

that they must have foreseen a long and difficult struggle. After all, My Lord, one must - may one not apply that to any opposition party? One may ask, put a United Party leader in the witness box, and say to him well now in 1960 the electorate seemed to be more against you than ever, you seem to have no hope of winning, you have lost three elections in a row and there is no sign of a swing towards you. Well, My Lord, what are the alternatives before that United Party man? He may just go on struggling in his present way, however long and hard it may be, or he may give up entirely. Or I suppose there is a theoretical possibility he might decide that we can't win by parliamentary means, we must go over either to extra-parliamentary means or to violence. But why, one asks, My Lord, draw the last inference? One can say to anyone, the government was stronger than ever in 1955, the electorate was more solidly behind it than ever, how could you hope to get a political change by your old methods? The answer is that political organisations go on. They never expected this to be a short struggle. They didn't expect to win within five years, My Lord, that hasn't been the slogan. My Lord, there have been political parties in this country which have gone on for forty years in order to go into power. And they may have setbacks, and things may be tough and difficult for them, but one doesn't infer from that that they don't have belief in the efficacy of their methods. Objectively speaking if one looks at an opposition parliamentary party today, one may say you have got no hope. One can imagine,

My Lord, with great respect to my learned friend Mr. Trengove, my learned friend cross-examining a leader of the Liberal Party, saying to him you have got no members of parliament, you have got no support, you lose your deposits, you can't honestly believe you can win by parliamentary means. And what is the answer to that, My Lord? The answer is, firstly, it is going to be a long and difficult struggle and we are unpopular, but we must go on. Alternatively we may conclude that his optimism is completely unfounded, he is going to fail in the end. But one doesn't draw the conclusion, well, you must be plotting something else. How can you believe you will win. Everything that my learned friend Mr. Trengove said could have been said to any leader of an unpopular political party, who wasn't making any political progress in the ordinary way, My Lord. And we submit that is all it amounts to. It is absolutely clear the A.N.C. decided it wouldn't win by mere supplication, it decided on extra-parliamentary methods, non-violent methods, My Lord, they were difficult, they were going to take a long time, they were going to involve hardship. And My Lord, there is nothing more to it than that. It is quite true that they couldn't guarantee success. But what happens, My Lord, if they can't succeed? Either they give up entirely, or they still struggle along optimistically, because there is nothing else that they can do. And the final possibility is that they might decide to change their methods, and that, My Lord, isn't the inference one draws from the fact that they realised that

they have got a hard long struggle against them and that success isn't certain.

My Lord, that was in fact a question which my learned friend often posed. What were you going to do, he said, if the White people did not give in? Well, My Lord, what can any political party say? What are you going to do if they didn't give in? And the answers in fact were given. They amounted really to this. Well, we are going to go on trying. If we don't succeed, well, it may be that we will be pushed aside by other organisations with different policies. Of course that is possible. My Lord, what if one had asked for instance General Hertzog in 1912 when he formed his new party, what are you going to do if you don't succeed at the polls?, What could he have said, My Lords? He could have said I will go on trying or I will be thrust aside or I will have failed. If you cross-examined him to show that he had a small majority - a small party and very little hope of getting a bigger one, the Crown in this case would have asked the Court to draw the inference that he was going to use violence. I submit, My Lord, that it is a most unsound inference that the Crown asks Your Lordships to draw.

MR. JUSTICE RUMPFER :

Of course, in isolation the Crown's argument couldn't possibly stand. I take it the Crown's case is that one must judge the position, having regard to what was said and written. That in a constitutional party that sort of argument is obvious...

MR. KENTRIDGE :

But My Lord, I am trying to show that it applies just as well to an unconstitutional extra-parliamentary party if what you are trying to find is whether they have gone over to a policy of violence.

MR. JUSTICE RUMPF :

What they expect may happen in future. I am just, for argument's sake, looking - having regard to your argument, looking at this particular issue of Liberation, a document which the people are advised to read. This is the Constitutional Fallacy article. Now you have the position there, you see, you have a certain policy, and you say we all know it is non-violent, and we know that there will be stiff opposition. If it - it is not necessary to say how the end will be, why? Because we base ourselves on non-violence. Again, then, a member is told to read a certain magazine, and he reads this. "The claim advanced in some quarters that there must be a guarantee that any campaign embarked upon can be carried out peacefully is to be rejected out of hand". Now that is the opinion of the writer.

MR. KENTRIDGE :

But My Lord, as Your Lordship will see in the context, what the writer has in mind is that even non-violent campaigns lead to the use of violence against the people who run the campaign.

MR. JUSTICE RUMPF :

And then it goes on, "Such a form of insurance is unknown in politics. In any case, every demonstration of the non-European people that has ended

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in bloodshed, has so ended as a result of vicious state action". One must look at the whole context. But I take it that is only how the Crown could argue. You must look at other features.

MR. KENTRIDGE :

That is so, and the Crown does say that, and what the Crown can find is this view not expressed by Ruth First, whose opinions, My Lord, we shall submit with respect, aren't of great value in finding A.N.C. policy, but A.N.C. leaders themselves do say, in and out of the witness box, we can't expect to carry this on without the expectation that some of our followers will suffer hardship and even be killed by state action. But the question is, whether because of that one can draw the inference that they say therefore we must go over to violence ourselves. My Lord, it is a non sequitur, we submit. Because after all, My Lord, we are dealing now with this argument of the Crown on what they really could have believed. It is quite true that the Crown does point to an article by Ruth First which appeared in Liberation, which was a journal which A.N.C. members were encouraged to read. But, whether or not - whatever inference one draws about A.N.C. policy from that, the point is, My Lord, that one can't infer simply because a struggle is going to be long and hard and that it will involve your own followers being killed, and because you don't make progress immediately, you can't infer that therefore you didn't believe in it and were going to go over to something else.

My Lord, there is another attitude taken up by the Crown in cross-examination particularly on this question. The Crown kept saying, they kept putting it that surely you must have expected your own followers or the masses might use some violence. Well, My Lord, the answer given was that no, they didn't. You can't guarantee it, possibly, you can't guarantee that some individuals may not use violence. But you do your best to obviate the possibility by preaching non-violence. My Lord, it may be that the Crown is correct that the A.N.C. people were over optimistic about their powers, but as Professor Matthews asked, why is the Crown hypothesis on this preferable to his own. After all, My Lord, there was nothing in the experience of the A.N.C. from 1949 to show that their hope and belief that they could keep their followers non-violent, was over optimistic. There was no case the Crown could point to in the various actions taken from 1949 onwards where the followers of the A.N.C. had resorted to violence, where they hadn't stuck to non-violence.

MR. JUSTICE RUMPF :

"hat do you say to the reference to Witzieshoek in that one document, is it unwarranted? Do you remember, it was argued that the A.N.C. claimed ...

MR. KENTRIDGE :

Yes, but My Lord, it is not clear from those documents what happened at Witzieshoek, whether the violence was on the part of the police or on the part of people who demonstrated or what part the A.N.C.

played in it. There are two documents. One claims some credit for it, and the other criticises the A.N.C. for not having taken up the matter sufficiently. But My Lord, the Crown led no evidence on that. It wasn't suggested whatever happened at Witzieshoek - it wasn't put for instance to people who had been in the A.N.C. in 1949, like Professor Matthews, or Mandela or Yengwa, it wasn't put to them what happened at Witzieshoek showed that you can't expect your followers to remain non-violent, didn't that teach you a lesson. Nothing like that was put at all. There were one or two references in documents which spoke of a clash...

MR. JUSTICE RUMPF :

On the evidence, what have we got that we could attribute to the A.N.C. fully? Not the A.N.C. only, necessarily, but in conjunction with other organisations. The Defiance Campaign? Western Areas?

MR. KENTRIDGE :

There was a stay at home in 1950 of which Mandela and Resha gave evidence. Then there is the Defiance Campaign of 1952/3, ...

MR. JUSTICE RUMPF :

The stay at home in 1950, was there a reference to some form of violence where the buses came?

MR. KENTRIDGE :

My Lord, there was a reference to the fact that people were shot by the police. Resha and Mandela said it was unjustified. In cross-examination of Resha, something was put to Resha in cross-examination about what had happened at bus stops, that Africans at

busstops had used violence, they had thrown stones. He denied that.

MR. JUSTICE RUMPF :

When the buses dropped the passengers, not so?

MR. KENTRIDGE :

Yes. Then the second stay at home on June 26th 1950 was apparently completely non-violent either way. There was the 1952 Defiance Campaign, which was not suggested to have resulted in any violence. There was the Western Areas Campaign, there was the Bantu Education Campaign, there was the Pass Campaign ...

MR. JUSTICE BEKKER :

Well, in the further particulars the Crown says that it does not allege...

MR. KENTRIDGE :

Yes, My Lord. And in fact, My Lord, to take that further, that is so. Not only does the Crown not rely on it, but in cross-examining Defence witnesses, and suggesting to them or asking them whether they didn't foresee that their followers or the masses would go over to violence and couldn't be non-violent, there was never any suggestion put to any witness that there was some A.N.C. campaign which should have taught them a lesson. All that the Crown relied on, merely in that connection, a document which my learned leader will deal with in due course, was that Transvaal lecture on Political Organisation in which it was mentioned that in 1922 the strikers had gone over to violence, although whether that was by way of retaliation

or not doesn't appear. Now My Lord, what the Defence witnesses have said was that we are having our campaigns, we anticipate there may be a strong reaction from the government, it is possible, even a strong possibility, a possibility that the government will even use violence, even a strong possibility some witnesses think, but, they say, we believe that our people would remain non-violent. Obviously they say you can't guarantee it. But they say we believe that our people would remain non-violent. Now My Lord, other observers with a different political outlook may think it was an unrealistic view. But there is certainly no evidence to show that those witnesses and the A.N.C. in general couldn't have believed it. My Lord, the Crown thesis we submit is based entirely on political speculation. And My Lord, we may even venture to suggest that there may be in it some element, perhaps of unconstitutional - some element of perhaps unconscious political prejudice. They have the feeling that these people can't carry on a campaign without people resorting to violence. Because, My Lord, there is really no evidence to support the Crown attitude on that. All that they were ever able to get from - to put to Defence witnesses, and my learned leader will deal with those passages in detail - they were able to put to them, there was a possibility that your people might use some violence, you can't exclude that entirely. The answer was, well, I suppose we can't exclude that entirely, but our propaganda was against that, we believed people would follow us, we had no

reason not to believe it. What has the Crown got, My Lord? Speculation. It is not a basis for an argument, My Lord, either on natural and probable consequences, it is not as though the Crown has been able to show that the natural and probable consequence of A.N.C. campaigns or stay at homes was to lead to retaliatory violence by the masses. Of course, My Lord, there is no guarantee of success, no witness tried to say that. The A.N.C. might fail with its non-violent policy, it might be pushed aside. There is a theoretical possibility that people in the A.N.C. may in the end - some of them - decide to go over to a new form, including violence. But such an organisation wouldn't be the A.N.C. with which this Court is concerned. My Learned leader has in fact already read to Your Lordship the criticism of the A.N.C. by a breakaway Orlando Branch on the basis that it did have a non-violent policy. It may be, if the A.N.C. failed, or the methods of the A.N.C. failed in future, people like those Orlando people may come to the fore and push it aside. That again is a matter of speculation, My Lord.

My Lord, this brings me to the general question of violence. Insofar as this Court is concerned with violence, it is concerned with violence against the state in order to overthrow the state. Now My Lords, I have already submitted that the Crown must at least show violence against the state. This isn't a charge of incitement to public violence in which it may not matter from which side violence comes or how it starts. So it helps the Crown not at all, My Lords,

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to show that the Accused embarked on methods which might have led the state to use force. My Lord, the Crown does sometimes argue...

MR. JUSTICE BEKKER :

Unless perhaps the Crown is able to show that it was intended on the part of the persons concerned to compel the state to use violence, if that was the real intention.

MR. KENTRIDGE :

In order to provoke a retaliatory insurrection. Yes, that would be the least the Crown would have to show. To compel the state to use violence, My Lord, not merely in the sense of course of embarking on methods which would lead the state to use violence in order to carry through its policy. But compel the state to use violence in the form that would lead to this mass retaliation. My Lord, I don't know if I have quite made the distinction clear. In the case of Western Areas for instance, one might say, just sit down at home, and then one might say, well, if the state wants to put through its policy, it will be compelled to use force in the sense that it will have to move the people out bodily.

MR. JUSTICE RUMPF :

Well, except that in that case too a feature may be - I don't say it was - a feature may be that you call out a sit down strike of fifty thousand people in the same locality where the people are to be removed, where a handful are to be removed, compared to the full population.

MR. KENTRIDGE :

My Lord, let us take the situation of a stay at home strike. One may say, whereas in Western Areas if the people who had to move didn't move when the government wanted to continue its policy, it would have been compelled to use police to move them bodily. But if we take a stay at home, one can't say then that the government is compelled to use force to put through its policy. Certainly no - as I have submitted, My Lord, there is no legal right in a government to break a strike by forcing people back to work in this country. Of course, I suppose one could theoretically visualise a law that if people stay away from work the government can use force and take each one back to his place of work and make him work, and shoot him if he doesn't. My Lord, that is so remote. My Lord, even if one takes the Crown idea of first compelling the government to use violence, in order to provoke retaliation, one doesn't get there by showing that the government may use violence to break the strike, even that there is a strong possibility of it. If people stay at home and don't go to work, there is no sense in which the Government is compelled to use violence in order to put through its policy. But then, My Lord, they would have to show that in any event that was designed to provoke retaliation, leading to an insurrection. And it is not enough, My Lord, for them to establish through Defence witnesses that it is a possibility which can't be excluded that some people will hit back at the police. Supposing police come to some man's house and

this man is a resentful man, and he doesn't go back to work and he doesn't even just lock his door, but he hits the policeman or throws a stone at him, or even stabs him, My Lord. That is not an insurrection, a revolutionary insurrection against the state. And that is a point which the Crown in its cross-examination tended to blur. They put to witnesses, can you entirely exclude that there may be some violent retaliation. The witness says we can't entirely exclude it. That doesn't take the Crown anywhere towards an insurrection by way of retaliation. They say it may be some individuals may assault the police, throw a stone at the police. It is not insurrection against the state, My Lord. It is not a plot to overthrow the state by violence, because you foresee that one can never entirely exclude the possibility of someone assaulting a policeman, or a number of people doing it. My Lord, the prosecution has consistently with respect, blurred these fundamental distinctions in cross-examination and in argument. My Lord, particularly, they have often used the word "violence" in cross-examination without making it clear whether it is violence by the state or against the state. My Lord, my learned friends for the prosecution have sometimes spoken of what they have called the evasiveness of Defence witnesses. But My Lord, there are certain parts of their cross-examination which one wouldn't call evasive but which are certainly extremely vague. And they have relied to a large extent on the answers they get from that sort of question. For example, My Lords, I turn to the Crown

file of argument on the witness Yengwa, as it was read out by my learned friend at the top of page 20.

"Mr. Yengwa," he is asked, "you know, you personally held the view that before freedom was achieved blood would have to flow in this country". Now as Your Lordships recall, the witness Yengwa took that to be a suggestion that he knew that people would have to be killed, by the people on his side. And then there is a long discussion about who was going to commit the violence. My Lord, one asks, why does the cross-examiner put it in this way, that you believed that blood would have to flow? Supposing Yengwa had said yes, what would the value of that be? Why does the cross-examiner in this case, which could be multiplied twenty times, not say, you believed that your followers or the masses would have to kill the servants of the state before freedom was achieved. My Lord, that would have been a direct question, and he would have had a direct answer. One gets it time and time again in the cross-examination of Mr. Luthuli, particularly with regard to the use of the word "clash", or direct clash or even "violent clash". My Lord, there are pages and pages of the cross-examination of Mr. Luthuli where it appears that talking about a "clash" or a "violent clash", and no one has got it clear from whose side the violence comes. My Lord, on the third paragraph of page 31 of the Luthuli file it is put to him that in the light of his experience of the 1949 Programme of Action, the A.N.C. knew that strike action would lead to a direct clash between the African people and

- that is the working class on the one hand and the ruling class on the other hand. And then there is a long discussion about clashes or direct clashes and even violent clashes. Now My Lord, one asks, if the Crown wants to rely on this, why didn't they say to Mr. Luthuli for instance, instead of talking of clashes, didn't the African National Congress know that if there was a strike, its followers would employ violence. And not talk of a clash in the - and the violent clash, and then there is a discussion about whose side the violence comes from. This distinction is always blurred. You don't get a direct question from the Crown saying, did you not think that a strike would lead to violence by your followers. There is talk of a clash and a direct clash. The - At pages 139 to 140 of the Luthuli file, similarly there are questions like, that the Crown asked : "Did you expect that the government intended to bring about a physical clash". Instead of saying, - and then there is a discussion on that. The only question which - to which an affirmative answer would have been of any value to the Crown was, did you expect that this would lead to a physical clash in which your followers would use violence. But the Crown constantly blurs that distinction, and by asking general questions about would there have been violence, without saying from whose part it comes, or would that have led to a clash, the Crown constantly blurs this aspect.

Now My Lords, that is why we say that it is no use as the Crown does in the Matthews file,

making a submission based on statements made by Professor Matthews that he couldn't exclude the possibility for instance that violence might result from their campaign, when it is clear from his evidence as a whole and even from the passages quoted, that he means that violence will be used against their people. My Lord, again, I am not - we are not asking the Court to hold that a campaign which might have those results is desirable, we are not asking for any stamp of approval from the Court on that. The Defence witnesses themselves concede it is an unpleasant method for them to have to use, they feel they must warn their followers of what might happen. It doesn't help the Crown ? Court just to say that this could lead to violence. They have got to show it was known and intended that it would lead to violent insurrection against the state. The Crown is always relying on words in speeches like "die". "They have to die in the struggle ". My Lord, there is an elementary proposition which, with respect to the Crown, it always overlooks, and that is that the word "die" and the word "kill" are not synonyms. One says that one must be prepared to die - let me put it very low, My Lord. It doesn't always mean that one must be prepared to kill. It is true that it may mean it sometimes. It doesn't always mean it. So, My Lord, apart from the specific evidence of the witnesses which will be referred to and the documents, these - we submit that the Crown on the issue of violence fails on either approach, insofar as it relies on Defence witnesses or on articles like the article in

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Liberation to which Your Lordship the Presiding Judge has referred. Insofar as it relies on statements to the effect that you can't exclude the possibility of people being killed by the state. Even insofar as it relies on statements by witnesses well, you can't entirely exclude that some of our followers may commit some acts of violence, but we don't expect or intend it and we try and guard against it. Insofar as the Crown relies on that, they can't ask the Court to find as a matter of fact that the Accused, the A.N.C., intended that their methods should lead to actual violent retaliatory insurrection against the state. And furthermore, My Lord, on their second leg, which the Crown says even if there is no direct evidence that they intended it or plotted it, they must be taken in law to have done so, because that is the natural and probable consequence of their activity, we submit My Lord that there is not the slightest basis for such a finding. My Lord, the sort of statement which the Crown relied on for that leg of its argument, was the statement one finds in Eramus' case. There, one recalls, rebels had actually taken arms and formed commandos and were committing violent acts against the state, capturing police stations. It was argued that they didn't have the intention really to overthrow the state, and the Court, quoting Boehmer says that you judge by deeds. If these men commit these violent acts, which have inherently in their nature this element of perduellio, they can't be heard to say they didn't intend to

overthrow the state, because those acts are acts which in themselves tend to overthrow the state. One had the same thing in the 1914 rebellion, My Lord. One had this armed, rebellion, and one of the defences was that this wasn't intended to overthrow the state, it was "n gowapende protes", and the answer was, well, it doesn't matter what you call it, you have set on foot military action against the state. But the Crown attempt, My Lords, to apply that sort of reasoning to a plan which some time in the future might result in a general strike, to say that if you embark on a programme of action which contemplates a possible general strike in the future you cannot be heard to say that you did not intend violence against the state, My Lord, we submit is a proposition without any foundation or merit. And that, indeed, My Lord, is what the Crown argument amounts to. They say, if you have a programme of action, however non-violent you may hope it to be, you can't be heard to say you didn't intend violence. My Lords, it is a completely untenable proposition. The whole concept of natural and probable consequence has been completely misused by the Crown in this part of its argument, My Lords. And we therefore submit, My Lords, that in general, the use of extra-parliamentary methods as contemplated by the A.W.C. and the other organisations was not violent, it was not intended to lead to violence, it wasn't shown that it was intended to lead to violence. It wasn't shown that it must necessarily have led to violence. It wasn't shown that the accused did not believe in it, or could not have

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believed in it, and in general, My Lords, we therefore submit that the whole policy of extra-parliamentary activity of the Accused is acceptable on the basis deposed to by the Accused and on the basis in which it is found in such key documents as the Programme of Action itself. And we submit, My Lord, that there is nothing in the type of extra-parliamentary activity either used or contemplated by the Accused which in any way assists the Crown in persuading the Court to draw an inference that violence was intended.

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