

correctly, in the case of alleged treasonable conspiracy, the crime is not constituted - the crime is constituted not by virtue of the mere agreement to bring about a change in or a different kind of state, but to achieve that object by means of violence. The emphasis in such a case, he said, lay on the means to be employed rather than the end sought to be achieved". My Lord, we would submit that in this case, we do submit, that it was vital for the Crown, if it had intended to make the case which is now being presented to Your Lordships to have pleaded it.

Now My Lord, Your Lordship will recall that yesterday I stated that the Crown case as now argued was not put to the Defence witnesses. In fact, My Lord, Your Lordship will find, in volume 68, in the evidence of Mrs. Joseph, that there was certain questioning by Your Lordship the Presiding Judge, on lines which somewhat obliquely if not directly, put the present - the case as the Crown now argues it. That is at pages 14519 to 14526. Mrs. Joseph dealt with it and denied any such intention or any such agreement. And the significant feature is, My Lord, that it was then not taken up by the Crown. It had not been put by the Crown My Lord to the witnesses who had given evidence prior to Mrs. Joseph; it had not been put for instance to Dr. Conco or Mr. Luthuli, and was certainly not My Lord put to any witnesses who succeeded - people like Nkalipi, Molaoa, Sibande, Yengwa, Matthews, volunteers - no none. And My Lord, if I may be permitted to say so, it wasn't even taken up by the Crown. Your Lordship's trend of

thought, as I understand it, was an exploration into the possibility of this occurring.

MR. JUSTICE BEKKER :

What is that reference at 14519?

MR. MAISELS :

It starts at 14519, and continues to 14526, My Lord. The gist of it is that the suggestion is put by the learned Judge that - by His Lordship the suggestion is put that the attitude of the Congress movement is put to Mrs. Joseph as a member of the Congress of Democrats was that there would be no violence on their part, but that their action might provoke violence on the part of the government, and that the masses would then retaliate. She dealt with it, and denied it, My Lord. Perhaps I had better read the paragraph to Your Lordship. It started, MY Lord, in relation to Kenya, and then went on :

"Flowing from that, the condemnation of violence also depends on the situation is that correct or not? --- No, My Lord".

"The blame is part (?) of the situation as the Congress of Democrats sees it - if the government is to blame in the opinion of the Congress of Democrats, would the Congress not condemn violence used against such government? --- My Lord, while we might not have gone so far as to actually in round terms condemn it, I feel that our line is contained in our own policy which says, you must not use violence against the government, but whether we have gone so far as to condemn

violence in other situations of the oppressed people I wouldn't be prepared to say. I know what we think here, it is so clear here."

"You see Mrs. Joseph, what I am asking you is this, that we have a particular - or we had a particular setup in this country. We have the fact of people called the oppressed people didn't have arms. We have a government which was called a fascist government, who had the power of the state behind it, the police. I am using the words of the document - the Courts, and even if necessary the army. So for any organisation to make any headway amongst the masses, it would be essential to propagate a policy of non-violence, not so? Because it would be suicidal to propagate violence in those circumstances. It depends on the situation where you are. And that is why I am asking you the question, to test the real approach to the problem by yourself and by the Congress of Democrats. I am putting to you the difference between the expressions of non-violence in this country, and the failure on the face of the documents at least the failure to condemn the violence in other countries where circumstances existed more or less shall I say the same as here, and where the oppressed people actually were said to have used violence. Do you see the conflict? --- I see My Lord. But that would suggest that non-violence is purely a matter of expediency in South Africa. I have never seen that here, My Lord".

"That is my difficulty? --- Never..."

"That is why I am putting it to you? --- I can see where (?)

Your Lordship is reading, but My Lords I have never seen it as a matter of expediency. I agree My Lord that it is the correct method for South Africa, but I have never seen it in the cynical sense of expediency."

"Now take the case if I may go one step - of China, which is a country which has been referred to in a number of documents, and which has been held up to the oppressed people as a country which has reached a stage of liberation that ought to be admitted. Now I think we can assume the fact that the liberation of China did not take place in a non-violent manner? --- That is so, My Lord".

"Yes. Now did the Congress of Democrats ever in putting up China as an example of a constitution to be adopted - I am putting it squarely in that form - in the interests of the oppressed people, did they ever in the same breath condemn the violence that took place in China? --- No, My Lords, it did not anymore that we specifically condemn the violence in the French Revolution, but nevertheless we uphold the principles that emerge from the French Revolution, the whole world has, My Lord".

"Yes, well, it is for that reason that I am really asking you the question. Did the point of view as regards non-violence, was that not a point of view which depended on the circumstances? --- Not in my understanding of it, My Lord. I would make one point, and that is, My Lords, in the Congress of Democrats, generally speaking, they are only concerned with the situation in South Africa. We did not I think ever have

a foreign policy as such. In fact we made it clear from the beginning we were not able to be a parliamentary party, for which it would be necessary to put forward specific policy, an economic policy, a foreign policy. We had a limited purpose, which was to assist in what we saw the liberation of South Africa and the granting of universal franchise. That is why I am finding it difficult My Lords to think in terms of a specific policy in these matters (?) of the Congress of Democrats. From time to time at our conferences where an issue was very much in the minds of people, a resolution will be passed on a specific issue, but really My Lord we did not have a broad policy in these matters." Question of shall I say relative violence. "Did the Congress of Democrats support the principle of the African National Congress that in order to achieve its aims it may be necessary to engage in a Union wide struggle? --- In a Union wide peaceful struggle, yes, My Lord".

"A Union wide stay at home? --- Stay at home, yes".

"I didn't say <sup>strife</sup> . . . . I said strike? --- I am sorry I thought you said struggle".

"A Union wide strike? --- Yes, My Lord".

"Did it support that? --- Yes, My Lord, it did".

"Did the Congress also accept the view that the government which it called a fascist government, would not collapse and instead of granting rights would become more and more hard? --- Yes, My Lord, we accepted that, it was a realistic view of the situation, we knew that".

"Did the Congress realise that in the case of an

ultimate strike, which would be an indication of failure of any negotiations prior to that, that there might be violence used by the state to break up the strike? --- My Lords, I am having a little difficulty with the use of the word strike as against a stay at home, where people remain peacefully in their homes on a very vast scale".

"What do you understand the difference to be between a strike and a stay at home? --- A strike to me, My Lord, is something which relates more to a specific industry, a national stoppage of work to me has a wider term, when people stay at home".

"A strike, a bigger strike? --- It is again more an expression of disapproval in which people stay at home . It is difficult, if in fact a stay at home is carried out in a highly disciplined manner, in which people remain in their homes, then it is difficult to see how armed interference could really arise. It is not a question so much of picketing where there may be clashes, but of people staying at home".

"Well assume there are arrests on a large scale, even by the army, strikes being illegal in the view of the state...? --- Only illegal in certain cases with certain people. A stay at home in itself is not My Lords illegal unless it affects the essential services. It is not an organised strike in a factory, which is illegal, it is different, My Lord".

"Well, as far as I understood the evidence so far, it was part of the policy of the African National Congress that it would go as far as universal or a

nation wide strike, a stay at home? e-- Yes, in order to achieve it if necessary". "These were envisaged as being possible even amongst our own members. We are in fact here today My Lords..."

"And in that case if there were ever a strike on that scale, and there were arrests on a large scale, did the Congress of Democrats envisage the possibility of violence occurring, resistance of arrest? --- No, My Lords, because that has not been the policy of the Congress as a whole, no, My Lord".

"It is not what the policy was, but what the Congress would envisage would happen? --- That should be something which we would try to prevent, My Lord".

"Was there a likelihood of it happening? --- My Lord, a likelihood is really in terms of how likely it is possible, or how near is the possibility of a nation wide stay at home".

"Well, I am putting it on the basis that once there is a nation wide strike it must have appeared to the Congress alliance that nothing else could do anything, could achieve anything. It would presuppose a situation of the government being as hard as a rock? --- Yes, My Lord".

"And the Congress alliance being as determined as anything? --- Yes".

"That situation must be presupposed before one thinks of a nation wide strike? --- Yes".

"Now in that atmosphere, having regard to the fact that the government of the day is as hard as a rock, and the Congress alliance is determined to carry on,

what would the Congress of Democrats or you, for that matter, what would you envisage might happen? --- I envisage that there might be as you say arrests, but I saw it and I think others too, that if that situation could be brought about, it would not be of very long duration. Our people might have to suffer during the time that the pressure would be on the population as a whole. It would not be of very long duration. Our people might have to suffer during that time. But the pressure would be on the population as a whole, because the country wouldn't be able to continue and therefore negotiations would be the result. That is how we saw it, My Lords, the people might have to suffer imprisonment, that is true, My Lord".

"And blood flowing? --- Yes. We have made that clear too to our people, that even non-violent methods might not be able to prevent violence being used against us. We said that repeatedly, My Lord".

"And if the strike is on a nationwide scale, would you exclude violence completely by the masses against the authorities if there were arrests? --- That would be the instruction, My Lord".

"But what do you envisage? -- To resist provocation".

"What do you envisage in that, if I may call it, final plan? --- My Lord, I envisage it this way, that we would not embark upon something of this nature which would be of such a vast character unless we had good reason to believe that our people would be disciplined. We wouldn't go into it rashly, My Lord."

"That must be the hope? --- Yes, it would be".



"But the expectation, what would be the expectation? --- The expectation would have to depend upon the circumstances at the time, I don't think I could really answer that".

"Assume that the position would be that the Congress alliance reached that stage, but it was determined to carry on with the nation wide strike, knowing that the government was adamant, and realising also the clash would be short because of the organisation of the Congress alliance, and if I may put it also, realising that although there may be some blood it would be small compared to a nation wide clash, and it would be of very short duration before victory would be achieved, would that be in line with the Congress of Democrats policy? --- My Lord, I don't think that at any time one can exclude a possibility, because we have said that over and over again, but I don't think that we will be justified in going forward with such a plan - I don't think we would be justified in going forward with such a plan, saying to ourselves yes, we know that there will be some casualties, but we don't regard that as important in view of the ends to be achieved. That My Lord, would to me, be a violation of our policy, it would be, because we must always go forward with the conscious determination to avoid bloodshed. We have never been able to give that guarantee, but it is fundamental to our policy, My Lord, that we don't engage in activities which we are convinced are going to lead to bloodshed, even if it is small, I put it that way, My Lord."

"I am asking this question to see how your evidence about

the fundamentals of your policy can be reconciled with the hard facts of life? -- My Lord, the fundamentals of our policy <sup>were</sup> can be reconciled to the hard facts of life in India. It took a long time, they can be reconciled, I believe it, My Lord."

And then there is a discussion, further questioning by Your Lordship, perhaps I will just conclude it, and then Mr. Liebenberg took it up again. I mean he took up his cross-examination, he didn't take this up. Just to conclude it up to the time when Mr. Liebenberg, who was then cross-examining, took over. Your Lordship then proceeded :

"Except there may be this difference in India between India and this country, that the very idea of non-violence was propagated by Gandhi, is an idea which according to the evidence as such has not been propagated to the same extent in the same particular manner? --- It started here, My Lord".

"Yes, I am now talking about the evidence before us. Do you follow what I mean? --- Yes, I do, but I mean Gandhi's first experiment was in SouthAfrica".

"And secondly the type of state that Gandhi might have wanted might not be quite the same type of state that the Congress alliance want? --- My Lord, I can't claim of course to be an expert on India or on Gandhi or on others - others are much better qualified than I. I have always understood that Gandhi's aim was to seek liberation for his people to decide for themselves what kind of state they want. That My Lord is in effect the aim of the Congress movement here, so that I see a

great similarity, My Lord, but I must say that I don't claim to be so well informed about Gandhi".

And that was the end of that. Now, My Lord, it may be, and it probably is, that because Mrs. Joseph, if I may say so with respect, My Lord, we have to argue this matter later on a different aspect of the case, had answered Your Lordship's difficulties satisfactorily, that the Crown didn't pursue it. What is most significant My Lord, is that it is put - it is not put to a man like Matthews.

MR. JUSTICE BEKKER :

Wasn't it put to Luthuli? The idea that if they go on with their unconstitutional, illegal action, that was the line that was being developed, the government would have to act?

MR. MAISELS :

But now the idea, My Lord ...

MR. JUSTICE BEKKER :

And didn't Luthuli concede that there was a possibility of retaliation?

MR. MAISELS :

Yes, My Lord, but in a different context. If Your Lordship pleases, one is dealing with the situation not as part of a plan, not as a part of planned retaliation.

MR. JUSTICE BEKKER :

I don't understand when you say it wasn't put to Luthuli. This was canvassed with Luthuli.

MR. MAISELS :

As Your Lordship pleases, not as part

of a conspiracy, not as part of the planned conspiracy.  
We will deal, My Lord, in great detail ...

MR. JUSTICE BEKKEH :

Do you mean there is a probability?

MR. MAISELS :

Yes, as something that might happen.

MR. JUSTICE RUMPF :

Incidentally, the same approach, I think, appears from the questions put by me to Helen Joseph. The expectation, not the plan. The questions put to her were directed to find out what were the expectations of the Congress of Democrats.

MR. MAISELS :

That is why, My Lord, I said it has been put somewhat obliquely, because what Your Lordship was really dealing with, was what is the sort of thing that might happen in this plan that you have, your non-violent plan. What are the sort of things that might happen. Not on the question, My Lord - Your Lordship will appreciate...

MR. JUSTICE BEKKEH :

Well, I want to ask you about Luthuli again. This cross-examination turns, - I am not quite satisfied that it was just as a matter of probability, because it arose out of the Programme of Action. That was their method of campaign. That Programme of Action envisaged what the Crown said was unconstitutional action, and it then gave rise - why do you say it is divorced of a plan if this cross-examination flows from an analysis of the Programme of Action?

MR. MAISELS :

May I put it this way, My Lord. The case is a conspiracy which had taken into account all these things, this is something that you had planned in advance. You had planned this progression, this contingent retaliation, as we have called it. Now that has never been put. What has been put, My Lord, is that if the police or the army or the government under certain circumstances does this, uses force, do you expect that the masses will retaliate. Purely, as a matter of expectation, purely as something that might happen, which My Lord, with respect is not the case. My Lord, may I put it this way. Your Lordship will recall how Professor Matthews was led. He was led most carefully. Notwithstanding my learned friend Mr. Hoexter's somewhat . . . . . in regard to Professor Matthews, when he said he knew enough about the policy to be a co-conspirator but not enough about the policy to be a reliable witness, notwithstanding that, My Lord, and that will be dealt with in its proper place, here is a man who has been associated with the African National Congress for many years, and who in fact, My Lord was the chairman of the drafting committee of the Programme of Action - he must have been in any plot, nobody can argue that. We certainly would have led him on this plot idea, but it never occurred to us, My Lord. It never occurred to us that this was the case. And certainly, My Lord, it was never put in so many words, this is what you are planning, this is the plot! Indeed, My Lord, so far - Your Lordship put to me the

Programme of Action as being the method, and I agree. Your Lordship will appreciate that the Programme of Action isn't even in the violence particulars.

MR. JUSTICE BEKKER :

Leave that aside for the moment.

MR. MAISELS :

Which shows, My Lord, how far it is removed from ...

MR. JUSTICE BEKKER :

Just tell me this, Mr. Maisels. It is common cause, I think, that the African National Congress relied on the Programme of Action as its means towards achieving its ends.

MR. MAISELS :

I go further, My Lords, it is not merely common cause, that is our case.

MR. JUSTICE BEKKER :

Right. If, as the Crown developed the cross-examination, based on the means to be employed, why shouldn't that be regarded, as far as the African National Congress is concerned, as the plan?

MR. MAISELS :

My Lord, with respect, the Programme of Action is the means of implementation of the either innocent or evil plot. Now, when one deals with it as a plot, then one puts to the person whose evidence is being attacked, the terms of that plot. The terms of that plot being the following - not merely that something might happen, but that this is what you are working towards, what you have agreed to work towards.

The fundamental distinction My Lord between having agreed to do something, - we agree to hold a meeting. It is possible that when we hold a meeting somebody may come and break it up ...

MR. JUSTICE BEKKER :

Yes, but on that line of thought, if as a matter of probability - and this is what the Crown puts up - if as a matter of probability on the means which you are going to employ certain results might follow, could it not be suggested that those results, being probable, should have been foreseen?

MR. MAISELS :

No, My Lord, with respect, we will deal with that in a separate chapter of the argument, whether it should be foreseen or not.

MR. JUSTICE BEKKER :

I am on the question of whether this was cross-examination on the plan.

MR. MAISELS :

I say he has not been cross-examined on the plan, because, My Lord, Your Lordship will appreciate - because the retaliation is planned, it is intended, it is not a question My Lord of something that may or may not flow, it is an intended thing.

MR. JUSTICE BEKKER :

The Crown has suggested, they may have said well, we never intended that particular result, but if in law or if in fact it is quite clear that the natural probable consequences is this result, you can't be heard to say it wasn't intended.

MR. MAISELS :

My Lord, that is not, if Your Lordship pleases - if the matter is put on the basis that you had a non-violent plan to overthrow, but incidentally this works in as a probable consequence, that is a different matter entirely.

MR. JUSTICE BEKKER :

Isn't that what the Crown tried to do in its cross-examination, and put that to Luthuli?

MR. MAISELS :

Yes, My Lord, but with respect that is not the plan which is now relied on as the case. That was why, My Lord, I was at pains to refer Your Lordship to the way this originally arose from the Crown argument, why I was at pains to draw Your Lordship's attention that this plan, as now planned, was never pleaded. My Lord, I didn't intend at this stage of the argument to go into the question of the probabilities, and I don't intend to, because that is a different matter entirely. I am merely saying that it is not specifically put as part of a plan to any A.N.C. witness. My Lord, Your Lordship will appreciate that that is not essential, even if it had been put, it doesn't destroy the validity of this point, because it is still not pleaded. It is not pleaded at all. Now My Lord, a case which was referred to, again many years ago, My Lord but which is relevant on this aspect of the matter, is the wellknown case of Rex versus Alexander, reported in 1936, A.D. p. 445. That was a case, My Lord, in which certain directors of a company had been charged



with fraud, and the Indictment set out the particular fraud, company fraud, and they were found guilty of a species of fraud, bribery, which it was contended in the Court below, was not covered by the indictment. Your Lordship may remember that case. It was what was known as the Doornhoek case, the Doornhoek fraud. That case, - the case came before the late Mr. Justice Solomon, and he complimented Counsel who appeared for the Crown, the late Mr. Justice Milne, on the brilliant manner in which he had adapted himself to the changing aspects of the case. Now My Lord, there is no doubt that my learned friend has adapted himself to the new situation in the light of the fact that the evidence completely fails to establish what is set out in the indictment, but the question is whether the indictment covers it. At page 457 of the Judgment, the Chief Justice, when the appeal was allowed on the simple basis that the indictment didn't cover what was the charge of which the Accused were found guilty, His Lordship says this : "What is the object of an Indictment? Its real purpose is to inform the Accused in clear and unmistakable language what the charge is or what the charges are which he has to meet. It mustn't be framed in such a way that an Accused person has to guess or puzzle out by piecing sections of the indictment or portions of sections together what the real charge is with - which the Crown intends to lay against him." And then at page 464 His Lordship Mr. Justice Curlewis, in a concurring Judgment said this : "Had the indictment intended to charge a fraud of this nature, that is by

bribery, it would have been so simple and easy to have alleged it". Now My Lord, if the Indictment in this case had intended to charge a case of violent overthrow in the way now suggested, wouldn't it have been easy My Lord to have said so? What would have been the difficulty? And we submit, My Lord, that this is a case where initially the Crown has not attempted, not even attempted to make the case which is set out in the Indictment. What the crown has sought to do is to make a case which is not set out in the Indictment at all, and we submit, My Lord, that initially Your Lordships should find that the charge does not cover the case as now presented to Your Lordship. The Crown has in effect admitted its failure to prove the case which we had to meet. We submit, My Lord, that by putting up this case, it has really admitted its failure to prove the only case which we have at any time been called upon to meet. And that was the case that we plotted violently to overthrow the state. That was the only case, My Lord, and that meant by direct action, not by contingent retaliation. And this isn't a case, My Lord, where the Crown has proved part of which is alleged and argued that such part is sufficient to sustain a conviction. In our submission, My Lord, it is a case of introducing entirely new allegations at this stage of the argument. Your Lordships would recall this too, I think, that if there had been any question of a conviction based on the overthrow of the state by means of a passive resistance or economic pressure, the whole case would have been conducted on a different

basis, and Your Lordship will recall that in the absence of the Accused certain evidence was sought to be introduced which was thought to be relevant to this issue, - I am sorry, My Lord, in the absence of Counsel. At volume 70, My Lord, page 14947, at line 12, the Accused Kathrada was leading the witness Cacaalia, and he put this question :

"There has been some suggestion that where a disenfranchised people struggle in an extra-parliamentary and unlawful manner it shows an intention to overthrow the government by violence".

By Your Lordship : "I don't think that is the suggestion by the Crown that merely by extra-parliamentary struggle..."

By Accused Kathrada : "I didn't say 'merely' My Lord".

By Your Lordship : "That is what you implied in your question, that that shows an intention to overthrow the government by force and violence, Nobody suggests that".

By Accused Kathrada: "My impression was that the Crown does suggest that when the Congress have used extra-parliamentary and unlawful methods, they were in a campaign to overthrow the government by force and violence".

"By Your Lordship: "No, you are mixing up two things. The use of extra-parliamentary methods may be for some purpose, it may be to increase wages or it may be to achieve a new state, in which case, depending on the circumstances, it might be argued that the use of extra-parliamentary methods, if these methods are intended to be used with violence, and for the purpose

of overthrowing the state, that those methods are said to have been used to overthrow the state. It has not been suggested that the use of unconstitutional, illegal and extra-parliamentary methods indicates the intention to overthrow the state, it depends on the purpose for which those methods are used."

And one final reference on that point, My Lord, page 14958, Your Lordship Mr. Justice Bekker made it quite clear, and Your Lordship said this : "Mr. Kathrada, there is something I would like you to consider. I come back to admissions made by Mr. Maisels on behalf of the Defence right at the outset, that the organisations mentioned by him worked together to overthrow the government or to change the government. Well, to work together to get a new government, I'll put it that way. Now the question between the Defence and the Crown is whether that was with or without violence, and whether the state was being aimed at. To what extent, and bearing in mind the cross-examination of Mr. Maisels conducted against Professor Murray, I would like you to consider the question to what extent it is relevant in view of the admission and in view of the issue between the Crown and the Defence, to trace in this close detail the history of the Asiatic Bills in South Africa and the various forms of passive resistance. I don't know whether I have made myself clear, but I would like you to consider that. If you think it is relevant, then you must carry on. The issue really between you and the Crown is violence".

That was the way the case was conducted.

The issue was violence. Are you going to try to achieve your aims by violence or not, and that was the only case.

MR. JUSTICE BEKKER :

Arising out of that, Mr. Maisels, I want to put this difficulty to you, that I have. Leave aside for the moment whether the Crown has proved the facts or not. The question is whether the Indictment is wide enough to cover this particular issue. Now look at page 5 of the Indictment, "advocating and propagating unconstitutional and illegal action, including the use of violence, as a means of achieving the aforesaid objects of the conspiracy". Now assuming these to be the facts, whether they are proved or not can be dealt with later on, assuming three people say we are going to overthrow this state, and what we are going to do, we are going to embark on unconstitutional means. The state will probably use violence. If the state uses violence, we use violence. Assuming that is the agreement. Would not this allegation be wide enough to cover that setup?

MR. MAISLS :

With respect not, My Lord. Your Lordship will recall yesterday I suggested that if that was envisaged, the allegation should be unconstitutional action, (loading?) . . . to violence.

MR. JUSTICE BEKKER :

Why? On the plain wording, if we agree, if the state uses violence, we use violence. And the indictment says, advocating unconstitutional

action, including the use of violence..

MR. MAISELS :

My Lord, may I just take it halfway.

Why don't the Crown say that?

MR. JUSTICE BEKKER :

The question is whether the Crown has said so.

MR. MAISELS :

I say they haven't.

MR. JUSTICE BEKKER :

Because you say the use of violence does not include action leading to violence. Now on the example I have put to you, if the state uses violence, we use violence.

MR. MAISELS :

My Lord, may I put it this way. That is, as I have put it originally, that is contingent violence. That is not incitement to violence, on the contrary. That is not incitement to violence.

MR. JUSTICE RUMPF :

You mean it is not a conspiracy?

MR. MAISELS :

Yes, it is not a conspiracy to incite by - to violence. This is conspiracy, My Lord, we are dealing with, this is the plan. This is the agreement. It isn't things that might or might not happen.

MR. JUSTICE RUMPF :

May I put it perhaps this way. Your violence is obviously the cornerstone in the case, because it says so in Part B. It says that the charge

is that they conspired with each other to overthrow the state by violence. That is the charge. Now in regard to the method of violence to be employed, the indictment then goes on and says the object to overthrow by violence remains constant. The means to do this, that is the means to acquire the overthrow by violence, the means to be employed, are set out then, it is the Congress of the People, to recruiting for violence - that was a positive allegation which might support the charge by the Crown, the basic charge; and then (iii) is advocating and propagating unconstitutional and illegal action, including the use of violence, as a means of achieving the aforesaid object, the conspiracy. How it is arrived at for the moment I am not concerned with, I merely say it means apparently that the agreement was to propagate unconstitutional and illegal action, thereby to overthrow by violence - exactly how that follows I am not concerned with at the moment, but that seems to be the meaning of this. And then organising and participating in various campaigns against existing laws, inciting to illegal and violent resistance against the administration - that shows a type of violence which is alleged as was contemplated in the conspiracy, a type of violence, a violent resistance ...

MR. MAISELS :

In particular circumstances.

MR. JUSTICE RUMPF :

Yes, the Native Resettlement Act and so on. I am asking you this because of Western Areas here.

MR. MAISELS :

Yes, My Lord, that is (a).

MR. JUSTICE RUMPF :

The allegation here then being that there was a conspiracy to overthrow by violence, one of the means of violence to be used was - to overthrow the state was to organise a campaign in which there should be violence.

MR. MAISELS :

In other words, My Lords, as I read it,- perhaps I am wrong, - take Western Areas - when the police come to move you, you attack.

MR. JUSTICE RUMPF :

Promoting discontent, that is all part and parcel of the whole, to get somebody to be violent. Advocating Marxism. And then (vii) Preparing and conditioning the population of the Union of South Africa, more particularly the non-European section thereof, for the overthrow by violence. Now this certainly does not indicate violence by the association, by the organisation...

MR. MAISELS :

No, My Lord, violence - what I mean is, My Lord, I hope I haven't been misunderstood - I accept that this means violence by the masses, I accept that, but that is not my point.

MR. JUSTICE RUMPF :

No, I am putting this to you because of the reference to direct violence and not oblique



violence or contingent violence. This is as far as the pleading is concerned, this indicates the manner by which the Accused through the associations or organisations as will appear later, conspired inter alia, that violence would be used through the masses to overthrow...

MR. MAISELS :

Clearly, My Lord..

MR. JUSTICE RUMPF :

Now apart from the particulars and apart from anything else, apart from the facts of this case, on a charge like this, if it were proved that three conspirators came together and said look, we must educate the masses - or three hundred for that matter - but a number of people got together and said we must educate the masses to use violence to overthrow the state, that might or might not be high treason...

MR. MAISELS :

My Lord, that would certainly be covered.

MR. JUSTICE RUMPF :

Covered by this Indictment, yes.

MR. MAISELS :

That would be under (vii).

MR. JUSTICE RUMPF :

That is the acme of the Crown case then, apart from direct violence by members of the organisation or volunteers, that the masses were to be used to do (?) violence to overthrow the state. Now the references to violence to which you have referred us in the Particulars, are references really that have the

the following background - I am putting this to you - the summary of facts was given to indicate, to form the basis to indicate to the Accused on what the Crown relies for its allegation that there was a conspiracy of the nature alleged and the adherence thereto.

MR. MAISELS :

No, My Lord, that it was the policy ...

MR. JUSTICE RUMPF :

No, the Summary of Facts.

MR. MAISELS :

I am sorry, My Lord

MR. JUSTICE RUMPF :

I am coming to that. It says that the - the Summary of Facts says that the Crown intends to prove the existence of the conspiracy from the facts alleged here, and it is set out. Now that is the conspiracy alleged. Now then the Crown refers to the organisations, inter alia, and policy. And it says here at page 57, (8)(a), in relation to the conspiracy that it was part of the policy of each of the organisations mentioned in paragraph 5 and 7, above, to achieve any one or more of the following objects, to subvert and overthrow the state, to make active preparation for a violent revolution against the state, to disturb, impair or endanger the security and authority of the state - and so it goes on. Violent revolution is referred to, and to subvert and overthrow the state, that means by violence. Now then there was the argument after this document was handed in, about how the Accused are going to know really what the case is against

them, how must they prepare their case, in view of the mass of documents and speeches relied on.

MR. MAISELS :

My Lord, if Your Lordship would just turn to page 59, sub-paragraph (iii) - save for saying . . . . . from the facts **set forth** in the summary of facts, the prosecutor is unable to state,...

MR. JUSTICE RUMPF :

Yes, particularly on the question of violence. Then, having regard to the violence alleged by the Crown, the overthrow by violence, and having regard now to the organisational policy as alleged in the Summary of Facts, the argument was addressed to the Court along the lines that the Accused should know, where to look in this vast mass of evidence. Then the Court ordered, as follows : The Crown however is ordered to inform each Accused upon which facts, speeches and documents it relies in support of its inference that it was the policy or part of the policy of each of the organisations mentioned, in the summary, to use violence against the state. Then the Crown deals with what it says is the violence on which it relies, and you have the use of the words - yes, the next is the liberation movement - then we come to page 156, 3(a)(i) - that is dealing with the A.N.C. - the A.N.C. accepted and propagated the view that the new form of state desired by them was to be achieved by extra-parliamentary, unconstitutional and illegal action, including the use of violence, and that the population of the Union of South Africa, more particularly the

non-European section thereof, had to be prepared and conditioned for the overthrow of the state by violence. That is a reference back in more or less the same terms. And then it goes on, and it deals with the other features. Now at this stage the case of the Crown was violence, which on these particulars to which I have now referred, seem to indicate that the Crown alleged that it was the policy of the organisation, and therefore the Accused, to prepare the masses for violence.

MR. MAISELS :

To prepare them for the overthrow of the state by violence.

MR. JUSTICE RUMPF :

Now in regard to the nature of this violent allegation or the nature of the violence here, the Crown sets out the documents on which it relies and the speeches. That is a description by way of reference to the documents of the violence to be used by the population, by the masses - that is how I take it, if you read the pleadings.

MR. MAISELS :

They say we are going to infer this from these documents.

MR. JUSTICE RUMPF :

They are going to infer that the A.N.C. wanted the masses to commit violence at some stage, and we are going to infer that from these documents and these speeches.

MR. MAISELS :

May I just interrupt for a moment, My Lord,

that means to train them to use violence at the proper time.

MR. JUSTICE RUMFF :

Yes, educate them. Now was there any further request in regard to the nature of the violence to be used by the masses, on which the Crown relies?

MR. MAISELS :

I think in the original request we asked them that, and they said violence against the state.

MR. JUSTICE RUMFF :

What I am thinking of - in regard to the nature of the violence, not at which it is to be directed, but ...

MR. MAISELS :

Your Lordship means did we ask the question is this violence ...

MR. JUSTICE RUMFF :

Not necessarily by giving the Crown an example of what it is to be, but was there a question in regard to what the Crown suggested its case was in regard to the violence to be used by the masses?

MR. MAISELS :

The kind of violence?

MR. JUSTICE RUMFF :

The kind of violence.

MR. MAISELS :

No, other than in the original request  
I think My Lord, which led up <sup>to</sup> this order, but not again  
after this, because ...

MR. JUSTICE RUMPF :

Then presumably one expected the kind of violence - if you deal with the preparation for violence, then one expected the kind of violence to be disclosed from the documents and speeches referred to.

MR. MAISELS :

That is, My Lord, now - yes, My Lord. Your Lordship means that one would have to look at all the speeches ...

MR. JUSTICE RUMPF :

Under this heading.

MR. MAISELS :

My Lord, what was that ...

MR. JUSTICE RUMPF :

I don't know what the result of all this is, but I am merely following up the sequence. I am trying to find out exactly what the Crown case is on the pleadings, in regard to the kind of violence.

MR. MAISELS :

As Your Lordship pleases. This is how the Crown is going to prove its case, by referring to these documents and speeches, that is how it is going to prove it. These aren't the particulars, these speeches are not the particulars of the method of violence. That is obviously so, otherwise it becomes fantastic. This is making confusion more confounded than ever if that is going to be suggested, with respect, My Lord.

MR. JUSTICE RUMPF :

I am not thinking it is going to be suggested, I am trying to find out what the Crown's case on the pleadings is in regard to the nature of the violence, that we are concerned with, because your attack is at the moment that the Crown relied on a violence, a direct violence by the masses...

MR. MAISELS :

Correct. Or by themselves, or by themselves and the masses.

MR. JUSTICE RUMPF :

And that is has now turned out to be, after the evidence has been heard, that the case is a sort of retaliatory violence only.

MR. MAISELS :

That is so, My Lord.

MR. JUSTICE RUMPF :

Now, if the Crown's case is this on the pleadings, that you, the Accused, agreed to educate and organise the masses to use violence in future against the state, - that is the gist of the case - ...

MR. MAISELS :

There is one thing that it doesn't say. It doesn't say that you prepared the people, you prepared the people to provoke the state to use violence against the masses, so that the masses would retaliate.

MR. JUSTICE RUMPF :

I am coming to that. Does it matter what the intermediate processes are until you reach the stage that the masses use violence?

MR. MAISELS :

Yes, My Lord it does. They have pleaded, My Lord, with respect - this (b)(iv) are the intermediate stages, those are the means. That is exactly what they have pleaded. They have chosen that way. They can't, My Lord, now by a twist of words say well we only pleaded half or a quarter or a third. We pleaded the unimportant sections, we never pleaded what we intended. We pleaded something else. My Lord, may I put it this way, and I take my stand on this really. My Lord, could anybody reading this indictment - and after all My Lord, and indictment is supposed to be able to be read and understood by the Accused - that anybody had thought that this involved the sort of case of provoking the state to use violence against the masses and the masses would retaliate? My Lord, could anybody read this in that way? Could anybody really do that? That is really the test.

MR. JUSTICE KENNEDY :

I don't think we read it in that way.

MR. MAISELS :

As Your Lordship pleases.

MR. JUSTICE KENNEDY :

Because I think my Brother Bekker in his Judgment clearly indicated that it was violence by the Accused against the state.

MR. MAISELS :

My Lord, with respect, that is exactly what we say, that is all it means. My Lord, that is why I quoted to Your Lordship an example in this case.



What are indictments coming to if an Accused person is supposed to extract some esoteric meaning from words that aren't used? What is happening, My Lord? If this was the Crown case, and Heaven knows they have had long enough time to prepare it, why didn't they say it in any one of these sub-paragraphs?

MR. JUSTICE RUMPF :

Mr. Maisels, if the case of the Crown on the pleadings is inter alia - I am again coming to population, the preparation of the population, that the accused wanted to organise or agreed to organise, to educate and organise the masses to use violence against the state, and they then set out the documents and speeches, if there are, on which the Crown relies, that particular conspiracy, to educate the masses to use violence, I get from this document and this speech or this bundle. That is my case. And then it appears - assume for a moment, assume that it appears from the documents...

MR. MAISELS :

From those documents..

MR. JUSTICE RUMPF :

From those documents, yes, that the particulars of the system leading up to the violence to be used by the masses would be, educate them to hate the state, educate them - well, not to get on, but eventually provoke the government into action, and then you go into action.

MR. MAISELS :

My Lords, assuming there was one

document and that stated it in plain terms...

MR. JUSTICE RUMFF :

Or it could be inferred from the document...

MR. MAISELS :

My Lord, really I must say I don't like the use of the word "infer" in indictment. You don't infer anything in indictments, you may infer things from evidence, but you don't infer from indictments, with respect, My Lord. Indictments speak, and tell you what the case is. My Lord, if Your Lordship will remember, I mentioned yesterday that in opening - the purpose of an Opening, My Lord, is to explain an Indictment, it says so, in the Statute. Your Lordship remembers that one of the points I made yesterday was that this case wasn't even explained in the Indictment.

MR. JUSTICE RUMPF :

Tell me, what did Mr. Trengove say in his argument, at the beginning of the argument for the Crown.

MR. MAISELS :

My Lord...

MR. JUSTICE RUMPF :

Did he deal with it at all?

MR. MAISELS :

I gave Your Lordship the reference yesterday and I will give it again. This arose for the first time, My Lord, with respect, as a result of questioning from Your Lordship in volume 92.

MR. JUSTICE RUMPF :

I have looked at that.

MR. MAISELS :

It never arose at the beginning...

MR. JUSTICE RUMPF :

When this matter was argued, when the law was argued, at the end of the evidence, when the Crown started its argument.

MR. MAISELS :

When the Crown began its argument? I never suggested that, My Lord, ...

MR. JUSTICE RUMPF :

What was the suggestion then?

MR. MAISELS :

As far as I understood, my learned friend ...

MR. JUSTICE BEKKER :

I think it turned on this, Mr. Trengove said he needn't prove violence at all. High treason can be committed without violence.

MR. MAISELS :

But, he said, he is going to prove violence. He addressed to Your Lordship a long argument on coercing the state, and that you could have a case of high treason without necessarily having any violence at all. But then I think he was interrupted by I think His Lordship Mr. Justice Bekker, who said but that is not the case on this indictment, and he said no.

MR. JUSTICE BEKKER :

He was wedded to violence.

MR. MAISELS :

That is absolutely clear, My Lord.

MR. JUSTICE BEKKER :

May I take you back to 7, Mr. Maisels, the Indictment, 4(b)(vii). The words, "or the overthrow of the state by violence therein appearing". The question is, must that be construed to mean direct violence either against the state, or is it wide enough to cover indirect violence in the form of retaliation? You are educating the masses for the commission of violence. Does it matter whether it is direct or indirect in the sense that it is retaliation?

MR. MAISELS :

My Lord, may I put it to Your Lordship this way. What is the plain and ordinary meaning of those words? That is the only real test to be applied. It is the only test that can be applied in an indictment.

MR. JUSTICE BEKKER :

Direct violence?

MR. MAISELS :

Yes, that is all it means. My Lord, if the retaliation case was ever really what the Crown had in mind when it drew this Indictment, here was the place par excellence to put it in, an inciting it to carry out by means of provoking the state to violence or by retaliation for acts of violence by the state on it. Inciting it to retaliate against state violence. There are, My Lord, innumerable places where it could be put in. And I do submit with respect, My Lord, that

in the words of Sir John Wessels - they are so apposite, you are not there to puzzle out pieces. My Lord, we submit, as I said, that on this aspect of the case the Crown has simply failed to prove what - simply failed to allege what it now claims to have proved.

MR. JUSTICE BEKKER:

And sub-paragraph (iv) on page 5, with reference to Western Areas, violent resistance. Assuming that is proved - we will investigate whether it is proved or not later - assuming that it is proved that there was incitement to violent resistance ...

MR. MAISELS :

Then that is not, My Lord, a question of provoking violence and resisting violently to that. My Lord, may I draw Your Lordship's attention to this, that is not the general conspiracy. That is a means confined...

MR. JUSTICE BEKKER :

One of the means?

MR. MAISELS :

Not only that, My Lord, but one of the means confined to three particular matters.

MR. JUSTICE RUMPFER :

But it is a means alleged to have been considered in the conspiracy.

MR. MAISELS :

Oh yes, as part of I suppose the ever increasing crisis.

MR. JUSTICE RUMPFER :

The point is really this, which I think

my Brother Bekker has in mind - assume you are correct on your violence in regard to the masses, how does that affect the indictment, and assume that you are correct that the Crown has now stated that its case is a retaliatory violence, and that is not covered by the indictment - assume that - how does that affect the position of the Western Areas under this indictment?

MR. JUSTICE BEKKER :

Pleaded as it is in sub-section (iv). Assuming with hostile intent and all the other ingredients that go to make up high treason. The allegation is that the people were incited to illegal and violent resistance..

MR. MAISELS :

Yes, against the state...

MR. JUSTICE BEKKER :

Against the Resettlement Act in order to bring the state to its knees...

MR. MAISELS :

Against the state. That is the violence that was to be employed by the Accused, by the masses against the state. That is not, My Lord, a case that the campaigns were to be non-violent and in the event of certain contingencies, were intended to lead to violence. That is not the case, My Lord.

MR. JUSTICE BEKKER :

I am not on - I am not on retaliatory violence....

MR. JUSTICE RUMPF :

Your contention is that the whole

case is that, and that this must be made subject to ...

MR. MAISELS :

My Lord, may I put it this way. The Crown is no longer contending for instance the freedom volunteers were incited to commit acts of violence. The Crown is no longer contending that when we said non-violence, we didn't mean non-violence, excepting that we meant non-violence now and in the future violence. My Lord, Your Lordship will remember changing facets of the Crown case. Let me just remind Your Lordships. In the Opening, violence was always meant non-violence. It was said in the opening speech that it was a golden thread that ran through the whole of the evidence, of violence, in all our speeches. That was the case. The other was incitement to violence, Resha for example, Ndimba, Sejake and someother, inciting to violence. That was the case, My Lord. So that when the Accused meant violence . . . . . that they meant violence. Now the case is, when we say non-violence we mean non-violence; we mean non-violence now, we mean non-violence for as long as it suits us to be non-violent, with the eventual plan that at a certain stage we will provoke this government to do something, which will cause the masses to retaliate, because by that time the masses will have been sufficiently educated. That is the case now.

MR. JUSTICE RUMPF :

You rely on that solely for what was said

by Mr. Trengove at page ...

MR. MAISELS :

No, not only that, My Lord. It was repeated many times by Counsel when arguing the individual cases. My learned friend Mr. Hoexter repeated it in the course of dealing with - I think it was Matthews.

MR. JUSTICE RUMPF :

Will you just read again what I put to Mr. Trengove, volume 90, I think... You quote - there I think the Western Areas is also dealt with.

MR. MAISELS :

It starts this way, My Lord, at page 19300, volume 92.

"Mr. Trengove, as far as I have been able to follow you up to now in regard to the A.N.C. generally, is it correct that you submitted the A.N.C. wanted to organise the masses against the state"...

MR. JUSTICE RUMPF :

That is dealing with the masses, yes.

MR. MAISELS :

"I think you submitted that by a process of campaigns, strikes, stay at homes, the A.N.C. would through the masses make its demands, and finally if those demands were not met, and if the circumstances are favourable in the sense that the masses are sufficiently politically conscious, that they would organise a nation wide strike which would be a final clash"?

MR. Trengove : Yes, My Lord.

By Your Lordship : A final clash between the people and



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