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Retyped after Revision.

IN THE SUPREME COURT OF SOUTH AFRICA.

(WITWATERSRAND LOCAL DIVISION).

Johannesburg: 22nd August, 1963.

BEFORE:

The Honourable Mr. Justice DE VOS.

In the matter of:

THE STATE versus NAPOLEON LETSOKA & OTHERS.

- J U D G E M E N T -

DE VOS, J:

I will now deal with the main cases of the five accused on the merits. At an earlier stage before the pleas were taken the indictment was more fully dealt with, and at this stage I merely record that a main and two alternative counts are left which as particularised broadly charge as to the main count, that a conspiracy was entered into between the accused and others on the 8th and 9th of April, and near Orlando location, for the purpose inter alia of possessing explosives, firearms, or weapons in contravention of the law, of killing members of the police force, of killing members of the White population, of damaging or destroying the Orlando Power Station, of damaging and setting on fire and destroying buildings in Johannesburg, including those of M.E. Stores, Safric's (Pty) Ltd, theGrays and Shell (S.A.) (Pty) Ltd. This is the gist of the main count.

The first alternative count contains the allegation that the accused actually broke the glass of the display windows of M.B. Stores, entered the building and set it on fire, and that this was done by the accused, acting with common

purpose so to do.

The second alternative charge alleges the unlawful aiding, advising, encouraging or procuring of persons to break the glass of the display windows of Safric's and set fire to the building, and to set on fire the building of Shell. This in broad outline constitutes the essence of the indictment.

Now it seems to me that the evidential material can be classified into firstly the evidence of what occurred at the meetings on the 8th and 9th and the events connected with those meetings, secondly, evidence of what occurred in the city of Johannesburg on the night of the 9th at about 11 p.m. and finally evidence contained in those confessions admitted by me for reasons already given. These confessions relate to the cases of accused numbers 1,2,4 and 5 respectively. Accused number 3 had made none and accordingly no confession was proved against him. No evidence was given or called by any of the accused. Neither did any of them make any unsworn statement at the end of the case for the State.

All of them were defended by counsel who left no stone unturned on their behalf. I add that in evaluating the evidence in each particular case, I exclude from consideration evidence given in the separate trials or enquiries which dealt with the admissibility of the confessions.

I now turn to consideration of the facts under the heads indicated. As to what occurred at the two meetings on the 8th and the 9th and immediately prior thereto, and during the intervening period, most of the information is given by Samson Radebe, one of the witnesses called by the State. Though searchingly cross-examined he stuck to his guns on all material points. The considerable extent to which he is corroborated by other evidentiary material will be dealt with

in due course. Despite suggestions put in cross-examinations to him, no evidence was lead, as I've indicated before, for the Defence, and his evidence, therefore, stands uncontradicted and is accepted by the Court on all material points. I should add, although he was not formelly treated as an accomplice, I have borne in mind that he is the type of witness whose evidence should be approached with proper and almost similar caution.

The gist of his evidence is to the following effect: He says he drives a taxi for one Earnest Ndhlovu, and while sitting inside his parked car, on the taxi rank at Naledi at approximately 8 p.m. on the 8th, he was approached by two Bantu's who in effect placed him under arrest. He was put in the back of the car and surrounded by henchmen of his custodians. Somebody then began driving the car and they all left, he himself being one of the passengers in the car. He was told: "Brother, don't be scared, we are going to fight", or words to that effect. He was then taken to a spot which is identified and will be called in the course of the judgment "The Koppies", which is also pictured on several photographs handed in as exhibits. It is an isolated spot between built-up areasin the vicinity of Orlando.

On the way there he says that he was again told not to be afraid and that these people were going to fight for their country. He found the Koppie wrapped in darkness and many people gathered there. He saw bottles and petrol tins and pieces of iron of various dimensions, apparently being home-made weapons. At a later stage a certain person whom he came to know in the course of these goings on as Dennis, said that the leader had to be fetched.

He said that the leader having arrived then spoke loudly for all to hear and members of the crown added suggestions

of their own as to what should be done, and these suggestions which were apparently agreed to by all concerned inter alia envisaged the obtaining of trucks at the Orlando Police Station, an attack on the station, the setting on fire of buildings in the city, the taking of arms from shops and the burning down of the Power Station. It was then said that it had become too late for further action that day and that the meeting would be convened again for the next day. Radebe's position was then considered, and in particular it was considered whether he should be killed or detained or let go. The outcome was that number 4 accused volunteered to hold him in custody, and number 1 accused came to him and allayed his fears as far as his car was concerned, telling him that the car was safe. He then went to the house of number 4 and with others in the same room slept there that night without finding an opportunity of escaping, as he tells theCourt, because of the continuous presence of his guards. He was, however, comforted by some of his warders who told him that he would be safe. The next day his guards said that arms had to be obtained and prepared andhe says that number 4 was then sent to buy certain material which included tennis balls, ballbearings, bottles, permanganate of potash, glycerine and matches.

He says number 4 returned with the material and the match tops were then cut off and put into the tennis balls. Oil and petrol were mixed in bottles and rags tied around the bottles. He identified a bottle, now before the Court, to which I will refer later, and being similar to these bottles then prepared. They worked until about eight o'clock that night. Number 1 was there for some time,he said, and assisted with the match heads, and number 4 played the role of which I have already spoken.

At 8 p.m. they left for the second meeting which had

been convened for that night, in the company of number 4 and the other guards. There again were many bantu's, he says, and more of them constantly arrived. There was a speaker who told them to go to the city to destroy buildings, to blow up the Power Station and Orlando Police Station and to kill Europeans. They were ordered to do as they were told or suffer the consequences, that is, they were threatened that they would die if they did not obey.

Then they were divided into groups and he, Samson Radebe, was a member of one of these groups. They were told to go to the station, and board the train on the side furthest from the platform. They went to the station and he and others, he says, whom he did not know, ran away, and he got home at 2 a.m. that morning in a mood of anger at what had happened to him during the time he had spent with these people. His car was subsequently found.

A further witness for the State on the events which led up to the meeting on the 9th, was Stanley Nkapene. He is a brother of number 4 accused. He confirms that he saw Samson at the house of his brother on the day of the 9th, and he also confirms that Samson and the other people came to the house the previous night approximately at the time mentioned by Samson himself. He confirms that these people were given accomodation there, and that the following morning number 1 accused, *inter alia* also arrived there. His story is at some variance with that of Samson, mainly on this point, namely that he says that Samson was not continually guarded and that he appeared to move normally and unrestrictedly about the house.

He seemed to me a somewhat reluctant witness, desirous of saying as little as possible, as far as he could, perhaps to avoid implicating his brother, number 4 accused.

On material points he seems to me to be speaking the truth. When he directly contradicts Samson as to the existence of restrictions placed on the latter, he may be honest in what he says; he may po ssibly not have noticed all the activities of the conspirational group, of which himself admittedly was not a member. In view, however, of the evidence regarding Samson's activities as a whole, I accept that in fact Samson was not moving about freely.

At this stage I turn to the evidence of one, Kruywagen, a Senior Inspector of Explosives, to assess the significance of the activities on the day of the 9th. He said he conducted a test: he put a mixture of matches, ball-bearings, permanganate of potash, and glycerine inside tennis balls, and then, using the ball as a hand-made bomb, tested the effect. He said an explosion of moderate extent and with shrapnel effect followed.

I now turn to what happened in the city on that night. Here we have the evidence of a number of people who all seemed to me to be reliable witnesses, giving their accounts of what occurred as accurately as they could, though at times understandably finding it difficult to remember exactly all the details regarding e.g. street names and the precise routes followed by each of the participants in the course of the events that night.

Firstly, I refer to the evidence of Smit, a sergeant of police, attached to Radio Headquarters, who was that night in his patrol car with Constable Gouws. They were approaching the corner of Pritchard and Harrison Streets, on the night of the 9th, in the immediate vicinity of M.E. Stores, situated on that corner, when they saw a number of people running away, followed by members of the public. No.

2 accused was there and then caught and placed under arrest in the immediate vicinity of the patrol car by Gouws, and number 4 accused fled and was followed by members of the public, and by Smit and Gouws, in the patrol car, to a point in Jeppe Street where he was arrested. They then returned to M.E. Stores and found one of the display windows smashed and flames were seen at the back of the interior of the building.

Smit immediately entered and saw clothes and display cabinets burning. Members of the police and the public assisted them in extinguishing the fire. On the floor of M.E. Stores he saw the bottle, which is now before theCourt, Exhibit 1, and also fragments, which seemed to be bottle fragments, lying about. He also saw an axe which was brought to him by Gouws.

Gouws, the co-member of Smit's patrol on that particular night, in evidence said that he heard whistles being blown; he saw bantu's running from M.E. Stores followed by night-watchmen and he succeeded in arresting one of these, being number 2 accused. Ultimately, in Jeppe Street, number 4 was arrested. He said that when they returned to M.E. Stores, he picked up an axe, now before the Court, and one half of a pair of huge scissors or shears, also now before the Court, and he took these in possession. These could obviously be dangerous weapons, judging by their appearance.

Continuing with the evidence as to the occurrences there that night, I turn now to that of Constable Esterhuizen, who was also on patrol with Constable Cootzee at 11 p.m. that night. They were driving along in Pritchard Street, heard a whistle, and saw approaching night watchmen blowing whistles in the immediate vicinity of M.E. Stores and chasing two people. He arrested one of these and his comrade

Coetzee, after some manoeuvring on the part of the fugitives, succeeded in also arresting the other one. The one Esterhuizen arrested was later identified as one Ellington, who is neither an accused before the Court, nor a witness. Subsequently Esterhuizen picked up Exhibit 4 in front of M.E. Stores on thepavement, being a can which was marked as a container of William Penn Oil.

Coetzee, his companion, in outline confirms what I have just summarised as being Esterhuizen's evidence. He also saw the persons running, with the night watchmen following them and blowing their whistles. After the first person, named Ellington, was caught, he followed the other one and eventually, on the corner of Main and Sauer Streets, caugt up with him and placed him under arrest. Coetzee asked him why he had been running away and this person told Coetzee that he had thought that Coetzee was a tsotsi, and said that there was some trouble about "messtekery by die stasie". Coetzee added that he was in uniform at the time, and that this occurred a considerable distance from the station. Now the persons being chased by the night watchmen were running, according to him, in a direction away from M.E. Stores. Number 3 accused is the person caught by Coetzée.

There is also the evidence of an independent observer, Middleton, who was window-shopping that night of the 9th. He had his car parked almost opposite M.E. Stores, and he saw a boy, seemingly on the qui vive, on the corner where M.E. Stores is situtated. He was thus walking when he happened to look back to M.E. Stores, just as he heard the sound of glass being shattered. He saw two people stepping from the pavement, one with a crow-bar, as it seemed to him. Then traffic policemen came around the corner, sounding their sire

ns and chased these people who

were eventually joined, it appeared to him, by the boy on the corner. He also followed the chase, blowing his hooter and in Jeppe Street he saw one of the fugutives being caught by a night watchman, while the police, who arrived almost simultaneously arrested that person. This obviously ties in with the story of Gouws, and relates to the arrest of number 4.

There is also the evidence of Jack Makuwani, who was on duty as a night watchman at M.E. Stores that night. He remembered seeing a number of Bantu people gathering and coming to the spot where he was sitting while on duty. These people asked him for guns, but he refused their request. They became impatient with him and he then withdrew into Union Centre, being part of the premises of M.E. Stores. Shortly afterwards he heard blows crashing, a whistle was blown, and Bantu's on the premises were seen by him running away. He also saw an axe, which he identified as being similar to the one before the Court, as well as half of the pair already referred to scissors, on the scene that night. He also identified number 4 accused and number 5 accused as being respectively in possession of the axe or the chopper, and the scissors. Counsel for theState, however, mentioned that Jack, in his statement to the police, had identified only one person - that is number 4 - and not number 5. Clearly, as far as the identification of persons concerned in the events that night is an issue, it would be unsafe to rely on the evidence of Jack. As will appear also from other evidencd he was manifestly wrong as far as number 5 was concerned.

Again, ~~the~~ to assess the significance of what happened there that night, I turn to the evidence of van der Merwe, a fire officer, and a member of the Institute of

Fire Engineers. He arrived at M.E. Stores at 11.30 that night, and found a plate glass broken. He saw the signs of the fire which had occurred there, and he saw two bottles, one broken, on the floor of the building. According to his evidence thepart of the building where the fire occurred is the old part which is highly inflammable, and which is considered by the Fire Department to be a fire hazzard, requiring particular caution.

He said, drawing his conclusions on this point, from what he saw of the building itself, and also from what he knew about the building, and the way it is built, that a fire at that particular spot would be difficult to control and could easily get out of hand. He said that M.E. Stores were specifically prohibited because of the fire hazzard inherent in the type of building,from handling "Handigas". He also said that any mixture of petrol and oil is more destructive from the point of view of kindling dangerous fires, than pure petrol.

While I am about it I also mention that his evidence about the Shell Depot was that a vast amount of petrol was being stored there in storage tanks above the ground and a fire that might be caused by igniting that amount of petrol would be accompanied by great loss of life, and would rage with destructive effect unprecedented in the annals of Johannesburg.

There is also the evidence of Aaron Beka, who was a night watchman near to the spot where number 4 accused was arrested. I do not intend dilating on what he said, which broadly confirms the other evidence available about that arrest.

We also have the evidence of a director of M.E.

Stores, who said that he left all in order at the Stores on the night of the 9th, and subsequently found the damage to the amount of R490 had been caused. He confirmed that his shop sold arms and ammunition; One Watkin, employed by Safric's said the same about Safircs, namely that it was a firm which stocked arms and ammunition.

I should add at this stage that certain Exhibits were sent for analysis and the report was placed before the Court, which indicated that the bottle found in M.E. Stores the tin picked up in front of M.E. Stores, as well as a big bottle found by the Adjutant-Officer Weyers when he visited the Koppie on the morning of the 10th, contained an inflammable mixture of petrol and oil.

What I have related up to now as to the events in the city, in particular pertains at what occurred at M.E. Stores. As to the events at Safric's nothing is known except what is mentioned in the confession of number 1, and that is of course evidence only against himself, and I will deal with that at a later stage. I have already referred to the evidence of Watkin as to the type of business they do; buying and selling arms and ammunition.

As to the events at Shell, there is the evidence of Petrus Radebe, who was, prior to giving evidence, warned as an accomplice in terms of Section 254 of the Criminal Code. It seems to me that he is entitled to the indemnity he was promised, and I grant that indemnity. His evidence relates to what occurred from the moment number 5 accused and certain of his companions left the railway station and proceeded to Shell.

According to his evidence he was forced at the railway station by someone with a metal helmet to accompany

him. He was threatened thathe would be killed if he did not obey, and he then joined the group who started running towards the Shell Company premises. When they got there the gate of the Shell Company was found to be closed, and number 5, who was one of the people who joined him in the running, and a member of the group, said that they should turn back to go home because the man with the steel helmet was not there any more. It seems to me that his evidence should substantially be accepted by the Court, despite the fact that he may possibly be minimizing his own role in what occurred.

I have sketched broadly the background against which the individual cases of the several accused should be considered. I now start with the position of number 1. His confession is confirmed on many material points by the evidence of Samson, for instance, as to the two meetings which were held; as to what occurred at the meetings, and as to the taking away of Samson's car ~~and~~ in the course of events; also as to the preparations at the house of number 4, made during the day of the 9th, for the events that had to come later. Number 1, in his confession, says that he was appointed leader of the group which had to go to Saffric's. He was obviously, in terms of the confession, well informed regarding the plans in connection with Shell and M.B. Stores, as well as the plans regarding Safric's, to which latter destination he had to proceed. Incidentally, on another point, Stanley's evidence, to which I have also referred, ties in with number one's story as contained in the confession, to the effect that he saw Stanley at the house of number 4.

The introductory part of his confession is meant to be exculpatory and sets out that he was mislead into attend-

ing the first meeting, and then by threats he was forced to remain there. Even if this should be true, which I do not find, it cannot avail him, for he subsequently had ample opportunity to make a get-away. He even moved about on his own story, by car and cycle. He never attempted to dissociate himself from the criminal venture, but carried on until the time set for breaking into Safric's, namely 11 p.m. that night, when his courage apparently failed him, and at 11.15, he says, he called off the venture. Clearly on all the facts admissible against him, he should be found guilty on the main count. He could also be convicted on the second alternative count.

As to accused number 2; on his confession he had joined the organisation called the Pan Africanist Congress in the beginning of 1963. He paid a subscription, attended six or seven meetings where grievances against Europeans were aired. On the 8th, he says, he was summonsed to a gathering of about fifty persons, who were making bombs. He was told that the day had arrived to declare war on the Europeans. In the evening, he says, there was a meeting at Orlando where one, Marshall, was the speaker. On the night of the 9th he was ordered as a member of a group to go into Johannesburg to M.E. Stores to break in, take arms and ammunition and then return to Orlando. According to the confession again, they then left the city in the company of other groups. The members of the particular group with which he was concerned, were supplied with petrol bombs, and told to throw them at the walls and set the place on fire. He himself had one bomb in his possession. He had to stand guard on the corner of Pritchard and Harrisons Streets, he says, while the others broke the glass, and shortly afterwards the police arrived and the further events already referred to followed.

I do not propose to dwell on the extent to which other evidence confirms the contents of this statement. It fits into the picture painted by Samson's evidence of occurrences at Orlando, and the evidence of observers, inter alia Middleton and others, of what occurred at M.E. Stores. On the evidence admissible against him he could clearly be found guilty of a criminal conspiracy in terms of the first count, or of being associated in the criminal activities outlined in the first alternative count relating to M.E. Stores.

COURT ADJOURNS.

ON RESUMING:

I turn now to the position of number 3. In this case, as I have said before, there is no confession to consider. The State asks for a conviction based on the following factors:-

Firstly there is the fact that at just about 11 a.m. number 3 accused and Ellington were seen by the two police I have mentioned, Esterhuizen and Coetzee, on motorised patrol. Number 3 and Ellington were running in the direction away from M.E. Stores, and in the immediate vicinity of M.E. Stores, while being pursued by native watchmen blowing whistles.

Secondly there is the fact that the two patrol men in their vehicle followed the fugutives, of whom one stopped in his flight. He was apprehended by Estherhuizen. The person so arrested wasEllington: the other one being number 3, fled, and was, after some manoeuvring caught and arrested by Coetzee some distance further, and the corner of Main and Bauer Streets.

Furthermore, when number three was asked by Coetzee why he ran away he replied that he han been involved in

"messtekery" at the station, and that he thought that Coetzee, who was in full uniform, was a tsotsi. A further factor, it is then submitted, is that number 3 did not give evidence to explain his position at all. The last factor relied on by the State was that he pointed out the Koppie I have repeatedly referred to as the venue of the meetings held on the 8th and the 9th, when he, that is number 3, and others accompanied Weyers on the morning of the 10th. In considering the position it seems to me that the last-mentioned factor shouldbe disregarded. It is not known precisely under what circumstances the pointing out of the Koppie took place, and it seems to me that I should infer nothing whatsoever from that.

The principle as to what weight should be attached to the failure of an accused to give evidence has been considered in numerous cases, I propose to refer to the one of R. vs. Masia, 1962(2) S.A.L.R. p 541 at p. 546, paras. D. to G. There Botha, J.A., reviewing a number of precedents to which he refers, in particular the decision of the Appellate Division in R. vs. K. 1956 (3) S.A. at p. 353, and R. vs. Ismael, 1952(1) S.A. p. 204, stated the position as follows:-

> "That an accused person's failure to testify may, in appropriate circumstances, be considered as a factor in deciding whether or not his guilt had been proved beyond reasonable doubt, is clear.
>
> (R. vs. Nyati, 1960 A.D. 319 and 324).
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> "What is not so clear is what weight, if any, should in any particular case be given to it, On the one hand it is clear that it can only be used as a factor against an accused person where at the end of the case for the State there is evidence on which a jury may convict; that is where the State has prima facie discharged the onus which rests on it. (R. vs. K, 1956(3) S.A. 353 (A.D.) at p 358). It cannot therefore be used to supply a deficiency in the case of the State, that is to say, where there is no evidence on which a reasonable person could convict. On theother

> "hand it would be wrong to regard it as a factor only where at the end of the State's case there is proof of guilt beyond reasonable doubt, for then it would not be needed. The wiegnt to be given to any factor in arriving at a decision in any case must necessarily depend upon the circumstances of that case. Similarly the weight to be given, within the limit set out above to accused persons failure to testify in any particular case must also depend upon the surrounding circumstances of that case, such as.......

the learned judge then quotes from Rex vs. Ismael:

> ".... the strength or weakness of the Crown case, the apparent certainty with which the accused could have answered that case, if he were innocent, and the probability or improbability of the accused's failure to testify being explainable on some hypothesis unrelated to his guilt on the charge in question."

He then considers the facts of that particular case, and inter alia finds that the appellant,

> ".....if he were innocent, could have answered that case with apparent ease".

In any event the basis for the correct approach to this problem seems clear. Obviously it must depend on the facts of every particular case whether, and to what extent, weight is to be attached to the failure of the accused to testify.

Now the background of this case must be considered. I refer now to the case of number 3 at the very moment set for an organised and concerted attack on M.E. Stores, in the immediate vicinity of the Stores, and at the precise time when it is known now that the plan was in fact being implemented to the extent indicated by the evidence I have already quoted. Number 3, a person, judging by appearances of a type and class similar to the others infolved in the venture, comes running from the direction of M.E. Stores, the scene of the crime, with native watchmen blowing whistles in hot pursuit. He makes determined attempts to escape, even when the police join in pursuit, and when ultimately apprehended he tells

the policeman in uniform that he took him to be a tsotsi and that he had for that reason fled. The arrest took place in one of the public thoroughfares of Johannesburg.

I should say at once that one of the suggestions that was made on behalf of number 3 was that he might have been anotherperson, not the one who was originally seen with his comrades fleeing from the night watchmen. This point was, however, never investigated in cross-examination, and on the evidence as I read it, there is proof beyond a reasonable doubt that it was in fact the person who had run away from the night watchmen, who was ultimately arrested by Coetzee.

Under these circumstances it seems to me that if an accused fails to provide an explanation he leaves unanswered a set of facts which may well be the basis for a finding that he was a member of the group of people who attacked M.E. Stores at that time, and that he therefore participated in the venture.

Counsel for the Defence suggested that a finding on these lines may fall outside the scope of the indictment as particularized and may therefore, not be part of the case the accused is called to meet. It seems to me, however, that if it was proved that number 3 was a member of the group involved and participated in the criminal attack on M.E. Stores, in whatever capacity, such a case against him would not fall outside the scope of the indictment read with the further particulars, especially as set out in paragraph B(1) including B(1)(i) of the further particulars read with paragraph D(1)(iv) and (v).

If his activities indicate no more than he participated as member of the group at the time the venture was being executed I do not think that the fact that all the par-

ticulars furnished by the State have not been clearly proved against him, alters the positionin favour of humber 3. I should add that I do not think that it is for the Court to speculate on the far-fetched possibilities thus to constitute a defence not raised by the accused himself.

I have been referred in this regard to the case of R. vs. Bhardu, 1945 A.D. p 813 at 823, where the learned judge inter alia said. referring to certain evidence for the Defence:

> "We disbelieve that, and we should not, as it seems to me, invent on his behalf a theory not even suggested by any evidence, that he may have made arrangements for the closing of the goods......"

The facts in this case are different, but the approach to the mind seems similar. It seems to me therefore that number 3 should be found guilty on the first alternative count.

I now deal with accused number 4. In his confession he states that he was partly lured, partly ordered, by a member of a sporting club at Orlando on the night of the 8th. He gives no details of what was said there, except that it was apparent that he stayed a long time, and then left at a late hour, and was told to return the next night. He was then asked for accomodation for the night by four people, and he somewhat reluctantly, as he alleges, consented. The next day these people stayed there at his house, where they had spent the night, and he bought tennis balls, ball bearings, permanganate of potash for his guests. A mixture was made on that day and introduced into the tennis balls by certain of his guests. That night, so he says, they all returned to the place where they had been the night before, and they were sorted into groups and told to follow a certain man with a helmet. Without knowing their destination they then left by trainn.

On the trin bottles tied in rags were issued to them, and he was told to stand guard on the corner of Pritchard and Simmonds Streets, while the leaders went to M.E. Stores to obtain what they wanted. Shortly afterwards he heard thesound of breaking glass and he was subsequently arrested.

Again we find material confirmation of themain features of the evidence of Samson and Stanley, and also of the evidence already referred to regarding the actual occurrences at M.E. Stores. There are also notable gaps in the confession, for instance in the accounts of what transpired at the meetings and regarding the details of teh plans. Looking at his activities as a whole and in view of the supplementary information to be gleaned from the evidence of Samson I find that he must have known the further details as testified by Samson as to what occurred at the meetings he admittedly attended.

He suggests that considerable pressure and threats were at various stages brought to bear on him. I do not think this avails him, even if I should decide to believe it, which I do not.

He clearly co-operated actively, and at times when he could disentangle himself from what he must have realised was a criminal venture, in particular, when he went into town on his own to buy materials. On all the evidence I have no doubt that he could be found guilty on either the main count, or the first alternative count.

I now consider the position of accused number 5. According to his confession he was on the evening of the 9th invited by a friend to accompany him to some meeting about the object of which ~~notie~~ neither of them knew anything. Then followed a very clear account of themeeting itself, obviously confirmed in many details by the evidence of Samson.

Number 5 says that he grew nervous when he listened to the speech unfolding the schemes that were being considered. He said the audience was told of the plan to go to M.E. Stores, Safric's and Shell's, and that at M.E. Stores arms and ammunition had to be stolen, the Shell group had toused bottles wrapped in rags, ignite them and then cast them on the petrol tanks to set these on fire. There was then a division into groups so he says, of those at the meeting, and he was appointed the leader of one group. Some of the bottles were issued to each group, and the Shell group of which he was the leader, got three of these.

He then leftforthecity by train, and on arrival there, were divided into three task forces, bound for Shell, Safric's and M.E. Stores respectively. He and his grop were then instructed to proceed to Shell and they did so on foot. Before reading Farraday Station, i.e. the immediate vidnity of Shell, he said, he told his group that it would be wrong to commit arson, and they also met a night watchman who enquired of them what they were doing. This gave them a fright. They eventually returned to the Johannesburg Station, in the

especially of Petrus' evidence, and dispersed.

I have very concisely related part of his confession, Leaving out other parts to which I now direct my attention. Before I do so, I point out that what has been summarised so far again fits in with what was said by Petrus onmany points, and on other points with what was testified to by Samson of the occurrences at the meeting.

Counsel for number 5, however, seeks to avail himself of the indications mentioned in the confession. He refers to the repeated mention made of dire threats of death

which were uttered by the man in command, usually described as a man with a helmet, at several stages of the events, both at the meeting and at the station at Johannesburg. Counsel for the defence has also pointed out that the evidence of Petrus to some extent supports number five in ter alia as to the suggestion made by number 5 when they came to Shell, that they should go home. That is as the stage after the locked gate at Shell had been reached. Also the treatment meted out to Petrus as I understood counsel for the defence, seems to indicate that the confession of number 5 as to threats, could be true.

Reference was also made to the position of Samson which I have in outline recounted, who was kept in detention for a certain time. On this particular aspect I am now dealing with, it appears that mention is in fact made at several points in the confession of the threatened use of force. Typical of this is the following: "Hy het gesê die man wat na die dorp moes kom as daar een is wat wil uitskei, moes die ander hom doodmaak". This was also allegedly repeated on Johannesburg Station at a later stage. These are not the only occasions where force is mentioned in the confession.

There are also certain difficulties, seen from the point of view of the Defence, in the statement itself. I refer in particular to the following passage: "Ons is toe beveel om die trein by Mazemhlopi-stasie te haal. Ek het toe begin moed skep maar het lus gevoel om weg te hardloop, maar het nie kans gesien om uit die hande van so baie te ontval nie" The State has suggested that the words "moed skep" here indicates that he found courage to proceed with the venture, although, at the same time, not unnaturally, as I read it, feeling the effects of fear and nervousness, and an urge to run away. This is certainly one possible way of interpreting

this particular part of the confession.

Of course, number 5 never gave evidence and therefore was never cross-examined on the confession as far as the case on the merits is concerned, so we do not know what his explanation of this point would or could have been.

It also seems to me that the facts as far as the termination of theproject is concerned, should be accepted: Number 5 did ultimately tell his men to leave. That is corroborated by what Petrus also said on this point.

The question now remains whether it can be believed that number 5 first of all, went to that meeting on the 9th, in the dark of night, following a friend, while being at that stage completely ignorant of the purpose of the meeting, that when he got there he was appointed leader of a group proceeding to Shell, though allegedly an untested and unknown and stranger in that gathering, that he then proceeded to act, up to the very gates of Shell, including the journey on the train, as the leader of the group and that he was doing all this throughout without any intention to associate himself with the project or without voluntary participation in what was being done. His activities, be it remembered, include taking of the hand-made bomb and his running, as he told Petrus, according to the latter, to keep away from the man with the helmet towards Shell.

Samson's position as far as the facts are concerned was certainly different. He as initially kidnapped, then remained a passive prisoner for almost a day, until the conspirators went into action, when he escaped.

Number 5, on the other hand, with full knowledge of the scheme, to all intents and purposes, participated outwardly from the meeting place to the station, on the train to

Johannesburg station, and to the closed gates of Shell, arriving there with a bomb in his hand. He then gave up. I do not forget, of course, that he had been telling Petrus that they should get away from the man with the helmet and that number 5 alleges in his confession that he had told his group apparently just after leaving Johannesburg station that they should not proceed to implement their plans against Shell. This allegation is not confirmed by any other evidence.

Now it seems to me that when I consider this position as far as proof of the conspiracy is concerned, as indicated in the main count of the indictment, the onus is on the State to prove that a conspiracy was participated in by number 5. If I have a reasonable doubt on thatparticular point he should getthe benefit of that doubt.

Also to be taken into account is the approach with regard to confessions which I think is authoritatively set out in Rex vs. Valachia 1945 A.D. p 826 at 837. Iquote from the judgment of Greenberg, J.A.:

> "..... it does not seem to me that there is any ground for disregarding the authority of the cases quoted and it must be held that in England, and consequently in South Africa also, the rule is that when the proof of an admission made by a party is admitted, such party is entitled to have the whole statement put before the Court, and the judicial officer or jury must take into consideration everything contained in the statement relating to the matter in issue........."
> "Naturally the fact that the statement is not made under oath and is not subject to cros-examination detracts very much from the weight to be given to those portions of the statement favourable to its author, as compared to the weight which would be given to them if he had made them under oath, but he is entitled to have them taken into consideration to be accepted or rejected, according to the Court's view of their cogency".

This statement of the law has again been approved of in Rex vs. Vather. 1961 (1) S.A. p 350, also being an appellate division case. Here the exculpatory explanation of the 5

emerging from his confession, as I understood Counsel for the Defence to construe it, viz. to the effect that he subjectively never associated himself with the criminal venture, seems to inherently unworthy of credence, and in addition remains untested in cross-examination. I do not think I can accept it as being reasonably possible or true. I have indicated what acceptance of number five's story would involve, I find myself unable to believe it in this respect. I add that there is no indication even in the statement of the accused, of a direct threat addressed to him personally, although I fully comprehend that the threats were made to gmups of people amongst whom he foundhimself, and that he could, on his own version apply those threats also to himself.

I also add that there is no evidence of any implementation of a threat and there is further positive evidence of a number of people who in fact did escape when the venture was being implemented, without dire consequences to themselves.

It seems to me that the furthest one could go would be to say that he may not unnaturally have been assailed by fears in the course of the venture. Even, however, when only towards the end of the escapade hedecided to run from the leader in the helmet it is impossible to find that he then decisively abandoned the project, for he still proceeded as arranged towards thepremises of Shell without deviating from the prearranged course and while still carrying the bomb. I cannot resist the concivtion that only the accumulation of factors unfavourable to a successful completion of the enterprise not excluding the incident with the watchman and the closed gates of Shell, ultimately and decisively broke his nerve and foiled the plan in the execution of which he till then had been actively and voluntarily participating. Even

if the time when he deserted is shifted back to some point between Johannesburg Station and the premises of Shell, which in my view would not be justified, I do not think that will assist him.

If, however, I review the position of accused number 5 in the light of the second alternative count, it seems to me his position would be even weaker. For it seems that his actions, as recorded by the evidence as a whole and by himself must in fact at least have encouraged others to perform the wilful or wrongful acts envisaged in this count. It seems to me that objectively his actions must have encouraged those who led him and those whofollowed him, in proceeding with the project. If that view is correct, it seems to me that the onus ison him to prove on the balance of probabilities, absence of mens rea again assuming in his favour that mens rea is necessary for this particular offence.

As authority for this I quote the well-known cases of R. vs. H. 1944. A.D. 127; R. vs. Movage. 1958(3) S.A. 400 at p. 415, and the latest one, R. vs. H. 1962 (1) S.A. p. 207, all of these being Appellate Division cases.

Defence Counsel asked that I should take into consideration the finding I made at the end of the enquiry into the admissibility of the confession itself, to the effect that I thought that accused number 5 was motivated by a desire to speak the truth. I did find that I thought on the evidence in ter alia of number 5 himself, but of course, not only on that evidence, but it seemed that in confessing he was acting not under duress, but because he in fact wished to tell the truth. Of course, I did not find that the whole statement, indlucing the exculpatory part of it, was in fact true. I do not, however, propose now to discuss the precise basis and ambit

ambit of that finding as I made it, because it seems to me that whatever the finding I made there, it was founded on evidence when placed before me, including evidance by number 5 himself, all of which I should completely ignore at this stage when I deal with this case on the merits. Indeed if I were to do otherwise it would open the way to permit other inferences, pro and contra, on the basis of evidence given merely on the issues of admissibility to be used in the present argument on the merits. Evidence placed before me in that inquiry, and findings based thereon must now, it seems to me, be ignored, and that I have done. That is also in line with the approach adopted in the case of R. vs Meer, 1958(1) S.A. p 243, at p. 244 .

In the outcome, therefore my verdict is the following

Numbers 1,2 and 4 I find GUILTY ON THE MAIN COUNT.

Number 3 is found GUILTY ON THE FIRST ALTERNATIVE COUNT.

Number 5 is found GUILTY ON THESECOND ALTERNATIVE COUNT.

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AD1901 9.8

IN THE SUPREME COURT OF SOUTH AFRICA.

APPELLATE DIVISION.

Between:

1. NAPOLEON LETSOKO)
2. MICHAEL MAIMANE)
3. ELLIOT MLOTSHWA) APPELLANTS
4. VICTOR MKABINDE)
5. LUCAS JIYANE)

AND

THE STATE.

RESPONDENT

Coram:

Beyers, Holmes, et Faure Williamson JJ.A.

Heard: 8, 9 ~~and~~ September, 1964

Delivered: 24 September, 1964.

J U D G M E N T.

HOLMES, J.A.

The five appellants were charged before De Vos J., sitting in the Witwatersrand Local Division, with a contravention of section 21 (1) of Act 76 of 1962 (sabotage). The first, second, and fourth appellants were found guilty on the main count. The gist of it

was .... /2

was that they and others conspired on 8 and 9 April 1963 near the Orlando Location in regard to the commission of various unlawful acts whereby the safety of the public would be endangered, the supply of light would be put out of action, and property would be damaged. The envisaged acts related to the possession of explosives, fire-arms, or weapons, the killing of members of the police force and of the White population, the damaging or destroying of the Orlando power station, and the setting on fire and destroying of certain buildings in Johannesburg, including those of M.E. Stores (Pty) Ltd., Safric's (Pty) Ltd., the Gray's, and Shell (S.A.) (Pty) Ltd.,

The third appellant was found guilty on the first alternative count, which particularised the actual commission of the unlawful acts of damaging property by breaking the glass display window of M.E. Stores (Pty) Ltd., entering the building, and setting it on fire.

The fifth appellant was found guilty on the second alternative count. It alleged that he aided, advised, encouraged, or procured certain persons to commit unlawful acts whereby damage to property would be caused, to wit the breaking of the glass display window of

Safrica (Pty) Ltd., the setting fire to the building, and also the setting on fire of the building of Shell (S.A.) (Pty) Ltd., and motor vehicles nearby.

At the trial, the State case consisted of evidence in relation to meetings near Orlando on 8 and 9 April 1963, evidence as to events in Johannesburg on the night of 9 April, and confessions by all the appellants save the third. There is some question whether the fifth appellant's statement amounts to a confession, and I shall deal with that later. No evidence was given or called by any of the appellants (save in regard to the admissibility of the confessions). Nor did any of them make an unsworn statement at the end of the State case. They were represented by counsel who, according to the trial Judge, left no stone unturned on their behalf.

The trial Court convicted the first, second, fourth, and fifth appellants on their confessions as confirmed by proved facts. In the case of the third appellant, who did not confess, the Court held that there was sufficient circumstantial evidence, to which I shall refer more fully later, to warrant a conviction.

In this Court Mr. Chaskalson, for the appellants, arrayed a phalanx of points against the convictions. He attacked first the trial Court's admission of the four confessions (i.e. by the first, second, fourth and fifth appellants). It is of course axiomatic and no authority is needed therefor, that a confession is not admissible unless the State proves beyond reasonable doubt that the accused made it freely and voluntarily, in his sound and sober senses, and without having been unduly influenced thereto; see section 244 (1) of the Code.

With regard to the fifth appellant, it may be that his statement is not a confession, in which event section 244 (1) would not apply. But the point is of no consequence in regard to its admissibility because, assuming that it is not a confession, the question whether it was made freely and voluntarily was raised at the trial, and the prosecution was thereupon obliged by the common law to prove that it had been so made; see R v Burton 1946 A.D. 773 at 779 to 781. It is therefore not necessary in this case, in deciding its admissibility, to pronounce upon its status. As a matter of convenience I shall refer to it as a confession, as did counsel.

In regard to the admissibility of the confessions, the trial Court held a "trial within a trial"; see R. v Dunga 1934 A.D. 221 at 226. Each confession was dealt with separately save that, by consent, the State first called the Magistrate and interpreters in regard to all of them. Thereafter, in each case, the relevant appellant testified to his ill-treatment and, in each case, the State called rebutting evidence. In all, thirteen Police officers were called. It would have been far more convenient and practical in this case to consolidate these "trials within the trial". However, nothing turns on the procedure adopted. In the end the trial Court held that the confessions were not induced by assaults and threats, and were made freely and voluntarily.

During the first of this series of trials within the trial, counsel for the defence intimated to the Court that he wished to establish that the sabotage squad of Police officers had followed a set pattern or system of investigation in this case, which included the assaulting of those arrested. To this end, the defence wished to call as witnesses twenty to thirty other Bantu, who had been arrested on this charge, to testify to their treatment and assaults at the hands of the sabotage squad. It was argued that this evidence was

relevant, not to discredit Police witnesses but because it could be inferred therefrom that, in the application of the particular investigational technique, the appellants too had been assaulted. Before any such evidence was led, by consent the trial Court was asked to give a ruling on its admissibility. The ruling, which is now challenged on appeal, was that it was inadmissible.

The concerted investigational modus operandi which the defence sought to establish was as follows:

1. A special sabotage squad of police officers was assigned to the investigation of the alleged offence in this case.
2. Thirty seven Bantu, including the five appellants, were arrested and charged with the offence.
3. They were detained together in a large police cell at Marshall Square.
4. They were not allowed visitors, contrary to the provisions of section 84 (1) of the Code.
5. They were not allowed out for exercise.
6. They were not warned in terms of rule 8 of the Judges' Rules.
7. They were persistently questioned, in disregard of rule 7 of the Judges' Rules.
8. They were individually taken out of the cell, by day and sometimes by night, to another room where they were rigorously interrogated and were assaulted, to induce them to divulge information.
9. All this went on for a fortnight prior to the making of the confessions to the Magistrate.

Reading the testimony of those appellants who had confessed, with the evidence elicited from certain of the police witnesses in cross-examination, it can be said that there were not insubstantial indications that the foregoing was the modus operandi, save that the appellants' accounts of assaults were disbelieved by the trial Court and the police denials were accepted.

The ..../7

The basic principle applicable in this case is that evidence is admissible if it is relevant to an issue in the case. "Relevancy", said Schreiner J.A. in R. v Matthews and Others, 1960 (1) S.A. 752 at 758, "is based upon a blend of logic and experience lying outside the law. The law starts with this practical or common sense relevancy and then adds material to it or, more commonly, excludes material from it, the resultant being what is legally relevant and therefore admissible".

To warrant the legal relevance and the admissibility of what is called similar facts, there must be a sufficient nexus between the evidence sought to be led and the issue in respect of which it is sought to be led. As was said by Lawrence J. in R. v Bond, 1906 (2) K.B. 389 at 424, "In proximity of time, in method, or in circumstance there must be a nexus between the two sets of facts, otherwise no inference can be safely deduced therefrom". That passage was approved by this Court in The State v Green 1962 (3) S.A. 886 at 894.

To sum up so far, in the present case the issue, in the trial within the trial, was whether the confessions were freely and voluntarily made, which involved the issue whether the appellants had been assaulted by members of.../8

of the police sabotage squad. It was sought to lead evidence of a concerted modus operandi on the part of the police sabotage squad, an investigational system which included assaults and was applied to all the Bantu who had been arrested and charged in respect of the alleged offence in this case. If a body of those persons were to give credible evidence of that system and to say that they were assaulted in the course of its application to them during a period of two weeks after their arrest, it seems to me that there would be a sufficient nexus, in respect of proximity of time, of method, and of circumstance, at least to add weight to the other evidence that that also happened to the appellants. In the particular circumstance of this case the evidence tendered was therefore wrongly excluded.

The trial Judge relied upon R. v. Hendricks 1952 (1) S.A. 138 but that is not a comparable case for, as Van Winsen A.J. indicated at page 141, there was no nexus between the evidence sought to be led and the issue. The present case seems to me more akin in principle to R. v. Matthews and Others and R. v. Green, supra.

In the result, the trial Court's refusal to allow the appellants to lead the evidence in question was an irregularity. Although the appellants were unimpressive witnesses in their testimony of assaults, certain trenchant criticisms can also be levelled against some of the Police officers as witnesses, as Mr. Masters was constrained to agree; and if the evidence which it was sought to lead had been led, it is possible that the confessions might have been ruled inadmissible. The order as to their admissibility cannot stand.

The question now is whether, without the confessions, a reasonable trial Court would inevitably have convicted. (This does not apply to the third appellant in respect of whom NO confession was admitted). I proceed to analyse the evidence. As to the meetings on 8 and 9 April 1963, most of the evidence was given by one Sampson Radebe, a taxi driver. In outline he said that on the evening of 8 April his taxi was commandeered by several Bantu and was driven, he being an unwilling passenger, to an isolated spot near Orlando. Many people were gathered there. He was told not to be afraid and that these people were going to fight for their country. He saw bottles and petrol tins, also pieces of iron of various sizes, apparently home-made weapons.

The leader addressed the meeting and it was decided inter alia to attack the Orlando police station, to burn down the power station, to set on fire buildings in Johannesburg, and to take arms from shops. (There was evidence that both M.E. Stores and Safric's, to which reference will be made later, stocked fire-arms and ammunition). A further meeting was convened for the following day. In the meantime Radebe was detained, so he said, in the house of the fourth appellant. There some Bantu, including the first appellant at one stage, busied themselves with filling tennis balls with match heads. He also saw ball-bearings, permanganate of potash, and glycerine, which were fetched by the fourth appellant. An expert witness testified that a tennis ball with these ingredients could be used as a hand-made bomb, with moderate explosive and shrapnel effect. Radebe also saw oil and petrol mixed and put into bottles. There was evidence that a mixture of petrol and oil kindles more dangerous and destructive fires than petrol does. At the meeting on the evening of 9 April the speaker ordered the Bantu there assembled to go into the city to destroy buildings, blow up the power station, and kill Europeans. The crowd was divided into groups. Radebe was put in a group which was told to go to the railway station and

board .... /11

board a train. At the station he managed to run away.

There was some slight corroborative evidence by Stanley NKABINDE, who is a brother of the fourth appellant.

As to the events in the city on the night of 9 April, a night-watchman named Jack Mokawani was on duty at M.E. Stores that night. He saw a number of Bantu gathering, and they came to him and asked for guns. He refused, and withdrew to a different part of the building. There he heard the sound of crashing and he blew his whistle. He saw Bantu running away.

A witness named Middelton said that about 11 p.m. on 9 April he was window shopping in Pritchard Street near Harrison Street. He parked his car at the corner of the intersection, diagonally opposite M.E. Stores. He then walked across the street and looked into the window of a furniture store opposite M.E. Stores. He said that although normally there are pedestrians, both European and non-European, to be seen in that vicinity at that time of night, he observed only one, a Bantu, who was standing alertly at the corner, in a manner which aroused his suspicion. He conceded the possibility that there might

have been other pedestrians in the vicinity but he only saw the one. After looking into the window the witness returned to his car, and was just opening the door when he heard a crash. He looked at M.E. Stores and saw two "boys" walking from the smashed window and off the pavement. One of them had a crowbar or a stick in his hand. Then two traffic policemen on motor cycles came on the scene and the two "boys" took to their heels, joined by the one who had originally stood at the corner. The witness also said at one stage that there was a fourth. The traffic police sounded their sirens and pursued them. The witness joined in the chase, together with a night-watchman. He thinks there was also a Morris car in the hunt. A police car arrived and one of the fugitives was arrested. There was evidence that this was the fourth appellant, but the witness could not say that this was the one whom he had first observed at the corner.

Sergeant Smit said that about 11.05 p.m. on 9 April he was on patrol duty in a police car, with constable Gouws. At the corner of Harrison and Pritchard Streets he saw a number of Bantu running away. He arrested one of them, the second appellant, about 20 paces from

the corner. Members of the public pursued the others, and he (Smit) followed them, in time to assist in the arrest of the fourth appellant. He then returned to M.E. Stores; and he described the damage which he saw there. One of the display windows was found to be broken, and flames were seen in the building. On the floor was a bottle and what appeared to be bottle fragments, as well as an axe and one half of a pair of shears. There was evidence that the bottle contained a mixture of petrol and oil. Display cabinets and clothes were found to be burning. The flames were extinguished.

Constable Gouws said that as their car approached the intersection about 11 p.m. he heard whistles blowing. He saw Bantu running in various directions from M.E. Stores. They were pursued by members of the public and night-watchmen. He and Smit gave chase and arrested the second appellant and took part in the arrest of the fourth appellant.

Constable Esterhuysen was on patrol that night in a police car with constable Coetzee. At about 11 p.m. they turned from Sauer Street into Pritchard Street. They came to President Street. He heard whistles blown and they

did a U-turn in President Street. This was in the general vicinity of M.E. Stores. He jumped out and caught a Bantu named Ellington. Coetzee arrested another one. Coetzee's version was as follows: They were in Sauer Street, and turned into Pritchard Street. There he saw two persons running away from the general direction of M.E. Stores, pursued by night-watchmen who were blowing whistles. There were no other persons running away. The fugitives turned into President Street and the police car pulled up close to them. Esterhuysen jumped out and caught one of them, who had stood still, and the witness pursued and arrested another, whom he identified as the third appellant. He asked him why he was running away from him, seeing that he was a policeman. He replied that there had been a stabbing afair at the station and he was fleeing because he had thought the witness was a "tsotsi". (I suppose "Bantu gangster" would be the English equivalent). The witness was in full uniform.

A fire officer named Van der Merwe, who is a member of the Institute of Fire Engineers, arrived at M.E. Stores about 11.30 that night. He saw the two bottles, one broken, on the floor. He said the fire had been

started in the old part of the building which was highly inflammable and was considered by the Fire Department to require particular precautions as a fire hazard, and that a fire at that spot could easily have got out of hand.

As regards the events that night at Safric's, all that was known was contained in the confession of the first appellant, which of course cannot now be looked at.

As to the events at the Shell depot, Van der Merwe said that a vast quantity of petrol was stored there in tanks above the ground, and that any fire caused by igniting it would rage with a destructive effect unprecedented in the annals of Johannesburg, causing great loss of life. In this regard a witness named Petrus Kadebe, who was warned as an accomplice and was later granted an indemnity, gave evidence as to what occurred on the night of 9 April, from the time that the fifth appellant and his companions left the railway station and proceeded to Shell. I shall refer to it when dealing with that appellant's appeal.

It will be convenient at this stage to deal with the appeal of the third appellant. It will be recalled that he did not make a confession. He was convicted on the first alternative count. As amended and as amplified by further particulars, it alleged that the accused were guilty of the crime of sabotage, in contravention of section 21 (1) of Act 76 of 1962, in that they conspired with one another and others at a gathering on 9 April 1963, near Orlando location, at which accused Nos. 2, 3 and 4 and others were deputed to set on fire and destroy the building of M.E. Stores; that bottles containing petrol and oil were distributed to them; that they went by train to Johannesburg and arrived in a group at the M.E. Stores, at the corner of Pritchard and Harrison Streets; and that about 11 p.m., in execution of their common purpose, one or more of them (the State being unable to say which accused did which act) broke the glass display window, entered the building, and set fire to it and articles in it, thereby causing damage to property.

There was no evidence that the third appellant was present at the gathering on 9 April 1963, (or, for that matter, at the one on 8 April); or that he was issued

with a bottle of petrol and oil; or that he caught the train to Johannesburg; or that he arrived with a group at M.E. Stores. However, it was common cause, AND I AGREE that, in the circumstances of this case, his prior conspiracy and common purpose could be inferred if there was proof of his participation in the acts committed at M.E. Stores at 11 p.m. I proceed to examine whether his participation was proved. There is no direct evidence thereof; it is a question of inference.

The evidence in outline is that he was seen running away from the general vicinity of the crime at M.E. Stores, and gave an admittedly false explanation to the Police for his flight. To this must be added the fact that he gave no evidence at his trial.

Generally speaking, the falsity of an explanation to the Police, especially if given on the spur of the moment, should weigh but little in the scales against an accused. Sometimes it is a mere makeweight; see R. v Nel 1937 C.P.D. 327, AT 330, as clarified by this Court in R. v Gani 1958 (1) 102 at 113. Mr. Masters, however, relied strongly on the fact that the third appellant,

knowing that he had been caught running away from the general vicinity of the crime and that he had given a false explanation for his flight, elected to give and call no evidence. If he were innocent, he submitted, it would have been simple for him at the trial to correct the previous explanation and to testify that his flight and lie were caused by fright and not by implication in the crime. There was of course no onus on him to do this, but by not doing so he took the risk that his failure could be taken into account as a factor against him. This has long been recognised in this country; see, for example, R. v. Dube 1915 A.D. 557, R. v. Nyati 1916 A.D. 319 at 324. See also R. v. Ismail 1952 (1) S.A. 204 (A.D.) at 210. It would not be correct to say that an inference of guilt can be drawn from his failure to testify. The true position is that, in cases resting on circumstantial evidence, if there is a *prima facie* case against the accused which he could answer if innocent, the failure to answer it becomes a factor, to be considered along with the other factors; and from that totality the Court may draw the inference of guilt.

The weight to be given to the factor in question depends upon the circumstances of each case. S. v Masia 1962 (2) S.A. 541 (A.D.). S. v Mini 1963 (3) S.A. 188 (A.D.) at 195/6.

I pause here to observe that Mr. Masters submitted that where, as here, there was direct evidence of the commission of the crime, the accused's failure to testify ipso facto tends to strengthen the State case. For this proposition he relied upon S. v Nkombani and Another 1963 (4) S.A. 877 (A.D.) at 893 (lines F-G). The answer is that line G, from the context of the paragraph and the use in line F of the words "by an accused", is plainly referring to cases where there is direct evidence of the commission of the offence by the accused. That is not the case here.

In my view, the crucial question in this case, in regard to the weight to be given to the third appellant's failure to testify, relates to the strength or weakness of the State case when it was closed. As to that, there is no evidence of the distance that the third appellant was from M.E. Stores when he was seen to be running from that general direction. The further away he was, the weaker the link between him and the crime. It — /20

It would seem from the evidence that he must have been at least a block away, and possibly further; and although Coetzee says that he was being pursued by nightwatchmen, the latter were not called as witnesses and there is no evidence as to where they were on duty or where or why they started pursuing him. Furthermore, the Bantu who was running with him, Ellington, was arrested but does not figure in the case either as an accused or a witness. If he was possibly an innocent bystander who had taken to his heels in the circumstances, could that not also apply to the third appellant? In all the circumstances in my view the case against the third appellant was so weak that his failure to testify does not operate to tip the scales against him beyond reasonable doubt, despite the apparent ease with which he could have answered the charge if innocent. He was therefore wrongly convicted, and his appeal must be allowed.

The facts of the case against the second appellant are stronger. The established facts may be summarised as follows:

(a) A group of Bantu male conspirators decided inter alia to burn M.E. Stores on the night of 9 April.

(b) Bantu men did set fire to the store that night.

(c) Immediately after the smashing of the glass display window the appellant, a Bantu man, was seen running from the immediate scene and was arrested 20 paces from it.

(d) There was no evidence that there were any ordinary Bantu pedestrians at the immediate scene of this crime at 11 p.m. On the contrary, a careful reading of the evidence of the witnesses Middleton, Sergeant Smit, and Constable Gouws, strongly tends to negative any such suggestion.

(e) The appellant gave no evidence.

The foregoing items, considered individually, are not decisive. But it is their cumulative effect which must be considered; see Rex v. De Villiers 1944 A.D. 493 at 508/509. Bearing in mind also the principles, discussed earlier herein in regard to a failure to testify, I am of the opinion that a reasonable trial Court, properly directing itself, would inevitably have convicted the appellant on the foregoing facts. The invalid admission of his confession does not therefore operate to rescue him. His appeal against his conviction accordingly fails.

With regard to the first appellant, he is implicated in the crime by the evidence of Sampson Radebe. The case against him may be summarised thus:

(a) He was seen to be in attendance towards the end of the meeting on the night of 8 April at which it was decided to carry out the acts referred to in the main count, as set out in the opening paragraph of this judgment. The meeting was adjourned, it being agreed that the deeds would be done on the following night.

(b) After the meeting the appellant came to Sampson and told him that his taxi was safe, that he had removed it and was looking after it.

(c) On the following day the appellant helped with the preparation of match heads i.e. for the tennis ball bombs, at the house of the fourth appellant, where Sampson was detained.

(d) He was seen in attendance at the meeting on 9 April.

(e) He gave no evidence.

Mr. Chaskalson contended that there was an irregularity in regard to the evidence of Sampson. At the commencement of his evidence in chief he was asked, in order to bring him to the point, whether he remembered having made a statement to the police in connection with certain events. When he answered affirmatively he was asked to tell the Court of the events which he had reported to the police. Near the end of his evidence in chief,

after having described how he ran away at the station and walked home, he was asked if he had gone to the police station and made a statement. He replied that he had done so on the following morning and made a report similar to the account given in his evidence. The defence later called for the report. The Court ruled that it was privileged. Mr. Masters then undertook to inform the trial Court if there was any conflict between the statement and the evidence of the witness. I have no doubt whatever but that Mr. Masters, a senior counsel of long experience, would have honoured his undertaking, and would also have informed this Court, if there had been a divergence between the statement and the evidence. Assuming that the trial Court wrongly ruled the statement to be privileged (which I do not find it necessary to decide) it is clear that in the circumstances there has been no prejudice to the appellants.

Mr. Chaskalson also attacked the trial Court's acceptance of the evidence of Sampson. As to that, the Court warned itself that his evidence should be approached with caution almost as if he were an accomplice. He was searchingly cross-examined. He was somewhat supported by Stanley Nkabinde - the brother of the fourth appellant -

who was believed and who said <u>inter alia</u> that he saw the first appellant at his brother's house on 9 April. No defence evidence was led to contradict Sampson on any point. The trial Court accepted his evidence on all material points. I see no reason for disturbing the positive and well-reasoned finding of credibility. And it is well settled that, in applying the test whether a reasonable Court would inevitably have convicted, the Court of Appeal may properly have regard to findings of credibility made by the trial Court.

Mr. Chaskalson further contended that there was no evidence that the first appellant was a party to the decision taken at the meeting on 8 April. In my view that inference is inescapable, in view of his subsequent conduct as outlined above. In the result I am of the opinion that a reasonable trial Court would inevitably have found him guilty. His appeal against his conviction fails.

With regard to the appeal by the fourth appellant, the case against him is as follows:

(a) He was seen by Sampson Radebe at the meeting on 8 April, towards the end. The witness was thereafter taken to the appellant's house where he spent the night of 8 April and the day of 9 April. During the latter day the appellant was sent out to buy ingredients for the tennis ball bombs and returned with them, e.g. glycerine and permanganate of potash.

(b) He attended the meeting on 9 April.

(c) He was arrested running away from the scene of the crime at M.E. Stores.

(d) He gave no evidence.

Mr. Chaskalson, in arguing against the conviction, attacked the reliability of the witness Sampson Radebe. I have already indicated that the trial Court's acceptance of his testimony cannot be disturbed. In my view the cumulative effect of the factors (a) to (d), supra, is such that a reasonable trial Court would inevitably have found this appellant guilty. The appeal against his convictions fails.

Turning to the fifth appellant, his confession cannot be looked at and the evidence concerning him was given by the State witness Petrus Radebe. He said that on the night of 9 April he attended a bioscope and thereafter

went towards the railway station about five minutes before 11 p.m. He saw a group of Bantu men. One of them, a man wearing a miner's helmet and carrying a chopper, told him to accompany them. The witness did so, walking with four others, one of whom was the fifth appellant, while the man with the helmet and some others brought up the rear. They arrived at the Shell premises and walked round them until they came to a gate, which was locked. Nobody tested it or tried to enter. The fifth appellant suggested that they all run away before the one with the helmet caught up with them. They did so. The witness did not know the object of the group.

In the light of the general evidence as to the conspiracy hatched at the meetings on 8 and 9 April, there is a suspicion that the group of which the fifth appellant was a member was going to set fire to the Shell premises. But in this regard the State case was very weak. Furthermore there is at least a reasonably possible inference from the foregoing evidence that the appellant, far from encouraging his companions as the charge alleged, actually discouraged them. In these circumstances I do not think that his failure to testify is of significance. It cannot be said that a reasonable trial Court would inevitably have convicted him. His appeal succeeds.

TO ..../27

To sum up so far:

1. The confessions by the first, second, fourth and fifth appellants were wrongly admitted.

2. The question whether, on the admissible evidence, a reasonable trial Court would inevitably have convicted these appellants, is answered in favour of the State in regard to the first, second and fourth appellants; and their appeals against conviction fail.

3. It is answered in favour of the defence in regard to the fifth appellant; and his appeal against conviction and sentence succeeds.

4. In regard to the third appellant (in respect of whom no confession was admitted), his guilt was not proved beyond reasonable doubt; and his appeal against conviction and sentence succeeds.

The appeal is also directed against the sentences. The first, second, and fourth appellants were sentenced to imprisonment for 17, 20, and 20 years, respectively. As was said by Innes C.J. in R. v Mapumulo and Others 1920 A.D. 56 at 57, the infliction of punishment is "pre-eminently a matter for the discretion of the trial Court". When a trial Court gives a decision on a matter entrusted to its discretion, a Court of Appeal can interfere

only if the decision is vitiated by irregularity or misdirection, or is one to which no Court could reasonably have come - in other words if a judicial discretion was not exercised. S. v Kearney, 1964 (2) S.A. 495 (A.D.) at 504 (B). R. v Freedman 1921 A.D. 603 at 604 (in fine). R. v Ford 1939 A.D. 559 at 561 (final paragraph). In the present case it is not contended that there was any irregularity or misdirection in regard to the sentences. (And I would mention in passing that it does not appear that the confessions affected the punishment to any appreciable extent, for they tallied substantially with the evidence against each appellant). The issue is one of severity. In deciding whether a judicial discretion was exercised in that regard, there are several accepted tests, all amounting to much the same, and it is unnecessary to lay down any one of them as being the test; see S. v Anderson 1964 (3) S.A. 494 (A.D.). A test very often applied is whether the sentence induces a sense of shock; see for example R. v Reece

1939......../29

1939 T.P.D. 242 at 244, and R. v Zonele and Others 1959 (3) S.A. 319 (A.D.) at 331 (D).

In the present case one is deeply conscious of Mr. Chaskalson's submissions to the effect that these are young men who apparently fell prey to inflammatory speeches of discontent and criminal design; that, as it transpired, no great damage was done; and that, if the sentences stand, they will be paying a grievously heavy price for their brief incursion into the field of sabotage. All this is unhappily true; but it is not the whole picture. The conspiracy was an evil one; they put their minds or hands to deeds of pitiless wickedness, reckless of the property or lives of others; and it is no thanks to them that the kindled fire did not become a raging conflagration in the centre of Johannesburg. Moreover, in the matter of sentence, the Legislature has, in section 21 (1) of Act 76 of 1962, equated sabotage with treason, save that it has gone further and provided for a minimum sentence of imprisonment for five years. Furthermore, with this type of sabotage the deterrent aspect of punishment calls for emphasis, lest others think the game is worth the candle, and order yield to planned and lawless chaos.

Reviewing ....../30

Reviewing all these considerations for and against the appellants, I am unable to hold that the trial Court did not exercise a judicial discretion in the matter of punishment. Accordingly this Court cannot interfere.

To sum up:

1. The appeals of the first, second, and fourth appellants are dismissed.

2. The appeals of the third and fifth appellants are allowed, and their convictions and sentences are set aside.

NEVILLE HOLMES.

Beyers, J.A. }
Williamson, J.A. } Concur

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