:

> "SCHEDULE 3
> ACCUSED 3, I. MOODLEY, being a member or active supporter of the South African Communist Party, and/or the African National Congress, performed one or more of the activities set out hereunder.
>
> 1. During approximately May - August 1971, and at Durban, in the district of Durban, Accused 3 gave a copy of No. 1 Inkululeko to Ananda Naidoo, an Indian male, with the request that he should read it, and destroy it, thereafter.
>
> 2. During approximately June - August 1971 and at Durban, in the district of Durban, Accused 3 gave a copy of No. 1 Inkululeko to Deenadayalan Kisten Chetty, an Indian, with the request to read it and destroy it thereafter."

There was also, as I have mentioned earlier, an alternative charge under the Terrorism Act. This charge was that the accused had committed the acts set out in the schedule with the intent to endanger the maintenance of law and order in the Republic.

In support of the aforementioned charges, the State called as witnesses, the two persons whose names are mentioned in the schedule, namely, Chetty and Naidoo. At the time of the

commission...../41

commission of the alleged offence they were students at the University of Durban, Westville, Natal, at which university the accused then held a teaching position as a lecturer in pharmacy.

Chetty told the Court that he knew the accused; they at one time attended the same lectures and met on the university campus. He said that on a particular occasion towards the middle of 1971, he went to see the accused at the university laboratory, a part of which was used by the latter as an office. There, he said, the accused handed him a pamphlet and told him that he should read it and thereafter destroy it. The pamphlet was a copy of No. 1 Inkululeko.

In examination-in-chief he was asked whether, at the time when the accused handed him the pamphlet, the accused had given any reason why he wanted the witness to read it, and his answer was "No".

In cross-examination, Chetty admitted that many Indians, including himself, are opposed to the policy of "apartheid", and that the question of bringing about a change in the political situation in South Africa was often discussed on the university

campus.....@2

campus. The witness was, however, so he said, opposed to any form of violence and to communism. From discussions on the campus he knew that the accused held the same views and agreed that the latter had "often expressed himself to be anti-violence".

Chetty was asked whether, over the years 1970 and 1971, there had been talk among the students at the university of reviving an organisation known as the Natal Indian Congress, which organisation, in its promotion of the cause of the Indians, was opposed to violence. He replied that there was such talk and that both he and the accused supported the idea of reviving the said organisation.

He also admitted in cross-examination of being aware of a movement in Durban during 1971, led by one Meva Ramgobin, to obtain clemency for political prisoners at the time when South Africa was celebrating the tenth anniversary of the founding of the Republic. He also agreed that the view held by the supporters of this movement was that subversive organisations such as the Communist Party and the A.N.C. were "things of the past". The witness remembered that he had discussed this topic with the

accused...../43

accused and that they shared that view.

Regarding the conduct of the accused in handing the pamphlet to Chetty, the following are some of the questions put to and answers elicited from the witness:

> "He said, he told you he had received something in the post. Is that right, Mr. Chetty?----Yes.
> And then he showed you this document?-----Yes.
> The"Inkululeko"?----Yes.
> And is'nt it true Mr. Chetty, that he expressed alarm that this came from what purported to be the Communist Party? Did'nt he say to you Mr. Chetty, look at this, we thought this was dead, look at this, it comes from the Communist Party? Is'nt that right?----He may have said something like that, but the thing is, he asked me to read it, to take it and destroy it.
>
> To destroy it, that is right.
>
> Mr. Chetty , you did'nt for one moment think that Accused No. 3 was trying to persuade you to believe what was stated in that "Inkululeko", did you?--No, I was quite surprised myself.
>
> You were quite surprised to see the contents of it, right?----Yes.
>
> You knew it came from an anti-communist, Accused No. 3?-----Yes.
>
> And he knew you were an anti-communist?----Yes."

and later-

> "I am putting to you that Accused No. 3 when he gave this to you, pointed out to you that the Communist Party, that this came from the Communist Party. That is correct, is'nt it?----Yes, he did.

And...../44

And made the point that apparently you people were wrong in thinking that the Communist Party had gone out of existence, is'nt that right?-----I can't remember.

BY THE COURT: Where did you read that document? In his presence or did you take it away?----I took it away to my office.

MR. BROWDE: Mr. Chetty, I want to just get this clear. No. 3 had expressed the need and the....., and enthusiasm for a revival of the Natal Indian Congress?---Yes.

And did'nt you understand, when he showed you this, that No. 3 was once again underlining the great need for the Natal Indian Congress to be revived?---Now that you mention it, I suppose he did."

This matter was again taken up in re-examination when Chetty was asked whether, at the time of the handing over of the pamphlet, the accused had expressed any surprise at the fact that the S.A.C.P. was still active. His answer was "He may have done, I cannot remember now."

The next witness, Naidoo, told the Court that, before the accused was appointed as a lecturer at the university, both of them were students at the university. He said that during 1971, he was not sure of the month but thought that it was in May, he had occasion to go to the office of the accused in the laboratory.

There...../45

There the accused handed him a pamphlet which the witness, by reference to the contents thereof, identified in court as a copy of No. 1 Inkululeko.

As to the circumstances under which this pamphlet was handed to him the witness testified as follows:

> "Mr. Naidoo, just sketch the circumstances to the Court under which it came about that you received this pamphlet from Moodley, Accused No. 3. ---It being a long time ago, what I can remember is that I walked into the laboratory and Mr. Moodley was there, and he handed me over something that was folded, it looked like a sheaf of notes, which I took and put into my pocket.
>
> Did any conversation take place at the time of the handing over?----No, there were other people in the laboratory at the time.
>
> So did he just give you the item and then leave?----Well he gave me the item and left.
>
> And there was no conversation as to the content of the item?----No, none."

In cross-examination Naidoo was asked whether he and the accused had, as students, discussed the political future of South Africa and his answer was "I cannot say for certain but it is probable that we did." Naidoo said that he rejected communism and was definitely opposed to violence, and that the accused was aware

thereof...../46

thereof. And, from what he knew of the accused, the latter was also opposed to violence and communism.

According to his testimony, he knew of the movement, to which reference has already been made, led by Ramgobin, to obtain clemency for political prisoners in South Africa, and he conceded that the attitude of the supporters of the movement was that, as the subversive organisations of which the political prisoners had been members were dead, and no longer existed in South Africa, such prisoners should be released. In that regard the following question was put in cross-examination:

> "And let's face it, Mr. Naidoo, that seemed to be the position, that these subversive organisations were dead and gone, did'nt that seem to be the position?"

and his reply was

> "For most of us that seemed to be the position."

As to the circumstances under which the pamphlet in question was handed to him by the accused, he replied as follows to questions put by cross-examining counsel:

> "Now I have put it to you, Mr. Naidoo, that he in

fact...../47

fact said it had come through the post, and you say that he might have said that?----That is true.

Now Mr. Naidoo, I don't know what your motive was for saying that nothing was said, but I want to put it to you that that is not so. ----I do not say that nothing was said, I said I did not recall that anything was said."

"And I want to put it to you that No. 3 Accused said to you that this had arrived in the post and he expressed astonishment that it came from a body called the South African Communist Party. He said, look who it comes from, and we thought that they were dead... Yes, perhaps I have put it too strongly, My Lord, my learned junior reminds me. He does'nt remember the exact words, I must tell you now, he does'nt remember the exact words but he expressed surprise at the existence, the apparent existence of the South African Communist Party. Do you follow that?---- I do.

Now, is that possible that that was said?---It is possible.

BY THE COURT: Do you remember that it was said?----No, I don't remember that it was said.

MR. BROWDE: Well in fact you don't remember anything being said?---- That is true. It is a long time ago.

Did he tell you to destroy it, for example? Do you remember that?----No.

Did he tell you to read it? Do you remember that?----Well I assume that having given me the document he expected me to read it.

Yes, but you don't remember him saying, read it and destroy it?---He could very well have said it."

"Well he showed it to you, saying...., using words to the effect, look at this, we thought this was dead, just look at it, it comes from the Communist Party.

He...../4 8

He might have said that?---He might have said that. Look at it and destroy it?---He might have said that."

When the matter was again raised in re-examination, his reply to a question as to whether there was any conversation between him and the accused at the time when the latter handed over the pamphlet, his reply was "As far as I can remember there was no conversation."

The accused, a young married man, testified in his own defence. He told the Court that, although he did not agree with the policy of "apartheid", which he regarded as humiliating for Indians, he was opposed to communism and to any form of violence. He knew, from discussions with them, that both Chetty and Naidoo were also opposed to communism and violence. He said that he supported the idea of reviving the Natal Indian Congress for the very reason that this organisation was opposed to violence.

He also told the Court of the movement, led by Ramgobin, to obtain the release of political prisoners and the belief, which he shared, that subversive organisations such as the S.A.C.P. and the A.N.C. were dead, or at least no longer active in the Republic.

He...../49

He had never been a member or supporter of either of these organisations.

Regarding the person Timol, the accused said that he first met him ~~on~~ during or about October 1970. In this regard he explained that, at that time, he was interested in forming a youth organisation in Durban to foster cultural activities for Indians. A friend of his, a Miss Chetty, told him that Timol was interested in founding a similar organisation in Johannesburg, and she said that she would mention the accused's interest to Timol. While the accused was working in Johannesburg, before taking up a teaching post as a lecturer at the University of Durban, Timol phoned him at his work during or about October 1970. He presumed that Miss Chetty had given Timol his telephone number. They arranged to meet at the accused's home. At this meeting two friends of the accused were present. Their discussion on that occasion centred mainly round student politics and the possibility of starting a youth movement in Johannesburg. Before Timol left he invited the accused to have tea with him before leaving to take up his teaching post in Durban.

This..../50

This the accused did in December 1970. Timol then lent him a book called "The Theory and Practice of Communism".

The only other occasion on which he saw Timol was when the latter visited Durban during January 1971. Their discussion on this occasion was mainly concerned with cultural matters and youth organisations. As Timol was returning to Johannesburg by car, he offered the accused and a friend of the latter, one Cooper, a lift to Johannesburg. The accused accepted the offer and he and his friend travelled to Johannesburg with Timol. The aforementioned were the only occasions on which the accused, so he said, had met Timol, and he never saw Timol again.

The accused told the Court that at no time did Timol discuss communism with him or attempt to convert him to the ideas of communism. In this regard the witness's attention was drawn to the following passage in a letter written by Timol to his London principals:

> "I wish to recommend Indhrasen Moodley to work with us in the main group. He is a science graduate from Salisbury Island, lives in Lenz and works at S.C.C. Pharmaceutical Laboratories in Johannesburg. His

permanent...../51

permanent home is in Durban. I have had several discussions with him and am confident that he will prove to be a devoted comrade in furthering our struggle."

The accused told the Court that Timol had never asked him to become a member of any group, nor could he have had grounds for recommending him as a member. Indeed, he said, Timol had, up to the date of his recommendation, only met him on one occasion.

Dealing with the circumstances under which he handed a copy of No. 1 Inkululeko to each of Naidoo and Chetty, an act which he readily admitted, the accused explained as follows. He said that this took place on the same day. He had earlier that day collected his mail at the home of his parents-in-law, and he took it with him to his office in the laboratory at the university. On opening one of a number of envelopes addressed to him, he found that it contained a copy of No. 1 Inkululeko. He saw that it was a propaganda pamphlet of the S.A.C.P. This surprised him as he was under the impression that this organisation was dead or, as he later put it in cross-examination, that it was no longer active in South Africa. Shortly thereafter, while still reading his correspondence, Naidoo came to his office.

He...../52

He handed the pamphlet to Naidoo. He could not recall the exact words used by him in addressing Naidoo, but stated that it was to the effect that, whereas they had thought that the S.A.C.P. was dead, this did not appear to be the case. He told Naidoo to destroy the copy. After Naidoo had left, he noticed amongst his mail another envelope similar to the one in which a copy of No. 1 Inkululeko had been addressed to him. This envelope was addressed to his wife. On opening this envelope he found that it also contained a copy of No. 1 Inkululeko. This copy he handed to Chetty who shortly thereafter came to his office. He could not remember what he said to Chetty but, as in the case of Naidoo, it was to show his surprise that subversive literature was still being distributed in South Africa by the S.A.C.P. He asked Chetty to destroy the document.

He persisted throughout his testimony that, in handing the copies of the pamphlet to Naidoo and Chetty, he had no intention other than to make them aware that the S.A.C.P. still existed and was still active, and to underline the need

for...../53

for reviving the Natal Indian Congress.

When he was arrested in March 1972, the accused had in his possession a copy of each of the following publications:

(a) "The Theory and Practice of Communism" by Carew Hunt.

(b) "1984" by George Orwell.

(c) "Brave New World" by Aldous Huxley.

(d) "In defence of Philosophy against Positivism and Pragmatism" by Maurice Cornforth.

At the trial it was admitted on behalf of the State that the firstmentioned book, by Carew Hunt, which the accused received from Timol, "is a recognised text work on communism of which it is analytically critical. The author is a right-wing Anglican who is opposed to Marxism and communism." It was further admitted that the books "1984" and "Brave New World", both satirical novels, are critical of the regimentation of societies which occur in communistic and other authoritarian systems of government. These two books the accused said he got from his friend, Miss Chetty, from whom he also received

the...../54

the book "In Defence of Philosophy against Positivism and Pragmatism". He explained that he ~~and~~ had himself selected the last-mentioned book because of the word "philosophy" in the title, and without knowing that it had anything whatsoever to do with communism. He found this book "difficult and boring" and so "just left the book."

In evaluating the evidence of the State's witnesses, Chetty and Naidoo, the learned trial Judge remarked in his judgment that they were friends of the accused and anxious to say what they could in his favour. And with regard to Chetty in particular the Judge stated

> "He was also being watched by an Indian audience who showed their partisanship for the four accused. He, and indeed other Indian State witnesses, appeared uncomfortable at the cross-examiner's method of putting the words into their mouths, requiring them only to say 'Yes'."

With regard to the accused, the learned Judge found his evidence to be unsatisfactory in many respects, particularly his evidence that he believed that the subversive organisations were dead or non-existent in South Africa and that

this...../55

this was his reason for handing the copies of No. 1 Inkululeko to Chetty and Naidoo, whom he knew held the same belief.

On this aspect the finding of the trial Court was that "The effect of his evidence really is, at best for him, that he thought these organisations were dormant, not extinct."

Regarding the question whether anything was said by the accused when he handed copies of the said pamphlet to Chetty and Naidoo, the learned Judge reasoned as follows:

> "In regard to his statement that he handed them over on the basis of showing his surprise that the S.A.C.P. still existed, this in effect is denied by both Naidoo and Chetty. It is true that under cross-examination they made the concession that this may have been the background for the handing over or that he may have said something. It seems to me that if the cardinal purpose for the handing over of the pamphlets was to make the point that these organisations were still alive, these two witnesses must inevitably have remembered it. But neither of them did."

and he stated:

> "It can be gathered from both Naidoo's and Chetty's evidence that when the pamphlets were handed to them there was no talk on the basis that these organisations were thought to be non-existent but that to their surprise this had proved wrong. I gather from their evidence that there had never been any strong discussion about it."

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The above finding by the learned Judge led to the following conclusion:

> "I have come to the conclusion that I must reject the accused's contention that these matters (the alleged belief that the subversive organisations were extinct or dormant, and the desire to revive the Natal Indian Congress) formed the basis and the reason for handing the the"No. 1 Inkululeko" to the two witnesses. It does not assist the accused in what is obviously his intention with it, that is to show that he ahd no criminal intent in handing the pamphlets to Naidoo and Chetty."

For reasons stated by the learned Judge, he also rejected the accused's evidence that he did not read the copies of No. 1 Inkululeko received by him properly because he realised , by just reading part thereof, that it was "a lot of rubbish". The Judge therefore made the following finding:

> "As I see the accused's position, he was most unsatisfactory in his explanations; not that he owed any explanation, but having chosen to give an explanation I am entitled to examine it. It seems to me that his explanations were aimed at refuting the State's allegation that the purpose of the distribution was to promote the causes and policies of the S.A.C.P. and/or the A.N.C. He realised that if he admitted to having read through the pamphlet and then having handed over copies to the witnesses, it

would...../57

would be destructive of his defence, namely, that he distributed these pamphlets not knowing their contents, and for a purpose other than that alleged by the State. I find that he did distribute the pamphlets knowing the contents and with the intention that the two witnesses should read it."

On the basis of that finding the reasoning of the learned

Judge was as follows:

"The State for its main count relied on Schedule 3 in respect of Accused 3, namely, that being a member or active supporter of the S.A.C.P. or the A.N.C. he performed one or more of the activities set out in the schedule.

Paragraph 1 of the schedule alleges that approximately during May to August, 1971, Accused 3 gave a copy of "No. 1 Inkululeko" to Ananda Naidoo with the request that he should read it and destroy it. I find that this has been proved.

Paragraph 2 alleges that during approximately June to August, 1971, Accused 3 gave a copy of "No. 1 Inkululeko" to D.K.Chetty with the request to read it and destroy it.

It is true that the State has not shown that he requested Chetty to read it and destroy it. However, in fact he gave it to him to take away. It seems to me that paragraph 2 has substantially been proved.

In order that the presumption in subsection 2 (2) of the Act may become operative the State must also prove that the acts alleged were likely to have had any of the results set out in the subparagraphs to subsection 2 (2).

Proof...../58

Proof of the acts alleged in the main count depends on proof of the allegations in Schedule3. The evidence in my view proves that the activities of Accused 3 were carried out in a manner which promoted the causes and policies of the S.A.C.P. and/or the A.N.C. These acts in turn I find were likely to have had the results set out in subparagraphs (e), (f) and (i) of subsection 2 (2) of the Act.

The presumption is therefore operative and it casts the duty on Accused 3 to prove beyond reasonable doubt that he did not intend any of the results set out in the subparagraphs."

"---------taking the evidence as a whole my conclusion is that Accused 3 has not proved beyond a reasonable doubt that he did not intend any of the results set out in the subparagraphs. The presumption has therefore not been disturbed and consequently operates as conclusive proof that Accused 3, with intent to endanger the maintenance of law and order in the Republic or any portion thereof, conspired with Timol, the S.A.C.P., the A.N.C. and with the other persons named in the main count to the indictment to promote the causes and policies of the S.A.C.P. and the A.N.C."

Counsel for accused no. 3 submitted on appeal that, in reasoning in the manner evidenced by the abovequoted passages in the judgment, and in coming to the conclusion that there was "conclusive proof" that the said accused had, with the intent to endanger the maintenance of law and order in the Republic,

participated...../59

participated in the conspiracy charged, the learned trial Judge erred in several material respects. I agree with that submission.

In the first place the learned Judge relied upon and applied the presumption provided for in section 2 (2) of the Terrorism Act to a charge to which the presumption could have no application by reason of the very nature of the charge and the element of intent embraced therein. Like the case of accused no. 2, accused no. 3 was charged with conspiring to promote the causes and policies of the S.A.C.P. and the A.N.C. The alleged conspiracy, according to the indictment, involved the distribution of subversive literature, including copies of No.1 Inkululeko, in the Republic with the intent to endanger the maintenance of law and order in the Republic. It must therefore follow that, if the State had succeeded in proving that the accused had participated in the conspiracy, his intention to endanger the maintenance of law and order in the Republic would have been established, in consequence of which a conviction on

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the main count would then have to follow. If, however, the State had failed to establish the accused's alleged participation in the conspiracy, then it could not have been said that the State had proved the commission by the accused of "the act alleged in the charge", proof whereof is a material requirement for the bringing into operation of the presumption. In neither of the above postulates could there be room for any application of the presumption. In this connection I refer to what has been stated earlier in this judgment relative to the main charge preferred against accused no. 2, which remarks, in my view, apply with equal force to the main charge against accused no. 3.

Another respect, and indeed a very material respect, in which I find that the learned trial Judge erred in his reasoning, was the grounds upon which he rejected the evidence of the accused that, when he handed a copy of No. 1 Inkululeko to each of the witnesses Chetty and Naidoo, he did so without any criminal intent but merely to make them aware of the fact that, contrary to the belief of all three of them, the

S.A.C.P. was still in existence and active in the Republic, and that he at the time used words to that effect.

In dealing with the evidence of Chetty and Naidoo earlier in this judgment I mentioned the fact that both of them had, in examination-in-chief, stated that the accused, in handing the pamphlet to them, had said nothing except that they should destroy the copies handed to each of them. I also, however, indicated by quoting passages from their evidence, that in cross-examination each of them stated that he could not remember whether the accused had used words to the effect testified to by him or not. Indeed they went further; Chetty in one of his replies said "Now that you mention it, I suppose he did." and Naidoo conceded that the accused "might have said that."

The trial Judge, however, found explicitly that the accused's version of what took place "is in effect denied by both Naidoo and Chetty." Explanatory of the above finding is the passage which follows immediately thereon, namely,

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> "It is true that under cross-examination they made the concession that this may have been the background for the handing over or that he may have said something. It seems to me that if the cardinal purpose for the handing over of the pamphlets was to make the point that these organisations were still alive, these two witnesses must inevitably have remembered it. But neither of them did."

With regard to the concessions made by the ~~accused~~ witnesses in cross-examination, the learned Judge laid stress in his judgment on the fact that the witnesses Chetty and Naidoo were friends of the accused and also mentioned, as I have already indicated, the fact that these witnesses were "being watched by an Indian audience who showed their partisanship for the four accused." Circumstances such as those mentioned by the learned Judge would of course require that the evidence of the witnesses concerned be approached with circumspection and caution, but surely cannot, in themselves, cause the evidence in cross-examination to be given no weight - unless, of course, there are other considerations such as contradictory evidence by other reliable witnesses or the inherent probabilities of the case. In the present case there was no contradictory

evidence...../63

evidence.

With regard to the probabilities, it is clear from the passage in the judgment quoted above that the trial Judge considered that it was wholly improbable that, if the accused's version of what took place was true, that the witnesses Chetty and Naidoo would not have remembered what was said. Neither of the witnesses were specifically asked whether, if the accused did say what he alleges he said, they would have remembered what was said. It is, however, implicit in their answers to cross-examining counsel that, although they did not remember, the accused could well have said what he alleges he did say. Can one then, in the face of that concession, with justification reason that "they must inevitably have remembered", and not having remembered, they "in effect denied" the accused's version? In my judgment one cannot.

Counsel for the accused submitted, and in my opinion with justification, that also in other respects the reasoning of the trial Court is assailable. In view, however, of what has already been stated above, I do not find it

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necessary to enter into a discussion of the further matters raised by ~~the~~ counsel.

Inasmuch as it has, in my view, clearly been established that the trial Court erred, not only in its application of the presumption provided for in subsection 2 (2) of the Act, but also in its reasoning which led to the rejection of the accused's testimony with regard to a very material aspect of the case, it becomes the function of this Court to consider the matter and to come to its own conclusion as to whether or not the guilt of the accused was established beyond a reasonable doubt.

In the absence, as I find the position to be, of any evidence in contradiction of the accused's explanation as to how he came to be in possession of the two copies of No. 1 Inkululeko, and his explanation as to his object in handing the said copies to Chetty and Naidoo, and the circumstances under which that took place, the sole enquiry appears to me to be whether the accused's evidence in that regard can or cannot, as a reasonable possibility, be true.

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The trial Court did not reject the accused's evidence that he received the two copies of No. 1 Inkululeko through the post, and there are, in my opinion, no reasons which militate against the acceptance of that evidence. As to his explanation concerning the handing of the said documents to Chetty and Naidoo, there serves as a background for his motives the fact that he was, according to his evidence, at all times opposed to communism and any form of violence. This is confirmed by Chetty and Naidoo, who, according to their testimony, were also opposed to communism and violence and were aware that the sentiments of the accused were the same. And there is nothing on record to contradict their testimony on this aspect of the case. Nor is there anything contradictory of the testimony of the accused, Naidoo and Chetty that they all shared the view that the subversive organisations such as the S.A.C.P. and the A.N.C. were extinct, or at least inactive in the Republic. In this lastmentioned regard the the following comment appears in the judgment of the Court a quo:

"He...../66

> "He was also questioned about his belief that these subversive organisations were dead, and he had to admit that he knew that a lot of activity was still going on, and even that trials were taking place based on the activities of these subversive organisations. He also knew that the Security Police was constantly kept busy with it. He admits that he knew of a trial in Pietermaritzburg, he also knew of the trial against Dean Ffrench-Beytagh."

The accused did admit that he had heard of terrorism on the borders of the Republic and Rhodesia. He, however, consistently denied knowledge of the S.A.C.P. and the A.N.C. being active within the Republic. As to the trial in Pietermaritzburg(the Hassim trial) the charges against the accused in that trial could not have been known to the accused in the middle of 1971, and, as to the Ffrench-Beytagh case, the accused said that he did not believe that an eminent churchman such as the Dean could be involved with subversive organisations. However, as I have already indicated, the learned Judge's finding on this aspect of the case was that "the effect of his evidence really is, at best for him, that he thought these organisations were dormant, not extinct."

Bearing in mind the convictions and beliefs of the

persons...../67

persons concerned - the accused, Chetty and Naidoo - it seems to me unlikely that the accused would hand copies of No. 1 Inkululeko, a crude and boastful propaganda pamphlet, to educated persons such as Chetty and Naidoo with the object of converting them to the cause of communism. And it is indeed even more unlikely that, if he did so intend, he would have said nothing in support of communism. Regard being had to the background and the circumstances under which the copies of the said pamphlet were handed over, it seems more likely that the accused handed the said documents over with the object and in the manner testified to by him. But, be that as it may, a conclusion that the accused's evidence on the particular aspect in question cannot, as a reasonable possibility be true, is not, in my opinion, justified. That being the case, he should not, in my judgment, have been convicted on the main count.

In coming to the aforementioned conclusion I have not lost sight of the fact that the accused had on more than one occasion been in contact with Timol and that at the time

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of his arrival he was in possession of certain books which the learned trial Judge described as "communist literature." He, however, explained how it came about that he had met Timol and that their association was in all respects completely innocent; and there is no evidence to contradict that explanation. In this regard I have, earlier in this judgment, made mention of the fact that the name of the accused appeared in Timol's correspondence as a person recommended to work in the latter's Main Group of the S.A.C.P., and that the accused had denied any knowledge thereof or that Timol could have had any justification for making such a recommendation. In this regard I must state that Timol, according to his correspondence, had also recommended other persons, Miss Chotia and Miss Jhetam, as potential recruits, whereas they, both State witnesses, denied any knowledge of such a recommendation or that Timol could have considered them as potential recruits for the S.A.C.P. It therefore appears, at least as a possibility, that Timol's recommendations, including his recommendation of the accused, could have been made without justification and

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merely to impress the S.A.C.P. overseas with his alleged efforts and achievements in furthering the cause of communism in South Africa. In this regard it should be mentioned that the trial Judge found that the State had failed to prove that accused no. 3 was a member of the S.A.C.P.

Regarding the books referred to by the learned trial Judge, I have earlier in this judgment mentioned the accused's explanation as to how he came into possession thereof and what the books were about. The fact that the accused, a politically conscious person, had the books in his possession, coupled with the fact that he had been in contact with Timol, may be creative of suspicion against him, but suspicion in itself cannot, of course, serve as the basis for a conviction, nor can it, in view of the evidence as a whole, serve to render the accused's explanation as to the reason for and the purpose of his handing the copies of No. 1 Inkululeko to Chetty and Naidoo, one which could not, in the circumstances, as a reasonable possibility, be true. That accused no. 3 was, in many

respects..../69(a)

respects, an unsatisfactory witness, is true. But, where one has the position that his evidence on the vital aspect of the case stands uncontradicted, and , coupled therewith, the fact that the basis for an innocent motive in handing the copies of No. 1 Inkululeko to Naidoo and Chetty was confirmed by them, then the fact that he was an unsatisfactory witness cannot justify a conclusion that, in acting as he did, he was participating in a conspiracy of the nature charged.

Counsel for the State submitted on appeal that,

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if this Court should find that the State failed to establish the charge in the main count, i.e. participation in a conspiracy, then a conviction on the alternative charge under the Terrorism Act was competent, and he invited us so to find. The alternative charge, as I have already mentioned, was that the accused had, with the intent to endanger the maintenance of law and order in the Republic, participated in terroristic activities in contravention of section 2 (1) (a) of the Terrorism Act, by handing a copy of No. 1 Inkululeko to each of Chetty and Naidoo. In this regard counsel's argument was that, inasmuch as the evidence showed that the accused had handed the copies of No. 1 Inkululeko received by him to Chetty and Naidoo, the State had proved the commission by the accused of "the act alleged in the charge", in consequence whereof the presumption in section 2 (2) of the Act came into operation because the said act was likely to have had at least the result specified in subparagraph (i) of the subsection. And,

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so the argument proceeded, inasmuch as the accused had not proved beyond a reasonable doubt, as required by the said subsection, that he did not intend such result, he was guilty of the offence charged. I cannot agree with counsel's submission, for the reason that the State did not, in my opinion , prove, as is required by the subsection, that the act of the accused was likely to have had the result specified in subparagraph (i) or any of the results specified in the other subparagraphs.

Subparagraph (i) reads:

> "(i) to cause, encourage or further feelings of hostility between the White and other inhabitants of the Republic."

In the Ffrench-Beytagh case(supra), at pp. 457/458, the learned Chief Justice remarked as follows with regard to the wording of subsection 2 (2) of the Act:

> "It is, however, to be observed that the words of the statute are not 'could have had' but 'likely to have had'. Accordingly, mere possibilities or remote contingencies are not, in my view, embraced by the section. In the present context

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> the expression 'likely to have had', in my opinion, connotes probability; the concept perhaps emerges more clearly from the Afrikaans text 'waarskynlik kon gehad het'. Consequently, for the section to apply, it must be shown either that the 'act' proved to have been committed or attempted, etc., in fact had one of the results listed (a) to (l) in the section or that it probably would have had one of those results (cf. R.v.Nkomo,1964 (4) S.A. 452 (S.R., A.D.) at p.454, and R.v.Ngwenya,1965 (1) S.A. 243 (S.R., A.D.) at p. 245). The Court must, on the evidence before it, assess what the probabilities were of the proved 'act' producing the particular notional 'result'contended for."

If, as I have found, the accused's evidence as to the background of and the circumstances under which, and the object with which, he handed the copies of No. 1 Inkululeko to Chetty and Naidoo, cannot be rejected, then the mere physical act of handing over these documents to the persons concerned (to whom the accused conveyed the reason for so doing) cannot, in my view, in the particular circumstances, be regarded as likely, in the sense aforestated, to have had the result specified in subparagraph (i) of the subsection. Chetty and Naidoo are educated persons, and both are opposed

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to communism and to violence. Although they both dislike the policy of "apartheid", I do not think that crude propaganda , such as is contained in No. 1 Inkululeko, was likely to have caused, encouraged or furthered feelings of hostility on their part. Indeed counsel for the State did not even ask them in the course of their testimony whether the pamphlet did or was likely to have had any such effect on them.

For the reasons stated above the presumption in question could not operate against the accused inasmuch as the State failed to prove that the accused, in handing the copies of No. 1 Inkululeko to Chetty and Naidoo, did so with intent to endanger the amintenance of law and order in the Republic, a conviction on the alternative charge under the Terrorism Act was not competent.

Also in the case of the accused, counsel for the State intimated to us on appeal that, if it were to be found that the State had failed to establish the charges under the Terrorism Act, he could not argue in support of a conviction on any of the further alternative charges

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preferred against the accused under the Suppression of Communism Act, No. 44 of 1950.

The appeal of accused no. 3 must therefore also succeed.

In the result the appeals of both appellants are allowed and their convictions and sentences are set aside.

G.v.R. Muller

G.v.R.Muller.
Judge of Appeal.

Trollip, J.A.) Concurs.