#DA101 1815

NATAL JUDGMENT. 27/2/1964.
PP 3063 – 3095

ON 27th FEBRUARY 1964 AT 2.15.P.M.

THE STATE

versus

EBRAHIM ISMAIL AND OTHERS

JUDGMENT

MILNE, J.P.:

We find accused No. 1 guilty in respect of the main charge on counts, 1, 9, 12, 18, 25 and 27, to all of which he has pleaded guilty. There is no maneer of doubt about his guilt on all these counts. In respect of all theremaining counts he is found not guilty.

In respect of No. 2 accused, the State has abandoned all counts except counts 1, 12 and 25. We find him guilty on each of these three counts in respect of the main charge. We find him not guilty on all the remaining counts. It was not disputed by the defence that the accomplice Perumal was a satisfactory witness and, in our opinion, he was a reliable witness. There are, apart from demeanour, many features in his evidence which show him to be giving a trustworth account of the matters to which he testified. We regard the probabilities as very great that he would not falsely incriminate No. 2 accused and we believe his evidence that No. 2 accused took the part which Perumal says he did with respect to the commission of the acts of sabotage referredto in counts 1, 12 and 25. We do this in the fullest recognition of the special need for caution regarding accomplice evidence, about which I shall indicate presently how I have directed the other members of the Court and myself. With respect to the counts on which we have found accused No. 2 guilty

there is no manner of doubt that the acts of sabotage were committed. As regards the pointing out with reference to count 12, Lieutenant Prins says that accused No. 2 pointed out Kajee's door and the nearby staircase. Although the place with reference to the stairs was not quite the same as that pointed out by Perumal to Lieutenant Prins, we find ourselves persuaded, beyond all manner of doubt, regard being had to the fact that it was the accused who took Lieutenant Prins to the spot and that he pointed out the door itself and the staircase. The knowledge he had of the door and the staircase is not reasonably consistent with any other view than that he had taken part in the commission of the offence. I may say that the Court regards Lieutenant Prins as a most reliable witness. Nor has it been contended otherwise by the defence. As regards count 25, we accept Lieutenant Prins' evidence that accused No. 2 pointed out the exact spots on the railway line near the Victoria Street bridge, the two railway tracks, one on the up-line and one on the down-line, and the cable which were blasted by the acts of sabotage to which this count refers. We find that the pointings out made by accused No. 2 as testified to by Lieutenant Prins, indicate a knowledge of the relative spots which is reasonably consistent only with his having taken part in the commission of the offence. As regards count 1 we find accused No. 2 guilty because we consider Perumal to be fully trustworthy in his implication of accused No. 2. As I have already indicated, we find that No. 2 accused gave wilfully false testimony in denying, in respect of count 25, that he pointed out to Lieutenant Prins three particular spots on exactly where the relative three charges of dynamite were laid and no mere general area. Although No. 2 accused, after the failure of the attempt on Kajee's office, did no more than agree with the proposal of No. 1 accused to

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explode the petrol bomb on the train, he not merely foresaw that his companions, in pursuit of their common objectives of sabotage, would put the bomb on the train but went with them whilst they did it in full knowledge of their intent. Cf. The State vs. Malinga, 1963(1) S.A. at p. 692 A.D. We disbelieve accused No. 3 when he says that No. 2 accused was not a party to this act of sabotage.

At this stage it will be convenient to indicate the lines upon which I have directed the Court, both as regards the special need for caution in assessing the weight to be attached to an accomplice's evidence and as to how evidence as to pointings out made by an accused person, made admissible by section 245(2) of the Code, may be evaluated. Section 257 of the Code reads thus:

> "Any court or jury may convict any accused of any offence alleged against him in the charge on the single evidence of any accomplice, provided the offence has, by competent evidence, other than the single and unconfirmed evidence of the accomplice, been proved to the satisfaction of such court or jury, as the case may be, to have been actually committed."

Although the section is couched in positive terms and provides that it is lawful to convict on the single unconfirmed evidence of an accomplice if the commission of the crime has been proved by evidence aliunde, it is necessarily implied that if there is no proof of the commission of the offence by competent evidence other than the single unconfirmed evidence of the accomplice, no court or jury will be entitled to convict on the single evidence of an accomplice. Although this negative is implied, the section is enabling and positive in its terms and is the law. Nothing that has been said by any court can alter that. If any court were to hold otherwise it would be a contradiction of the statute and wrong. Nothing of the kind was held in the leading case of R. vs. Ncanana, 1948(4) S.A. 399 A.D.

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The Court, in that case, speaking of the cautionary rule, said in the plainest terms that a court may convict on the single evidence of an accomplice (where there is proof aliunde of the commission of the offence) if, for example, the accused does not give evidence to contradict or explain the evidence of the accomplice, or if he shews himself to be a lying witness. I refer to the judgment of Schreiner, J.A., at p. 405, where he says that -

> "the cautious court or jury will often properly acquit in the absence of other evidence connecting the accused with the crime, but no rule of law or practice requires it to do so."

He goes on to say -

> "What is required is that the trier of fact should warn himself, or, if the trier is a jury, that it should be warned, of the special danger of convicting on the evidence of an accomplice; for an accomplice is not merely a witness with a possible motive to tell lies about an innocent accused but is such a witness peculiarly equipped, by reason of his inside knowledge of the crime, to convince the unwary that his lies are the truth. This special danger is not met by corroboration of the accomplice in material respects not implicating the accused, or by proof aliunde that the crime charged was committed by someone; so that satisfaction of the requirements of sec. 285 does not sufficiently protect the accused against the risk of false incrimination by an accomplice."
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> (I interpose that section 285 of the earlier Code is in the same terms as the present section 257).

He goes on

> "The risk that he may be convicted wrongly although section 285 has been satisfied will be reduced, and in the most satisfactory way, if there is corroboration implicating the accused. But it will also be reduced if the accused shows himself to be a lying witness or if he does not give evidence to contradict or explain that of the accomplice."

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The learned Judge (at p. 406) went on to say this:

> "And it will also be noticed, even in the absence of these features, if the trier of fact understands the unreliable danger inherent in accomplice evidence and appreciates that acceptance of the accomplice and rejection of the accused is, in such circumstances, only permissible where the merits of the former as a witness and the demerits of the latter are beyond question."

With all respect to this most distinguished Judge I cannot help thinking that this additional sentence did not help to clarify the position. The two features, to the absence of which the learned Judge referred, are -

(1) "If the accused shows himself to be a lying witness" or

(2) If he does not give evidence to contradict or explain that of the accomplice."

If the accused does give evidence then feature No.(2) is absent but if, in giving evidence he shows himself to be a lying witness then, surely, the demerits of a witness are established. It seems to me, with respect, wrong to say, in such a case, that a conviction is only permissible on the single evidence of an accomplice (the offence having been proved aliunde) if the merits of the accomplice as a witness are "beyond question." If the merits of an accomplice as a witness are beyond question, ~~eadit questio~~ - you do not need any other factors whatever (apart from proof aliunde of the commission of the offence) to warrant a conviction.

Although it does not represent all the law on the subject, section 257, as I have said, states the law. In the main passage from the judgment of Schreiner, J.A., I have already quoted the reference to what the cautious court or jury may do. It is not merely implicit in that passage but, indeed,

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it is fully explicit that a cautious court or jury may properly convict in the absence of other evidence connecting the accused with the crime because "no rule of law or practice requires" it to acquit.

What has been authoritatively said about the cautionary rule seems to me to have been designed to serve as signposts by way of reminders to triers of fact,

(1) that no verdict of guilty can properly be reached unless there is proof of guilt beyond all reasonable doubt,

(2) that the triers of fact must be on the look-out, in considering whether or not a reasonable doubt exists, for those factors generally inherent in accomplice evidence which, if not carefully watched, might mislead them into believing the evidence of an accomplice although he may not be speaking the truth when he implicates the accused,

(3) that if any element of doubt regarding the accused's complicity arises because of the inherent possibility that an accomplice (more than any other person, all things being otherwise equal) may falsely implicate the accused, that element of doubt is not reasonably removed unless there are present factors which are sufficient to convince the minds of reasonable men that the accomplice, in implicating the accused in the offence, is speaking the truth. (As was said, e.g., in R. vs. Gumede, 1949(3) S.A. 749 (A.D.) at p. 758, "Where the accomplice's evidence, besides implicating the accused, implicates someone near and dear to the witness and against whom the witness has no ground for rancour, that fact must argue strongly in favour of the truth of such evidence.")

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There would appear to be three principal reasons why special caution should be observed in evaluating the credibility of an accomplice:

(1) he is, ex hypothesi, a criminal himself,

(2) bedause he has taken part in the commission of the offence (or is an accessory - S. vs. Kellner, 1963(2) S.A. 435 A.D.) he is peculiarly equipped, by reason of his inside knowledge of the crime, to convince the unwary that his lies are the truth,"

(3) that there is the possibility that he may have implicated the accused in order to gratify the police, in the belief that, by so doing, he will improve his chances of securing an indemnity for himself against prosecution for the offence. (See Gumede's case at p. 756). That possibility is one which needs particularly careful consideration in the present case.

I make three further observations:

(a) When it is said that the merits of an accomplice as a witness must be "beyond question" in order to be accepted as sufficient for a conviction, this does not mean that his evidence must be free from any defects. See Gumede's case at p. 758, quoting with approval what was said in R. vs. Kristusamy, 1945 A.D. at p. 556.

(b) Despite what was said in R. vs. Tapfumaneyi, 1963(3) S.A. at p. 787 (S.R.), I treat it as settled by S. vs. Avon Bottle Store (Pty) Ltd., and Others, 1963(2) S.A. 389 (A.D.) that where two accomplices give evidence implicating the accused, there may be circumstances in which the evidence of one may properly be treated, for the purpose of the cautionary rule, as corroborating the evidence of the other even though the evidence of neither accomplice could, by itself, be regarded as so satisfactory as to convince the minds of reasonable men of the accused's compli-

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city. One accomplice, although far from perfect as a witness, might be much better than the other and there may be circumstances rendering it highly unlikely that both would bring in that accused as one of the perpetrators of the offence unless the accused were guilty. It may be, for example, that the two accomplices have not had an opportunity of comparing their stories before giving evidence and the court is satisfied, on adequate grounds, that neither has been prompted by the police (or by anyone else) to bring the accused into the picture as one of the wrong-doers.

(c) It is for the triers of fact, regard being had to the circumstances of each particular case, with reference to each particular accused and each particular count to say, after giving itself or being given, a proper warning with regard to the potentiality of false implication of the accused by an accomplice, of heeding that warning, whether any particular accused has been proved beyond reasonable doubt to be guilty on any particular count.

I have advised the Court that, even where it is satisfied, after giving due heed to the requisite warnings, that an accomplice is so trustworthy as a a witness that it can quite safely convict a particular accused on particular counts mainly on the accomplice's evidence, it is nevertheless permissible to acquit other accused or the same accused on other counts notwithstanding that the same accomplice gives incriminating evidence regarding them because, as Schreiner, J.A., indicated in the passage to which I have referred, a cautious court may properly acquit if there is not some evidence aliunde connecting the accused with the crime, that is even though it regards the accomplice as a reliable witness. It seems that what was intended here was that the

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court, in so acquitting, would not err in the wrong direction. As regards pointing out, the ruling I gave at an earlier stage has not been seen by the learned assessors. It is necessary to say how I have now advised the Court. The case of R. vs. Rooifontein, 1961(1) P.H., H.10, which was cited by Mr. Gurwitz, is distinguishable. There, in an unsworn statement from the dock, the accused said he had told the constable that he did not know the place and that he was taken there by the constable. If the evidence, which is accepted, is that the accused took the policeman to the spot, the situation is quite different. The Court is then bound to ask itself whether in such a case there is any reasonable possibility that he was, by the pointing out, imparting knowledge to the police which he had acquired otherwise than by participation in the offence. Mkya's case, 1962(1) P.H., H. 80, applied the decision in Tebetha's case, 1959(2) S.A. 337 (A.D.); Davidson's case, 1960 (1) P.H., H.109 and Gwevu's case, 1961(4) S.A. 536. In that case it was said that it would seem that there were only three ways in which an accused person can have knowledge of the exact position of an implicatory spot -

(1) he can have this knowledge because he took part in the commission of the offence,

(2) he can have this knowledge because he saw others committing the offence,

(3) he can have this knowledge on information supplied to him by someone else.

It seems correct to say that there may be a fourth possibility, viz.,

(4) that the accused acquired some knowledge of the place without being a witness to the crime and without having been told about the place, in some quite innocent manner.

If the accused gives evidence and does not say

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that he saw others committing the offence, the second alternative need not ordinarily be given very serious consideration. If, in giving evidence, he says that he acquired the knowledge because of what others told him but there is acceptable evidence that there were details in the pointing out which he does not thus explain (because he denies the pointing out of those details) the only reasonable inference may well be that his knowledge was due to his taking part in the commission of the offence. If he says that he acquired his knowledge of the place, including the details pointed out by him, because he had visited the spot on an innocent occasion or occasions, the triers of fact are entitled, and bound, to consider all the circumstances and to decide whether there is any reasonable possibility that the accused, in taking the police to the spot and pointing out the place or places there, did so otherwise than because he had knowledge of such place or places in consequence of his own participation in the relative offence. The well-known passage from the judgment of Schreiner, J.A., in Tebetha's case was his judgment alone where he said that -

> "... the object of the Legislature in enacting section 245(2) was clearly to enable inferences to be drawn from the evidence made admissible by the sub-section and that would always be impossible if every pointing out must be rendered colourless by the consideration that there are innumerable possible reasons, consistent with innocence, for pointing anything out."

Although it was the judgment of Hoexter, J.A., which was concurred in by the other members of the Court, I do not understand it to be disputed by the defence that this passage, when read in the light of the Full Bench decision of the Appellate Division in Davidson's case, indicates the manner in which the evaluation of the evidence should be approached, always

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assuming, of course, that the evidence is true. I do not propose to read the relative passage in the judgment in Davidson's case. I have already read it out to the learned assessors.

Before I proceed further I must say that it is admitted by the defence and, indeed, apart from the accomplice's evidence, it is clear that all the acts of sabotage alleged in the indictment were actually committed with the exception of count 5. Here the defence has submitted that the evidence falls short of proving that that offence was actually committed, that is the offence of attempting to damage the offices of the Bantu Administration at Kwa Mashu on the 14th October, 1962. It will be convenient now to deal with the question whether the attempted sabotage referred to in that count was proved to be actually committed by evidence other than that of any accomplice. Mr. van Dyk, himself, took the scrapings which were contained in exhibit 5B from Mr. Brummer's door on the 18th October, 1962, and his reference to scrapings from a door (on page 1628 of the record) read in the light of his evidence elsewhere and the identity of the chemical analysis regarding the contents of exhibit 5B with those which relate to exhibit 3B in respect of which it is clear that an explosion occurred (I refer to paragraphs 5 and 11 of exhibit AT) have made us come to the conclusion that there is no room for reasonable doubt that Mr. van Dyk, in saying (on page 1629) that the evidence was consistent with the same powder having been used to produce the contents of those scrapings as was used as a powder found as a result of the actual explosion in Poduiene Building, was saying that the original ingredients of the relative powders were the same. We find that his evidence, read with Sergeant Grobler's and the admissions made by the defence, established beyond

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reasonable doubt that there was an explosion of powder at Mr. Brummer's door which is consistent only with an attempt to commit sabotage with respect thereto having been committed. In reaching this conclusion we have relied also on the evidence of Dumagude and the evidence that five different acts of sabotage were all planned to take place on the 14th October, 1962, as a protest in connection with the case of Nelson Mandela.

I come now to deal with the case of No. 3 accused. We find him guilty on the counts to which he has pleaded guilty namely, counts 1, 17, 20, 25 and 28. In respect of counts 1, 17, 20 and 25, we find him guilty on the main charge. The State seeks his conviction on the second alternative charge in respect of counts 3 to 16 and counts 18, 24 and 27. It is essential that we should indicate our view of Bruno Mtola as a witness. The impression he made upon us, save with respect to certain matters some of which I shall mention in detail, was that of a man who was trying to give a full and honest account of all his dealings with Umkhonto we Sizwe and the members of it whom he knew. His cross-examination involved his being required to repeat a great deal of the evidence he had given in chief no doubt with the object, and the very proper object, of testing both his honesty and his memory. The effect, however, of this line of cross-examination was to confirm the prima facie reliability of this witness as time went on. Apart from the matters which I intend to mention in a moment, there can be no doubt that his long cross-examination established him as a witness who not only had a remarkable memory but who could not reasonably be regarded as falsely implicating a particular accused when repeating his implication of such accused in the detailed way that was required by the cross-examination. A favourable feature of his evidence which may be mentioned was the manner in which he referred to No. 6 accused when speaking of the preparation in the garage of the charges of dynamite which were to be used for the

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acts of sabotage referred to in counts 7, 8 and 9. He could very well, if he had been intending to implicate persons falsely, have attributed to No. 6 accused a much more active part in the garage than he did. His evidence, however, has been rightly criticised in a number of respects. In dealing with count 27 relating to the attck on the signal box near Duffs Road, he said on page 1733, whilst giving his evidence in chief, that he was not present at the meeting of the Regional Command when this act of sabotage was decided upon. In answer to the very first question in cross-examination (page 1971) he said he was present when the decision was taken. In the immediately ensuing answers he gave thereafter, he was seeking to say that he was confusing two different occasions and trying to justify what he had said. In giving his evidence at this stage he presented the appearance of a person who had made a serious blunder and was vainly seeking to find a way out. He was, we think it is clear, trying to extricate himself from what was a real difficulty resulting from a contradiction between what he had said in chief and his very first answer made under cross-examination. This view of the matter, however, has not led us to think that he was giving deliberately invented evidence when he said that he was present at the meeting which decided upon this act of sabotage. If he had been intending to give invented evidence it would have been very easy for him to have said, in giving his evidence in chief, that he had been present at the meeting which decided to blast the signal box at Duffs Road.

Another criticism was his evidence that he and Kasrils had fetched the dynamite required for the attack referred to in counts 7, 8 and 9 from Shallcross shortly before those attacks took place. The general tenor of his evidence was that the fetching of the dynamite was within a day or so

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of the actual attacks. When however he was confronted with the fact that, what was left of the hoard of dynamite at Shallcross was discovered by the police on the 14th October, 1962, somewhat more than a fortnight before the acts of sabotage referred to in counts 7, 8 and 9 were committed namely, 1st November, 1962, he then acknowledged that he must have been wrong in relating the date of the fetching of the dynamite so soon before the actual attack. Regard being had to the fact that the three pylons had first to be selected and that they had to be measured and that they were in areas fairly widely separated from one another and to the fact that it had been decided that all three attacks should take place simultaneously, it seems to us to be not unlikely that the dynamite was brought away to the garage of No. 6 accused a considerable time before the actual attacks. The actual preparation, too, of the charges of dynamite might well have been undertaken some time before the final preparations were made for the simultaneous triple attack. There is evidence that there was often a quite substantial gap between a decision of the Regional Command in approving of targets and the actual carrying out of the attack on the targets approved by the Regional Command. Another criticism of his evidence was that it differed from that of Solomon Mbanjwa with regard to the alleged handing over of a parcel of dynamite by him to Mbanjwa. It is clear that there is a discrepancy between the two versions. Mr. Thirion's claim is that one of these two accomplices is speaking the truth and that the other is either mistaken or lying. He was unable to suggest which was speaking the truth and which not.

Mr. Thirion attacked Mtolo's evidence (page 1981) that he had spoken to Solomon Mbanjwa about the attack involved in count 13 at a meeting of the Regional Command

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before the attack took place whereas Mbanjwa did not become a member of the Regional Command until very much later. An examination, however, of Mtolo's evidence on this page shows, it seems to us, fairly clearly that he immediately retracted any suggestion that he had discussed this attack with Mbanjwa in advance of its being made. He was also criticised for the evidence which he had given at the Rivonia trial with regard to the reasons why the attacks planned for the 14th October, 1962, had taken place on a Sunday having a direct relation to the conviction of Nelson Mandela whereas that conviction, it seems, took place only in November. It is clear enough that the five simultaneous attacks were planned in connection with the prosecution of Mandela and the most that Mr. Thirion could make of this point was that the evidence Mtolo had given at the Rivonia trial shows that his memory was not very reliable. As I have indicated, we have come to the conclusion that he had a remarkably good memory. It is manifest, however, that it is not infallible. In considering him to be a trustworthy witness in the manner I have indicated, we have taken into account not only the criticism which I have mentioned but certain others dealt with by Mr. Thirion, as well as the need for special caution in evaluating his evidence because he is an accomplice who, on his own admission, has served long terms of imprisonment for crimes involving dishonesty. We do not regard him as infallible but we do not overlook that a very considerable portion of his evidence has been admitted to be true by certain of the accused. We regard ourselves as justified in accepting his evidence where it appears to be cogent and there is proper corroboration, or else that the accused has given no evidence, or else has given no evidence which can properly be regarded as sufficient

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to raise a reasonable doubt. As to the membership of No. 3 accused, I am continuing with the case of No. 3 accused, of the technical committee, No. 3 accused says that he had no knowledge of how to prepare initiating powders until mid-December, 1962. Ganassen Naicker, who is known as Coetzee Naicker, says that he attended a meeting of the technical committee, which included No. 3 accused, in Naidoo's office at the beginning of the second half of 1962. This witness, an admitted accomplice, made a good impression on us when giving evidence. Mtolo said that No. 3 accused and he together prepared the petrol bombs that were fired for the first series of attacks in October/1962. He also says that No. 3 accused was instructed to prepare the initiating powders for the attacks of sabotage referred to in counts 7, 8 and 9 and that he got those initiating powders from No. 3 accused. We are satisfied that No. 3 accused was not speaking the truth when he denied this evidence. Perumal's evidence confirms that No. 3 accused was on the technical committee and, indeed, No. 3 accused admits being present at demonstrations of petrol bombs in the Mayville area, to which that witness referred. One of these demonstrations Perumal said, was conducted by No. 3 accused. Initiating powder was necessary for the petrol bombs used in respect of count 1 to which accused No. 3 has pleaded guilty. We accept Perumal's evidence that the bomb required for this count was made up in the room of No. 3 accused. We find accused No. 3 guilty on the second alternative charge of aiding the commission of the acts of sabotage referred to in counts 3, 4 and 5 and counts 7, 8 and 9. I have already indicated that we believe that he falsely denied the complicity of accused No. 2 in certain acts of sabotage and we are fully persuaded that he falsely denied that certain exhibits, such as

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31.C.17 and 31.C.19 were found at premises which he had occupied. Lieutenants Prins and Steenkamp gave us the impression of being not only honest but very careful witnesses and we accept their evidence in preference to the evidence of the accused. We have no doubt, too, that Warrant Officer Schoon was speaking the truth about the finding of the match heads and that No. 3 accused's denial of this was false. His evidence was unsatisfactory in a number of other respects as an examination of it will reveal. One aspect of it will be dealt with in considering the case with respect to accused No. 19, which I shall do immediately. Whilst we consider the probabilities to be very great that No. 3 accused assisted in the preparation of the initiating powders required for committing the acts of sabotage referred to in other counts than those upon which we have found him guilty, we have decided, without going into the details, to find him not guilty, and we do find him not guilty on count 6, on counts 10 to 16, on count 18, on count 24 and on count 27. I add here that the State did not seek his conviction on counts 2, 19, 21, 22, 23 and 26. He is found not guilty on those counts as well.

I now deal with accused No. 19. The pointing out by this accused, at night time, of the spot where a tin was found as a result of the pointing out, containing 102 sticks of dynamite on the evening of the day of his arrest is, we are satisfied, regard being had to the evidence generally, of Coetzee Naicker's evidence in particular, and the absence of any evidence from the accused himself, as being consistent only with his having had a hand in putting the tin there well knowing what its contents were. We reject as absurd the evidence of accused No. 3 that No. 19 accused did not know what was buried there. No. 3 accused's evidence

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that he took No. 19 accused to the spot where the full tin was found whilst clearly involving No. 19 accused with knowledge, we are satisfied, was an inperfect account of what happened. Stephen Seshemane said that it was decided at a meeting at Kloof that No. 19 accused together with No. 18 accused should assist in removing the dynamite to another spot. No. 19 accused was, at the time, a member of the technical committee as testified to by Coetzee Whicker whose evidence we regard as being confirmed by the evidence of No. 3 accused in involving No. 19 accused as far as he did as well as by Stephen's evidence. The State has abandoned all charges against No. 19 accused except count 28. We find him guilty on count 28 with respect to 102 sticks of dynamite. On all other counts he is found not guilty.

I now deal with accused No. 4. He has pleaded guilty to counts 2, 3, 4, 6, 7, 8, 9, 11, 12, 21, 25 and 26 to 28. With respect to all but the last his plea is a plea of guilty to the main charge. We find him guilty on count 28 and also on the other counts to which he has pleaded guilty, on the main charge. We also find him guilty on count 5. There is no doubt regarding his complicity on that count. He was, admittedly, a party to authorising it. We have already found that the offence was proved by competent evidence aliunde.

Before proceeding any further it is necessary to come to a decision regarding the applicability or otherwise of section 381(7) of the Code which reads thus:

> "When a member of an association of persons, other than a corporate body, has, in carrying on the business or affairs of that association or in furthering or in endeavouring to further its interests, committed an offence, whether by the

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performance of any act or by the failure to perform any act, any person who was, at the time of the commission of the offence, a member of that association, shall be deemed to be guilty of the said offence, unless it is proved that he did not take part in the commission of the offence, and that he could not have prevented it: Provided that if the business or affairs of the association are governed or controlled by a committee or other similar governing body, the provisions of this sub-section shall not apply to any person who was not at the time of the commission of the offence a member of that committee or other body."

It was submitted by Mr. Gurwitz that it was not intended, by this subsection, to deal with an organisation existing solely to commit criminal acts. He pointed out that the only way in which a member of an association formed to commit crimes could prove that he could not have prevented the commission of a particular crime by some member of the association is to take steps which would result in the destruction of the organisation, for example, by revealing its plans and its members to the police and that its very destruction would result in his ceasing to be a member. Regard being had to its context in the section I do not think that there can be much doubt that it was designed to deal with offences committed as it were, incidentally, in the course of carrying on the business or in the furthering of the interests of a lawful organisation. It appears in a section dealing mainly with corporate bodies and corporate bodies are required by law to have lawful objects. On the other hand, in Regina vs. Meer and others, 1958(2) S.A. at p. 175(N), it was held by Caney, J., that a company formed with apparently lawful objects but with the ulterior object of carrying out unlawful objects was,

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nevertheless, answerable under the relative provisions of the Code. Cf. Myandu and Ngcobo vs. Rex, 1943 N.P.D. at p. 87. It would be anomalous, indeed, if it were held that members of a lawful association could be made liable under this sub-section in the absence of proof of non-participation and inability to prevent the crime though committed by another and that members of an association formed for unlawful purposes should be better off. The fact that the burden of showing that he could not have prevented the crime would be virtually impossible to discharge is not a sufficient reason for holding that the sub-section does not apply to unlawful organisations. For such a misfortune the accused can have no one to blame but himself in being a member of an association whose objects are to commit criminal acts. Can it, however, be said that accused No. 4, by being a member of the Regional Command, was a member of a committee or other similar governing body within the meaning of the sub-section? Mr. Rees has argued that if the Regional Command was not such a committee or similar governing body then the main portion of the sub-section would cover the accused because the proviso would then not apply and the main part of the sub-section would, but I do not think that the State can rely on that, as an alternative. It had, in framing the third alternative count against accused Nos. 4 and 8 expressly relied on their being members of such a committee or similar governing body. Cf. R. vs. Limbada and Another, 1958(2) S.A. 481 (A.D.). I do not think that the Regional Command can be regarded as a committee of the members of Umkhonto we Sizwe. The rank and file of members had no say in the selection of the members of the Regional Command. It was said in MacIntosh vs. Pretoria School Board, 1908 T.S. at p. 874, that a committee "is a person or body to whom the discharge of certain duties is committed or delegated by another

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or others." It is to my mind clear that the Regional Command is not a committee of the Natal members of the Umkhonto we Sizwe in that sense at all. Was the Regional Command a similar governing body within the meaning of the sub-section? Umkhonto we Sizwe was an association having members largely unknown to one another, not only in Natal, but in various parts of the Republic. The Natal Regional Command had no control of any kind over the members of Umkhonto we Sizwe outside Natal. Nor does it seem at all clear that all the rank and file were aware even of the existence of the Natal Regional Command. The man they knew was Kasrils. The Regional Command was in no way representative of the members, nor were they leaders which the members had appointed or approved or in some cases even knew of. I take the view, then, that section 381(7) does not apply. On counts 10, 13, 14, 15, 16, 17, 18, 19, 20, 22, and 24 we have come to the conclusion that the verdict must be one of not guilty and it will be ordered accordingly. There is no corroboration of Mtolo and we find ourselves unable to say that the evidence given by accused No. 4 or by accused No. 8 was manifestly, that is, on its face, untruthful. As regards count 22, we find ourselves unable to say, on the admissions of accused Nos. 4 and 8 that they must have foreseen that there would be an attack on the Drakensberg Pers. Mtolo's evidence (page 1736) tends to show that the Regional Command did not know that the Nationalist Party offices and the Drakensberg Pers were in the same building. Accused No. 4 is found not guilty on counts 1 and 23. On these two counts no conviction was sought by the State.

It will be convenient now to deal with accused No. 8. It is clear from the evidence, including his own admissions, that he is guilty upon counts 2, 3, 4, 5, 6, 7, 8, 9, 11, 12, 21, 25, 26, and 27. On these counts he is found

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guilty in respect of the main charge. He is also found guilty in respect of count 28 in respect of which he has also admitted his guilt. For the reasons I have given with regard to accused No. 4, mutatis mutandis, accused No. 8 is found not guilty on counts 1, 10, 13 to 20 and 22 to 24.

With respect to accused No. 5, his conviction is sought by the State on counts 9, 11 and 21 only. Solomon Mbanjwa says that No. 5 accused was one of his section leaders and that his name was discussed by the Regional Command. So does Mtolo. He says that the Regional Command decided that Kisten, as leader of the Clairwood Group was to commit the act of sabotage referred to in count 11. No. 8 accused has testified that the Regional Command approved of the target which is the subject of count 11 and that the attack upon this target should be done by the Clairwood Group. Coetzee Naicker says that Kisten was with him in committing the act of sabotage referred to in count 9. I am dealing first with count 9. His saying that No. 5 accused looked like Kisten when he first referred to accused No. 5 in the witness box does not, we think, mean that there is any real doubt as to the identity of Kisten. It means that, as far as Coetzee Naicker could see from the witness box at the time, No. 5 accused was the same Kisten who accompanied him on this act of sabotage. The evidence of Mbanjwa and Mtolo makes it clear that the Kisten of the Clairwood Group is No. 5 accused and, on a further study of No. 5 accused, Coetzee Naicker was quite firm that No. 5 accused was the man. Coetzee Naicker did not have the best opportunities for getting to know the features of accused No. 5 but, to our way of thinking, it is very clear that he knew him as Kisten Moonsamy, also known as Zulu, and we are satisfied that it was No. 5 accused who took part in the act of sabotage

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referred to in count 9. On count 11 there is Mtolo's evidence that the Regional Command approved of this target and decided that it was for Kisten to attack it. There is no doubt that it was to No. 5 accused that he was referring. Added to this there is Mbanjwa's evidence that, after receiving a report from Kasrils that the act had been committed, No. 5 accused, upon being asked about it, informed him that it had been committed by him, No. 5 accused. Mbanjwa, like Mtolo, was subjected to very long and pertinacious and skilful cross-examination and our view of him at the end of it was that he was a person who was giving substantially truthful evidence. As a witness he was certainly as impressive as Mtolo. Nothing that accused No. 5 has said has operated to diminish the favourable impression we formed of Mbanjwa as a witness. No. 5 accused was a lying witness. We accept the evidence of Lieutenant Prins that the entire act of pointing out by No. 5 accused in relation to the act of sabotage referred to in count 21 was performed by No. 5 accused of his own volition and that there was no pointing out as he at times suggested, of places by the police to him. He was prepared, on his oath, to say without any apparent shame and quite deliberately, exactly opposite things. His whole story about having had his lunch with his friends in the clearing within the palms near the manhole was completely at odds with his earlier evidence that he had first come to know about the manhole when he was taken there by the police on 21st July, 1963. As we are satisfied beyond all reasonable doubt that Mbanjwa was speaking the truth when he said that No. 5 accused had admitted the acts of sabotage on the pylon near Umlazi bridge, we find accused No. 5 guilty on count 11. As regards count 21 it will, I think, be clear from what I have already said in dealing with accused No. 5, that his

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pointings out at the Clairwood race course cannot reasonably be regarded as being consistent with anything but his own participation in the commission of this act of sabotage. We accordingly find him guilty on count 21. The findings of guilty in respect of counts 9, 11, and 21 are in respect of the main charge. On all other counts we find him not guilty.

I shall deal now with accused No. 7. His conviction is sought only on counts 11 and 21. We have come to the conclusion, applying the considerations which I have mentioned with respect to the approach to evidence of pointing out tendered in terms of section 245(2) of the Code, that the taking of the police by accused No. 7 to the pylon and the bridge to which count 11 refers, pointing out the base of the pylon and bridge, is not reasonably consistent with the accused having been a mere passer-by who saw the damaged pylon from the bridge. The taking of the police to the spot by the accused is, in the absence of some other explanation from the accused, in our opinion, reasonably consistent only with the view that the knowledge which he was imparting to the police by the pointing out, was due to his having participated in the commission of the offence. We consider that there is no reasonable possibility that the police would have accompanied him there merely to be shown, for example, a pylon at which the accused had seen some undetermined person or persons congregated many months before at the time that the explosion occurred. Mutatis Mutandis, we regard the same considerations as applying to the evidence on count 21. We accept the relative police evidence on both counts which, indeed, the defence admits ought to be accepted. We find accused No. 7 guilty on counts 11 and 21 in respect of the main charge. We find him not guilty on all the other counts.

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I now deal with the case of accused No. 6. His conviction is sought only upon counts 7 to 13, 19, 21, 22, 25 and 27 apart from count 28 to which he has pleaded guilty. We are satisfied , upon a consideration of his own evidence, not omitting his admission that he knew that No. 4 accused and Mbanjwa who were members of Mkhonto we Sizwe by October, 1962, and the evidence of Mbanjwa, No. 4 accused and Mtolo, respecting what took place in the garage, establishes beyond reasonable doubt that accused No. 6 assisted in the preparation of the charges required for the commission of the acts of sabotage referred to in counts 7, 8 and 9. We find him guilty upon those counts in respect of the second alternative charge. We also find him guilty on count 28 to which he has pleaded guilty. As regards the remaining counts, we find ourselves unable to hold that it has been established beyond reasonable doubt that, apart from possessing explosives as alleged in count 28, he participated in any of the particular acts of sabotage to which those remaining counts refer. On all counts other than counts 7, 8 and 9 and 28, we find accused No. 6 not guilty.

I deal now with the case of accused No. 10. He has pleaded guilty to counts 6, 23 and 26 in respect of the main charge and we find him guilty on those counts in respect of the main charge. It was not disputed and, indeed, it is clear that he must be found guilty also on count 5 provided that it was proved, as we have held it to be proved aliunde, that the act of sabotage referred to in this count was actually committed. He is found guilty on count 5 in respect of the main charge. The only other count on which the State asks for a conviction is count 24 but we do not think that there is proof beyond reasonable doubt of his guilt on this

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count. On all counts other than counts 5, 6, 23 and 26, accused No. 10 is found not guilty.

I now deal with accused No. 11. The State seeks a conviction against him only in respect of counts 5, 6 and 27. It was not disputed by the defence that accused no. 11 must be found guilty on count 5 if that offence was proved aliunde. His guilt on this count is established by the evidence of Stephen Seshemane corroborated by the pointing out to Warrant Officer Malan. His guilt on count 6 is similarly established as is also his guilt on count 27. We find him guilty on counts 5, 6 and 27 in respect of the main charge. On all other counts we find him not guilty.

I now deal with accused No. 12. No. 12 accused has pleaded guilty, in respect of the main charge, to counts 26 and 27. We find him guilty on those counts in respect of the main charge. The only other count on which the State seeks a conviction against him is count 22. Mutatis mutandis having regard to similar considerations which apply to accused No. 7, we regard as applying with respect to the pointing out of the centre of the explosion at the premises of the Nataller by accused No. 12, and we find him guilty on count 22. I add that although there were some unsatisfactory features in Mvulu's evidence on this count, we did not get the impression that his implication of No. 12 accused was unreliable. We have, however, found him guilty by reason of the inference which we regard as the only reasonable inference in the circumstances, arising from his pointing out of the centre of the explosion as a result of his taking the police to the spot. On all counts other than counts 22, 26 and 27, accused No. 12 is found not guilty.

I now deal with the case of accused No. 13.

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His conviction is sought on counts 2 and 13 only. As regards count 2, upon analysis of the relative evidence we have come to the conclusion that there is insufficient corroboration of Mbanjwa's evidence implicating the accused on this count. With regard to count 13, Mbanjwa's evidence implicatingaccused No. 13 on this count is corroborated by the evidence of Lieutenant Prins and Sergeant Grobler. We do not propose to rely on the evidence as to the pointing out by this accused underneath the railway tracks between the two pylons. In our view, however, the admitted taking of the police by No. 13 accused to the relative pylon was consistent only with the view, that in the knowledge that he was imparting to the police by pointing out, was due to his having participated in the offence, in the absence of any innocent explanation of his so doing which could reasonably be true. In our opinion there is none. I add that the accused's evidence was very far from satisfactory and that we prefer Mbanjwa's evidence to his. Accused No. 13 is found guilty on count 13 in respect of the main charge. On all other counts he is found not guilty.

As regards accused No. 14, the only counts on which his conviction is sought are counts 2 and 13. As regards count 2 we have no hesitation in accepting the evidence of Lieutenant Prins as to what was pointed out by this accused in preference to the evidence of the accused himself. That pointing out, for considerations mutatis mutandis similar to those which have applied to the pointing out by accused No. 13 in respect of count 13, is in our view not reasonably consistent with anything but the participation of accused No. 14 in the commission of this offence. As regards count 13, mutatis mutandis for similar reasons, we find accused No. 14 guilty on count 13, that is for reasons similar to those upon

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which we have found accused No. 13 guilty on that count. The evidence of accused No. 14 was, it is clear, far from satisfactory and we preferred Mbanjwa's evidence to his. We find him guilty on counts 2 and 13 in respect of the main count and not guilty on all other counts.

I deal now with accused Nos. 15 and 16 together. The State seeks their conviction in respect of counts 2 and 13 only. We find that the evidence against these two accused on count 2 is insufficient for a conviction. On count 13, however, we find them guilty for the reasons mutatis mutandis which operate as regards accused Nos. 13 and 14. Neither accused No. 15 nor accused No. 16 gave satisfactory evidence and we prefer Mbanjwa's evidence to theirs. Both these accused are found guilty on count 13 in respect of the main charge. On all other counts we find them not guilty. In case I have not made it clear, I add that in convicting accused Nos. 14, 15 and 16, we ignore the evidence referring to a pointing out underneath the tracks between the two pylons as we did in convicting accused no. 13.

I now deal with accused No. 17. The State seeks a conviction against him only on count 27. Stephen Seshemane gave, in our opinion, entirely satisfactory evidence involving this accused on count 27. We prefer his evidence to that of accused No. 17 who, we find, falsely denied the pointing out of the back of the signal box to Lieutenant Prins. We are satisfied that his taking Lieutenant Prins right up to this signal box (he was, obviously, speaking the truth when he said, at first, that whilst on the bridge with the police he did not point out the signal box to them, though it was visible from there and we disbelieve his later retraction of this) and the pointing out as testified to by Lieutenant

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Prins, was consistent only with his imparting to Lieutenant Prins a knowledge by pointing out due to his actual participation in the offence. We find accused No. 17 guilty on count 27 in respect of the main count. On all other counts we find him not guilty.

I deal now with accused No. 18. Conviction is sought against him only on count 28. Although it was possible, as admitted by Lieutenant Steenkamp, that a person could be directed to the bush where the explosives were and there is evidence that accused No. 18 had to take his bearings in order to locate the spot where the tin containing 102 sticks of dynamite had been unearthed, we think that nobody could have gone regard being had to the nature of the area, so unhesitatingly to the spot as described by the police merely on information given to him by someone else. Furthermore, it was he who took the police there. The police already knew of the spot. The tin containing the 102 sticks of dynamite had already been unearthed. In our view, the fact that he took the police there was consistent only with his imparting to the police his own knowledge of the existence of what had been buried in the hole. Seshemane's evidence that he had been instructed, together with accused No. 19 to move the dynamite, the fact that the dynamite was moved, that Seshemane's evidence was corroborated by the finding of a key in No. 18 accused's possession which unlocked the door of the room at Kloof where Seshemane says the instructions were given , all tend very strongly to show that he, like accused No. 19, had a hand in putting the dynamite where it was found. Mtolo's evidence was that accused No. 18 became a member of the Regional Command in July 1963, confirming the evidence of Stephen Seshemane on this point. In our view the probabilities are so strong, regard

being had to all the evidence that he and accused No. 19 carried out the instructions given to them to remove the dynamite, as to exclude all reasonable possibility that his knowledge of the buried hoard was not due to his having taken a hand in burying it there. We find him guilty on count 28 in respect of the 102 sticks of dynamite. On all other counts we find him not guilty.

THE STATE NOW APPLIES FOR THE DISCHARGE OF ALL THE WITNESSES WHO WERE ACCOMPLICES AND GAVE EVIDENCE ON BEHALF OF THE STATE.

THE DEFENCE DOES NOT ADDRESS THE COURT ON THIS APPLICATION:

MILNE, J.P.:

The witnesses, Solomon Mbanjwa, Stephen Seshomane, Brian Chaitow, Bruno Mtolo, Devandran Perumal, Canassen Naicker, otherwise known as Coetzee Naicker, Michael Mvulu and Michael Musuku are hereby discharged from liability to prosecution for any of the offences referred to in counts 1 to 28.

THE COURT ADJOURNS TO 1030 A.M. ON 28th FEBRUARY, 1964.

ON 28th FEBRUARY 1964 AT 10.30.A.M.

APPEARANCES AS BEFORE

COUNSEL FOR THE DEFENCE, MESSRS. GURWITZ, THIRION AND WILSON ADDRESS THE COURT ON MITIGATION OF SENTENCE

THE COURT TAKES A SHORT ADJOURNMENT

MILNE, J.P.

Justice is a distinctively human concept and does not belong to the animal world. All men by their nature are lovers of justice. It is because injustice is intolerable that humanity, over the centuries, has developed systems of law designedto secure that there will be, as far as possible, justice between man and man and between man and the community to which he belongs. What civilised people, I think, regard as ideal is a legal system where men get their proper deserts. It has been represented that you, the accused, have committed acts of sabotage in furtherance of your aim to avoid what you consider to be unjust and that you regard it as unjust that the non-white members of our community have no vote in the Parliament which makes our laws. There are, however, others who believe that some non-white peoples have not yet reached in their evolution an ability to maintain, on their own, a civilised way of life and who believe that it would produce disaster and the most grievious injustices, not merely to some portion of the community, but to the whole community, to hand over political control to people whom they consider have not yet acquired the competence to exercise it. It is no part of my duty to suggest which view is the correct one. What is clear is that a majority of the electorate, holding the beliefs which I have just mentioned, in this country ever since it became a political unit, has always put and kept in power governments committed to keeping

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political control in thehands of that electorate. Among the laws e nacted by the duly elected Parliament is section 21 of Act No. 76 of 1962, commonly known as the Sabotage Act. By that law Parliament enacted that sabotage could be punished as for treason which can be punished by death and that the minimum punishment should be five years' imprisonment. Knowing this law, each one of you, the accused, has deliberately set out, in definace of Parliament and the law, to seek by sabotage to overthrow the foundations of Parliament. I have been asked to regard it as a mitigating factor that you believed that you were serving the cause of justice. Whilst I accept it that you acted as you did because you believed it would serve that cause, nothing can be plainer than that Parliament's intention was to enact that so far from serving the cause of justice, acts of sabotage are calculated to destroy it. To commit these acts deliberately well knowing the penalties, may be said to show your bravery, but you did not commit these acts openly. You did them in such a way that if you could you wouldescape having to pay the penalty. You have been found out but not before Parliament had had to devise drastic measures - I refer to the 90-day detention provisions - to ensure that you would be found out. Though all the acts of sabotage are serious some of the offences I regard as being intrinsically less serious than others and, in deciding what sentences are appropriate, I have taken that into consideration. I have also taken into account the comparative youth of accused No. 2 and accused No. 1, as well as accused Nos. 12 and 19. I have also borne in mind the special representations that were made on behalf of No. 18 accused. As regards accused No. 8, he is manifestly a capable man and it is cleaf that he exercised the functions of a capable leader in this organisation.

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The sentences that I pass are as follows:-

Accused No. 1: The sentence that I pass on you is that you be imprisoned for 15 years, all the counts on which you have been convicted being taken as one for the purpose of sentence.

Accused No. 2: The sentence which I pass upon you is that you be imprisoned for ten years, all the counts being treated as one for the purpose of sentence.

Accused No. 3: The sentence which I pass upon you is that you be imprisoned for 16 years, all the counts being treated as one for thepurpose of sentence.

Accused No. 4: The sentence which I pass upon you is one of 20 years imprisonment, all the counts being treated as one forthe purpose of sentence.

Accused No. 5: The sentence which I pass upon you is one of 14 years imprisonment, all the countsbeing treated as one for the purposeof sentence.

Accused No. 6: The sentence which I pads upon you is also one of 14 years imprisonment, all the counts being treated as one for the purpose of sentence .

- accused.....

Accused No. 7: The sentence which I pass upon you is one of 12 years imprisonment, both counts being treated as one for the purpose of sentence.

Accused No. 8: The sentence which I pass upon you is one of 20 years imprisonment, all counts being treated asone for the purpose of sentence.

Accused No. 10: The sentence which I pass upon you is one of 10 years imprisonment, all counts being treated as one for the purpose of sentence.

Accused No. 11: The sentence which I pass upon you is one of 10 years imprisonment, all counts being treated as one for the purpose of sentence.

Accused No. 12: The sentence I pass upon you is one of 10 years imprisonment, all counts being treated as one for the purpose of sentence.

Accused No. 13: The sentence which I pass upon you on count 13 is one of 8 years imprisonment.

Accused No. 14: The sentence which I pass upon you is one of 10 years imprisonment, both counts being treated as one for the purpose of sentence.

- accused.....

Accused No. 15: The sentence which I pass upon you in respect of count 13, is one of 8 years imprisonment.

Accused No. 16: The sentence which I pass upon you is one of 8 years imprisonment. The sentence is passed in respect of count 13.

Accused No. 17: The sentence which I pass upon you is one of five (5) years imprisonment. The sentence is passed in respect of count 27.

Accused No. 18: The sentence which I pass upon you is one of 8 years imprisonment. The sentence is passed in respect of count 28.

Accused No. 19: The sentence which I pass upon you is one of 8 years imprisonment , that is in respect of count 28.

MR. THIRION APPLIES TO THE COURT FOR LEAVE TO APPEAL TO THE APPELLATE DIVISION ON BEHALF OF ACCUSED NOS. 5, 7 and 18.

MR. WILSON APPLIES FOR LEAVE TO APPEAL TO THEAPPELLATE DIVISION ON BEHALF OF ACCUSED NOS. 13, 14, 15, 16 and 19.

APPLICATION FOR LEAVE TO APPEAL IS OBJECTED TO BY MR. REES ON BEHALF OF THE STATE.