"effect on the assessment by the trial court of the witness' credibility and reliability. Such a real possibility is not created by a discrepancy of a minor or trivial nature."

Now if there is a written statement to the police which is subsequently, in a material respect, departed from or added to, when I say added to I mean added to in relation to matters which one would expect to be in that statement or to see in that statement, during consultation with counsel, that is no different to whether it is added to or departed from during(10) the course of evidence. It cannot make any difference whether the last consultation before the witness gives evidence is a consultation with the police or a consultation with counsel. The important thing is that if the police have recorded a written statement and they have in their possession that written statement and a witness subsequently gives evidence which if one had that written statement one could say why did you not say that, you have said something different in your evidence, this is something which should have been in your statement. You could have made use of that in cross-exami-(20) nation. And that is as we understand Xaba's case, is, and I need to put it no more than that at the very least arguable. And that is the argument that we want to advance there, because it is quite clear that the prosecution had an understanding of its responsibilities in a particular way and I do not dispute that that was its understanding. The question is not whether when it put the witnesses into the box it had that understanding. The question is whether that understanding, which is recorded at page 27 185 in the passage that I have cited to your lordship, was correct. Now I shall be very (30)

brief/....

brief as far as the rest is concerned. There was a statement made in argument that the defence kept witnesses away from the court. Now much depends upon counsel's perception of the onus of proof and what is required to rebut any case that may have been led and whether or not that onus has been discharged. Something which counsel has to decide from time to time - sometimes they make the right decisions and sometimes they make the wrong decisions but your lordship would appreciate that where witnesses have been called and where evidence, if accepted, is sufficient to answer the state case that one would not lightly call people to give evidence, people who are said themselves to be guilty of treason. One would not lightly call people to expose themselves to cross-examination when there is an uncertainty as to the parameters of what is and is not treason, what the limits of dissent may or may not be, where as your lordship put it in your judgment, where the line gets crossed, what is legitimate dissent and when does it become treason. Those persons themselves may not wish to be subjected to that ordeal. There are many reasons, many good reasons for not calling witnesses and the question is not whether other witnesses might or might not have been called. The question is whether there was or was not sufficient evidence before the court and it was said to your lordship in argument that we did not call anybody to talk about the material policy of the UDF, about the conditions and their policies on the national convention and so on. But that is not correct. We called accused nos. 19, no. 20 and no. 21 who were able to give evidence on that. Now of course there is no other evidence from the state and if their evidence were to be accepted that should be more than enough to answer the

case. And the same with the areas. We called people who were in different positions, different backgrounds, to speak about what had happened in meetings and on different occasions. They too, some of them may have been thought to, some, not all I agree but some of them may have been thought to have come to the case with less of a direct involvement in some of the disputed facts or in relation to some of the disputed facts. Their evidence has not been accepted. If their evidence were accepted the findings would be very different and the question is not whether X or Y could have come here to give evidence. The question is whether A and B and C who gave evidence in all the circumstances whether their evidence was sufficient to create a doubt which, if it exists, should lead to an acquittal. So in the end one has to decide this matter not on the basis of who could have given evidence, bearing in mind that accused 19, 20 and 21 all did, but whether there is a reasonable prospect that the evidence was sufficient, that the 136 witnesses - perhaps I have got the figure wrong - whether their evidence is sufficient or whether it is just so bad that it might never have been called at all. Now I do appreciate that the record is massive and it is a case which happens once in a lifetime. Courts unfortunately are sometimes called upon to deal with these once in a lifetime cases and it means that the appellate division will unfortunately be called upon to spend much more time on one case than it would ordinarily have to do. And of course counsel will have a responsibility to the appellate division to prepare full heads of argument and to try to make the case as manageable as it possibly can. I would assume that the appellate division will be guided to the passages and to the important issues, not only by the

heads/....

heads of argument but by your lordship's judgment and by your lordship's report. But it does not mean that the appellate division is going to ahve to read every piece of paper that is put in front of it. And if it is going to be a big task for the appellate division - and we acknowledge that it will be - it is also equally a case of great national importance. So those two do go together and I do not want to go back to what I have said about that already.

As far as the admissibility of documents and videos is concerned there are in our submission points of considerable substance and importance to be raised there. There are many important issues which the appellate division will have to resolve for us which have not yet been resolved. The way section 69(4) should be used, the way it should be interpreted is a point of fundamental importance upon which the appellate division has never really addressed itself. It has dealt with matters which are clear and in cases where there is no dispute but it has never been called upon to address this particular issue and I may say that the same is true, in a different way, of many difficult questions of evidence which arise here. As far as the interpretation of such material is concerned that too is a task which cannot be avoided. The appellate division will have to make the interpretation. It cannot have an appeal. As counsel for the state will have that you can appeal as long as you cannot challenge the conclusions of the judge. That is what it comes down to. The interpretations of that documentation and that material is really fundamental to the case.

As far as the other matters are concerned we have argued them fully really at the time of the trial and I

do not want to go back to that and to trot out the arguments which I have already, or we have already addressed to your lordship. Your lordship is well aware of them. The submission we make to your lordship is that they are arguments of substance, they are arguments of importance and they are arguments which deserve consideration by another court.

I think that is really all I should say to your lordship. One observation I think I may have to make and that is that the fact that there was no, there was a suggestion in argument that there was no question from the accused that they (10) had themselves been assaulted. No statements were tendered by the, from the accused. The accused were held in detention, no statements made by the accused were ever tendered. So the issue, the question of their own treatment is not really an issue in this case and I would not like my silence in that regard to be construed as agreeing that that was the position.

COURT: How should I construe your silence on the question of sentence of the UDF three?

MR CHASKALSON: I have a note about that.

COURT: And no. 16. (20)

MR CHASKALSON: I have a note about that in front of me. As far as the UDF three are concerned I think the central issue there is whether it was wrong to treat accused nos. 19, or no. 21 on the same basis as accused no. 19.

COURT: So in fact the appeal is by no. 21, not by no. 19 and not by no. 20?

MR CHASKALSON: Yes, I do not have any instructions not to proceed with a request for an appeal. I think my learned friend Mr Bizos has said all that can be said on that issue and I cannot add anything to it but as far as accused no. (30)

21 is concerned he has been treated on the same basis as accused no. 19 and I think that from the point of view of a reply that was not really dealt with and I think that that is a material point which should be taken into account by your lordship. For the rest I cannot add anything.

COURT: Yes, but now I was not clear. I understand Mr Bizos to address me on the Vaal accused and sentence. I cannot recollect that anybody addressed me on sentence on no. 16 or on no. 19 and no. 20. I understand the argument as far as no. 21 is concerned. (10)

MR CHASKALSON: I was under the impression, and may I check. I really was under the impression that my learned friend Mr Bizos did deal with sentence.

COURT: It may have slipped my mind.

MR CHASKALSON: My learned friend says he had made certain broad submissions to your lordship in that regard and he is content with what he has said there. I understood him to make submissions to your lordship in regard to sentence. I certainly did not because he had done so. I understood him to address submissions to your lordship on the Monday. (20)

COURT: On the?

MR CHASKALSON: On the Monday of this week. I may be wrong but that is his recollection, that is my recollection and ...

COURT: Well it seems to be that these submissions are not so outstanding to all of us that we can all recall them.

MR CHASKALSON: Well I do not, my recollection was that my learned friend Mr Bizos did address argument to your lordship on that. My recollection is that he did address you on accused no. 16 along the lines, if I remember it correctly and I may now be quite wrong because it may be someting he has (30)

told/....

told me and it was not articulated in that way. But I understood that argument to be that if one takes the act for which he had been found guilty, which amounted to an incitement which led on the evidence to nothing, that the substance of that did not warrant the sentence which was imposed. I think that was all that he said.

COURT: Well it may have been so broad that it got lost in the offing. Now as far as nos. 19 and 20 are concerned, what is your argument?

MR CHASKALSON: Well I would content myself with the ... (10)

COURT: By saying nothing?

MR CHASKALSON: Yes. I think, I do think that some broad submissions have been made to your lordship.

COURT: Yes.

MR CHASKALSON: I do not think I have anything more to say to your lordship.

COURT: Judgment is reserved.

COURT ADJOURNS.