

SOUTH AFRICA / JUDGMENT

S v Mazala (128/85) [1985]

ZASCA 112 (27 September 1985)

[1985] ZASCA 112

COURT

Supreme Court of Appeal

BEFORE

Kotzé, Hoexter, Galgut

CASE / FILE NUMBER

128/85

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IN THE SUPREME COURT OF SOUTH AFRICA (APPELLATE DIVISION)

In the matter between:

HAROLD ABEL MAZALA appellant

and

THE STATE respondent

Coram: Kotzé et Hoexter JJA, et Galgut AJA. Date of hearing: 19 September 1985

Date of judgment: 27 September 1985.

J U D G M E N T

GALGUT, AJA: The appellant, to whom I shall refer as the accused, was found guilty in the Regional Court, Johannesburg, of contravening sec. 2(1)(c) of the Terrorism Act No 83 of 1967 ("the Act"). The Magistrate found that the State

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had proved that he had been in possession of an explosive, a hand-grenade, during the period alleged in the charge sheet, viz May 1981 to 15 July 1981. The sub-section casts an onus on an accused found in possession of an explosive to prove beyond a reasonable doubt that he did not intend

using the hand-grenade to commit any act likely to have any
of the results referred to in sub-sec. (2) of sec. 2 of the Act.

There is no need to detail the results set out in sub-sec. (2). It is sufficient to say the long list includes the causing of serious bodily injury to or endangering the safety of any person or causing substantial loss to any person or the State. No attempt was made by or on behalf of the accused to discharge the above onus. The Magistrate sentenced him to six years imprisonment. The accused appealed to the Transvaal Provincial Division against the conviction and sentence. That Court dismissed

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the appeal against the conviction but reduced the period of imprisonment to five years. Leave to appeal was granted

by this Division.

At about 8 am on the morning of 15 July 1981 Lt. Van Wyngaard, who was attached to the Security Police and was then stationed at the Protea Police Station in Soweto, received a telephone call from a black man. The name of the person who called him is not in dispute. He was Raymond Dhlamini ("Raymond"). Raymond gave him information about a man who was at a house at No. 698 (b) Zola 3, Soweto. Pursuant to the call Lt. Van Wyngaard, accompanied by members of the Security Police proceeded to that address. In the kitchen of that house there were two black men and two black women. One of the black men later became the accused and the other was Raymond. These men were then taken to the police station. Because of the information which had been given to Lt. Van Wyngaard, he, together with others members of the Security Police, later went back to the house. Warrant-officer Steyn and Warrant-Officer

/ Olivier

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Olivier searched the yard of the house. They were, because of the information which had been given to Lt. Van Wyngaard, searching for a hand-grenade. W/0 Steyn found a brown bag near the fence of the yard, hidden under grass. He described the bag as a "drasak" which, so he testified, had been made from a "streepsak" (grain bag). This bag later became exhibit 1 in the case. He handed the bag and its contents to W/0 Olivier. The latter is a trained explosives expert who had been appointed an inspector of explosives in terms of the Explosives Act 26 of 1956. Because of his training he is able to identify, and is fully conversant with the mechanisms of, the various types of hand-grenades. W/0 Olivier confirmed the evidence of W/0 Steyn. In the bag he, so he testified, found a Russian Fl hand-grenade in a blue plastic bag. The grenade was wrapped in newspaper and a white rag. He took the grenade and locked it in a safe to which only he and his commanding officer had access.

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More as to this aspect later. W/o Olivier went on to say that a photograph of the grenade was taken (this photograph became exhibit E); that this type of grenade contained TNT and RDX which are highly explosive materials; that he did not examine the contents of the grenade; that approximately a week and a half later, in terms of regulations, he destroyed the grenade; this he did after pulling out the safety pin; that it thereafter exploded; that it could have caused death and serious injuries to persons and also damage to buildings. There is no doubt that the grenade which W/o Olivier destroyed was an explosive as defined in sec. 2(1)(c) of Act 83 of 1967.

It was submitted by counsel, who appeared for the accused in this Court (he did not appear for the accused in the trial Court nor did he draw the written heads of argument), that inasmuch as more than a week had elapsed, from the time when W/o Olivier put the grenade into the safe and

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the time when he caused it to explode, it had not been shown that the exploded grenade was the one found in the yard and put into the safe. W/o Olivier testified that, save when the photograph (exhibit. E) was taken, no one other than himself had handled the grenade from the time it was found till the time it was exploded; that he was present during the whole time that the photograph was taken; that he had put the grenade into the safe; that he was the only person who had access to the safe; that had any person other than himself wanted access to the safe he would firstly have had to obtain permission from the station commander and secondly it could only be done in his presence.

It follows from the above that the grenade found in the yard was the one which was exploded.

It is convenient at this stage to set out the evidence given by Detective Warrant-Officer Terblanche. The importance of his evidence will appear later.

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He testified that he was not concerned with the investigation of the case; that on 8 October 1981 at 00h30 in the night he, in the company of a Sergeant Terblanche, was taken by the accused to a house in Soweto; that they knocked and one Shadrack Tshitsha ("Tshitsha") came to the door; that in the presence of accused Sgt Terblanche told Tshitsha that the accused alleged that he (the accused) had obtained a hand-grenade from that house; that Tshitsha looked startled (verras) when that was said; that Tshitsha's reaction was to say, in the presence of the accused, that he had previously seen the accused on one or two occasions at the house; that the accused did not react in any way to what was said by Sgt Terblanche and by Tshitsha; that the accused took them to a bedroom in the house and there pointed out two steel trunks; that these trunks were locked; that Tshitsha could not produce the keys; that they broke the padlocks; that they searched the trunks and thereafter the house; that they

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did not find a hand-grenade or any explosive; that Tshitsha was taken into custody. In fact Tshitsha was kept in custody for days before he was released.

Tshitsha, a man of 44, testified that he had seen the accused on three occasions prior to the trial; that on the first occasion, while he was sitting in the yard of the house in which he lived, the accused came laughing up to him and asked him if he had not seen him (accused) previously in Botswana; that accused told him that he had been to Botswana and Tanzania; that he gave his name as Mandela; that the second occasion was when he came home one evening and saw the accused in the kitchen with others having a drink; that he went past into the dining-room and that accused came and spoke to him there; that the accused then showed him three books which he said had been banned but that the accused did not allow him to look at the books; that the accused then took out an article which looked like a pineapple from a brown bag; that he did not look closely at the bag;

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that the article was similar to the one in the photograph, exhibit E; that the accused said he was going to destroy police stations with the grenade and that he could get 200 more such grenades; that he (Tshitsha) had not seen a grenade or a photograph of one prior to this; that he asked the accused to leave because "he gave me a fright because this

thing would cause trouble for me". Tshitsha was shown a bag like a brief case which he said was not the bag which the accused had. He was then shown exhibit 1, whereupon he said he could not say it was the bag which the accused had but that it was similar to that bag. He further testified that on the third occasion the accused came to his house with the police and pointed him out to the police. I have already set out W/O Terblanche's evidence as to what transpired on that occasion.

In the voluminous written heads of argument it was submitted that Tshitsha was a single witness on the issue of what transpired on the first two occasions; that

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it was improbable that any person would have behaved as the accused was said by Tshitsha (who did not know him) to have behaved on the first occasion; that no person carrying an explosive or banned books would have behaved as it is said the accused behaved on the second occasion; that Tshitsha's evidence as to the dates of the first two visits was vague in the extreme and showed that he had a poor memory and that in all the circumstances the Magistrate should not have placed any reliance on the evidence of Tshitsha. As to the submission that Tshitsha was vague about the exact dates of the first and second occasions when he saw accused, all that need be said is that a study of Tshitsha's evidence shows that although he was uncertain about the date of the first visit, he stated that the second visit was in May 1981. As to the improbabilities the Magistrate was of the view that the accused was boasting.. There can be no doubt that the accused was a person who behaved (for lack of better words)¹¹

in strange ways. More as to his behaviour later. The Magistrate did approach Tshitsha's evidence as that of a single witness. He was of the view that he was a truthful witness despite some minor inconsistencies in his evidence which the Magistrate found were due to the time which had elapsed by the time Tshitsha gave evidence. The Magistrate also had regard to the fact that the evidence of other witnesses, viz. Patrick Dhlamini ("Patrick"), Prudence Dhlamini ("Prudence") and Raymond lent credence to Tshitsha's evidence in that to one or more of these witnesses the accused had given false names; had stated that he had been to countries outside the Republic and stated that he had had training in fire-arms and explosives. Tshitsha's evidence-in-chief and re-examination consists of seven pages. He was cross-examined at inordinate length (57 pages). There is nothing in his evidence which justifies a finding that the Magistrate erred in accepting his evidence. Moreover, there is circumstantial

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evidence, viz, that of the other witnesses and of W/0

Terblanche, which lends credence to Tshitsha's evidence as

to the accused's behaviour. I pause to stress that there

is no room for a suggestion, nor in fact has it been suggested,

that Tshitsha and the other witnesses conspired to inculcate

the accused.

Patrick, a young black man then aged 19, testified that he was in the kitchen when the accused arrived at his home (at 698(b) Zola

- 3) at about 19h00 one night (it would be 14 July 1981); that the accused stated that he had come to see Raymond (Patrick's brother); that he then told accused that Raymond had not yet come home; that his mother and sister were in the kitchen; that the accused then said that he and Patrick should go outside; that the accused had a brownish bag about 30 cms. long; that he carried this bag "so onder sy arm, sy regterhand hier op sy gehad"; that he did not look closely at the bag; that he could not

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say exhibit 1 was the bag; that when they got outside the accused said he was hungry; that he, Patrick, then asked his mother for money and he and the accused went to the shop and bought eggs; that they returned to the house and that accused, who had. carried the bag until then, then entered the house without the bag; that the eggs were then prepared and the accused was busy eating when Raymond arrived; that Raymond was surprised to see the accused; that after greeting each other Raymond and the accused talked in the kitchen; that he, Patrick, while in the kitchen, did not sit with them while they were talking; that he went to bed leaving Raymond, his mother, his sister and the accused in the kitchen; that the next morning his mother went to work before he Left for school at about 07h45; that a week later the police came and took him to the police station and questioned him; that he there made a written statement and returned home the same day.

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It was submitted that Patrick's evidence as to the events prior to Raymond's arrival was that of a single witness and that his evidence showed him to be evasive and unreliable. The following matters were urged in support of this submission.(a) That at the very outset of his evidence-in-chief Patrick said that he had not seen the accused before that day at the trial. This submission was stressed, in fact put in the forefront, in the written heads of argument. I find this submission surprising. It appears from his answer to the very next question put to him that he had seen the accused on the day the accused came to the house and asked for Raymond. If one also has regard to the whole of his evidence it is obvious that he misunderstood the purport of the question put to him. As I read his evidence, it is obvious that he was intending to convey that he had not seen the accused before the day the latter came to the house.

/ (b)

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- (b) That he made no mention of the fact that on the morning of the arrest of the accused (ie, 15 July 1981) his mother was annoyed with Raymond as alleged by Raymond in his evidence. The answer to this submission is that no questions were put to him on this aspect. (c) That he said that Raymond did not leave the house after having arrived there in the evening. The answer to this submission is obvious. Patrick did not say that he himself remained continuously in the kitchen. He

in fact said he went to bed and left the others in the kitchen.

- (d) That at one stage in his evidence he said the accused carried the bag under his right arm and at another stage he said the accused had it in his right hand. I find no merit in this submission. His evidence quoted above explains how the bag was carried. The fact that it was under his arm does not mean that his right hand was not on it.

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It must also be remembered that the accused came into the house and thereafter walked all the way to the shop and back. If he had the bag as alleged by Patrick during that time, it is more than likely that he would at some stage have had it under his arm and at others in his hand.

- (e) That he was not told by Raymond of the latter's experiences while he was in the hands of the security police. This I do not find improbable
- more particularly when it is remembered that Raymond did not return home on 15 July 1981 but went to his (Raymond's) father's home and stayed there for five days. (f) That his evidence, as to the events prior to Raymond's arrival, was for all practical purposes that of a single witness and the Magistrate did not have regard to this aspect when evaluating Patrick's evidence.

The Magistrate was fully aware of the importance of Patrick's

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evidence. It is clear from his reasons for judgment that he approached Patrick's evidence with the caution required when evaluating the evidence of a witness who is the only one who has testified on a particular aspect.

Patrick's evidence-in-chief takes up less than four pages. His evidence in, cross-examination takes up thirty-seven pages and was not completed in one day. It would be surprising indeed if there were not some minor inconsistencies in the evidence as to the sequence of events. The Magistrate had ample opportunity to observe his demeanour and to decide on his credibility. It was suggested that Patrick had a motive and was part of a conspiracy to inculcate the accused, viz, to protect Raymond. In this regard it must be remembered that if he indeed had any such motive he could have bolstered the case against the accused by being more positive when asked if exhibit 1 was the bag which the accused had, by saying that the accused had shown him the

/ grenade

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grenade, by saying that he heard the accused tell Raymond (as we shall see from Raymond's evidence) that he, the accused, had left the Republic and received training. For all the above reasons I am of the view that the Magistrate was justified in accepting Patrick's evidence.

I have set out the evidence of Patrick and Tshitsha and the submissions made in regard thereto at some length. I have done so because their evidence directly implicated the accused in regard to his possession of the hand-grenade. The one testified that he actually saw the grenade and was told by the accused what he intended doing with it. The other testified that he accused had a brown bag on the evening of 14 July which he did not bring into the house. The next morning the police found a brown bag which contained a hand-grenade, hidden in the garden.

I turn now to examine the circumstantial evidence given by Raymond and Prudence. I do not find it necessary

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to detail their evidence and the criticism thereof as fully as was done in regard to the evidence of Tshitsha and Patrick.

Raymond testified that when he came home that night his mother, his sister Elizabeth, Patrick and the accused were in the kitchen; that accused was busy eating; that he had known the accused from before under the name of Mandela, and that they were well known to each other; that he did not know that the accused would be there; that he and his sister went to another room in the house and his sister made a report to him; that he went back to the kitchen where he and the accused sat and talked; that Patrick, although in the kitchen, sat a little distance away from them; that at a certain stage he and the accused went outside where he told the accused that his mother was suspicious of the accused and that she did not want the accused to sleep there that night; that the accused told

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him to speak to his mother and say "daar is niks nie"; that they went back into the house; that despite his mother's instructions he allowed the accused to sleep in his room; that his mother had already gone to bed. Raymond went on to tell the trial Court that the accused told him that he had been to Swaziland, Botswana, Tanzania and Mocambique; that he had received "training" in Tanzania and Mocambique; that this training was "with fire-arms and also bits of the bomb". Raymond said the talks which he had with the accused took place in the kitchen. He also said that they continued talking when they retired to the bedroom. Raymond testified that on a previous occasion the accused had told him that while he, accused, was in Botswana he had met

Raymond's cousin, one Veli Dhlamini; that Veli was struggling and sent a message that Raymond should tell Veli's father to send money and clothes to Veli. Raymond said he did thereafter convey this message to his uncle who replied that he did not wish to hear about Veli's troubles.

/ Raymond

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Raymond was asked in cross-examination why he

had telephoned and told the police that the accused was at his home. The following extracts from his evidence are

self-explanatory:

"So, the reason why you 'phoned the police was because the accused had got you into trouble?-- Your Worship, I realised that I will get into trouble because even the people at home, your Worship, had nothing to do with me.

Just answer the question. The reason why you reported to the police was because the accused had got you into trouble with your family?— Well, what frightened me more, your Worship, what scared me more is the thing that he alleged that he had had with him and when they asked him to give it to them, so that they put it into the room, he refused it.

Answer the question. The reason why you went to the police was because he had got you into trouble?— Your Worship, yes, he would get me into trouble when it came out that he had been with me and that I had not informed the law about it.

Now you say that that night someone told you about that thing that he had?— Yes, my sister told me about it, not the accused.

I suppose she saw this thing?— I think so, because she is the one who told me.

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Did she tell you that she had seen this thing?— Well, she said that there was something that the accused had that he did not want to be placed in the room.

Did she say what it was?— She said it is a bag your Worship.

Your Worship, since the accused had

this bag, and then they asked him to give them the bag so that they could put it into the house, if he had not refused with it, they would not refuse him accommodation at my home.

So, what are you talking about?-- Your Worship, my sister wanted the accused to give her the bag so that she, my sister, could put it into her room."

Raymond, as set out earlier, was taken to the police station with the accused on 15 July. He was released that day but because he had disobeyed his mother and he was afraid of what her reaction would be, he did not return home. He went to stay with his father (his parents had parted) for five days.

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It was submitted in the written heads of argument and by counsel in this Court that Raymond sought to evade answering questions put to him, that there were contradictions in his evidence relating to what the accused told him in the kitchen and in the bedroom, that there were conflicts between his evidence and Patrick's evidence. I do not find it necessary to detail the criticisms. The record reflects that this witness's evidence-in-chief (I exclude some 8 pages of legal argument) took up ten pages. His cross-examination took up seventy-three pages. Furthermore, after he had given his evidence-in-chief the case was adjourned to a date to suit counsel. Thereafter the case was again adjourned for three months. I have given full consideration to all the submissions made on behalf of the accused. A study of his evidence leaves me in no doubt that the witness was not evasive. It also leaves me in no doubt that there are no real contradictions in his evidence and also no real conflicts between his evidence and Patrick's. Indeed,

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having regard to the inordinate length of the cross-examination and the lapse of time, it would not have been surprising if there had been contradictions and conflicting evidence. I am of the view that the Magistrate's acceptance of Raymond's evidence cannot be faulted.

Prudence was 16 years old at the time of the trial. She is Raymond's cousin and is the sister of Veil. She testified that Veli had gone to Botswana in 1976 and had not returned; that the accused, who was not known to her, came to her home in 1981; that he introduced himself as Selbian Tuli and said that he had come from Botswana and that her brother Veli had sent him to ask that they send money, clothes and food to Veli; that the accused came there a second time and repeated what he had said the first time; that on this occasion the accused said he himself wanted food; that the accused came a third time with a similar message; that on

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each of these occasions he was carrying a brown bag which was similar to exhibit 1. She further said that her father's reaction to the message from Veli was that he did not want to hear anything about Veli. She further testified that shortly thereafter she was asked to go to the police station where she saw a bag which was similar to the one which the accused carried on each occasion and which was similar to exhibit 1. It was submitted in the written heads of argument that she was a single witness whose evidence should not have been accepted because it was, so it was

argued, improbable that the accused would have come to the house about Veli on three occasions and also that having asked Raymond to give the message to Veil's father, it was, improbable that he would personally go to the father's house. It was further suggested that as she had not known the accused previously, she could be mistaken as to the identity of the

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person who came on the three occasions. I find no merit in these submissions. Prudence's evidence-in-chief and reexamination consists of four pages. The evidence in cross-examination takes up twenty-five pages. The Magistrate found Prudence to be a truthful witness. This finding cannot be challenged.

The accused gave evidence. He denied ever leaving the Republic, being in possession of a hand-grenade, having received any training, being in possession of the bag, exhibit 1, and ever having met witnesses Tshi±sha, Patrick or Prudence. He admitted sleeping at Raymond's home and explained how he came to do so.

The Magistrate, having detailed the evidence given by each State witness and the accused, gave his reasons for accepting the evidence of the State witnesses. I have already given my reasons for saying that he did so correctly. It follows from this and from a reading of the accused's evidence, that the

/ Magistrate

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Magistrate correctly found that the accused's evidence could not be accepted. The conduct of the accused was in many respects strange. I refer to the fact that he gave false names to Raymond, Tshitsha and Prudence; that he told Tshitsha and Raymond that he had received training overseas; that he boasted about his ability to destroy police stations; that he boasted that he could obtain 200 grenades. In this regard a question put to Raymond during his cross-examination may be significant. The import of this question appears from the following question by the Magistrate to counsel immediately after Raymond had concluded his evidence:

"COURT: Adv. Basslian, during the cross-examination of the previous witness, Raymond Dhlamini, it was put to the witness that to the witness's knowledge the accused is regarded as mentally retarded by people who know him. Is it alleged that the accused is by reason of mental illness or mental defect not capable of understanding the proceedings so as to make a proper defence, or that at the time of the commission of the offence he suffered from a mental

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illness or mental defect which makes him incapable of appreciating the wrongfulness of his act or of acting in accordance with an appreciation of the wrongfulness of his act?

MR BASLIAN: Sir, at the..my first consultation with the accused, I gained the impression that there might be something wrong with him. I discussed it with my instructing attorney and we actually had him examined by a psychiatrist. I understand that during the course of his detention before, I think it was before his first appearance in Court, the State had him examined at Sterkfontein. Sir, our psychiatrist, who is a Dr Alexander M Don, has furnished us with a report before the commencement of the trial, it was shown to the State Prosecutor, he does not say, go so far as to say, that he is mentally retarded or anything like that sir, but what he does say is the following. Sir, unfortunately I do not have a clear copy on me at the moment but this can be handed in."

I have earlier set out my reasons for saying that the Magistrate's findings of credibility in regard to Tshitsha, Patrick, Raymond and Prudence are unassailable. The following factors, already mentioned earlier, also lend

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credence to their evidence: The accused -

(aa) told Raymond and Prudence that he had been

to Botswana and that Veil had sent a message; (bb) told Raymond and Tshitsha that he had received training abroad; (cc) gave false names to Tshitsha, Raymond and Prudence. Mandela was the name given to both Tshitsha and Raymond;

(dd) took the police to Tshitsha's house;

(ee) did not react when the police, in the presence of the accused, said the accused had said that he had obtained a grenade from that house; (ff) did not react when Tshitsha said to the police, in the accused's presence, that he had seen the accused on two previous occasions.

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It must be remembered that it was not suggested that the above-named persons had conspired to inculcate the accused.

Tshitsha's evidence proves that in May 1981 the accused

showed Tshitsha an article which the accused claimed was a hand-grenade which could blow up police stations.

I do not think that that proved that the article was infact an explosive. However that may be, Patrick's evidence as to the events in the evening of 14 July 1981 and the fact that the police found the grenade (which Olivier

later exploded) on the morning of 15 July, proves that the accused was in possession of the grenade on 14 July 1981. The accused was therefore correctly convicted.

The accused was convicted of contravening sec.

2(1)(c) of the Terrorism Act No 83 of 1967. That Act

provides for a minimum mandatory sentence of five years. On the 2nd July 1982 the Internal Security Act No 74 of 1982 came into effect. Sec. 73(1) thereof repealed the Terrorism Act. It (in sec. 54) provided that conduct

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such as the accused's constituted an offence. It did, however, do away with mandatory minimum sentences. In the written heads of argument which are dated 6 February 1985 it was submitted that even though the offence was committed before 2 July 1982, the accused was convicted in August 1982 and, that the mandatory minimum sentence of 5 years did not apply. It was further submitted that in all the circumstances of this case the five year sentence of imprisonment was too severe and should be reduced. Counsel's attention was drawn to the case of the State v Mpetha, 1985 (3) SA 702 (A). In view of that decision counsel, in this Court, withdrew these submissions. I have drawn attention to the inordinate length of the cross-examination of the State witnesses. This was due to the fact that irrelevant matters were investigated and questions were repeated many times. Counsel also persisted in having small debates with the witnesses. The patience of the Magistrate is to be commended.

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It follows from all the above that the appeal cannot succeed and it is accordingly dismissed.

O GALGUT.

KOTZÉ, JA) HOEXTER, JA) CONCUR.

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