Act F(3) alleges that:

During April 1976 and at or near Oshoek, the accused crossed the border of the Republic to Swaziland in order to arrange funds for the ANC. He used another person's passport.

This allegation is found proved by the evidence particularly of Victor Sithole with reference to the date on the passport and the evidence of Joseph Tseto that he did not use the passport on that date, and the documentary evidence about these documents which is before us. The fact that accused no.6 elected not to contradict or gainsay these allegations is also a factor to be taken into account and we have come to the conclusion that that Act has been proved satisfactorily on the totality of all the evidence against accused no.6.

Act F(4) alleges as follows:

During or about the period July to September 1976 and at or near Highlands North, Johannesburg, the accused through Joseph Tseto, bought two Combis to be used for transporting purposes by the ANC.

The Combis were used by the persons from the terrorist den, but it cannot be said that they were exclusively so used. Alpheus Ramokgadi said that the Combis were never let. His knowledge would however not have been such as to justify such a statement. The evidence of Alfred Mohlaka discussed with accused no.2 may also be relevant to this Act. On the totality however we hold that this Act has not been sufficiently proved.

Acts F(5), F(6) and F(7) were not proved and the State did not request a finding on these issues, and I think corcorectly so.

Act F(8) the allegation is:

During or about the period August 1976 to December 1976 and at or near Alexandra in the district of Randburg, the accused rendered assistance to terrorists by organising transport for them.

The evidence to which I have referred is conclusive on this Act; particularly important is that accused no.6 sent Norman Shabalala to Swaziland on the 29th of November, 1976, which culminated in the Bordergate incident and the subsequent finding of the bloodstains in the Combi. The evidence of the woman, Martha Tseto, I have dealt with is conclusive on this point. (10)

Act F(9) was abandoned by the State. Act F(10) alleges: During or about the period January 1976 to March 1976 and at or near Alexandra in the district of Randburg, the accused sent and received secret messages inside cigarette boxes and/or books to and from the ANC officials in Swaziland, to further the objects of the conspiracy.

The evidence to which I have referred is conclusive on the point. This rests on the totality of evidence admissible against accused no.6, and particularly that of the witness, Victor. From these facts the intent as alleged in the main count is in our view proved. The military training of Joseph Tseto with the knowledge of accused no.6 is conclusive on that point. (20)

I must now consider the evidence against accused no.7. It rests mainly on the evidence of Abel Mthembu, Timothy Mahlangu and Victor Sithole.

Act G(1) alleges:

During the period June 1962 to January 1963 in the Republic and/or elsewhere to wit: China, the accused underwent military training. (30)

The /...

The witness Abel Mthembu, who was quite a personality, testified in English. He was an active and prominent member of the ANC who went with accused no.7 to China during 1961, to receive military training to start an armed struggle in South Africa by the ANC. This is now some 17 years ago. The Act was made with retrospective effect to the 27th of June, 1962. If one makes a calculation from the very approximate dates he gave then the State's calculation is about three months before the 1962 Christmas season. On all the evidence we are not satisfied that the period of the training was subsequent to the 27th of June, 1972. As he was the only witness on this Act, it has not been proved to our satisfaction.

Act G(2) which alleges that he was the head of the ANC in Johannesburg has not been established at all.

Acts G(3) and (4) allege as follows:

G(3) During or about the period August to September 1976 and at or near Soweto in the district of Johannesburg, the accused gave political books and pamphlets such as "Sechaba" to Timothy Bhago Mahlangu to conceal.

G(4) During or about June 1976 and at or near Soweto in the district of Johannesburg, the accused attempted to arrange meetings between himself and the student leaders of the riots through Timothy Bhago Mahlangu.

The evidence of Timothy was very short. He is a 19 year old Black youth. Accused no.7 stayed at the house next to his grandfather's with whom he had stayed at Mafulo location, Johannesburg. He was attending Morris Isaacson High School during the unrest. Accused no.7 asked him if he could find him student leaders. He was a newcomer to the school and could not comply with the request. Accused

no.7 handed him the book "Sechaba" to read. It is the official organ of the ANC. He occasionally slept at the house of accused no.7 where he left the book in question. Accused no.7 did not discuss the book with him. This book clearly urges persons to engage in armed struggle against the South African Government.

On an occasion accused no.7 gave him some books wrapped in brown paper to keep at his house. He did not unwrap the books and it is not known what these books were. There is no evidence to give any idea for what reason accused no.7 wished to see the student leaders. He had told accused no.7 about the happenings at the school. From this it is clear that this allegation has not been proved. The request to speak to the leaders has no probative value. The State's argument is that the handing of the Sechaba to the witness to read is an incitement. There is just no such allegation in the indictment under which such an argument can be entertained. It was further argued that the documents found at the house of accused no.7 on the 27th of February, 1976, were in his possession and that the presumptions of the Act therefore apply. This argument cannot succeed for two reasons. Firstly it was noted that all the accused had been in custody in terms of Section 6 from the 5th of January, 1976, onwards. The books were found at the house of accused no.7 on the 27th of February, 1976. Some of these had his name on them showing that they must have been in his possession at some stage, but it does not apply to the others where the name of the accused is lacking. The lapse of some six weeks from the date of his detention until they were found at his home, accepting the doctrine of recent possession, creates a degree of uncertainty which must be decided in favour of

the accused. Secondly, there is no act alleged which relates to the possession of these documents. The contents of these documents show as I have said an ultra-leftist connotation. It even includes a document which refers to the trial of the Baader Meinhoff gang in Germany, and there is also a card from the ANC in London. This relates only to possibilities but there is not sufficient proof of this Act.

On the allegation G(5) there is no allegation on which any finding can be made. Act G(6) alleges the following:

During or about the period October 1976 to November 1976 and at or near Alexandra in the district of Randburg, the accused attended meetings together with ANC terrorists to wit: Martin Ramokgadi, Alois Manci, Henry Makgothi and Mosima Sexwale where the violent overthrow of the Government of the Republic was discussed.

This relates to the occasion when accused no.7 was allegedly picked up by Alpheus Ramokgadi on the corner of Corlett Drive and Louis Botha Avenue, and then driven to Nelspruit together with the persons named. This cannot possibly succeed. Firstly what accused no.6 had told Alpheus Ramokgadi about accused no.7 is not admissible evidence against accused no.7, but only as against no.6, who made the statement at the discussion. At the hearing it was so ruled. Secondly the identification of accused no.7 as the person so conveyed in the court is of no probative value. The whole exercise about the letter allegedly written by John Nkadimeng and the evidence of the handwriting experts has therefore become irrelevant.

In our view on the case against accused no.7 the

State/...

State cannot succeed.

Next the evidence against accused no.8 must be considered. These acts relate to events in Sekhukuniland. I shall deal with the evidence under the alleged acts.

Act H(1) reads:

During October 1976 and at or near Mothopong in the district of Sekhukuniland, the accused attempted to procure recruits for the ANC and/or for military training through Mamagase Jack Nkwane Sibeyi.

The evidence of Sibeyi, an old man, deals with this allegation. He is an illiterate tribal type of Black man. He met accused no.8 at Bopedi where the witness lived. The statement which he attributed to no.8 is that no.8 had asked him to get him standerd 6 boys to be taken without the knowledge of their parents to a school in Gaberone or Swaziland where they would be trained as soldiers to fight for Africans. This request was refused because he disapproved of the proposal put to him by accused no.8. He was asked by accused no.8 whether he knew of someone else who would be more receptive to his suggestion. He gave him the name of Sekgotle and Phakeng. The witness subsequently spoke to Phakeng in connection with the contemplated schooling of the children. The witness used the word "congress". On a subsequent occasion he met accused no.8 again when Sekgotle arrived on the scene. Accused no.8 repeated his request to Sekgotle whose reaction was that he would think about it.

The witness Stephen Lekgoro was with accused no.8 on that occasion. These facts raise the problem whether they are sufficient to establish an attempt to procure recruits. In between the incitor and the incitee is the decision of the intermediary. The leading authority on this point is still

the judgment of the Appellate Division in R v Ndhlovu 1921 AD 485 from which I quote the relevant passage on page 490 from the judgment of Solomon J.A. which reads as follows:

> "No doubt an incitement to commit a crime is an act done towards its commission; and if the crime is committed, it would have been one of the series of acts which culminated in its consummation. However, nothing had been done by the person incited to carry out his instructions. The great weight of authority is in favour of holding, and I venture to think rightly so, that the mere incitement is too remote from the contemplated crime to constitute an attempt to commit it."

On this test the attempt has not reached the consummation of the crime. In my view these were only acts of preparation. See in this connection Burchell and Hunt, Volume 1, page 381, and also S v Nkosiyana 1966(4) S A 655 and particularly at 658.

The State cannot for these reasons succeed on this Act.

Acts H(2), (3) and (4) relate to the evidence of Stephen Lekgoro. He testified that accused no.8 had requested him to get recruits for military training, that accused no.8 possessed a machine gun and that he aided accused no.1 in giving him military training. Against the background of the prevailing circumstances at the house of no.8 at that stage there are many probabilities supporting his testimony. He was, however, a most unsatisfactory and unreliable witness. If I cast my mind back and think about the evidence he gave about how a briefcase was in one place and then at another place all at the same time his evidence has no probative value.

In our /...

In our view because he is a single witness to these events no reliance can be placed thereon, and the State therefore cannot succeed on these facts which rely exclusively on this witness.

Act H(5) alleges:

During or about the period December 1976 to January 1977 and at or near Apel in the district of Sekhukuniland, the accused harboured or directly or indirectly rendered assistance to terrorists to wit: Mosima Sexwale, Naledi Tsiki and Simon Samuel Mohlanyaneng by making his home available to them as a base for their operations. - The last one being of course accused no.4.

In the Further Particulars supplied it was stated that "the terrorists stayed at his house".

The relevant evidence is that of old Solly who testified that he on occasions accompanied by accused no.6 had driven accused no.2 and no.4 to the house of no.8. On both occasions no.2 had no.4 were left at the house of accused no.8. On one of his return journeys he picked up accused no.1 not far from the house of accused no.8. The evidence of the taxi driver Abinar Mathabe was that he had taken no.1 to the house of no.8 and also he left accused no.1 at the house of accused no.8.

The witnesses Aaron Debeila and Motale Mantati testified that no.1 gave them military training which I have already dealt with. Accused no.1 was accompanied on that occasion by Elleck, the son of accused no.8. After the military training accused no.1 and Elleck walked in the direction of the house where accused no.8 stayed and where Elleck stayed with his parents. About the military training it was said that accused no.8 must not know about it.

The following was recorded by agreement:

On Monday the 3rd of January 1977, Constable J.G. Raath, Sergeant M. Modipa, Sergeant Mashigo, Sergeant Mabunda and Constable P. Modipa went at about 8 p.m. to a village in Apel, Sekhukuniland. Raath and P. Modipa waited outside the village and M. Modipa, Mashigo and Mabunda went into the village to the house of Petrus Nchabeleng (accused no.8). In the yard in front of the house Sergeant Modipa found Naledi Tsiki, accused no.2, who identified himself as "Chris". Sergeant Modipa took accused no.2 to Constable Raath. At (10) the house of accused no.8 on a bench. Sergeant Modipa found a blue denim jacket and a portable radio (Exhibit 102). He took these objects to Constable Raath. In the jacket, Constable Raath found the following:
A reference book in the name of Patrick Mandla Dumeni Magagula and bearing a picture of accused no.2, a R10 note and a handgrenade which was wrapped in wrapping-paper and it is admitted that all these items belonged to accused no.2.

Lieutenant De Waal testified about his discussion with accused no.8 prior to the arrest of accused no.4, with which (20) I have already dealt under the evidence against no.4. Accused no.8 said the following to him:

> "Hy het aan my gesê dat hy gedurende daardie selfde dag in die vooroggend het hy sy seun as gids saamgestuur met beskuldigde no.4 na die kraal van beskuldigde no.9. Aangesien beskuldigde no.4 nie die gebied daar geken het nie, het hy gesê dat hy sy seun wat wel die gebied daar ken saamgestuur het as gids. Hy het ook aan beskuldigde no.4 - dit is nou beskuldigde no.8 het aan beskuldigde no.4 'n leertas oorhandig met (30) sekere vuurwapens daarin."

This /...

This is not a statement in a crisis situation where the person concerned realised that the game was up. On this occasion accused no.1 was with Lieutenant De Waal and it was suggested to him that accused no.1 had told him about the firearms and not accused no.8. He persisted that accused no.8 had told him about the "leertas".

Considering these facts one must have regard to the statement that accused no.1 was left at the house of accused no.8 and he was later seen walking towards the house of accused no.8 with the son. When he was fetched by accused no.6, as testified in that special context, he was not at the house of accused no.1. Accused no.4 was sent by accused no.8 to sleep at another hut. We are then left with the finding of accused no.2 at the house of no.8 with the overall containing the handgrenade in the house of accused no.8.

Having regard to the averment of a base for their operations where they stayed, there has not been sufficient evidence to establish that allegation. The facts fall short of what the State had undertaken to prove. No direct evidence was tendered on Act H(6) which alleged that no.8 had acted through his son Elleck.

The final Act H(7) alleges as follows:
During January 1977 and at or near Apel in the district of Sekhukuniland the accused supplied firearms and explosives to Simon Samuel Mohlanyaneng. - That being accused no.4.

This act is the statement by accused no.8 to Lieutenant De Waal which I have quoted in full to determine the context in which the words "leertas oorhandig met sekere vuurwapens daarin" must be understood.

In my view there is a marked difference between "oorhandig"

as/...

as opposed to "supply". The one has a more sinister connotation than the other, depending on the circumstances. It was contended by the State that the indictment must be amended at this late stage to cover the offence proved, as it cannot possibly prejudice the defence because from the previous hearing the defence knew what the State's case was all along.

In my view it would prejudice the accused if I were to amend the indictment at this stage. It is very much a borderline instance and this case gave us perhaps more problems than any of the other accused. The benefit thereof must go to the accused.

Accused no.9 is also a resident in Nebo, Sekhukuniland. The evidence against this accused was given by the brothers Matsimela and the witness Jan Maleka and Johannes Sepheu and also the father of accused no.9. I shall start with the evidence of the father, Andos Diale.

He was an old man and I let him sit down whilst giving evidence. On the relevant occasion they were at a beer drink. He was himself apparently far gone when the discussion about war took place and his son, accused no.9, said there is war on and he wanted soldiers. His evidence is of little if any real value. He is a senile old man who was intoxicated on this occasion.

Save for some general evidence by Lieutenant De Waal and Sergeant Zeelie who refer to him without necessarily implicating him, the evidence can conveniently be considered under the separate acts.

Act I(1) reads as follows:

During December 1976 and at or near Masemole in the district of Nebo, the accused incited and/or instigated and/or advised

and/or ...

and/or encouraged and/or attempted to procure John Mabupudung Matsimela to undergo military training.

John Matsimela testified about the discussion he had had with accused no.9 on the occasion when he was selling vegetables alongside the road and no.9 came past on his bicycle and stopped to buy an orange. The witness after having sold him an orange then sat down under a tree reading a newspaper. He and no.9 had a discussion while no.9 apparently was enjoying his orange. It was at that stage that the relevant conversation took place. The newspaper had reports concerning the riots and they had a discussion about what appeared in the newspaper. Accused no.9 told him that due to White oppression some students had gone overseas for military training. No.9 said he wanted students but did not say for what purpose he wanted them, because he was not alone in his work. When the witness questioned him further no.9 said he was in a hurry and left. The witness agreed that the discussion was a result of what had appeared in the newspaper. After this discussion he had not seen accused no.9 again. This evidence certainly does not support the allegation of incitement alleged in the indictment.

The evidence of his brother Elliot refers to the Act I(2), the wording of which is the same. The witness Elliot testified about a discussion he had had with accused no.9 on the occasion when accused no.9 came to their home to have a drink of water. Present was the witness, his brother John and his father. After his brother and father had left he had a private discussion with accused no.9. The witness had a copy of the Rand Daily Mail with him and the news about Rhodesia contained therein was discussed between the two of them./...

of them. The witness told accused no.9 that the Rhodesians wanted majority rule with which accused no.9 agreed. The Rhodesians were still arguing about it and that it might result in war, to which the witness replied that the Blacks can't wage war because they have no weapons. It was in reply to this question that accused no.9 said that even South African Blacks could go overseas for military training and that he could arrange it. The witness replied that such a possibility did not apply to him because he wanted to continue his schooling. Accused no.9 then told him that the military training is a secret and if he reported what no.9 had told him he, the witness, would be in trouble with the police. The possibility of war related to the eventuality of majority rule not being attained by negotiations. He admitted in cross-examination that this discussion was along the lines of the newspaper report and was in relation to Rhodesia.

From this evidence it is clear that the averments in Act I(2) were not proved. Accused no.9 at no stage even advised him to go for military training.

No evidence was tendered in support of Act I(3). Acts I(4) and I(5) relate to the events at a wedding festival and allege as follows:

I(4) During or about the period December 1976 to January 1977 and at or near Masemola in the district of Nebo, the accused incited and/or instigated and/or advised and/or encouraged and/or attempted to procure and/or procured Moshumane Jan Maleka and Makgeretsane Johannes Sepheu to undergo military training and instructed the said persons in the use of firearms and ammunition.

I(5) During January 1977 and at or near Masemola in the

district/...

district of Nebo the accused possessed a firearm or weapon to wit: a Tokarev pistol.

Both Maleka and Sepheu testified. The gist of their testimonies are that accused no.9 spoke to them at the festival, took them to a spot some distance away where he demonstrated a Tokarev pistol to them, this festival being a wedding festival.

Their evidence starts with the beerdrink on the 30th December, 1976, testified to by the father of the accused, no.9 to which I have already referred. At this beerdrink there was a general discussion about military training and accused no.9's contribution was that a person can't be a soldier without having been trained, and then told them about the knowledge he had about such matters. What is lacking in the State's case is that he did not directly request or urge any person to undergo such military training. Between the two there are many contradictions which I do not propose referring to in detail save to say that these contradictions make such request by inference just not possible.

The next incident was at the wedding festival on the 1st of January, 1977. At the wedding accused no.8 came with accused no.9 who introduced him to them. A report was made to him and he and Sepheu and accused no.9 went to the veld where accused no.9 demonstrated the firearm to them. This happened after there had been quite a lot of drinking. He identified the weapon shown as similar to Exhibit 52. The witness Maleka could not identify the weapon so displayed.

Between these two there are so many contradictions that it is doubtful if such an event ever took place. The notes I made at the time about these contradictions are the following: They described different routes that they had taken

to /...

to the spot where the demonstration allegedly took place. They described the place where it took place differently, the one said it was in the hollow, the other one said they were just under a tree and no mention was made of a hollow, and when asked about the hollow he said no. One said they were seated while the demonstration took place, the other that they had been standing, when the demonstration took place. The difference in the identification of the weapons concerned, the material contradictions about the serving of liquor by one of them which has bearing on the discussion as to how it started. To these Counsel have added further contradictions.

On the totality of the evidence on this act the State has not proved its case, which applies to the whole of the case against accused no.9.

I must next consider the evidence against accused no.10. These acts relate to the events at a house where accused no.10 stayed near Rustenburg. If the poems appearing in the book found in the house of accused no.10 are his efforts as alleged, thenthey show a marked talent for poetry. He was also referred to by some of the witnesses as a talkative person. No evidence was tendered on Act J(2).

Act J(1) alleges:

During October 1976 and at or near Rustenburg in the district of Rustenburg, the accused advised and/or instructed Domenicah Thelma Busisiwe Ngubeni in methods of secret communication. He offered the said Domenicah Thelma Busisiwe Ngubeni an ANC sponsored scholarship and also gave her a code name.

The witness described how on the Sunday she was alone with accused no.10 at his home. He told her about the Black Power Movement and how it operated. He told her about

sending objects by changing bags and how a person could disguise himself by dressing differently. He quoted as an example by giving her the name Mkwanazi. He also told her that she must not be involved in the Black Power Movement. He spoke also about children not going to school and he offered to send her, her sister and his children to study in Swaziland without elaborating on what they would be studying. He also said that if there was money available they could further their studies overseas. The gist of this conversation is not capable of any sinister connotation, but rather indicates concern that she must further her studies. It certainly does not support any of the allegations in the indictment.

The other act alleged against accused no.10 is Act J(3) which reads as follows:

During or about the period October 1976 to November 1976 and at or near Rustenburg in the district of Rustenburg the accused procured and/or attempted to procure, incited, instigated, advised and/or encouraged Newton Calvin Mosime, Josiah Stone Mokalane, Buti Zimba, Abel Innocent Tsomakae, Ebenizer Gqiba, Johannes Lefi Mualefi and Edna Lena Zimba and/or through them others to become members and/or supporters of the ANC and/or to undergo military training and/or to commit acts of sabotage and/or to accept ANC sponsored scholarships and/or to form ANC cells.

All seven these persons testified. I do not propose summarising the evidence of each of them. They testified mostly of similar conversations which they had had with accused no.10. He had come to stay at the Black township near Rustenburg named Hlabane during September, 1976. The witnesses are all Black youths except Edna Zimba, the sister

of/...

of Buti Zimba, who was a teacher in Boputhatswana. He had shown them his banning orders and requested secrecy of their discussions. He told them he planned a secret organisation which would operate on a cell system and would be something like the French Revolution. He asked them to find him persons who would be prepared to join such an organisation. He explained that the persons would be educated and trained. It was posed as a future possibility. Such a possibility according to Tsomakae would be that such recruits would do as the children had done in Soweto. According to Mualefi they could be trained as soldiers. Gqiba referred to his statement that children would be sent with weapons. Molaka stressed that as he wanted to become a teacher the accused encouraged him to pursue his studies. Mosime referred to his statement that he, the accused, would buy petrol and have the children burn the schools. The witness regarded this statement as sheer madness. Edna Zimba, the teacher, referred to his statement about the French Revolution. Buti Zimba referred to the request that he must get him sixteen people to burn the police offices at Phokeng. The trouble about his evidence is that at the previous hearing he said this to have taken place in the presence of Mualefi. In this court he said the discussion took place while he was alone with the accused.

Some of them were given pamphlets to read but the English used was beyond their comprehension.

None of these witnesses did anything to comply with his requests. The overall impression is that they regarded it as the ramblings of an old man. It is also difficult to judge what is fact and what is fiction to them at their immature age.

I have/...

I have already referred to the judgment in R v Ndlovo (supra) and want to add a passage of the judgment of Macaulay J. in the case of R v Dick 1969(3) S A 267 and quote a passage on page 268 thereof which reads as follows:

"These cases are distinquishable from the present one on the facts, because the question as to whether an attempt had been committed by a principal in a situation where he had incited an agent to commit a crime was not under consideration in them. It seems to me that in the class of case with which one is here dealing the authorities referred to in Ndlovo's case indicate that the question whether the stage of mere preparation has been passed and whether the stage of commencement of the consummation of the act constituting the offence has been reached, is one that can be decided only on the ccnduct of both the incitor and the incited agent. This is implicit in the reasoning of Solomon J.A. at page 49. There is however a further factor which militates against the accused's conduct being regarded as an attempt. It is a fact that the administration of the DDT was to take place only when the herbal treatment contemplated by the accused proved ineffective. The act incited was therefore conditional on the failure of the latter, and therefore removed to a still further stage the remoteness of commencement of the consummation stage. In respect of the main count Counsel for the Crown did not press his charge, in our view rightly so."

In this case we have in between the contemplated incitor and/...

and the contemplated incitee the intermediary and everything depends on the success or otherwise and preparedness of the intermediary to coöperate that must be considered.

I also want to refer to a passage in the 226 page judgment of Ogilvie-Thompson C.J. in the Ffrench-Beytagh case which does not appear in the reported case (1972 (3) S A 430). It appears on page 85 of the typed judgment and reads as follows:

> "The gravamen of the act charged against the appellant in paragraph (8) of the indictment is that he had incited or encouraged Jordaan 'to support the commission of acts of violence and to take part in preparations for a violent uprising against the State.' The onus of proving this allegation beyond reasonable doubt rested squarely upon the State. That onus is not discharged unless the statements alleged to have been made by the appellant are shown clearly in the circumstances to amount to an incitement or encouragement of Jordaan to do something contrary to the Act. It is not enough to prove that the statements are conceivably capable of that construction, or that they are ambiguous in the sense that they are also capable of an innocent construction; for in such a case the onus resting upon the State would not have been discharged. It is also not enough that the statements merely amount to an expression of the views entertained by their author. The State's case is that appellant incited Jordaan, in the manner averred in paragraph (8) and pursuant to the conspiracy alleged in the indictment, 'with intent to endanger the maintenance

of law/...

of law and order in the Republic.'

It was contended on behalf of the State that the first averment referred to in paragraph (8)(b) alleged to have been made by the appellant to Jordaan 'that there should be an organisation in existence to control and direct the commission of acts of violence, in the event of it being resorted to', amounts to an incitement or encouragement of Jordaan to take part in the commission of acts of violence. The statement however, would appear to be no more than an expression of the belief of the person alleged to have made it that, in the event of violence being resorted to, an organisation should be in existence and ready to direct and control it and does not amount to an incitement or encouragement to take part in acts of violence." (10)

That judgment I think is applicable to the case under consideration.

Our case has the further factor that the witnesses must find persons to be so incited, after they had decided to be instrumental in finding such persons. (20)

On these authorities the allegations have not been proved. The letter written by accused no.10 and signed "Whitey" is so ambiquous that one will have to speculate on any possible meaning it could have. It does not take the matter any further. The fact that it was found in the house of accused no.6 seems suspicious, but no more.

These acts in the alleged sense have not been proved.

I must next deal with the evidence against accused no.11. He testified under oath. As far as possible I will deal with (30) the evidence in chronological order.

The accused /...

The accused lived with his wife at 50, 6th Avenue, Alexandra where he carried on the business of a shebeen and bottle collecting business. His brother, Sammy, lived at 124, 7th Avenue, Alexandra, where there were two rooms to let. The one room in the backyard was let to Petrus Dlamini, with whose evidence I have already dealt. The other room, being in the main building, was the terrorist den to which I have already referred. The witness, Freddie Motaung, alias One Night, who lived at 12th Avenue, Alexandra, figures prominently in the evidence relevant to this accused. (10)

Equally prominent is the evidence against accused no.3 in so far as it is admissible against accused no.11, to which I have already referred. Only parts I repeat are admissible against accused no.11.

The accused was the elder brother and he administered the estate of his late father. His sister lived at 9th Avenue, Alexandra, where rooms were also let. The accused described how the group of persons came to live at 124, 7th Avenue. The evidence of Petrus Dlamini did not describe the arrival of the first of these persons. Accused no.11 (20) testified that one Norman Shabalala whom he had known in the '50s and '60s came to him with the request for accommodation for himself and his friends who were working with him. They were according to Norman all builders. The room was let to Norman for R5 per month. During October, 1976, Norman brought the two co-workers to him. They were David Ramusi and accused no.2. He did not know either of these two persons at that stage. Norman later introduced accused no.3 to him as Peter who would occupy the room while the other two were out, and that accused no.3 would help him in his business, (30) by collecting empty bottles. His brother Sammy came to

assist /...

assist him daily. According to Petrus Dlamini accused no.11 visited the house at 124, 7th Avenue. He was unable to say whether accused no.11 visited all of these or actually whom he had come to visit, because he did not stay long. He "visit and go, visit and go". He did, however, see him enter the room where the group was accommodated. He would "enter their room and go outside". It is also possible that he came to visit his brother. He regarded Sammy as the owner of the house at 124, 7th Avenue. Accused described the extent of his business which I need not repeat. Accused no.11 (10) saw accused no.1 at 124, 7th Avenue. He had known accused no.4 for a long time and he frequented his shebeen. He knew him from the days when he apparently played a bugle in some band. He was also an acquaintance of accused no.6 for a long time. He unsuccessfully tried to get employment for accused no.6. He was never a member or a supporter of the ANC. His evidence about his son Hans and the evidence of Fred Mathibe about the events at Parktown will be dealt with separately.

I next want to deal with the events on the Wednesday (20) night. The dates mentioned by the different witnesses differ but the sequence of events is the same. On the Wednesday night, the 29th of December, 1976, after he had been to his farm he, on his return, was informed that his brother Sammy had been taken away by the peri-urban police. On this occasion he used the Ford Fairmont of accused no.6. He explained that his Chevelle was being repaired and One Night had the use of the Chev van to go to One Night's farm, accompanied by accused no.3. By arrangement with Joseph Tseto he had to leave the Ford Fairmont at the garage in (30) Bramley near the place of employment of Joseph Tseto. After

he had/...

he had received the news about his brother's arrest he went to 124, 7th Avenue, but found it in darkness. From there he proceeded to the house of One Night thinking that accused no.3 might have the keys of the house at 124, 7th Avenue. He found accused no.3 at the house of One Night and broke the news to them that Sammy had been arrested. One Night's evidence differs in that he said that accused no.3, whom he had dropped on his return from the farm came onto the scene after the arrival of accused no.11. By agreement the Ford Fairmont was left at the house of One Night, One Night driving him home. This version is the same as that of One Night. One Night's evidence is that accused no.3 slept that night in the Ford Fairmont at his home. His reason for leaving the car at the house of One Night was that it was safer there because on a previous occasion the windscreen of his car had been damaged at his house. He could give no convincing reason why he did not return the Ford Fairmont to accused no.6. The purpose of his visit to One Night was to get the keys of the house at 124, 7th Avenue. No further mention was made about the keys. The following day he went to fetch the Ford Fairmont and parked it at the garage as arranged with Joseph Tseto. On his way to the garage he enquired unsuccessfully at two police stations about the whereabouts of Sammy. This is confirmed by the evidence of One Night. He knew nothing about weapons and did not know that the persons at 124, 7th Avenue, if so found, were terrorists. He was arrested on the 31st of December, 1976, being a Friday.

At this stage I must briefly deal with the evidence of One Night, before I deal with the police evidence about the happenings on New Year's Eve.

One Night was warned as an accomplice and it was ordered that his name should not be published. He is a person with a 9 to 15 years previous record for cases of theft. He knew accused no.3 and no.8 and no.11. He had close ties with accused no.11 in that he did repair work to the vehicles of accused no.11. On this Wednesday he had the use of accused no.11's Chev van. He told about an occasion when accused no.11 demonstrated the use of a Scorpion machine pistol to him. Accused no.11 took it from an old sump in the garage at the house of accused no.11. He demonstrated how the lever (10) of the Scorpion got jambed when it was so demonstrated by accused no.11. At the previous hearing his demonstration differed slightly because on that occasion it got jambed at a different degree. His demonstration convinced us that somebody had demonstrated this weapon to him at some stage. This assertion was denied both in cross-examination and in the evidence of accused no.11. He said that accused no.11 had told him at the demonstration that they had better leave it alone because they would get killed. He is an accomplice and this part of his evidence lacks the necessary corroboration. (20)

On the Monday which would have been the 27th of December, 1976, he went to the house of accused no.11 to arrange for transport to go to his farm. This is going slightly back in sequence. After the arrangement had been made accused no.11 gave him certain chemicals to keep. These are the objects referred to in Exhibit 33. He spoke about the powderlike substance. Under cross-examination he described these more fully and what had been said and seen on that occasion. The two packets he put on the floor behind the seat of the van (30) which he had borrowed from accused no.11. He went to his

farm/...

farm on which journey accused no.3 and his son accompanied him. On his return on Wednesday he dropped accused no.3 at the house of a priest, where they had a drink and then he proceeded home. After his arrival accused no.11 came to his house and reported that Sammy had disappeared. I think the difference between him and accused no.11 on this point is not material. Accused no.3 arrived with a blanket and slept that night in the Ford Fairmont. He also, as said by accused no.11, drove accused no.11 home leaving the Ford Fairmont at his home, on account of the danger at the house of accused no.11 in connection with the windscreen. He supported accused no.11 on what happened on the Friday.

I have quoted this evidence merely to give the background against which the disputes about what transpired on the Friday must be tested.

Next I must deal with the evidence of Emily Sheane, the wife of accused no.11. She was also warned as an accomplice. Her grief at having to testify against her husband to whom she was married by customary union was most obvious. At a stage she had to sit down and it was doubtful if she could complete her evidence. Her evidence was given in bits and pieces but I have put it together chronologically. On the 31st of December, 1976, while her husband was home the house was searched by the police. After her husband had been arrested on the 31st of December, 1976, at about sunset she went to the garage to get petrol. She unscrewed the cap of a 20 litre tin and put her finger inside and to her surprise found that it had paper inside instead of petrol. This puzzled her no little. She took the tin to the house, cut a part of it open with a tin opener. The opening was not big enough to get her hand in to solve the mystery of the tin

with the paper inside. She then sent for One Night. He came and took the objects from the tin wrapped in paper, put these in a cardboard box and took them with him. She did not see what the objects were. Her curiosity about the contents of the mysterious tin had suddenly vanished. Needless to say this part of her evidence we do not believe. At some stage later she discarded the 20 litre tin in 8th or 9th Avenue where she ultimately pointed it out to the police. We inspected the tin which was cut open at the top and bottom. Both the openings are big enough for the easy insertion of a hand.

The evidence of One Night confirms her evidence that he was sent for by her. On his arrival she showed him the tin from which he took the five Scorpion machine pistols. These objects are depicted on one of the photographs in Exhibit 64. He arranged with her to take these objects to the police. He was however intoxicated and for that reason took them home where he buried them in a nursery patch at his home. He next went to visit Japie Nonyane where he left the two parcels given him by accused no.11. He described how he had just forgotten them at that address. Needless to say that part of his evidence is just so much nonsense. He did a third thing that night. He went with Alpheus Ramokgadi, the brother of accused no.6, to the house of accused no.6 and sent him with the Ford Fairmont to take a message to accused no.6, who was at that stage on a farm near Pietersburg. This evidence is confirmed by Alpheus Ramokgadi, save about the dispute about showing the plastic bag.

Next I must deal with the evidence of Lieutenant De Waal, Sergeant Cox and Sergeant Zeelie. To understand the evidence of Lieutenant De Waal and the criticism levelled against his

evidence, one must realise that he was obliged to give his evidence six times over. It came about in this way. At the previous trial he testified in chief, the first occasion, and was taken through his evidence thoroughly in the cross-examination, being the second occasion as it appears from the extracts read from the previous record. In this case he testified with the exclusion of the statements made to him by accuseds no.3 and no.11. Apparently there was a dispute between Counsel about the admissibility of these statements, third occasion. He was taken through his evidence in cross-examination, fourth occasion. He was recalled after some days and asked to testify again as the dispute between Counsel about the admissibility of the statements had apparently been resolved. He then testified (fifth occasion), with the inclusion of the statements, and again cross-examined (sixth occasion). I mention these facts merely to indicate, not that there was anything wrong, but that his evidence was thoroughly tested from all possible angles.

In our view he was an excellent witness. He is obviously an intelligent young man and although all sorts of motives were ascribed to him he remained calm throughout and told what had happened in a calm and collected manner. We are however conscious of the criticisms levelled against him and these must be given their due weight when considering the totality of evidence. I shall deal with some of them in due course.

Just after midnight on the 31st of December, accused no.3 and accused no.11 were in custody in John Vorster Square. He was accompanied by Sergeants Cox and Zeelie. We have seen these three persons and there is no doubt that Lieutenant

De Waal is the outstanding personality both in demeanour and intelligence. In his first testimony he was led very briefly. He took accused no.3 with him to 50, 6th Avenue, the house of accused no.11. No.3 made a report to him and pointed out a certain spot in the garage. They looked for a 20 litre tin but could not find it in the garage. They spoke to the wife (Emily Seane), but she was uncoöperative. They returned to John Vorster Square and fetched accused no.11. They returned with accused no.3 and no.11 to 50, 6th Avenue, Alexandra. Accused no.11 made a report to him. After the report they went to the garage and to the same spot as before and could not find what they were looking for, namely the weapons and tin. From there they went to the home of One Night where he, One Night, pointed out a spot in the nursery where they dug and found Exhibits 36 to 45 which included the five Scorpion machine pistols. One Night took them to the house of Japie Nonyane where they found the two parcels Exhibits 33 and 47. Exhibit 33 consists of the powder and certain glycerine bottles and a parcel of pamphlets titled: "Message to the Workers from the South African Communist Party". One of these glycerine bottles had the fingerprints of accused no.11 on it. His evidence then deals with events on the 3rd of January, 1977, when accused no.4 was arrested at Nebo which does not concern this accused.

The cross-examination elicited the reply that at that stage they had information that the tin had been in the garage prior to the arrest of some of the accused, and that it was removed after their arrests. He suspected that the wife did not tell them the truth that she had no knowledge of the tin. His suspicion of course proved to have been well founded. They returned with accused no.11 and accused no.11 spoke to her. /...

her. No.11 spoke to his wife but he kept them under observation. This part of his evidence was criticised on the basis that he did not say that no.11 had told him about the weapons as testified on that occasion. But that comes from what was said in cross-examination on a later occasion. What is lost sight of is that his testimony was from the outset on the basis that he would only refer to the report and not to the contents thereof. The criticism is thus based on a misunderstanding of the limitations placed on his testimony. After the discussion accused no.11 had made a report to him and they left. After some days he was recalled and again started from the stage where he saw accused no.11 at John Vorster Square. That was at the stage after he had returned with accused no.3 to John Vorster Square. He was now to testify with the inclusion of the statements by accused no.11. He spoke to accused no.11 about the information they had about firearms being hidden in Alexandra. Accused no.11 denied any knowledge of the firearms. He requested accused no.11 to accompany him to the house of accused no.11 and he was in the car with him and accused no.3 in another car. He intentionally kept accused no.3 and accused no.11 apart. When they reached the house of accused no.11 he made a report to him that he knew that accused no.3 had hidden the firearms in his garage and that it was done in his presence. At that stage accused no.3 was still in the other car. He had the keys of the garage with him which he had taken on the first visit. The garage was unlocked and accused no.11 pointed out the same spot as accused no.3 as being the spot where the tin with the arms had stood. Accused no.11 then spoke to his wife, the witness was then cross-examined a second time, which then again covered the whole field. During the latter part of

his/...

his discussions at John Vorster Square he made mention of the firearms. The point was made that Cox who had in the meantime testified had said that the items they were looking for were not specified. This point of criticism raised was not fully justified because the evidence of Cox was that Lieutenant De Waal had referred to missing arms, but not specifying what was in the missing tin. This criticism in the full understanding I think is not fully justified. He was then cross-examined at length about his evidence at the previous trial when he referred to tin and not firearms. He explained that what he meant by looking for the tin was the tin containing the firearms. It was only the way which he expressed himself. But the tin and firearms were in this context the same. This seems to us to be no real criticism of his testimony. We nevertheless have regard to what such meaning as it may have. He mentioned that at all stages he mentioned firearms to accused no.11 after their initial discussion at John Vorster Square. His evidence at the previous trial was read to him but no real discrepancies save for the use of the word "tin" appeared from the extracts. Admittedly not the exact ipsissima verba were used. It was then put to him that accused no.3 pointed out a place where he had put the tin containing the firearms with which he agreed. The point was then made that the purpose of the visit was to speak to the wife but that on arrival they did not immediately speak to her. His answer to that was that the admission by accused no.11 after they had stopped was of more importance to him than speaking to the wife. This seems to us to have been a natural and reasonable act to have done under the circumstances, and that it was more reasonable for him to have gone with accused no.11 to the garage after he had made

the/...

the statement to him, rather than to look for the wife of accused no.11. This whole admission and pointing out of the same spot as accused no.3 were denied by accused no.11 in his evidence. His evidence was that his wife came to him while he was seated in the car and spoke to him through the window and that accused no.3 was at all relevant times with him in the same car. The outcome of this dispute is that De Waal's evidence is that the wife remained uncoöperative and denied all knowledge of the tin or firearms and that accused no.11 then said that the only other person who had (10) access to the garage was One Night, and that was the reason why they went to One Night. The evidence of the accused is that his wife had told him that One Night had taken the tin. Her evidence was that she had told him not that One Night had taken the tin, but that One Night had been there. The very fact that even in this court the wife still maintained that she knew nothing about firearms is more consistent with De Waal's evidence. Her denial of all knowledge of the firearms is inconsistent with the evidence of accused no.11, that she had told him that One Night had taken the tin as (20) testified to by accused no.11.

There is one other aspect that I think is of importance. One Night was cross-examined about what had happened on the arrival of the police, accused no.3 and no.11 at his home. One must understand it in the context of the assertions by accused no.11 that his wife had told them that One Night had removed the tin. On this point one must examine the evidence of One Night as to what happened on the occasion when they arrived at his home.

In cross-examination it was put to him "they asked you (30) what had happened to the tin which you had taken from accused

no.11's house." To this suggestion One Night replied "No, they didn't ask me that. All they asked me was did I go to 6th Avenue. I answered yes, and then said that there are articles which they want at no.6th Avenue." He further said that they had spoken about the tin only after he had pointed the articles out. This evidence must be understood in the context of the criticism and supports in our view the version testified to by De Waal.

The evidence of Lieutenant De Waal was corroborated by the evidence of Sergeant Cox and Zeelie. Sergeant Zeelie admitted that he was out to find the firearms which he found and admitted that he was not certain about some of the details. He did describe the pointing out by accused no.11 and the relevant movements. We have the impression of the totality of his evidence that if he was not certain he unashamedly said so. Sergeant Cox was positive in his evidence and corroborated the evidence of Lieutenant De Waal on all material respects.

There is no doubt that the three police officers are to be believed. They certainly did not invent this whole pointing out episode by accused no.11 merely to implicate an innocent man.

An alternative argument was addressed to us. It was argued that if we should find the denial of the pointing out incident to be false, we should find that he merely pointed out a place where the tin had stood and that it did not imply his knowledge of the contents of the tin. On the facts before us there is no reason for such a finding. The whole exercise was to find the firearms.

The other aspect of the case is the finding of the fingerprints of accused no.11 on one of the glycerine bottles

in/...

in Exhibit 33 which was found at the home of Japie Nonyane, to which One Night took the police after the discovery of the objects buried in his garden. His explanation of his fingerprints on the bottle of glycerine was that accused no.3 had on an occasion asked him to buy a bottle of glycerine for him which he did. This is the only reference to glycerine in his evidence-in-chief. In cross-examination he said that he had bought it from a chemist in Noord Street. (I notice in the record it is typed Moore Street, it should be Noord Street). He could not remember the name of the (10) chemist although he usually bought from this chemist. He explained how he unwrapped the packet which contained also malt for his child and then handed the bare bottle to accused no.3. There was also glycerine which the children and himself had used. That was in cross-examination. Then followed the display of the glycerine bottles from Exhibit 33. A row of small bottles of various sizes and shapes was placed in front of accused no.11. He was asked to choose the bottle of glycerine he had bought for accused no.3 from the bottles in front of him. He selected the biggest bottle saying that it, (20) meaning the one that he had bought for accused no.3, had a black cap on. A black cap was then placed on the selected bottle. He then said that it resembled the one he had bought. Amongst the row of bottles was a bottle smaller in size and shape. In the example when it was described in detail at the hearing to get everybody satisfied it was referred to by way of example as "bottle X". It was of a different shape and size than the one the accused had selected. Three bottles similar in size and shape than this smaller bottle were placed together with it, making four similar bottles. He was asked (30) whether he had ever seen such a bottle to which he replied no.

It was/...

It was then pointed out to him that his fingerprints were found on one of these similar bottles. He was asked to give any reason for how it could have come about that his fingerprints were on that bottle to which he replied "that I cannot explain". It means that he cannot explain how his fingerprints came onto a bottle like the one on which his fingerprints had been found. Pasted to the bottom of this bottle is a price tag marked "Clicks 25c". It was then recorded by agreement that Clicks has no branch in the vicinity of Noord Street. This demonstration was not (10) hurried. The accused was asked to take his time about it all. In so far as the price tag may indicate where it had been bought it was not bought in Noord Street or that vicinity. That however is not the real point, which is that he said that he had never seen a bottle such as the one on which his fingerprints had been found. Needless to say that this incident left him rather crestfallen. It must be realised that the bottle of glycerine is a full bottle and had obviously not been used.

In the re-examination a new field of enquiry was opened (20) about the use of glycerine. In cross-examination he said that at his home he had glycerine for his children and himself. This was at a stage before the demonstration with the bottles. When he said he could not explain his fingerprints on the bottle he did not consider that one of the used bottles could have had his fingerprints on it. At any rate it was a full bottle and he had not seen such a bottle before. Under re-examination he was asked about the general use of glycerine and he testified about the general use thereof. No wonder that his statement that accused no.3 even had a bottle of (30) glycerine in his cell caused a ripple of mirth. We were

asked/...

asked to improve on the performance of the accused and find that his fingerprints may have got onto the bottle innocently. From the facts such a reasonable possibility does not exist.

Reference was made to the judgments in R v Du Plessis 1944 AD 314 at 319 and 322, and R v Nksatlala 1960(3) S A 543. These cases do not apply to the present case because we are concerned with corroboration for the witness, One Night. At any rate the fact of the matter is we have a full bottle and his evidence is that it was not this one. He had bought glycerine for himself and he had never seen such a bottle before.

On the totality of evidence an innocent explanation is just not possible.

I think it is relevant in this sort of thing that I refer to the judgment by Rumpff C.J. in R v Glegg 1973(1) S A 34. I quote a passage on page 38H of the judgment which reads as follows:

> "Wanneer die Staat sy saak op so 'n manier moet bewys dat die judex facti oortuig moet wees dat die misdryf gepleeg is word dit nie van die judex verwag dat sy oortuiging gebaseer moet wees op 'n sekerheid wat daarin bestaan dat 'n onbeperkte aantal geopperde moontlikhede wat denkbeeldig is of op blote spekulasie berus, deur die Staat uitgeskakel moet wees nie. Die begrip "redelike twyfel" kan nie presies omskryf word nie, maar dit kan wel gesê word dat dit 'n twyfel is wat bestaan weens waarskynlikhede of moontlikhede wat op grond van algemene gangbare menslike kennis en ondervinding as redelik beskou kan word. Bewys buite redelike twyfel word nie gelykgestel aan bewys sonder die allerminste twyfel nie omdat

die las/...

die las so - om bewys so hoog te stel te lewer, prakties die Strafregsbedeling sou verydel."

I must now refer to the Act K(1):

During July 1976 and at or near Parktown in the district of Johannesburg, the accused aided four youths recruited for military training in Swaziland, by concealing them.

This is exclusively based on the evidence of Alfred Mathibe. He was too uncertain about the events at Parktown. On the other hand it is difficult to see how he would falsely implicate his friend of long standing. (10)

On all the evidence we have come to the conclusion that there is not sufficient certainty about this allegation and the State cannot succeed.

Act K(2) reads as follows:

During or about the period October 1976 to December 1976 and at or near Alexandra in the district of Randburg, the accused harboured or concealed or directly or indirectly rendered assistance to terrorists to wit: Mosima Sexwale, Naledi Tsiki, Lele Jacob Motaung, Simon Samuel Mohlanyaneng and David Charles Ramusi by making his home or homes available (20) to them as a base for their operations.- These are of course the names of the accused and the other person.

On all the evidence the State has proved this Act. We are mindful of the convenient way he changed these persons from being Norman Shabalala's co-workers and friends to his employees, and that he did not even know the surname of his tenant, Dlamini. If he was the person who was really in charge of the premises he would surely at least have known the surname of his tenant, and the fact that these persons came and contracted with him to get accommodation puts it (30) out of all realistic approach that he did not know who

they were.

It is inconceivable that such a group of terrorists would have gone to him for housing if he was not a sympathiser of their cause. To have that sort of landlord seems to us to be a consideration of considerable weight in the circumstances of this case.

On all the evidence we found that that Act has been proved beyond all reasonable doubt.

Act K(3) alleges:

During or about the period October 1976 to January 1977 and at or near Alexandra in the district of Randburg the accused either alone or jointly with Lele Jacob Motaung and/or Naledi Tsiki possessed firearms, ammunition and explosives to wit: five Scorpion sub-machine guns, one Tokarev pistol with magazine containing seven rounds; nine handgrenades; three loose detonators for handgrenades; two detonators; primers for handgrenades, each one attached to a vinyl cloth, - and then it goes on with the further description which I need not read at this time of the afternoon.

On the totality of the evidence on this Act to which I have referred in some detail, it has been proven beyond all reasonable doubt that the incidents tying him to the objects, one by way of his statement to Lieutenant De Waal and the other by way of his fingerprints are such that this act has been proved beyond all reasonable doubt. Both the statutory and the cautionary rules to accomplice have been satisfied.

Act K(4) alleges:

During December 1976 and at or near Alexandra in the district of Randburg, the accused possessed chemicals which could be used for the manufacture of explosives to wit: 610 ml. Glycerine; 122,5 gram Potassium permangante; 50 gram

Potassium/...

Potassium nitrate; 100 gram sulphur and 27 gram silver nitrate.

That I have already dealt with when I made my remarks under Act K(3) and for the similar considerations these allegations have been proved.

Act K(5) reads as follows:
During December 1976 and at or near Alexandra in the district of Randburg, the accused concealed a Ford Fairmont motor vehicle used by the ANC.

The element of concealment in the circumstances I think (10) has not been proved satisfactorily.

As regards the intent alleged in the main count his connivance with the group of terrorists and his participation in the weaponry and the chemicals in our view proves the intent as alleged in the indictment beyond all reasonable doubt.

Finally I shall refer to the evidence more particular to accused no.12. The first act being Act L(1) alleges as follows:
During or about the period October 1976 to November 1976 and at or near Soweto in the district of Johannesburg, the accused (20) procured and/or attempted to procure Paul Masebe and/or other unknown recruits for training to wit: military training and/or she aided the aforesaid recruits in obtaining such training.

The evidence on this Act is that of Inch, Andrew Mbele, Khehla Dube, Samuel Mankge and Victor Majafe. The evidence of Andrew Mbele we found unacceptable. Save for Inch the others do not necessarily implicate her. We are convinced that at a stage there was more than a platonic friendship between Inch and accused no.12. From the passages quoted from his evidence at the previous trial it seems that pre- (30) viously he was less inclined to implicate her than presently.

On the/...

On the totality one has no more than a suspicion.

Act L(2) alleges: - and that is the difficult one: During or about August 1976 and at or near Soweto in the district of Johannesburg, the accused typed and/or retyped and/or duplicated a pamphlet to wit: "The Voice of the ANC (Spear of the Nation)".

The only evidence on this issue is the evidence of her mother, and the letter she wrote while in detention. The admission which was recorded is as follows:

"Annexure N is the same as the pamphlet typed by accused no. 12 and given to Tryphinah Mohale (that is the mother) - and Sipho, a Black male. Accused no.12 used her typewriter Exhibit 73 to type this pamphlet. The pamphlet was given to Tryphinah Mohale by her daughter Paulina Moletsane who in turn received it from her neighbour Constance Buthelezi. Exhibit 76 is a letter written by accused no.12 while awaiting trial in detention. The letter was confiscated by wardress Yvonne Faasen.

At about 11.40 pm. on 21st August 1976, Constable David Lipschitz was on duty in Commissioner Street, Johannesburg. Constable Lipschitz saw a Black man handing out pamphlets and chased him and arrested him. While he was being chased, the Black man dropped approximately 25 pamphlets similar to Annexure N to the Indictment. Constable Lipschitz handed the pamphlets which had been dropped to the staff on duty at John Vorster Square charge office on 21st August 1976."

The relevant point in the letter Exhibit 76 is:

"I just wish that you have taken it and my typewriter somewhere else not at home."

Annexure N is titled "The Voice of the ANC (Spear of the Nation) - The War Is On." It is a foolscap page of

single /...

single space typing. I quote only one passage from Annexure N which reads as follows:

"The Voice of the ANC (Spear of the Nation) - The War is On" - is the title.

Then the concluding few paragraphs read as follows:

"The War is On so let us take it to the Whites right into town. Kill them if you can. Burn their buildings. Let the trains and their vehicles go up in flames. Let us show them that there is nothing will ever go right with us and please don't fight your children. We will die but there will be survivors. If they detain our brothers and sisters let them detain us all, let them detain all of us. To hell with our oppressors. Brothers and sisters, the war is on. As from Monday the 23rd of August 1976 onwards let us make them listen to us together with their arms, and they are gonna lose this war. Uhuru is here. Come on, brothers and sisters, power. When you have finished give it to the next brother or sister. Let the enemy not see this."

I think that is representative of the gist of the annexure.

Now the mother of accused no.12 was the only witness on this issue. During August, 1976, her neighbour had such a pamphlet. She was curious about the pamphlet because it said persons must not go to work. She took the pamphlet from the neighbour and asked her daughter, accused no.12, to type a copy and accused no.12 then typed one original and one carbon copy. While she was busy typing a person Sipho came onto the scene. She read one copy, Sipho the other. She then took both copies and put them in the fire. She read the copy after the neighbour had taken her copy away. She at no stage

discussed/...

discussed the contents of the pamphlet with accused no.12.

I do not think that she is linked to the main count of conspiracy. The question to be decided is whether she can be found guilty under the alternative count 1 or alternative count 5. It is common cause that the ANC is an unlawful organisation and the act of typing was proved. This it was argued brought the presumptions of Section 2(2) of Act 83 of 1967 into effect in alternative count 1. The relevant parts of the Section read as follows:

"Sub-section (2). If in any prosecution for an offence contemplated in sub-section (1)(i)(a) it is proved that the accused has committed or attempted to commit or conspired with any person to aid or procure the commission of/or to commit or incite, instigated, commanded, aided, advised, encouraged, or procured any other person to commit the act alleged in the charge, and if the commission of such act has or was likely to have been any of the following results in the Republic or any portion thereof: namely:

(i) to cause, encourage or further feelings of hostility between the White and other inhabitants of the Republic, the accused shall be presumed to have committed or attempted to commit, conspired with other persons to aid or procure the commission of or to commit or incited, instigated, commanded, aided, advised, encouraged or procured such other person to commit such act with intent to endanger the maintenance of law and order in the Republic, unless it is proved beyond all reasonable doubt that he did not intend any of the results aforesaid."

The significant portion of the Section is "had or was likely

to have had any of the following results."

In this regard I must refer to the judgment of Ogilvie Thompson C.J. in S v ffrench-Beytagh 1972 (3) S A 430 from which I quote the relevant passage on page 457G which reads as follows:

> "In as much as this section radically alters the general rule relating to the onus of proof in a criminal case, it accordingly should in my view be interpreted with strict regard to the context to which it relates, namely, the participation in terroristic activities referred to in Section 2(1)(a) of the Act. Whether or not any particular "act" proved to have been commited "had" (i.e. actually occasioned) any of the results mentioned in the section is a question of fact to be decided on the evidence of the particular case. The section is, however, not restricted to results which have actually occurred. Certain acts no doubt have inherent in them the quality of impairing the maintenance of law and order or of endangering the State - an apt illustration mentioned during the argument was the abortive activity of Guy Fawkes. It is, however, to be observed that the words of the statute are not "could have had" but "likely to have had". Accordingly, mere possibilities or remote contingencies are not, in my view, embraced by the section. In the present context the expression "likely to have had", in my opinion, connotes probability; the concept perhaps emerges more clearly from the Afrikaans text "waarskynlik kon gehad het". Consequently, for the section to apply, it must /...

it must be shown either that the act proved to have been committed or attempted, etc., in fact had one of the results listed in (a) to (l) of the section or that it probably would have had one of those results."

The typing was done for her mother to read who was interested in the allegation about people staying away from work. These were not distributed. The handing of the two copies to her mother and the resultant burning thereof is in our view not considered to have had such a likely result as contemplated by the section. The limited scope of the operation militates against the feared likely result.

The next possibility we considered is whether she can be convicted on the fifth count. Section 3 of Act 44 of 1950 provides as follows:

"3 (1)(a) No person shall in any way take part in any activity of the unlawful organisation or carry on in the direct or indirect interest of the unlawful organisation any activity in which it was or could have engaged at the said date."

The dispute to be solved is whether she took part in the activity of the unlawful organisation when she typed the original and carbon copy at the request of her mother. It was not done by her out of her own volition but merely at the request of her mother, which is divorced from the activity of the organisation. It may be that the mother did not tell the truth but lies still do not create positive evidence. This is like the case against accused no.8 a borderline case of which the benefit must go to the accused. The reference in the letter to the typewriter is also just a suspicious request that does not take the matter further.

The various heads of argument submitted by Counsel have been most useful. The special points referred to by me at the beginning of this judgment as well as the contentions in the heads of argument have all been fully considered by us in our deliberations. The various alleged acts were considered in the totality of evidence admissible against each of the accused.

We unanimously hold that the State has proved beyond all reasonable doubt the existence of the ANC conspiracy as alleged in the main count, being for the overthrow of the (10)
Government of the Republic of South Africa by violent means. The participants are those accused who stand to be convicted at this trial, as well as those persons named in Annexure M to the indictment to whom I have referred as such in this judgment.

All the accomplices who have been warned in terms of Section 254 are discharged from liability to prosecution.

As promised I also hand down the whole judgment I have prepared on the application in terms of Section 243 of the Code at that stage. (20)

In the result having had regard to all the relevant considerations:

ACCUSED NO.1, ACCUSED NO.2, ACCUSED NO.3, ACCUSED NO.4, ACCUSED NO.6 AND ACCUSED NO.11 ARE CONVICTED ON THE MAIN COUNT,

and

ACCUSED NO.5, ACCUSED NO.7, ACCUSED NO.8, ACCUSED NO.9, ACCUSED NO.10 AND ACCUSED NO.12 ARE FOUND NOT GUILTY AND DISCHARGED.

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THE COURT ADJOURNS UNTIL THE 6th APRIL, 1978.

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