

nothing whatsoever in the activities of the A.N.C. during the years of the Indictment period, that is from 1952 to 1956, which could not have its origin in the policy set forth in this document. And what reason, My Lord, is there then to look anywhere else for the basic policy. Can it be said, My Lord, can it be said that the propagation of the aims of this document by the methods of the 1949 Programme of Action, which is the next important policy document, can be treason? That My Lord, is really the extent to which the Crown has to go in this case. And we submit, My Lord, that that cannot really be contended for on a true analysis of the evidence. To be logical, My Lord, to be logical, and having regard to the basis of the Crown allegation, the adoption of Africans Claims must have been an act of treason, it must have been, My Lord. It must have been an act of treason, both because it condemns colonialism, imperialism and oppression, fascism, and also because it claims a new order, it claims far reaching changes, which it may be said could never have been contemplated would be conceded by the ruling White race in South Africa. And My Lord, certainly not by supplication, and certainly not for the asking.

My Lord, there is an attempt, if I may put it this way, My Lord, to read implied terms into the Programme of Action. One might as well read implied terms into this document. When you adopted this and you said you were going to fight for it, and you knew that there was going to be sacrifice,

and you referred to yourselves as a mass liberation movement, you must have known that you couldn't do anything unless you knew that this and this would bring about state reaction and violence on your part. It is the same sort of argument, My Lord. And the same basic (?) argument, with respect. I don't want to waste time on this, but I just want to make one observation. Can be - can it be said that this document is communist inspired? It is true My Lord...

MR. JUSTICE BEKKER :

Was it put to Professor Murray at all?

MR. MAISELS :

No, My Lord, it wasn't.

MR. JUSTICE BEKKER :

I mean by the Defence?

MR. MAISELS :

No, it wasn't put by the Defence. The true reason was, My Lord, we thought the Crown was calling another expert on communism, and we were saving some documents for him, but in fact it wasn't put to Professor Murray. It wasn't necessary to put it to Professor Murray. We were entitled to think that the Crown was going to call another expert, because they gave us a statement, it is referred to in the Particulars. But My Lord, it is true that this document talks of a liberation movement - My Lord, may I put it another way. This document was found in the possession of a number of Accused. And one can be absolutely - it was an Exhibit at the Preparatory Examination. One can be absolutely certain that if Counsel for the Crown

could have extracted the slightest bit of communism out of this document, they would have put it to Professor Murray as well - they would have put it to him. It is true, My Lord, this document talks of a liberation movement; it is true it talks of colonialism; it is true it refers to imperialism; it is true it refers to oppression. All those, My Lords, are the catchwords which apparently constitute the key to communism, or treason. But My Lord, we submit that that is an approach that will not commend itself to the Court. The true position is, My Lord, in our submission, that this document, just like the Freedom Charter, arose out of conditions in which the non-Whites find themselves in this country. Professor Matthews, My Lord, in volume 86, at page 18009, says this :

"In order to save time here on this, we have shown you that portion of the cross-examination of Professor Andrew Murray in this case, in which Mr. Maisels put to Professor Murray various acts and proclamations which relate to the African people, and also certain facts relating to the economic and social position of the Africans in South Africa. Have you seen that? --- Yes".

"If I can ask you a blanket question, were the questions put by Mr. Maisels in your opinion correct? --- Yes, I think they were correct."

"And on these points that he put, that is to say points of legislation differentially affecting Africans or the question of the economic status of Africans, do Africans in that regard labour under a sense of

grievance? --- They certainly do".

"Do you think it is justifiable? --- I think it is justifiable, yes".

"Do you believe that it is necessary to look anywhere beyond the sense of grievance you have referred to explain the various clauses of the Freedom Charter?

--- No. I believe that the clauses in the Freedom Charter and in Africans Claims and in various resolutions adopted from time to time arise out of the conditions in this country to which the people are subject. You don't have to look beyond South Africa to understand those grievances".

And Professor Matthews, My Lord, was not asked one question at all to challenge that answer given by him. Now My Lord, I then pass to consider the position of the Programme of Action. We use the Africans Claims in our favour, My Lords, we use it to show that for many years past the organisation has been lawfully, legitimately referring to grievances which the African people have been suffering, and the organisation, as it was its duty to do, has tried to find means to remedy those grievances.

And I propose now, My Lord, passing then to the Programme of Action, Exhibit J.D.M. 24. Perhaps My Lord, I had better give Your Lordships the reference as to when it was first put in in the case. It was first put in, My Lord, by the Defence, in the evidence of Dr. Conco, in volume 54, page 10878 to 10880. Now My Lord, though this document, the Programme of Action was ignored by the Crown in its pleadings and

its Opening, the Programme of Action has now apparently become the central feature of the Crown case. I don't think, My Lord, that that is overstating the position. It is at the same time, My Lord, the central feature of the Defence case. It is before the Court only because the Defence relied on it. If the Accused had not elected to draw attention to it, it is not unfair to say My Lord, having regard to the way in which the Crown conducted its case, that the Court may never have known of its existence. And the reason why the Defence relies on it, My Lord, is readily apparent from the reading of its text. And that, My Lord, Your Lordship will find at 10878, and I now propose, My Lords, to read this document to Your Lordship. After saying - after Dr. Conco saying that this document - perhaps I had better <sup>read</sup> from the beginning:

"Dr. Conco, this document, Africans Claims . . . . . is there any document adopted by the African National Congress which sets out the methods by which the African National Congress will work? --- Yes, there is a document which sets out methods of attaining the objectives, as set out in Africans Claims. It is the 1949 Programme of Action".

"Would you look at this Exhibit J.D.M. 24. Is that the Programme of Action you refer to? --- Yes, that is the Programme of Action I refer to".

"Do you know when it was adopted by the African National Congress? --- It was passed by the African National Congress in 1949 at their 1949 Conference".

Now it begins in this way : "The

fundamental principles of the Programme of Action of the African National Congress are inspired by the desire to achieve national freedom. By national freedom we mean freedom from White domination and the attainment of political independence. By national freedom we mean freedom from White domination -" I am sorry may I just repeat that sentence. "By national freedom we mean freedom from White domination, the attainment of political independence, which implies the rejection of the conception of segregation, apartheid, trusteeship or White leadership, which are all in one way or another motivated by the idea of White domination or domination of White over Black. Like all other people, the African people claim the right of self determination. With this object in view, in the light of these principles, we claim and will continue to fight for the political rights tabulated on page 8 of our Bill of Rights".

My Lord, that is the passage in the Africans Claims which I referred to earlier, headed Bill of Rights.

The witness says it refers to Bill of Rights on page 8.

Then the Programme of Action continues by talking of the rights such as the right of direct representation in all the government bodies of the country, they resolve to work for the abolition of all differential institutions specially created for Africans, namely Representative Councils, the present form of parliamentary representation. Paragraph 2: "To achieve these objects, the following Programme of action is suggested. The creation of a national fund to finance the struggle for national liberation. The appointment of a committee

to organise an appeal for funds and devise ways and means. The regular issue of propaganda material through (i) the usual press newsletter or other means of disseminating our ideas in order to raise the standard of political national consciousness; (ii) the establishment of a national press." Then the main paragraph 3 :

"The appointment of a Council of Action whose function shall be to carry into effect vigorously and with the utmost determination the Programme of Action. It should be competent for the Council of Action to implement our resolves (?) to work for the abolition of :

(a) The abolition of all differential and political institutions, the boycotting of which we accept and to undertake a campaign to educate our people on this issue, and in addition to employ the following weapons: Immediately an active boycott, strike, civil disobedience, non-co-operation, and such other means as may bring about the accomplishment and the realisation of our aspirations. Preparations and making of plans for a national stoppage of work for one day as a mark of protest against the reactionary policy of the government." And then 4 : "Economic. The establishment of commercial, industrial, transport and other enterprises, consolidation of the industrial organisation of the workers for the improvement of their standards of living. Pursuant to paragraph (a), instructions to be issued to provincial Congresses to study economic and social conditions". And then My Lord, there are education and cultural clauses which I won't trouble

Your Lordships with at the present. And then the question is put to Dr. Conco :

"How is it accepted in the African National Congress, this Programme of Action? --- This is one of the basic policy documents, and this sets out clearly the methods which the African National Congress will employ".

On the face of it, My Lord, therefore, this is a Programme of non-violent action, giving it the ordinary reading. It supports, My Lord, the Defence contention that the A.N.C. did not rely on violent revolution, but on such methods as strikes and boycotts, together with other methods, still less resembling violent revolt. In fact, My Lord, we do not understand the Crown really to dispute that this is the meaning of the Programme. But the Crown seeks to add an implied term to the effect that the African National Congress knew that the inevitable consequences of the methods envisaged by the Programme My Lord, would be the use of violence by the state, followed by mass retaliation and eventually by the violent overthrow of the government. My Lord, as we understand the Crown argument, the Crown does not contend that these consequences were inevitable as a matter of objective fact. It doesn't say that, that the government would in fact employ large scale and unlawful violence against persons engaged in non-violent resistance. They don't say that at all. The fact that not everyone who adhered to the Programme of Action is alleged to be a conspirator, is a further indication that the alleged

consequences are not supposed to be objectively inevitable. Your Lordship appreciates, they don't allege that everybody who adhered to this document is a conspirator. And that being so, it is a further indication, My Lord, that the alleged consequences are not objectively inevitable. The Crown My Lord, putting its case at its highest, can only rely on the state of mind and the beliefs of some of the persons who adhered to the Programme of Action. That follows, My Lord, from the previous concession. Now certain questions, My Lord, with regard to this implied term have in our submission never been clearly answered. Firstly, My Lord, was this implied term present to the minds of those who drafted and adopted the Programme of Action, or did it only come into existence later? That is the first question one asks oneself on this story. Presumably, My Lord, the allegation is, and must be on the Crown case as it now is, that it was present to the minds of the National Conference in 1949. Otherwise, My Lord, it is difficult to see how it could become part of the A.N.C. policy. But My Lord, this leads to certain difficulties. If this belief or knowledge was present to the minds of the 1949 Conference, it follows, My Lord, that the conspiracy dates back to 1949. There can be no question about that. There can be no escape from that. But this is not what the Crown alleges. On the contrary, My Lord, the Crown has expressly conceded that the Defiance Campaign

was not conducted in pursuance of this conspiracy. But it is plain, My Lord, on the wording of the Defiance Campaign resolutions to which we shall draw Your Lordship's attention, that it was conducted in pursuance of the 1949 Programme of Action. Furthermore, My Lord, if the allegation is that the implied term was in the minds of the original authors of the programme, why didn't the Crown put this unequivocally to Professor Matthews? Why didn't they do it, My Lords? Why are they always afraid to put the case to the Defence witnesses? He testified, My Lord, and I will give Your Lordships the references in great detail later in my argument, he testified to the discussions of the subject at two National Conferences in 1948 and 1949, as well as throughout the A.N.C. at all levels through - during the intervening period. Why wasn't he asked a single question about these discussions? On the Crown case, My Lord, mustn't the expectation of violence cropped up in the course of those discussions? One can't escape that position on the Crown case. In 1949 there was already this government in existence. The only alternative position to that, My Lord, is the strange concept - and I use that word advisedly, My Lord, the strange concept of an implied term which doesn't come into existence together with the main agreement, but only subsequently. And only subsequently, My Lord, in this way - in a still stranger way. By virtue of some change in the expectation of the individual contracting parties. Now My Lord,

surely that is the strangest concept of an implied term that has ever been put anywhere. I would suggest, My Lord, with respect, that in law it is quite - as a legal position it is quite insupportable, quite insupportable. But the concept, My Lord, becomes even stranger if related to the facts. During 1950 and 1952 this Programme was put into action. On the 1st of May, 1950, a strike was called, which led to shooting by the police at some of the places where it took place, and didn't anywhere lead to any retaliation, let alone mass retaliation. But perhaps the masses weren't ready, My Lord. On the 26th June, 1950, a far more widespread strike was called, which led to no violence at all by anybody. Perhaps again the government wasn't forewarned of the plans, and didn't know the part it had to play in the scheme and the thing just collapsed. And for six months during 1952, My Lord, a large scale Defiance Campaign was conducted. Leading, My Lord, neither to state violence nor to mass violence. My Lord, could it really be suggested that it was in the light of this experience, and we are now talking, My Lord, about a term that is going to be implied at some later date, that the A.N.C. came to the conclusion that such methods would inevitably lead to violence by the state, followed by mass violence?

MR. JUSTICE RUMPF :

Mr. Maisels, why do you say - why did you say some time ago that this document was the central feature of the Crown case?

MR. MAISELS :

I show Your Lordship from my learned friend's argument, My Lord, which I shall give Your Lordship the references to, I can give them straight away, Volume 89 on pages 18686, it must be. I am going to give Your Lordship the various passages in support of that contention.

My Lord, if the Programme of Action - perhaps I am being too charitable to the Crown, it occurs to me, because if they don't rely on the Programme of Action, what resolution is it that they do rely on?

MR. JUSTICE RUMPF :

I don't follow you, I don't quite follow this argument really at all. As far as I see the Crown case, it is this. They say well, you see, that may have been the case. We have the Freedom Charter, and we make that a separate overt act. So important do we regard it. There may have been other documents - there may have been a conspiracy long before, we are not interested. We are satisfied with the four year conspiracy, and let us be thankful for that. And they say, well, now look at the Freedom Charter, and they say now you see we are going to prove, not by resolutions, or not by resolutions only, by speeches and documents, that it was the policy. That I think Mr. Trengove has mentioned at some stage, you mustn't look at the resolutions only, you must look at what was said and what was done. Now

24264.

that was the policy. So they say look, irrespective of what happened in 1949, irrespective - except insofar as to show a difference between the Freedom Charter and the other documents, we say that the policy of the organisation was over this period to use the masses to overthrow the state. Look at the Freedom Charter and look at what was said and written at that time. We are not interested, they may say, in what happened before, whether it was high treason or not, we don't care. We say the Freedom Charter is in any event a document that we rely on.

MR. MAISELS :

The Freedom Charter is an overt act of treason because it is in pursuance of a previous conspiracy which was entered into by, at the latest, February, 1954.

MR. JUSTICE RUMPF :

The previous conspiracy is also to be inferred from whatever happened afterwards, after 1954.

MR. MAISELS :

Certainly, My Lord, they can have it before and they can have it afterwards.

MR. JUSTICE RUMPF :

How you are going to apply that is a different matter.

MR. MAISELS :

But, My Lord, we have got to test it, and I am going to show Your Lordship, my learned friend - this is what he said at page 18687 in regard to this Programme of Action. In dealing with this document,

my learned friend said : "My Lord, we submit it is very clear .." - he had just quoted the document - "... that right from the outset the African National Congress realised that they were adopting methods which were unconstitutional, which may if the necessity arises be illegal in the sense of being against some statute, they were means which would involve the loss of life. That notwithstanding that they were prepared to accept that as the basis - that they were prepared to accept, that the basis of their struggle would mean a programme embodying means by which they wanted to force and coerce the state or the government into submitting or capitulating to their demand for a radical and a fundamental change in the present form of state." He took a stand on this document, My Lord.

MR. JUSTICE RUMPF :

Did he say that apropos that document?

MR. MAISLES :

Yes, My Lord, he had just quoted the document. My Lord, at the foot of page 18686 they say : "Now My Lords, as far as the methods are concerned.." - My Lords, perhaps I had better read a little bit earlier, so that I can remove from Your Lordship's mind any doubt as to the correctness of my submission. I thought it was clear. My Lords, my learned friend said this, page 18686, line 13 : "My Lords, it is common cause therefore on the admissions the evidence of the Crown we submit proves that beyond any doubt, that the African National Congress movement wanted at

their very lowest new and radical changes in the Constitution. The object of their struggle was economic, political and social equality. They wanted a state based on the abolition of man's inhumanity to man, and that they said couldn't be got under the present system based as it was on the 1910 Constitution. My Lord, Leibbrandt's case, I have already referred to page 19 of the typed judgment, which says the type of change wanted is factor one of the many factors that could be taken into consideration. Now My Lords, as far as the methods are concerned, the African National Congress takes its stand on a document that has become known as the 1949 Programme of Action, Exhibit J.D.M. 24. Now the object of that Programme of Action was national liberation. The weapons to be employed, according to that document, are immediate and active boycotts, strikes, civil disobedience, non-cooperation and such other means as may bring about the accomplishment and realisation of our aspirations. Now My Lord, we submit that it is very clear that right from the outset the African National Congress realised that they were adopting methods...", the passage I have just read, My Lord. So there is no doubt at all, My Lord, that that is so, and there are many other paragraphs ...

MR. JUSTICE RUMPF :

Except that he says there that the A.N.C. takes its stand on that document, and we say that is the start already ...

MR. MAISELS :

So he makes it a feature of his case.

24267.

Your Lordships - in fact Your Lordship uses the words "the start". Well I ...

MR. JUSTICE RUMFEE :

Well, I am not going to bind myself to that ...

MR. MAISELS :

But My Lord, where is the start? It is a question we have been asking for a long time. My Lord, may I put it to Your Lordship this way. We have called evidence before this Court of persons who attended Conferences, Professor Matthews certainly, from the early 'forties. And he says he knows of no such conspiracy such as deposed to by the Crown. He said there couldn't have been such a decision without his knowing about it. And what we do is we take ourselves through all the documents which we think have got a bearing on it. And the one which we imagine - unless I have misunderstood my learned friend's argument, my learned friend Mr. Trengove's argument - I should imagine, My Lord, it is really, if I may put it this way, My Lord, if not the central feature, one of the cornerstones of the case.

My Lord, I was about to pose another question, another unanswered question, in regard to this implied term. Because, My Lord, the basis upon which the matter was explored by Your Lordship in the questioning of Helen Joseph, was on the basis of the lines of the pursuit of the Programme of Action, their expectation of what could happen, there is no doubt about that, My Lord. They were

going to have strikes, boycotts, general strikes, that was the basis of expectation of action. But, My Lord, who does the Crown say had this implied terms of their minds? We know it is not every member of the A.N.C.; it is not every member of the A.N.C. who was actively engaged in putting the programme into effect. For instance, take a man like - a witness called Ramakula, volume 85, page 17814.

Ramakula, My Lord, was a regular Congressite, he is in business in Brakpan, he has done a lot of work in the A.N.C. and he was a committee member of the Brakpan Branch, and he seems to have been a fairly active member in Brakpan. He says this - he was on the Native Advisory Board. He says :

have ?  
 "You are given the example of the action taken in 1950 and 1952. Did you have it in mind in 1949 or at any other time to go in for violent action? --- No, My Lords, we did this as members of the National Organisation. This National organisation abhors bloodshed. It is an organisation that doesn't want to see any bloodshed".

"Do you believe that any results could be achieved by the sort of action you took in 1950 and 1952? --

My Lords, that is the beginning of this action. I cannot say whether we were going to achieve our objects."

"Did you have in mind any effect which might be achieved by your methods? --- Yes".

"Will you explain that briefly? ---.." and then he says . . . . . heard our life Prime Minister (???)

say through the press, he has been to conferences, and he says he knows a number of the people and the speakers who come to his branch.

Now, My Lord, certain Ramakula, whose - who is actively engaged in putting the Programme into effect, one of the people who took part in the stay at home, he certainly didn't know anything about it. Now My Lord, is the case then, and I do wish, My Lord, that if we have got it wrong the Crown would tell me now - is the case then that at some time after 1949, some of these people who accepted the Programme of Action as their policy, came to believe that it would inevitably lead to violence? Is that the case? I don't know, My Lord, why I should have to ask these questions. I don't know, My Lord why ....

MR. JUSTICE BEKKER :

Well, hasn't the Crown set out its case in volume 92 and the beginning of volume 93?

MR. MAISELS :

The Crown has set out, the way I put it, My Lord, this chain reaction, and the question is when did it start, and who started it? When did the A.N.C. start a policy of expectation of violence? Because we know that the policy of strikes was decided in 1949. Is the case then that sometime after 1949 some of those who accepted the Programme of Action, their policy came to believe that it would inevitably lead to violence? It follows of course, My Lord, from what we have already argued, that if that were so, it wouldn't support the allegation that

24270.

the A.N.C. had a policy of violent overthrow. Assume, My Lord, that some of the people who were a party to the Programme of Action, a section, a faction, a clique, a large number of people, recognised the inevitability of violence. Does that make it the policy of the A.N.C.? Plainly not.

MR. JUSTICE RUMPF :

I take it the Crown doesn't rely on this document. I am putting that to you, because if it doesn't rely ...

MR. MAISLIS :

It does, My Lord. It says at page 18689 - I will give Your Lordship a passage ...

MR. JUSTICE RUMPF :

Well, he didn't rely on it in its particulars or ...

MR. MAISLIS :

Oh yes, Your Lordship is correct, but my learned friend Mr. Trengove was very careful in his Opening Address to point out to Your Lordship that he wasn't bound by his attitude, and he can certainly argue in argument, My Lord, on a document that we put it. He is perfectly entitled to do that. But at page 18689/90 he says this : "My Lords, they knew..." no, it starts earlier. Quite clearly he is talking about the Programme of Action, My Lord, At 18688 he refers to a passage ...

MR. JUSTICE RUMPF :

Well, he starts off by saying the Defence takes its stand on that document. And then he

24271.

deals with the document.

Mr. MAISLS :

Then he deals with it in this way.

"My Lords, we say it is quite clear, it is quite clear to the African National Congress, as it would be to anybody My Lords embarking on that programme.." - that is the Programme of Action - "... those methods for the achievement of national freedom which involves those radical and unconstitutional changes,.." - Your Lordship will see the Programme of Action is not only method, but deals with changes - "if one does seek to achieve that along unconstitutional paths, then one must be prepared to face prison and death. They realised the implications, these people who adopted this Programme realised the implications of the Charter - this programme from the very outset. Only one wonders, My Lord, why their words (?) were omitted from the press statement." It is another point which I shall deal with later. "Now My Lords, they realised that mass action of the nature envisaged by this programme, by their programme, that mass action would probably lead to violent conflict. They had their own interpretation of Bulhoek, they knew of the Bulhoek disaster. They were aware of the consequences of the 1922 miners' strike on the Rand, and they had the experience of the miners' strike in 1946. My Lord, they knew and realised that the course of conduct which they intended pursuing, in which they intended putting into operation

relentlessly, on an ever increasing scale, was a course of conduct that was in its very nature subversive, and was a course of conduct which no state and no government would tolerate. My Lord, they adopted this Programme of Action before the Witzieshoek disaster of 1950. They adopted this Programme of Action before the stay at homes of 1950 and 1951, before the riots in Port Elizabeth, Kimberley and East London. Now My Lords, they cannot say that because of government action in those instances this Programme of Action was forced upon them. They cannot say, My Lord, that they tried - as they tried to explain in the case of Kenya that because of certain actions they were forced to adopt certain measures. Even before Witzieshoek, before the stay at home, before the riots, they already expected suffering, imprisonment and death in embarking on this plan of campaign."

And then Your Lordship Mr. Justice Bekker says :

"Well, isn't the evidence that they embarked on this Programme of Action because supplications, petitions and interviews brought no success?"

Mr. Trengove :

"That was the motive, My Lord, that is what they say, My Lord."

And then Your Lordship :

"And for that reason they in that sense it was forced upon them because the other means didn't help at all".

Mr. Trengove :

"That is quite correct, My Lord, but it was forced upon

them not by a fascist government, it was forced upon  
them before this government they say is fascist. It  
was forced upon them by an imperialist or a capitalist  
government. That is the point, My Lords. In many  
of these documents, in many of the speeches they  
indicate that they are taking action against a  
particular government or a particular law. In the  
Defiance Campaign they sought My Lords to say the  
Defiance Campaign was directed at particular laws.  
It might have been directed at particular laws. But  
it was part of a Programme, My Lord, not directed  
at a particular government, not directed at particular  
laws. It was part of a Programme, directed at an  
attack on our society based as it was on the Constitu-  
tion and on the contradictions as they saw it,  
inherent in capitalist and imperialist society.  
My Lords, the fact that they knew and realised what  
the consequences of their actions were going to be,  
and that they realised that any government would be  
obliged to take strong measures to suppress and to  
stamp out activities which are subversive, that My  
Lords, is confirmed by the lecture Political Organisa-  
tion, B. 25." There is no doubt, My Lord that my  
learned friend does and has to rely on the  
Programme of action as affording some form of support  
for his case. And My Lord, I should be astonished  
if the submission that I have made that it is, if  
not a central feature, at least a cornerstone of the  
Crown case, if that were to be denied by my learned

24275.

friends appearing for the Crown. And My Lord, if they don't rely on the Programme of Action, I would like to know what they do rely on.

Now, My Lord, the Crown - we nevertheless, My Lord, turn to examine the evidence to see whether the evidence supports the proposition that there was an expectation, let alone a policy, of violent overthrow.

CASE REMANDED TO THE 15TH MARCH, 1961.

COURT ADJOURNS.

-----

15/3/1961MR. MAISELS

MR. MAISELS: My lords, before I continue 1  
my argument where I left off yesterday afternoon I  
should like to give his lordship, Mr. Justice Bekker,  
the reference that your lordship wanted in regard to the  
A.N.C.Y.L. I think there your lordship may have had in  
mind what happened at the conference of the A.N.C.Y.L 5  
held in Uitenhage on the 26th July, 1954, where a state-  
ment was made - - this appears in the evidence of Sagoni  
- - referring to the written reports and written speech,  
and at page 9640 - it's Sisulu speaking, my lord, and he  
says, talking about the Liberation Movement, "Depends on 10  
sound readers to be straight in its policies and programme.  
The National Conference of the A.N.C. is the main organisa-  
tion to direct the youths; all the members have equal  
rights to voice their grievances, the same as the Presi-  
dent. Once a decision has been taken it is binding for 15  
all members to carry it out, whether they like it or not",  
and then, my lord, in cross examination and in amplifica-  
tion of that at page 9810, where it is put this way - -  
he says 'he', meaning Sisulu - - it's at line 13 - - he  
proceeds with his speech and deals with the machinery of 20  
the organisation and says 'it depends upon sound readers  
and a sound policy', and he says: "The National Conference  
of the A.N.C. is the main organisation to direct youths,"  
and he complains about the fact that some members ignore  
the decisions of the A.N.C. and choose instructions as 25  
they like." I think that's the passage your lordship  
may have had in mind.

BEKKER J: Mr. Maisels, before you go on,  
there's something I'd like to know in order to clear my  
own mind. It concerns the issue of these bulletins. 30

Yesterday the Programme of Action was read in Court and it showed that it was decided to have their own newspaper. 1

MR. MAISELS: Yes, my lord; that never came about as your lordship knows.

BEKKER J: Well, now, the 'Congress Voice' was described by Luthuli as . . . 5

MR. MAISELS: Yes, that was it, my lord; that existed for a short period, but the National press that they hoped to have they never had.

BEKKER J: Let me put it this way. The policy of the organisation is to have its own press, and then 'Congress Voice' came into being. It may be that the other newspapers thereafter took over the real function of the 'Congress Voice'; I don't know whether that is so. If there had been a decision by an organisation to place material by way of bulletins or pamphlets before the public, and if over a period of four years - - why I mention four years is because there were conferences in between - - - one finds a particular theme or a type of propaganda in these newspapers without any objection being raised as far as we know at National conferences protesting against that type of propaganda, if it is then suggested - as I think the Crown has suggested - that is policy; if not, it serves as a yardstick of what they wished the policy to be, or it may be that it serves as an indication of the real objects the people had in mind. What do you say to that? 10 15 20 25

MR. MAISELS: My lord, I wouldn't concede that that is the position at all, short of an official and proper imprimatur. My lord, if your lordship puts it on the basis that these bulletins - these various publications - 30

MR. MAISELS

are the official voice in the sense that this is what we  
are doing and this is what we are saying, this is our view,  
and this carries on persistently over conference after con-  
ference, then, of course, my lord, it might come within the  
type of situation his lordship the Judge President put to  
me, of a constant series - - one would say then it would  
be the unanimous view of the organisation. But that's the  
extent to which one would have to go. My lord, I may say  
that the whole question of these bulletins and their proper  
standing forms a separate chapter of our argument, and per-  
haps, my lord, it might be convenient for the matter to be  
more fully dealt with then.

BEKKER J: Yes.

MR. MAISELS: Now, my lord, reverting to the  
question of the Programme of Action with which I was dealing  
yesterday afternoon I had intended to refer your lordship  
to the evidence in regard to expectation of violence on the  
part of the State, and expectation of retaliation, and my  
lord, I was submitting yesterday that in fact the Programme  
of Action was the central feature of the Crown case, or  
became the central feature of the Crown case. My lord, I  
submit to your lordship, quite apart from anything that my  
learned friend Mr. Trengove might have said, that that is  
undoubtedly so, because your lordship will see that the  
Programme of Action itself talks about strikes, and it was  
the Programme of Action itself which initiated the idea  
of striking for political purposes. So, my lord, if that  
wasn't the occasion upon which the decision was made to  
indulge in strikes with the consequences which the Crown  
says it had - the so called natural probable consequences -  
what was the decision? When was it made? My lord, we

submit it is patent and quite clear that it could only have  
been under the Programme of Action. There is no escape from  
that position, my lord, and my lord, if that is correct -  
if that is correct, then, my lord, certain consequences  
follow. It follows, my lord, for example that as initially  
stated by the Crown, the Defiance Campaign was part and  
parcel of the conspiracy to overthrow, but your lordships  
will remember that the Crown expressly withdrew that sub-  
mission; it was compelled to withdraw it - - we shall  
deal with that later, when I deal with the question of the  
Defiance Campaign - - but the consequence is that when one  
tests the position as to what happened after 1949 in the  
light of the Defiance Campaign, and in the light of the  
other activities, our submission is that the argument of  
natural and probable consequences receives, my lord, a  
very serious blow. But, my lord, I've argued the matter  
so far on the basis that that must have been the central  
feature of the Crown case. In fact, my lord, that it was  
appears from the last statement made by my learned friend  
Mr. Trengove at page 23590 of the record. My learned  
friend at page 23589, "We respectfully submit that the  
addition of the words 'which said demands'" - - he was  
dealing with part E, my lord, of the Indictment, that's  
the Freedom Charter part, in reply to certain questions  
which your lordship Mr. Justice Bekker put to him, "We  
respectfully submit that the addition of the words 'which  
said demands' the accused intended to achieve by over-  
throwing the State by violence" - they are a necessary  
consequence, my lord, of alleging that. Your lordship  
then said, "Yes, I understand the Crown case; what I want  
to know is, are you relying on the general set-up of the

means to be employed, rather than a particular decision  
as to how they, having decided on the Freedom Charter,  
how they were going to work towards it"?-- (Mr. Trengove)  
Oh, yes, my lord, the general means. All the Congresses  
had decided that their Liberatory struggle and their road  
to freedom, peace and democracy lay along the employment  
of the means in the 1949 Programme of Action, whether they  
were in the A.N.C. or not - and this was only one step  
along the road to that ultimate goal."

So there can be no doubt, my lord, about that  
at all, with respect.

And now, my lord, I proceed to deal with the evi-  
dence and we submit to your lordship that the Crown in its  
argument has largely ignored these passages in the Defence  
evidence which deal directly with the state of the belief  
of mind of the witnesses, and of their organisation on the  
questions of inevitable State violence and mass retaliation.

My lord, the volume of this evidence is small com-  
pared with what it might have been if anyone had known during  
the presentation of the evidence that this would be or  
become the crux of the case, and to some extent perhaps  
the credibility of the witnesses is perhaps enhanced by  
the fact that the witnesses could not have known because  
they had no motive to misrepresent their true state of  
mind.

Now, my lord, in regard to the first question,  
namely the expectation of violent action by the State, the  
question whether and in what degree the African National  
Congress expected violence to be used by the State was put  
to the Defence witnesses. My lord, our general submission

is that the weight of defence evidence is strongly in favour 1  
of the proposition that such violence was regarded as a  
possibility, even a strong possibility, but nothing more  
than that. There was no systematic attempt by the Crown  
to put the proposition that violence was regarded as inevit-  
able as distinct from merely possible. The first witness 5  
my lord, is Dr. Conco - page 10989 in cross examination,  
line 29, - well, perhaps the question should be read:  
("Q) Now, Dr. Conco, leave aside the position in India for  
the moment; you say you found it necessary in South Africa  
to warn your people that if they took part in the implemen- 10  
tation of the Programme of Action they might have to face  
death?-- (A) Yes, we've always said that and we wouldn't  
argue about that." Page 10990 -  
("Q) And notwithstanding that prospect you nevertheless 15  
urged and encouraged the masses of the African population  
to take part in this programme for the implementation of the  
Programme of Action?-- (A) Yes."  
("Q) And in doing that you realised that that may involve a  
conflict, a violent conflict, between the masses of the 20  
African people and the State authorities, the police?-- We  
have in the Defiance Campaign, which is a classical example  
of defiance, we did instruct our volunteers never to be pro-  
voked into violence as our aim and policy was a completely  
non-violent one. But one couldn't predict when these volun-  
teers went into action what could happen to them and we had 25  
to warn them that there was a possibility of their being  
attacked."  
("Q) Dr. Conco, after the Defiance Campaign in 1953/54,  
1955 and 1956, and with your experience of what has happened  
in other countries, you encouraged your people to take part 30

on a mass scale in action which could result in a violent 1  
 conflict with State authorities?-- Our policy was non-  
 violent".

By your lordship the presiding Judge: -

("Q) Do you understand the question?-- I do understand the  
 question. My lord, that we organised the masses, which could 5  
 possibly lead to violence in conflict with State authorities.  
 I understood the question, my lord."

Mr. Trengove: -

("Q) Well, Dr. Conco?-- (A) As I have already explained, we  
 did warn our people that it was possible that there could 10  
 be shooting; that some may be shot, but we always told them  
 when they joined the African National Congress that if  
 they took part in defiance campaigns they must remain non-  
 violent at all times and under all provocation."

The next witness, my lord, to be asked about that 15  
 was Luthuli, at page 11778, Vol. 59. In chief, my lord, he's  
 dealing with the question of the way the police might be-  
 have in certain circumstances and he says at line 25: -  
 "I should say, my lords, that even on the question of  
 baton charging, lawful baton charging by the police, that 20  
 insofar as one gets injured, one must always take into  
 account the fact that even in a baton charge you get hurt;  
 it might even result in your death, not even as a result  
 of direct police action. You might be running, you would  
 fall, so even from a general point of view people take the 25  
 attitude 'Well, anything can happen to me'".

At page 11951, my lord, in Vol. 60, line 18:

("Q) I want to put it to you that that was not the view  
 of the African National Congress held during the period in

review; the view they held and propagated was that the ruling class would use the whole State machinery, the police and the army, to crush the Liberatory movement to the extent of suppressing the struggle of the people by violence, by force of arms? That is what the people were told to expect?-- (A) My lord, I think insofar as the view would be that the State would use all possible means of suppressing the Liberatory Movement, that is correct. We did realise that the State might take a serious view of things and do all that it can, the Government using whatever force it has would try to suppress the Liberatory Movement."

By your lordship Mr. Justice Bekker: -

("Q) Including violence?-- No, my lord; of course, as far as the State is concerned . . . ."

("Q) No, I mean, did you visualise that the State might use the army and the police violently to suppress the Liberatory Movement by force of arms?-- No, my lords, I would not say that one would say the State would immediately use the army, or that the police would come. I would not go to the extent of saying that the State would purposely use it. But in a situation of working the State machinery the police, they might in the execution of their duty, be compelled to use force."

("Q) I would like to break up the question Counsel put to you. He put it to you that the A.N.C. view was that the ruling class would use the police and army for crushing the Liberatory Movement by force of arms; that's the question he put to you. Now I'd like you to break it up. From the point of view of the A.N.C. did the A.N.C. hold the view that the State would use the police and/or

the army to break up or crush the Liberatory Movement by force of arms if necessary, from the State point of view; is that the view which it held?-- My lord, I would say we have the experience, not the experience that we have had, but some experience that we have had before -- we didn't rule out, my lord, the question of the army being brought in to assist the police. For instance there are the Durban Riots of 1949, where it became necessary -- I'm not saying whether it was necessary or not -- where it became necessary for the State to bring in force, because in that case there was rioting, but where you have a Liberatory Movement, and you sometimes have got to carry out certain acts which are in defiance against the law, in that protest it is conceivable that the State will take action against you so that one wouldn't rule out, although one does not highlight that aspect of it -- it's not a deliberate action of the State, but it is the performance of their duty as they see it -- they might come to a time when the State uses the army."

Page 11953, my lord, Mr. Trengove: -

("Q) You wouldn't like to highlight this aspect of the crushing of the Liberatory Movement, but I would; I want to put it to you that not only did you conceive the possibility . . ." - note, my lord, how it's put -- "not only did you conceive the possibility that the State might crush the Liberatory Movement by violence and force of arms but you propagated that view amongst the masses, that they must expect that the State would at a given point of time resort to violence to crush the Liberatory Movement?-- My lord, that is not the view of the A.N.C but the African National Congress felt, and feels it its

duty, when people are entering a struggle, to appraise them  
of the possibilities that may take place, so that a man does  
prepare himself spiritually to meet the struggle, my lord". 1

("Q) To meet death?-- Yes, that can come."

("Q) On this aspect, did you conceive the possibility that  
the State would be compelled to use violence as a result 5  
of the Liberatory struggle in which your people were engaged  
?-- My lord, the possibility was there."

("Q) And if the State is compelled to use violence what is  
it that compels the State to do that", and then he explains,  
my lord, "My lord, as I have already indicated in the 10  
course of carrying out the struggle such as we were carry-  
ing out we engage in activity which according to the laws  
of the country are not legal activities. The State, in  
the circumstances, are performing its duty and I cannot  
judge now in how far the State would go, but I am suggest- 15  
ing that it's right in an organisation, as far as you can,  
to acquaint the people of what they are going in for, and  
one can't rule out death in a struggle."

Then, my lord, at page 11958, lines 3 to 15:  
my learned friend is talking about 'clash', and he says: 20

("Q) Now, how could there be a clash? How could violence  
arise if nobody is going to resist or interfere with the  
maintenance of law and order?-- My lord, I don't know  
whether I did say that in pursuance of our struggle violence  
would necessarily arise, certainly from our end." 25

Pausing there for a moment, my lord, the witness  
never said that. He continued: "I don't know whether I  
said so. I'm not visualising our opposing the State or  
opposing the police, but rather on the contrary I visualise  
a state where my people, even in the face of police action, 30

MR. MAISELS

would not retaliate by violence but rather would, if they  
should disperse, they should disperse and go away and not  
seek means of resisting." 1

("Q) Then the action of the State must be taken by force?--  
I don't quite follow the question".

Then at page 11960, my lord, after dealing with 5  
the ruling classes consisting of the banks, industry and  
mines, and my learned friend saying that a strike might  
undermine the whole economy of the State, he says, line 23:

("Q) Do you agree that in those circumstances it is con-  
ceivable that the State may feel compelled to take measures 10  
to break the strike?-- (A) It is possible."

("Q) And in the light of your past experience of strikes  
do you visualise that in breaking the strike the State would  
have to use force? And that that may lead to a clash?--"

My lord, note the way the question is put - "in breaking 15  
the strike the State would have to use force" - how my  
learned friend translates himself from it being conceivable  
to becoming something that is to happen,"and that that  
may lead to a clash, a violent clash between the forces of  
the State and the masses on strike?-- (A) My lords, I 20

think that all I would say on this proposition would be  
this, without having to repeat myself, and I don't think  
I can add anything to it. It's possible that my expecta-  
tions of white South Africa, the electorate and the people  
may not do what I think they would do, because my view is 25  
that surely leaving aside the question of the Government,  
I must lay my hope in the electorate; some people would  
come forward to try and get the government to change its  
course - beyond that I don't know, I can really carry the  
matter no further." 30

MR. MALSEIS

And, finally, my lord, the matter is resumed  
 again some several hundred pages later in Vol.62 at page  
 13233, during the some twenty day cross examination of  
 this witness - the same topic your lordship will find is  
 dealt with time and time again at different places in  
 the evidence of Luthuli. He is being cross examined, my  
 lord, on this article in 'Liberation' I think it is -  
 the article of Ruth First in 'Liberation' of November,  
 1953, called "The Constitutional Fallacy" to which your  
 lordship the Judge President referred yesterday. He  
 says this: -

("Q) The African National Congress on the other hand em-  
 barked on a Programme of Action which it realised was sub-  
 ject to the danger that it might result in a violent clash  
 with the State, and it deliberately embarked on such a pro-  
 gramme; do you agree with that?-- (A) My lords, I agree  
 that the African National Congress embarked on that pro-  
 gramme. I stress the word 'deliberately'. I say that  
 circumstances and conditions, as I have repeatedly said,  
 forced the African National Congress to adopt that pro-  
 gramme. It wasn't not merely just deliberately; the cir-  
 cumstances of the political situation in South Africa, as  
 it obtained, forced the African National Congress to this  
 programme."

Your lordship will see the highest that is put  
 by my learned friend in the end is 'it might result in  
 a violent clash with the State'.

Professor Matthews, my lord, very much to the  
 same effect.

BEKKER J: Have you got 13430 there?

MR. MALSEIS: I think, my lord, that passage

MR. MAISELS

I'll deal with - - is that the passage on retaliation? 1

BEKKER J: The A.N.C. knew that strike action in the Programme of Action would lead to a direct clash.

MR. MAISELS: Yes, my lord, I'm going to deal with that - - I think that that comes under 'Retaliation'. May I just check, my lord? 5

BEKKER J: Yes.

MR. MAISELS: I think, my lord - - no, I don't think that's a correct reference; I think, my lord, the reference that your lordship probably has in mind is the reference at page 13435 possibly. There is nothing on 10  
13430.

BEKKER J: The programme of action - cross examination starts at page 13436, - -

MR. MAISELS: Did your lordship say 13430?

BEKKER J: Yes. 15

MR. MAISELS: I think with respect, my lord, that that is wrong . . .

BEKKER J: Well, it's after that.

MR. MAISELS: I'm going to deal with that, my lord, 13435 to 13437; I'm dealing with that, my lord, because 20  
I've divided the argument up into the following categories: Firstly, my lord, expectation of violent action by the State; Secondly, the causation of the violence, and thirdly the retaliation aspect.

BEKKER J: But I'm at the present moment that 25  
it was never suggested that a strike would inevitably lead to a clash.

MR. MAISELS: Yes; your lordship says it was suggested there? Perhaps I've overlooked that passage, I'll just check. Oh, yes, my lord, he is dealing there with 30

a clash, and that's a long paragraph, my lord - - (reads) 1  
"In the light of your experience in 1949 . . . the A.N.C.  
knew that strike action in that sense would lead to a  
direct clash between the African people - the working class  
on the one hand and the ruling class on the other hand,.."  
My lords, I am going to deal with that specifically. I've 5  
got a note of those pages and I deal with it under 'Reta-  
liation', because I'm going to comment on the questioning -  
the form of the questions and the answers given, my lord.

Now, my lord, the next witness on the subject  
is Prof. Matthews. He discusses the question fully in 10  
Vol. 85, at page 17949. Perhaps I should read from the  
foot of page 17948: -

("Q) What reaction did you think the Government would pro-  
duce to your policy? Your policy of civil disobedience,  
and passive resistance and industrial action?-- There were 15  
two ways of looking at that; on the one hand, there was  
a possibility of a hardening of the attitude of the Govern-  
ment towards the African people; that was to be expected.  
But we always hoped that there might be a change as a re-  
sult of this pressure; there might be a change in the 20  
attitude of the government and of the electorate generally."

("Q) Did you indicate to your followers that the Govern-  
ment might react harshly?-- We did."

("Q) In this speech of yours to which we have referred you  
- talking of the Government - "We are dealing with a well 25  
organised relentless group which will stop at nothing to  
achieve its aim"; is that your aim?-- That is my view."

("Q) Did you have in mind that force might be used by the  
Government against your followers?-- I'd say yes."

("Q) Did you warn them of that?-- We did." 30

MR. MAISELS

("Q) What did you warn them that they might have to face  
 ?-- We warned them that they might have to face hardships,  
 hardships, suffering and even death".

1

Then your lordship Mr. Justice Bekker: -

("Q) What is it you had in mind when you said that?-- When  
 we said that we had in mind the fact that the Government in  
 suppressing a particular campaign might use force, and that  
 that force might result in harm to the people."

5

Then your lordship put the matter, I suggest, cor-  
 rectly: ("Q) What circumstances did you have in mind as to  
 the necessity of force being used on the part of the Govern-  
 ment? . Perhaps I shouldn't use the word 'necessity' - the  
 possibility?-- (A) Well, take the possibility like this:  
 that you might have a group of people who are having a meet-  
 ing which they consider a peaceful demonstration; the police  
 might come along and order them to disperse within five  
 minutes; before the five minutes have expired they order  
 a baton charge. Some people might be hurt in the process  
 and our suggestion was that our members must be prepared  
 for that."

10

15

By Mr. Kentridge: -

("Q) Did you have any question based on anything that you  
 knew of which would lead you to expect that as a possibi-  
 lity?-- There have been from time to time experiences of  
 that kind in the history of the African people."

20

("Q) Are these experiences which you refer to known among  
 your people?-- Yes, they are known and they are remembered  
 and they are spoken about; sometimes over long periods  
 of time." "Take for example the ..... affair which took  
 place in 1922; you still find that discussed among the  
 people as an example of the suppression of a movement by

25

30

the Government by the use of force." 1

Then your lordship put the question: -

("Q) How did the Africans view the Bullock incident?-- They viewed the incident, my lord, in this sense: that there were a number of people who quite rightly were in illegal occupation from the point of view of the government of a certain piece of land, but who were themselves quite completely unarmed; the government eventually, after a number of attempts to get them to move, used armed force to get rid of them, and the people look upon the use of force in the circumstances as unfortunate and undesirable." 5 10

Your lordship the Judge President: -

("Q) I don't quite follow. As far as as Bullock is concerned were people shot?-- Yes. About 170 people died there apart from the wounded."

By Mr. Justice Bekker: - 15

("Q) Well?-- (A) And that is remembered; it is talked about. The children and so on talk about it as an incident which has passed, what one might call a political history of the people."

("Q) What I would like to know is this: were there any - was there any enquiry into the rights and wrongs of the actual shooting, or was it just said 'Well, now there's an example, that people who are unarmed are shot'?-- You don't get that kind of judicial enquiry into the merits of disputes; obviously you don't get that . . . ." 20 25

("Q) The emphasis was on the fact of the shooting?-- Yes, and on the fact that no shooting on the other side."

At page 18251, in Vol.87, my lord, he says this:

("Q) It was put to you certain statements about the possibility of the government provoking violence, and I think 30

MR. MAISELS

you said it was not a matter of policy with the A.N.C. 1  
 that the Government was out to provoke violence?-- Yes."  
 ("Q) In the A.N.C. did you ever bear in mind, apart from  
 policy, that it was a possibility in fact?-- Yes, there  
 was a possibility; yes, definitely, in any clash. I'm  
 using the word here because it's been used so much - - 5  
 in any clash between people there is always the possibi-  
 lity that force may have to be resorted to and people  
 suffer in the process."

Then, my lord, Mandela, Vol. 75, page 15816, line 6:

("Q) What did you have in mind as far as you can recall, 10  
 speaking in that vein . . . ." - he spoke about Tshaka and  
 various others . . . (A) "All that I had in mind was that  
 in the struggle for freedom people may be shot; not because  
 they indulged in violence, not because they believed in  
 violence, but in spite of the fact that they had taken all 15  
 the precautions that there should be no violence as far  
 as they are concerned they may be shot, and these are  
 things that everybody who is taking part in our struggle  
 should accept."

At page 15974, my lord, in the same volume, line 2: 20  
 Cross Examination by my learned friend Mr. Hoexter:

("A) Certainly Congress reckons with the possibility of  
 violence? And a lot of bloodshed has been committed time  
 without number by the Nationalist Government, and Congress  
 has on several occasions warned its followers they should 25  
 expect it."

In the evidence of Yengwa, my lord, there is  
 one passage which seems to put the matter higher than a  
 mere possibility. That's at Vol. 84, page 17634, line 15  
 to 16, where he says this: My learned friend cross examining: 30

**Collection: 1956 Treason Trial**  
**Collection number: AD1812**

***PUBLISHER:***

*Publisher:- Historical Papers, The Library, University of the Witwatersrand*

*Location:- Johannesburg*

©2011

***LEGAL NOTICES:***

**Copyright Notice:** All materials on the Historical Papers website are protected by South African copyright law and may not be reproduced, distributed, transmitted, displayed, or otherwise published in any format, without the prior written permission of the copyright owner.

**Disclaimer and Terms of Use:** Provided that you maintain all copyright and other notices contained therein, you may download material (one machine readable copy and one print copy per page) for your personal and/or educational non-commercial use only.

People using these records relating to the archives of Historical Papers, The Library, University of the Witwatersrand, Johannesburg, are reminded that such records sometimes contain material which is uncorroborated, inaccurate, distorted or untrue. While these digital records are true facsimiles of paper documents and the information contained herein is obtained from sources believed to be accurate and reliable, Historical Papers, University of the Witwatersrand has not independently verified their content. Consequently, the University is not responsible for any errors or omissions and excludes any and all liability for any errors in or omissions from the information on the website or any related information on third party websites accessible from this website.