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COURT RESUMES ON THE 7th NOVEMBER, 1960.

APPEARANCES AS BEFORE.

BY MR. DE VOS :

My Lords, the Crown proposes to present its argument in the following manner. First of all there will be an argument on the law, presented by Mr. Trengove. Then the factual argument on the conspiracy, and the organisations concerned and the conspiracy, beginning with certain general aspects and then proceeding to the individual organisation or unit concerned. Up to that stage, My Lords, no argument on the basis of Communism will have been addressed to Your Lordships, and at the end of that part of the argument, at that stage, an argument on the basis of Communism as related to the position of the organisations and the conspiracy as a whole will be then addressed to the Court. After that, My Lords, will follow a further section of the argument of the Crown dealing with the position of individual Accused and co-conspirators. Again, in two broad sections, first of all, My Lords the factual and legal position of the individuals concerned, without regard to their Communist affiliations where there may be, and in many instances - most instances there will be comment on that part. Then the Communist argument on the basis of Communism as regards the individual co-conspirators and Accused concerned.

BY MR. JUSTICE RUMPF :

Are the Accused all here?

MR. DE VOS :

They are all here, My Lord. No. 24, My Lord,

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has not been apprehended. Your Lordships may recollect that a warrant was issued for his arrest. He is not in Court, so there are only twenty-nine Accused present this morning.

MR. JUSTICE RUMPF :

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What is the position of that Accused now? Isn't there a provision that you should ask for the separation of the trial?

MR. DE VOS :

My Lord, in fact the Crown is not arguing his position as an Accused at this stage. 10

MR. JUSTICE RUMPF :

Well, he is an Accused, isn't he? We have proceeded against him in his absence.

MR. DE VOS :

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My Lord, the Crown would like to consider his position and we will raise that again.

MR. JUSTICE RUMPF :

Shouldn't you have a look now, before you start with the argument? I don't know what the provision is, but I think there is a provision. You should do something about it. 20

MR. DE VOS :

As Your Lordship pleases. My Lord, apparently the position is - unfortunately I have not had time now to consider the Act as it stands, but apparently the position is that we don't apply for a separation of trials, but we ask leave to put his position before the Court at a later stage if need. If Your Lordship will permit me, I will fully put his position to the Court 30

just after tea. I would like to have a look at the Act and the provisions of the law in that connection.

MR. MAISELS :

My Lord, before we start, perhaps we can just deal with a few formal matters by the way. In the first 5 place, My Lord, the question of interpretation. I am told that provided the loud speaker works satisfactorily, it won't be necessary to have an interpreter. I understand that at the moment we don't require interpreters, but should any circumstance arise later, particularly in 10 regard to questions of fact, we may then ask for the interpreters. Secondly, My Lord, the question arises of hours of sitting, if it would be convenient for Your Lordships to deal with that matter now. I discussed the matter with my learned friend Mr. Trengove, My Lord, and 15 as far as we are concerned, My Lord, we would appreciate it very much indeed if the Court hours could commence at half past eight in the morning, the idea being that they should terminate somewhere after one, at Your Lordships' discretion, with two short breaks in the course of that 20 time. There is one additional request that we would like to make...

MR. JUSTICE RUMPF :

Will that suit the Accused? Will they be able to be here? . 25

MR. MAISELS :

Yes, My Lord, arrangements have been made, subject of course to the bus leaving Johannesburg early, but as far as they are concerned it would suit them. Secondly, My Lord, we would like permission from the 30

Court, when the Court adjourns every day, to be able to come into Court in the afternoons and evenings, because we only have one copy of the record. Thirdly, My Lord, there is one other matter while I am on my feet, the shorthand - the record, My Lord, has only become available 5 several days after the day of proceedings. I would suggest, My Lord, that if Your Lordship would feel so inclined, that Your Lordship should, as far as Your Lordship can - I appreciate there are difficulties - impress upon not only Mr. Nass who is concerned with preparing the record, but also with the Government department which is responsible for stenciling that an effort should be made to have the note of argument as soon as possible.

MR. JUSTICE RUMPF :

Yes, well we want the note too, that must be done. Mr. de Vos, I take it that - what is your attitude in regard to the request or the suggestion by the Defence that we have the hours of sitting from 8.30 in the morning till say 1.30 - theoretically we may adjourn at 1.15, but from 8.30 to 1.30 with two short breaks?

MR. DE VOS :

My Lords, as far as the Crown is concerned, we have no objection to that being done, subject to what the Court may feel about it. If the Court is agreeable, as far as the Crown is concerned, we are agreeable too. I don't know for the moment what the bus arrangements may be, whether that will cause any complications.

MR. JUSTICE RUMPF :

The main trouble is the Accused, they have got to get up earlier, they have got to get the bus. I take

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it that the Crown can see to it that the bus leaves in time from the Rand, wherever it leaves, to be here at some time before 8.30.

MR. DE VOS :

I assume it will be in order, My Lord. The point is that I have not made any enquiries about the position, but I suppose it will be and can be done.

MR. JUSTICE RUMPF :

Will you make those enquiries or have those enquiries made during this morning? I take it you will take steps to see that the record is produced, a copy of the record of the Address is produced very soon after it has been made.

MR. DE VOS :

My Lord, we will try and expedite that as far as we can.

MR. JUSTICE RUMPF :

It must be done as soon as possible.

MR. DE VOS :

My Lord, I will draw the Registrar's attention to that too, and ask it to be expedited. As far as the Crown is concerned, it is in a fairly impotent position as far as that is concerned.

MR. JUSTICE RUMPF :

Very well, Mr. Maisels, the Court proposes then to sit from 8.30 until 1.30 with two short breaks. I take it there is no objection to the Defence coming into Court during the adjournment, Mr. de Vos?

MR. DE VOS :

No, My Lord.

MR. JUSTICE RUMPF :

Yes, Mr. Maisels. Mr. de Vos, have you perhaps

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got a - the Indictment with the particulars and everything bound completely as it should be?

MR. DE VOS :

Yes, we have a copy, My Lord.

MR. JUSTICE RUMPF :

Have you made copies for the Court?

MR. DE VOS :

Yes, we will be able to make a copy available to the Court, My Lord.

MR. JUSTICE RUMPF :

We want three copies.

MR. DE VOS :

As Your Lordship pleases, we will try and meet that request.

MR. JUSTICE RUMPF :

Haven't you got them now?

MR. DE VOS :

Not at the present moment, I will have to find...

MR. JUSTICE RUMPF :

Well, you should have had that, because that is the basis on which we start off.

MR. JUSTICE RUMPF :

We ...

MR. DE VOS :

My Lord, again we have to rely in this regard on the Registrar to prepare the copies, and supply them, and I'll see, if they are available, they will be found and made available to Court, at least one copy will be available.

MR. JUSTICE RUMPF :

At least one copy to the three members of the Court each.

MR. TRENGOVE :

In this case, My Lord, we have been leading evidence to prove the charge of treason against the Accused. My Lords, let me say at the outset that the Crown submits that on all the evidence that it has proved 5 against the Accused in this case, that it has proved its charge beyond reasonable doubt. The Crown has proved beyond all reasonable doubt that each and every one of the Accused were engaged in the prosecution of a plot against the State, and it was a plot, My Lords, of such a nature 10 that if it had been allowed to follow its course unchecked, it would have ended without any doubt, My Lords, in bloodshed, death, disaster to the citizens of this country, whether they be Black or White, and it is on that broad basis, My Lord, that the Crown originally charged the 15 Accused with high treason, and it is on that basis, My Lords, that the Crown says that it has now, on the evidence before the Court established that charge. My Lords, as a background to the evidence which has been presented to Your Lordship, it will be necessary very shortly not to 20 argue the law, because this has been done to a very great extent when the argument was presented to Your Lordships on the Defence application to quash the Indictment and to dismiss the exception to the Indictment, but it will be necessary, My Lord, to state the law as the Crown 25 sees it very briefly, because that would be the background against which the factual position in this case will be presented to Your Lordships.

MR. JUSTICE RUMFF :

Have you got a reference to the Volumes and the 30 page numbers where the argument took place that you are

referring to now?

MR. TRENGOVE :

Yes, My Lords, the argument took place if Your Lordship will remember on two occasions, originally when the first application to quash was brought, and the Indictment was subsequently withdrawn, and Your Lordships will remember that after that when the present Indictment was presented it was again attacked, the law was again argued and the Indictment was upheld.

MR. JUSTICE BEKKER :

Mr. Trengove, the basis on which the Crown presents its argument, is that that the Indictment alleges and the Crown must prove that the violence would be violence committed by the Accused?

MR. TRENGOVE :

My Lord, the Indictment alleges that the Accused with hostile intent conspired to overthrow the State by violence, and that charge the Crown alleges has been proved.

MR. JUSTICE BEKKER :

No, I am just enquiring on the basis - you are going to submit that the violence would be violence committed by the Accused?

MR. TRENGOVE :

By the Accused or, My Lords, by people in the situation brought about by the Accused.

MR. JUSTICE BEKKER :

A sit down strike, assuming there is a sit down strike on the part of the Accused, is that what the Crown relies on as violence.

MR. TRENGOVE :

My Lord, that will be part of this argument which



I am about to address to Your Lordships. If the Accused are responsible for a situation which leads to a violent conflict, then it is as much their violence as the people actually engaging in the conflict.

MR. JUSTICE RUMPF :

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Have you got a reference where we can find the argument to which you have referred us, which you have mentioned.

MR. TRENGOVE :

My Lord, it would be very easy for me to get that 10 reference, and I'll give Your Lordship that reference. I have of course at hand Your Lordship's Judgment ultimately dealing with this question.

MR. JUSTICE RUMPF :

I take it you know that we can't remember all 15 the details of the argument. We know that the argument was there, it was addressed to us on two occasions.

MR. TRENGOVE :

And that is why, My Lord, I say that as far as the argument is concerned, it is really intended to re- 20 fresh the Court's memory as to what the basis of the Crown's attitude is. My Lords, we start off with the definition of the **crime** with the matter dealt with originally, the Crown relies on the definition of the crime accepted by the Appellate Division, and the 25 crime as defined by Van der Linden in his Institutes, (2.4.2.) in which Van der Linden defines the crime as " a crime committed by a person who with hostile intent disturbs, injures or endangers the independence or safety of the State". That My Lords is the accepted 30

definition, it is a definition which is very much the same as a definition of Moorman, Misdaden, 1.3.2., and as I have said, My Lords, it was accepted in Rex versus Erasmus, 1923, A.D. p.73 as being a proper and correct definition of this crime. It was stated, My Lords, in a slightly different form by His Lordship Mr. Justice Schreiner in Leibbrandt's case, in which His Lordship said at page 3 of the typewritten copy of the Judgment, - My Lords, I have the certified copy here, I may be referring to it at a later stage, and if I could just hand it in to the Registrar - in which His Lordship Mr. Justice Schreiner said that high treason is committed "by a person who does any act, whatever its nature, with hostile intent, that is with intent to overthrow the government or to coerce it by force". My Lords, as to the crime generally, reference was made to Boehmer in his Meditationes, article 124, paragraph 5, he deals very fully with the nature of this crime, and that portion in Boehmer was also dealt with fully in the case of Rex versus Erasmus, 1923 A.D. My Lords, there are other Roman Dutch authorities which are usually referred to as being accepted as setting out the position correctly, and they, My Lords, are also dealt with in Erasmus' case to which I will make reference presently. My Lords, the Crown in his argument to Your Lordships on a previous occasion, submitted that the two essential features in the crime of High Treason was firstly the hostile intent, and secondly an act by which that hostile intent was manifested in a greater or a lesser degree. But My Lords, the Roman Dutch Law authorities stress the point that the hallmark of this crime, perduellio, was the

existence on the part of the Accused of a hostile intent against the State, and that is why My Lords, the authorities state with abundant clarity that the intention to commit this crime is punished no less than its execution, provided that hostile intent is in some way manifested by 5 some physical act. And these principles, My Lords, were accepted in Erasmus' case, at page 80, and in Erasmus' case, My Lords, it was stated that hostile intent is not only an essential feature of this crime, but that it is the characteristic feature which distinguishes perduellio 10 or treason from any other crime and from any other of the forms of the crime against the State, any other forms of crimen Laesae majestatis. My Lords, it is because the voluntas is so important that it is to the existence of that in the Accuseds' minds, if manifested in some way 15 that the punishment is actually directed. It was stated, My Lords, in Cod. 9.8.5. - this principle was originally stated, it is stated and adopted in Damhouder in his Practijke, Cp. LXII, where Damhouder says "Ja, de afgrijs- 20 lijkheyd der selver misdaad is zoo groot en hatelijk voor de Wetten en Princes dat de wil zoo hard werd gestraft als de daad, wel verstaande indien den selven wille door enige uijterlijke handeling en zekere merkteekenen is bekend en bewesen". Clarus, Opera Omnium- Opera Omnia, the Fifth Book, under the heading Laesae 25 majestatis, it is stated : "punitur voluntas quae venit ad actum sine opera perfecto", and that is the test, My Lords. Did the Accused harbour in his mind this hostile intent. Perezius, in the Praelectiones, at Book IX of the Code, states the proposition, My Lords - and may I 30 My Lords, with Your Lordships' permission read a translation

of what he says. He says, "In this case there is furthermore this exceptional feature that the bare will or attempt suffices though it has had no result, but with this proviso that the will has in some degree gone over into a visible or external act, e.g. if with the purpose of killing the ruler, he has bought poison, though he has not offered it to him, or if he has entered by letter of messenger upon a design for the murder of the ruler with someone, so that the principle that nobody suffers punishment for a mere thought forms no obstacle, for a thought joined with an attempt is regarded and punished as a completed crime. It does not matter that as a rule an attempt is not punished, for in the case of the crime of treason, that is the rule accepted by way of exceptional law because of its heinousness."15

And Van Leeuwen, in his *Rooms-Hollands-Recht* (1709), IV Boek, paragraph 33, - there the same principle is stated, and also in Boehmer in his *Elementa Jurisprudentia Criminalis* (1774), paragraph 76. He says, "From the same principle and because this crime has everywhere rightly been regarded in the gravest light, it follows that by way of exception the will is here regarded as the deed and that therefore an attempt suffices." Now

My Lords, the question is what is this hostile intent? What is the state of mind that is required to distinguish the crime of High Treason from any other crime, and how does the Court approach the matter in have to decide whether there was present on the part of the Accused the - this characteristic element, this particular intent to satisfy a charge of High Treason. Now My Lords,

may I in this regard refer to Rex versus Erasmus, 1923 A.D. at page 73. I think Your Lordships will remember that that case of Erasmus arose out of the 1922 strike on the Rand. Erasmus was found guilty of High Treason, and on appeal the main contention advanced on behalf of Erasmus, the Appellant, was that this peculiar mental attitude, this state of mind essential to the crime of High Treason, had not been established by the Crown. It was argued on his behalf that it was an essential feature of the crime of High Treason that the overt acts complained of should have been done with the intention or object of subverting the Government; that is to say, either of altering the form of the constitution or changing the personnel of the Government. It was contended that the hostile intent to satisfy this crime should take that form, and that form only, and that any other intention, however hostile it might be, would reduce the crime of High Treason to some other form - some other kind of crime such as sedition or public violence or whatever the position may be. Now My Lord, I have quoted this case because it shows, My Lord, how the Court set about to determine what the intention was that inspired the Accused in committing these overt acts. Now the Court after a very full and detailed analysis of the Roman and Roman Dutch Law authorities, rejected the contention advanced on behalf of Erasmus. The Court found that the contention advanced on behalf of Erasmus was the view held by Voet and Mattheus and some other authorities, but that the majority of the Roman and Roman-Dutch Law authorities adopted a different view. And in the course of his

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Judgment, His Lordship Mr. Justice Innes, made the following observation, at page 80 : "So that under Roman Law the hallmark of perduellio as distinguished from lesser offences against majestas was the existence of a hostile intent against the State. The principle passed 5 into the law of Holland and a hostile intent was regarded as an essential feature of the crime. Thus Voet (Ad Pand. 48.4.2.) adopting Gotho fredus' definition - division of the generic offence into three classes, describes the crime of perduellio or laesae majestatis 10 in specie, as one which is committed with hostile mind against the Roman People or against the sovereign and his safety", and there is a quotation My Lords in Latin of the principle. "Obviously, however, the question of proof of a hostile mind may sometimes present difficul- 15 ties. In time of external war the matter is comparatively simple. Assistance rendered to the enemy would be conclusive evidence of hostile intent. But perduellio may be wholly unconnected with external war (see Rex versus de Wet, 1915 O.P.D. 157), and in such a case the test of 20 intention to assist a foreign enemy would not be available. Under such circumstances another test is suggested, namely the existence of a definite intention to overthrow the government. There is some authority for the sugges- tion. Voet, after adopting the Civil Law definition of 25 perduellio, instances a number of examples of varying gravity. He adds, however, that the acts enumerated do not invariably constitute the crime, but only when committed against the state and with a view to its overthrow." His Lordship then quotes the Latin phrase. "In other 30

words, he suggests that the hostile intent which he has already adopted as the hallmark of perduellio should be tested by the existence or otherwise of a definite intention to overthrow the state. Mattheus, de Criminibus, lends countenance to the same view", and then His Lord- 5 ship discusses the view of Mattheus, and he continues : "Later writers, however, do not attempt to limit in any way the broad test of the civil law, namely the existence of a hostile intent - of hostile mind. Van der Linden defines perduellio as a crime committed by those who with 10 hostile intent disturb, injure or endanger the independence or security of the state. And Moorman defines Hoogverraad or perduellio as something done or undertaken with a hostile intent to the injury of the state or supreme government (uit een vijandlijk opzet iets down of onder- 15 nemen ten nadeele van den staat of van's lands hooge overigheid). Boehmer, (Meditationes, Article 124, paragraph 5), has some very practical remarks upon the point. Deeds, he thinks, speak for themselves, and it will not avail an Accused person who has set on foot a movement which 20 necessarily tends to the subversion of the state, to set up the defence that he did not contemplate its overthrow; such acts he says amount to perduellio because they are pregnant with danger and cannot be undertaken without the idea of imperilling the state, whatever intention the 25 Accused may profess. I do not think we should adopt the limitation which Voet would seem to impose on the test laid down in the Digest. Neither he nor Mattheus quote any authority in support of their views; nor is it easy to define the exact limits of the term 'overthrow of 30

the state'". My Lords, I turn to page 82, where the Court deals with the specific contention advanced in this particular case : "Mr. Roos has asked us to say that the hallmark of the crime is an intention to change the form of the Constitution or the personnel of the government. There is no authority which approves that exact principle and it would be most inadvisable to adopt it. For the whole structure of society might be shaken by the violent action of a body of men whose object was not to alter the constitution or change the government, but to compel the latter to obey their behests. We shall be well advised, I think, in dealing with the mental attitude necessary to constitute the offence here charged, to apply the test of Roman Law and to inquire whether the acts complained of were done with hostile intent. The existence or otherwise of such intent is a matter to be gathered from all the circumstances, of which the probable consequences of the action taken are supremely important..... The intent to coerce the governing authority of their country by force may properly be described as hostile even though there is no direct proof that they 'aimed at wholly subverting the government'."

My Lords, in time of war, the only difference that the fact of external war makes to the situation that it makes the proof of hostile intent easier. The external enemy is at war with the state, the state is endangered by that war, the war is directed at defeating that state, and if a person in any way assists that external enemy, and the assistance is intentional,



has the hostile intent because however laudable his motives and his hopes might be, he knows, My Lords, that what he is doing is undermining the safety and security of the state to which he owed allegiance. My Lords, if there is no external war, the only problem, the only 5 additional problem which faces the Crown is a problem of proof of hostile intent. My Lords, the case makes it quite clear that as regards the proof of hostile intent it can be gathered from all the circumstances of a particular case, and of those/circumstances, the probable conse- 10 quences of the action taken by the Accused, are supremely important. Deeds, My Lords, speak for themselves. His Lordship makes the point quite clearly that it will not avail/a person who sets on foot a movement or a campaign which necessarily tends to undermine the security of the 15 state, or which necessarily tends to lead to the subversion of the state, to turn round and say he hoped that would not happen or he didn't contemplate the overthrow. My Lords, the views of the Chief Justice in Erasmus' case are shared by His Lordship Mr. Justice Kotze who also 20 gives a full and very detailed analysis of the Roman Dutch Law authorities, and who says, My Lords at page 85 of his Judgment - makes the following observations in this particular respect. He says : "Now, it is plain that the words 'hostile mind' are not merely confined 25 to acts which are connected with an enemy of the State from without. Mattheus for instance points out that it makes no difference whether one tirs up hostility from within - without or within the State; and the decided cases in our South African Courts likewise demonstrate 30

this..", and His Lordship refers to a number of instances. Then His Lordship goes on to say : "Nor is it necessary that the hostile mind of those who commit an act of treason should contemplate the total subversion or overthrow of the State or Government. Such appears to have 5 been the opinion of Hotomannus, and Voet's language seems also to point to this conclusion. But, as I have already remarked, it is too narrow a view and not correct. Ulpian and the Dutch Jurists have sufficiently demonstrated this through examples, which they have given, of acts which 10 amount to treason. As for instance, where armed men take possession of public places and temples in the city; where one takes up arms against the sovereign or the State, or compasses the death of the Sovereign or any of his Ministers, or the judges of the Court, etc., acting 15 in their official capacity, or publishes a seditious libel with hostile intent against the Sovereign and the like."

His Lordship gives these examples, and then goes Boehmer: "Boehmer likewise points out that acts may be committed which, although they do not show an intention (page 89) 20 to subvert the state as such, yet amount to treason; as where a person out of malice or hostility to the ruler or to some act of maladministration, attempts to oppose and resist his authority", and he quotes Article 124, Section 5. "Whether any acts, laid to the charge of an 25 Accused person amount to treason will depend upon the circumstances of each case. The ordinary rule, that a man's intention or state of mind is to be judged by reference to his acts and conduct applies. And Boehmer amply observes that if a person..." - His Lordship quotes

that passage again with approval, from Boehmer : "that if a person has set on foot rebellion or discovered plans to the enemy, it will not avail him to plead that he had no such intention, for - no such hostile intention, for such and similar acts naturally and necessarily manifest a hostile mind and tend to the subversion of the State. The principle of our law in regard to treason is not based on an antiquated notion, but is founded in reason and justice, and in its main feature is in accordance with the English Law, which depends largely upon statute." 10

Now My Lords, this approach to hostile intent comes - becomes even clearer, My Lords, in the very next case which the Appellate Division had to consider, the case of Rex versus Viljoen, 1923 A.D. at page 90. My Lords, Viljoen and his co-Accused Marée and Coetzee 15 were also involved in the activities on the Rand in 1922, Together on a charge of High Treason Viljoen was found guilty of High Treason, and his co-accused, Maré and Coetzee were found guilty of sedition only. When the case came before the Appellate Division, Maré 20 appealed on the grounds that the hostile intent shown was not a hostile intent to overthrow the State. His appeal was based on the same foundation, on the same contention as those that were advanced in Erasmus' case, and for the very same reason, his appeal against 25 his conviction for High Treason was rejected. His co-accused Maré and Coetzee, appealed on a slightly different basis. They said they were charged with High Treason, they were found guilty of sedition and that on the law as it stood, it was not a proper finding to find 30

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an accused charged with high treason, and high treason only, on that charge sheet, to find him guilty of sedition. And the question then was whether they had been properly convicted of sedition on the charge of high treason. My Lords, the effect of Their Lordships' judgment, apart from this technical question, the effect of that judgment was that Maré and Coetzee were very lucky not to have been found guilty of high treason. They were in fact guilty of high treason, but were not found guilty because the Court a quo had misconstrued the essential elements, the hostile intent. The Special Court found that Maré and Coetzee's intention was not as hostile as that of Viljoen. The Appellate Division held that the test does not depend upon the degree of hostility, a greater or a lesser degree of hostility; the test is whether the hostile intent is a hostile intent directed at the State, and whatever the degree may be, it does not take it out of the ambit of the crime of high treason. And the Appellate Division held in any event that although there was no specific provision in the Code, sedition on those facts was a lesser crime and it was competent for the Court to have found them guilty of the lesser crime of the same charge. My Lord, I am not dealing with that part of the matter. I am confining my attention for the moment to the investigation of what hostile intent was, because that was what the Court was concerned with in Viljoen's case, and the Court said this hostile intent is not characteristic of sedition and high treason. It is the hallmark of high treason alone, and whenever that intent is present, whatever the

degree may be, that crime has been committed. Now His Lordship Mr. Justice Innes, at page 92, deals with the question of what sedition is, and My Lords, I quote it because in trying to determine what sedition is, His Lordship has to deal with the question of what hostile intent is in treason, that being the distinguishing feature. His Lordship says at page 92 : "Now the difficulty of defining sedition is so great, that the task must inevitably be approached with diffidence. On the one hand the line which separates it from treason is often faint: on the other hand sedition and public violence frequently overlap. At the same time the test suggested by the Special Court is not borne out by the authorities." The test adopted by the Special Court was that it must be a question of degree of hostility as evidenced by the circumstances of each particular case, whether the act is one of treason or sedition. His Lordship says, referring to the authorities, "Reference to them will show that a hostile intent against the State is not a characteristic common to the two crimes. It is the hallmark of Treason alone; and its presence or absence may often be decisive as to the nature of a charge - may determine whether the act complained of is to remain in the lower category or pass into the higher. One's idea of sedition is apt to be unduly coloured by association with the word seditious as used in English law. Words or acts spoken or done with a seditious intention were by Transvaal Ordinance No. 38 of 1902 made specially punishable. Seditious intention was defined in the English sense, which generally speaking implies a

desire to bring the Government or Sovereign into hatred  
or contempt, or to excite disaffection among the people.  
That enactment has now been repealed; but its provision  
affords an instance of terminology which is in common  
use, but which has not the remotest bearing upon sedition 5  
as a distinct crime in our law." My Lords, I mention that  
here, because in this respect one much approach the English  
cases dealing with high treason and sedition with a measure  
of care. In English law sedition, as distinct from high  
treason would according to this definition, cover acts 10  
which are done with a desire to bring the government or  
sovereign into hatred or contempt, or to excite dis-  
affection among the people. Now that, My Lord, His Lord-  
ship goes out of his way to point out, that is not  
seditious in our law, and that could be high treason 15  
My Lord according to our law. "I do not propose to go  
further into the authorities," His Lordship says, "because  
they were carefully considered in Rex versus Endemann,  
and I agree with the conclusions reached by de Villiers  
J.P. in that case, that to constitute the crime of sedi- 20  
tion, there must be a gathering in defiance of authorities  
and for an unlawful purpose. Those who incite and lead  
such gatherings and those who take part in them are both  
punishable, but the former more seriously than the latter.  
Sedition, is a species of the crimes laesae majestatis, 25  
for it is committed in defiance of authorities and against  
public peace. But it does not imply.." - and this is  
the distinguishing feature, My Lords - "but it does not  
imply the existence of a hostile intent against the  
government as such. When that intent exists, the 30

the disturbance of the rising becomes high treason; it passes into a more serious category. A sudden rising or tumult accompanied by no hostile intent against the government as such - no intent to treat the latter as an enemy - would be sedition merely. But, if it could 5 be shown either by direct evidence or otherwise that such a gathering was accompanied by hostile intent, then it would become high treason. A local rising, for the rescue of prisoners, for instance, would prima facie be sedition only; but it might be part of a wider and more general 10 attack against the Government and be undertaken with hostile intent against the State. In that case it would amount to High Treason."

So, My Lords, the test here is, has the person charged with the act, has he done it with the object of 15 treating the State or the Government as an enemy, - the government, My Lords, not a political party, but the government as representing the people. Is that the enemy? And is his act directed at that enemy? One may, in a particular case, My Lords, get a number of people taking 20 part in a tumult, many of them My Lords may be guilty of sedition only, but the people behind that tumult may be using that as an attack against the state or the authority. They may have the intention by organising that rising or campaign or whatever it is, they may 25 haven't the intention that it should be part of a wider campaign for attack against the State or government who is regarded as the enemy. And for them, My Lord, the same external actions would be high treason.

MR. JUSTICE BEKKER :

Mr. Trengove, would you enlighten me. You use

the phrase "the government, not a political party, but as representing the people". . . Could you elaborate on that?

MR. TRENGOVE :

My Lords, many times people talk about the "government" or about a particular political party whom they associate with the government. When you attack, when you regard the government as an enemy, it is the lawfully constituted authority who in terms of your constitution is exercising the majestas or whatever it may be on behalf of the people of the State. I'll be dealing with that a little later, My Lord. My Lords, in this connection I could also refer Your Lordships to the case of Rex versus Neumann, 1949, (3) S.A.L.R., p.1238, at page 1258. My Lords, another and perhaps more recent case was that of Strauss, Rex versus Strauss, 1948 (1), S.A.L.R. p.934. In this case the Accused was charged with high treason, because My Lords during the Second World War, while in Germany, he broadcast for the enemy. He was then charged with high treason. On appeal two propositions were advanced on his behalf - I'll deal with the other one a little later, My Lord. The second proposition that was advanced on his behalf was that there was nothing in the evidence from which the Special Court could reasonably arrive at the conclusion that the hostile intent towards the State which was admitted to be a requisite element of the crime of high treason, accompanied the commission of the overt acts. He admitted, My Lords, that he broadcast, he admitted the overt acts, but he said, the overt acts

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and the surrounding circumstances didn't show that he had a hostile intent against the State. It was argued that far from being animated by hostility towards the State, he was animated by a desire to benefit the Union by furthering what were in his judgment its best interests. He thought it was in the best interests of the Union to take no further part in the war and consequently his purpose was to persuade the people of the Union to bring about a change in the Government, by constitutional means and thus put a stop to the war against Germany. He wanted them to do that by the exercise of their legitimate rights. The question was, My Lords, even though that might have been an honest purpose held by him, did he realise that by his acts he was in addition to whatever other motive he might have, did he realise that he was undermining the safety and security of the State to which he owed allegiance and which was at war with the enemy. The Special Court was not satisfied that that was the real purpose of the Accused or that that was the only purpose, and even if it was, if it was a purpose, the Special Court held that the ultimate end which the Accused desired to bring about was the motive for his conduct and whatever the ultimate end might be, that that was not the decisive or the only fact to be taken into consideration in determining whether he had the hostile intent when he committed these acts. Now His Lordship Mr. Justice Watermeyer, then Chief Justice, agreed with the view of the Special Court and His Lordship in agreeing made the following observations at page 940. His Lordship deals with the view of the Special Court, and His Lordship then says : "Though the ultimate end

which an actor has in view is often spoken of as his motive, it is perhaps more correct to say that the desire or wish for that end is his motive because it is the desire or wish which moves him to act. But if in yielding to that desire, the actor takes steps to achieve his end which as a reasonable man he must know or foresee are likely to cause some forebidden effect, other than the one desired as his ultimate end, then in law he intends that effect and is responsible for it. The requirement in the definition of treason that the actions complained of must have been done with hostile intent against the State, does not mean that the accused must have been animated by feelings of hatred or ill-will towards the State, but merely that he was intentionally antagonistic towards it. In time of war, if the subject of one State intentionally gives direct assistance to the enemy in his war effort he must necessarily in ordinary circumstances act with hostile intent towards his own country, because he must know, as a reasonable man, that such assistance to the enemy is an act which tends to hamper the cause of his own country in however small a measure, and therefore is an act hostile or antagonistic towards it, in the cause for which it is fighting. He therefore intends to do a hostile act and consequently acts with hostile intent. ... In the present case, however, no evidence..." - His Lordship then deals with the contentions of the Accused, and states : "In the present case, however, no evidence was given by the appellant to negative the existence of hostile intent which was naturally to be inferred from his acts, and the Court

found on the evidence that the Accused, by broadcasting on behalf of the enemy rendered assistance to the enemy in its war against the Union and by so doing must have acted with hostile intent against the Union, and that the motives which led him so to act were immaterial. There was ample evidence before the Court upon which it could come to that conclusion."

My Lords, in the same year, the same attitude was adopted by the Appellate Division in the case of Rex versus Mardon, 1948 (1) S.A.L.R. at page 942.

My Lords, one has the circumstances, you have the acts, you have the declaration, you have the activities of an accused. And if those activities show, My Lords, that he acted intentionally against the State, that he was treating the state as an enemy, that he was antagonistic, whatever other lofty motives or objects or hopes he might have, My Lords, he cannot escape from the position that in addition to anything else, he still had the hostile against the state to which he owed allegiance. And that, My Lords, is also the view shared by the Roman Dutch Law authorities. I quoted Boehmer, My Lords, and Boehmer in the Article 124, paragraphs 4 and 5, makes that very point. My Lords, it has to be like that. The intention of his hostile state of mind, there is no better guide to it than what he says and what he did irrespective of what his motives were, and what the probable or likely or necessary results of his actions would be. My Lords...

MR. JUSTICE BEKKER :

When you say "regard the State as an enemy", in what sense, as one would view an enemy in time of war?

MR. TRENGOVE :

My Lords, the state is regarded as an enemy if - in time of war, My Lords, the enemy is somebody who is acting against the State, I am not dealing now, My Lords with the way he is acting against the State. If you regard the state as an enemy, if you want to destroy the state, if you want to overthrow the state, if you attack the authority of the state to enforce and administer the laws, then you regard and - then you regard the state as an enemy.

MR. JUSTICE BEKKER :

There is, for argument's sake, a government in power and there is an opposition. The opposition may very well say that is my enemy, it is not in that sense that you are advancing this argument?

MR. TRENGOVE :

No, My Lord, no it is not. Are you attacking - is your attitude hostile to the State as the authority which has to make and enforce laws? Are you in that way antagonistic towards the State, and do you in that way regard the state as an enemy? Do you say, My Lords, that this state of mine is an imperialist state, a capitalist state, a state in the warmongering camp, and as opposed to that there is another camp which stands for peace and freedom and democracy, and the destruction of inhumanity of man to man, and that type of state we must have, and not this state founded on our prosecution, which is an instrument of suppression of the oppressed peoples. That attitude, My Lords, that would be antagonistic towards the State. Now My Lords, I may just refer to Leyser in his *Meditationes ad Pandectas*.

Dealing My Lords with specie, 568, perduellibus, page 503 , Volume VIII of Leyser, Leyser deals with the crime of high treason. He deals with certain examples that he gave elsewhere in Specimen 50 of high treason, he gave some examples of what would constitute high treason, and then he makes the point, My Lord, in this passage - he says it would be an error to infer - My Lords, I have for my own benefit had a translation made of this passage, and if I may be allowed to quote from it, My Lords - he says "it would be an error to infer that I confine the crime of high treason to those examples which are given in the Digest, Title 48.4. That was never my intention. Examples do not restrict but merely illustrate a rule and definition." And then he quotes authority for the proposition that by quoting examples it is not a restrictive interpretation of the rule. He then deals with this crime of high treason. He says "Therefore every crime by which the majesty, that is the supreme authority is directly harmed falls in this category, even if it is not expressly noted in the Digest Title to which I have referred. As an example disobedience may serve, for instance when someone refuses disobedience to the command of the ruler or state, - refuses obedience to the command of the ruler or state, and thus publicly indicates that he does not recognise his or its authority. Nothing is more noxious than this crime or better calculated to to taint (?) the spirits of others with the same infection. The evil should therefore be cut short in good time, lest it should spread. Yet it is obvious to everyone that disobedience is classed with treason only when it arises

from contempt for the supreme authority, for someone who disobeys but has a sound or at least a likely reason to offer is excused. Here I would include cases where a citizen is prevented from obeying his ruler, as a result of external fear, however groundless, and intimidation. It is indeed true that a man of courage ought not by any apprehension to be deterred from doing his duty, Yet, we are human, and such courage is rarely found in nature." So that the approach My Lords of Leyser dealing with this question of disobedience is what is at the back of the mind of the man who disobeys. Is he just disobeying out of contempt for the supreme authority of his state, does he by that means intend to overawe or intimidate the ruler? If he does that, then his intent would be the hostile intent required for the crime of treason. But, My Lords, someone - if someone were to be intimidated into disobeying the ruler, if someone were to, as a result of months and months of agitation and propaganda - if he refuses to obey the state in the form of a certain law, he may be doing<sup>it</sup>/My Lords, merely because of the intimidation, and in that event, My Lords, he wouldn't be doing it out of contempt for authority, but out of fear that has been inspired in him and it won't be high treason.

COURT ADJOURNS.

COURT RESUMES.

MR. DE VOS :

My Lord, may I raise the position of Mkwai,

the Accused 22 who is not present today. The operative section seems to be 156 (ter) of the Criminal Procedure Act which was added in 1957, an amendment of 1957, to the other sections, and sub-section vi(a) and (b) seem to be relevant. They read as follows, My Lord : (a) Where the evidence in respect of all the accused present has been closed and the evidence in respect of any absent accused has not been closed, the Court shall, subject to the provisions of paragraph (b), postpone the proceedings until such absent accused is in attendance, and if necessary further postpone the proceedings until the evidence in respect of that accused has been closed". Then (b) follows : "If it appears to the Court that the presence of such an absent accused cannot reasonably be obtained, the Court may direct that the proceedings in respect of the Accused present be concluded, as if his trial had been separated from the trial of the absent accused at a stage at which that accused became absent from the trial, and when such absent accused is again in attendance, his trial shall continue from that stage of the proceedings at which he became absent and the Court shall not be required to be differently constituted merely by reason of such separation". Now My Lords, it seems in this particular instance that the presence of the absent accused Mkwai cannot reasonably be obtained. Your Lordships will note that a Warrant of Arrest has been out some time, and he has not been apprehended, and under the circumstances it seems that the direction of the Court that the proceedings in respect of the accused present be concluded, as if his trial had been separated from the trial of the absent accused, should be made.

18354.

MR. JUSTICE RUMPF :

Mr. Maisels, have you any objection to that?

MR. MAISELS :

My Lord, I just want to draw Your Lordship's attention to the position that we don't appear for Mkwai. That was announced My Lord on the 1st of August, at page 15,585 of the record. We have no objections, obviously.

MR. JUSTICE RUMPF :

In this matter the Accused Mkwai has been absent for some time, and a warrant for his arrest was issued, but apparently that could not be effected. In terms of section 156 (ter), sub-section vi(b), we direct that the proceedings in respect of the Accused present are to be deemed to be concluded as if their trial had been separated from the trial of Mkwai at the stage at which he became absent from this trial.

MR. DE VOS :

My Lord, one other matter, the Indictments which Your Lordships wish to have will according to information received from the Registrar of the Supreme Court, will be - of this Special Court, will be made available in usable form, in a compact form, with all the pleadings and the argument as prepared at the time for the case...

MR. JUSTICE RUMPF :

I don't want the argument, I just want the Indictment plus the Further Particulars, the complete Indictment with Further Particulars, in a workable form.

MR. DE VOS :

I am given to understand that that will be available tomorrow morning for each member of the Court.



MR. MAISELS :

My Lord, I presume that that will be numbered so that it can be used by all parties, and I take it it wouldn't be asking too much of the Crown if we would be afforded the courtesy of having a copy as well.

MR. JUSTICE RUMPF :

Yes, copies will be available. Yes, Mr. Trengove?

MR. TRENGOVE :

I was dealing with that passage from Leyser, and I said My Lord that the same idea was expressed by Boehmer in 1924, paragraphs 4 and 5. My Lords, His Lordship Mr. Justice Bekker raised the question of the "enemy", regarding the state as the enemy, and My Lords, it may be proper at this stage to deal with the case of Rex versus Christian, 1924 A.D. p.101. In that case, My Lords, the principle was accepted that according to our law the hostile intent was not confined to acts which were connected only with the external enemy or with an enemy from without the State, but also where the hostility is stirred from within the state, and that is so, My Lords, because the internal majestas of the state relating to the power of making and enforcing laws is just as important a function or part of the sovereignty of the state as its external majestas which is attacked by the external enemy in time of war. That was the principle which was laid down in Christian's case. His Lordship will remember that was a case of high treason committed in South West Africa, and the appellant was an inhabitant of the mandated territory of South West Africa, and he was convicted by the local Circuit Court of high treason

on two counts. On appeal the question which was submitted for the consideration of the Court was whether the government of the Union of South Africa, as a mandatory of South West Africa under the Treaty of Versailles, possessed sufficient internal sovereignty to warrant a charge of high treason against an inhabitant of that mandated territory who took up arms against the government in that territory. And in the course of his Judgment, His Lordship Mr. Justice Innes discusses the various aspects of majestas, and at page 106 His Lordship points out that "A state defends itself against foreign aggression by war; it protects itself against domestic attack, among other ways by enforcing criminal penalties for treason. This distinction between internal and external sovereignty is inherent. And of the two, the internal is the more important; for a law making and a law enforcing authority is essential to the very existence of a state. Moreover, in considering the question of treason it is the internal aspect of sovereignty which must be regarded, for that is the side from which it is attacked." Therefore, My Lords, if my state of mind is such that my attack is directed against the law making or law enforcing authority of the state, I have a hostile intent against the state. Because, My Lords, whatever people may think, My Lords, as a result of agitation or propaganda, whatever distorted views they may have of the rights of the state to enforce its laws, no state, My Lords, can function, no state can allow, no state can tolerate an attack upon its law making or law enforcing authority. And anybody, My Lords, who embarks upon that attack knows that they are

coming in conflict with the state because they are attacking the very existence of the state itself. And no amount, My Lords, of calling the state a fascist state, or an imperialist state or a capitalist state can change the position. No state, My Lord, whatever it is, can allow a position to be developed in which the masses become the instrument of the few in attacking this vital part of the sovereignty of the state. And it is not only the state's right, it is the state's duty in providing for the safety and security of its people, it is the state's duty to enforce the law of high treason in order, as His Lordship says, in order to crush any attack upon this aspect of its sovereignty. My Lord, it becomes much more serious when you have a state which you describe as fascist, and when you have a state which you say enforces its laws by force, by brutal force, by viciousness, - it becomes much more serious if your state of mind is such that you are prepared to attack that type of state. The question then arises, My Lords, if you do attack that state, and - can you then say that I didn't think that a clash would result between the state and the people, I thought this state was going to negotiate.

MR. JUSTICE BEKKER :

Doesn't that mainly depend on how you attack that state? You can call a state a fascist state, but that isn't serious. It depends how you attack that. Therein may or may not lie the sting.

MR. TRENGOVE :

Exactly, because, My Lord, it is a point that I want to make at a later stage, to call the state a fascist

in itself is nothing, My Lords. An opposition party, a parliamentary party, a legitimate party following ordinary constitutional methods can attack as fascist, but what do they mean by it? Do they mean by a fascist state, a state which if attacked by unconstitutional means is going to indulge in violence and bloodshed to exert its authority, or don't they mean that? What do they mean? It becomes very important, as Your Lordship says. Now in this same case, My Lords, His Lordship Mr. Justice Kotze confirms the view he had - he expressed with - the view he expressed on hostile intent in Erasmus's case, and he states at page 107 of his judgment: "The qualification 'hostile intent' is not merely confined to acts which are connected with an enemy of the state or government from without, for hostility can also be stirred up and exist from within, as the authorities clearly demonstrate. Nor is it necessary that the hostile intent should contemplate the total overthrow of the government, for acts may be done which, while not manifesting any intention to subvert the government as such, yet amount to treason, as where a person out of malice and hostility to the ruler, or to some act of maladministration, attempts to oppose and resist his authority." And he quotes Pothier, a passage 48.4.1. in support of this contention. And in the same case His Lordship Mr. Justice Wessels also deals with the matter, and at page 135, His Lordship expresses the view that "Treason is an offence against the highest political power in the state. Every state therefore, according to our law, which is a sovereign power is entitled to exact

from those who reside in its territory a respect for its sovereignty and to punish any person guilty of taking up arms to subvert the government. The majestas or sovereign power of a state may be considered either in relation to other states or in relation to its subjects and persons who live in its territory. The former may be described as external majestas and the latter as internal majestas. This distinction was known to the civil law and has been taken over from that system by the Roman-Dutch Law. Prima facie, a state which has the full and exclusive right to make laws for its subjects and inhabitants and to enforce these laws, possesses internal majestas in relation to its subjects and inhabitants. It is by virtue of this majestas, that it compels obedience to its law and respect for its political authority." My Lords, that view - I am not dealing now - the problem which arises is not whether one can have high treason if there is no external enemy, that has been accepted, and decided. I quote these authorities to make this point, My Lord, of the - that the vital consideration is the state of the mind of the person directed towards the authority of the state, which authority of the state to make and enforce laws is fundamental. There are other authorities which I needn't quote now, except, My Lords, I want to refer Your Lordships to Pothier in the Pandectae Justinianae, it is book 48, Pandect, Tit.IV. Pothier says, My Lords, - I am reading from a translation, - he commenced of Cujacius, and he says : "Cujacius Observatione XV 34, thinks that we should read : Ad hostes autem transfugae,

or hostes, id est, transfugae. But Bynkershoek more correctly leaves the text unaltered and interprets hostes here not as foreign enemies engaged in a regular war with the Roman people, but as citizens who have undertaken hostile acts against their country and have been adjudged enemies of their country. Thus in Sallust's Catelarian Conspiracy the associates of Cateline are often styled hostes."

Now My Lords, another aspect of this particular branch of the treason, hostile intent, is that for the purpose of treason the government, as the law enforcing authority and representing the people, the government as such, is identified with the people, with the state and with the land. One cannot say that I had a hostile intent against the government, but not against the state. As the law enforcing authority, it represents the people constituted in the state.

MR. JUSTICE BEKKER :

Can't a person say, well, I am against this government, but I am in favour of the constitution?

MR. TRENGOVE :

But then he is not against the government as a law enforcing authority. Then he may be against a particular group of people who are exercising the functions of the government at that particular stage. That is the furthest that one can go. My Lords...

MR. JUSTICE BEKKER :

Just repeat your submission, please. A person can't say I am against the government, when the government

is in power, because it represents the people?

MR. TRENGOVE :

Yes, he can't say my attack is directed at the law enforcing authority of the state, it is not directed at the state, because the two are separate aspects of the same thing. So that, My Lords, in Rex versus Leibbrandt at page 4 of the Judgment of His Lordship Mr. Justice Schreiner, his Lordship deals with this position and he says that acts apparently directed at the Executive Government may very well be acts done with hostile intent against the state. He analyses the attack upon the Executive Government and says that that attack may be of such a nature that it is in fact an attack against the state. And the Appellate Division, in the case of Rex versus Leibbrandt and Others, 1944 A.D. at page 253, at page 279, His Lordship the Chief Justice deals with this aspect, and His Lordship says at page 279 : "In Erasmus's case it was contended that unless there existed a definite intention to overthrow the Government by changing its personnel or altering the constitution, there could be no high treason but at the most sedition, but this argument was definitely rejected by the Court, and in the subsequent case of Rex versus Viljoen, it was laid down that a 'hostile intent against the state' is the hallmark of treason which distinguishes it from sedition and public violence. The state against which the hostile intent must exist is, of course, the people of the Union of South Africa organised as a state, of which the King, under the South Africa Act, is the head. The various powers of the people so organised (e.g. legislative, executive, judicial), are exercised on

behalf of the state by the persons entrusted by the state under its constitutional laws with those functions. Under the Status Act, 69 of 1934, the Executive Government of the Union is vested in the King acting on the advice of his Ministers of State for the Union and may be administered by the Governor-General as his representative."

He says at page 280 : "Consequently, acts apparently directed against the executive government may very well be acts done with hostile intent against the state, and as was pointed out in Erasmus's case, such intent need not go the length of an intention entirely to overthrow the government, it being sufficient if there exists an intention to coerce the government authority, and in this connection it is worth while to draw the attention, as was done in Erasmus's case to the remarks of Boehmer referred to by Innis, C.J. in the following terms." I have already quoted this, My Lords, that deeds speak for themselves, you cannot imperil the state and try to explain away the necessary or likely consequences of your act. And then His Lordship says : "These decisions are binding on us unless it can be shown that they are palpably wrong". His Lordship considers that and comes to the conclusion : "Mr. Ludorf boldly asked us to say that they are wrong, but he has not produced any argument or authority which shows that they are wrong, and consequently the law must be accepted as laid down in those cases." Now My Lords, as far as the Accused in the present case are concerned, the Crown alleged that they had the hostile intent against the state, they had the intent to subvert and overthrow the state, to disturb, impair or endanger the existence and security



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