

course the question arises when we look for a witness, can we get the witness to come along.

BY MR. JUSTICE RUMFITT :

Well, in the meantime, we have a witness who is giving evidence. We also have, I may put it that way, some witnesses who would appear to be under detention.

BY MR. KENTRIDGE :

However, My Lord, on the general principle laid down in Your Lordships' Judgment, it doesn't seem that we on our side can find any way of - find anything new that would take the matter outside Your Lordships' Judgment. As I said, the only new facts as far as we know, are the facts that have been announced that everyone who has been detained is going to be prosecuted on charges which are being investigated, and which apparently may be serious. But apart from that, My Lord, we can't point to anything which takes the matter outside of Your Lordships' Judgment given on the last occasion.

BY MR. JUSTICE RUMFITT :

But Mr. Kentridge, apart from that, I am looking at the position from the point of view of the witness. If a witness is called to give evidence on the policy of the A.N.C. between 1952 and 1956, and if his attitude is I am perfectly willing to give evidence on that, I am not willing to give evidence about my own feelings at the moment or the policy of the African National Congress at the moment or a year ago, would that detract from his evidence in any way?

BY MR. KENTRIDGE :

Well, I take it it might. It might for instance preclude the Crown from putting to the witness as they did, a certificate which he apparently signed and

gave to someone who burnt passes, it might be a very legitimate thing for the Crown to put to a witness. But, My Lord, the point is of course, I don't really know what the position of a witness will be if he comes into the box, and one says to him, do you accept the bona fides of the Minister of Justice? I don't know that I would like to ask a witness in the box that question at the moment, My Lord.

BY MR. JUSTICE RUMFEE :

Well, for purposes of an assurance in this case, he may have to say why not.

BY MR. KENTRIDGE :

Well, he may say that he would like to hear the assurance from the Minister and he would like to ask him a few questions first. Is he coming to Court, I have a few questions to ask him. That may well be the attitude of a witness.

BY MR. JUSTICE RUMFEE :

Why should he?

BY MR. KENTRIDGE :

Well, My Lord, he would want to know whether it was a genuine assurance, whether it really comes from the Minister, what the Minister would do in certain circumstances, and I would like to interrogate the Minister.

BY MR. JUSTICE RUMFEE :

I am afraid I don't see why.

BY MR. KENTRIDGE :

Well, My Lord, if I can explain why - one of the things which my clients had in mind is an incident which happened in Cape Town a few weeks ago. A certain African was leading a crowd of thirty thousand people. He was asked to send them home, he said yes he would if

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he could have an interview with the Minister of Justice. He was told yes, he could. He was given that assurance. The Crowd went home. Well, it has since been admitted that that assurance was not given effect to.

BY MR. JUSTICE RUMIFF :

By whom was the assurance given?

BY MR. KENT RIDGE :

The assurance was given by someone purporting to act on behalf of the Minister by either an official of the Department of Justice or a senior police officer.

BY MR. JUSTICE RUMIFF :

Do you say that he acted under the authority of the Minister?

BY MR. KENTRIDGE :

No, My Lord, I don't know that. Presumably the assurance was asked for, I take it that it would not have been given without authority, but perhaps it was. Well, My Lord...

BY MR. JUSTICE RUMIFF :

Was there an assurance given by the Minister?

BY MR. KENTRIDGE :

My Lord, the assurance was given on behalf of the Minister.

BY MR. JUSTICE RUMIFF :

Was it said that it was given on behalf of the Minister?

BY MR. KENTRIDGE :

According to the reports which my clients have, right or wrong, it was, My Lord. The position is that the attitude taken was simply well, the Minister didn't say it was given without his authority or with his authority, but simply the man was not allowed to see the

Minister. What happened to him is a matter of controversy.
My Lord...

BY MR. JUSTICE RUMPF :

At least we don't know whether the Minister gave an assurance to that particular person.

BY MR. KENTRIDGE :

My Lord, one must remember also that there is nothing sacrosanct about the Minister of Justice. One remembers what has happened previously in this very Court in connection with Ministers of Justice. But as far as my clients are concerned, My Lord, I am afraid that - or witnesses for that matter, we cannot assume that they will simply accept an assurance. They may want to know a little bit more about it. They might want to have that assurance in a particular form. After all, My Lord, if one considers certain things which have recently been said by the Minister about the African National Congress, my clients and other members of the African National Congress obviously do not accept their bona fides. It is not a matter which we discuss here, who is right or who is wrong. But I don't know that a witness should be called into the box and asked, do you accept the bona fides of the Minister of Justice, and - on this assurance, do you accept its value or validity, and then if he says no, Your Lordship suggests that he might be asked why. Must he then go into the question of why he takes a certain view about the Minister of Justice. I wouldn't like to do it in his position, certainly not under present circumstances. But My Lord, as I have said, if this case must go on, it must go on in the face of all the difficulties stated in Your Lordships' Judgment, but at present we cannot say that it can go on on the basis of any Ministerial

assurance. My Lord, as far as the - if the case does go on in spite of the difficulties, naturally the legal representatives of the Accused will have to consider whether in those circumstances they can really be of any value to their clients and whether it is really worth the expenditure on legal fees to have continued legal representation. But that, My Lord, is another matter.

BY MR. JUSTICE RUMPF :

Why should they consider that? Isn't it obvious that they will be, at a time when the case is drawing to a close?

BY MR. KENTRIDGE :

Well, My Lord, the Accused themselves have certain views. If this case must go on in the face of difficulties, the conduct of the case would obviously have to be different from what it would otherwise have been with regard to the calling of witnesses and their examination. And it may well be that the Accused have a certain view on that which we will have to consider, and it may be that we will have to give them certain advice about their position and what line they would have to take if the case went on in present circumstances. But at any rate, My Lord, all these factors really don't take it any further than Your Lordships' original Judgment. Really all we have to say is that there doesn't seem to be anything so far which the Crown has said which takes it outside Your Lordships' Judgment.

BY MR. JUSTICE RUMPF :

Well, Mr. de Vos, is there a possibility of the Crown conveying to this Court any indemnity or assurances? You have now given us an indemnity on behalf of the Attorney-General?

BY MR. DE VOS :

That is so, My Lord. My Lord, perhaps just before proceeding, may I very shortly revert to the ex parte statement of so-called facts made by my learned friend as to what may have happened or are alleged to have happened in Cape Town and how the Minister is supposed to have been involved. I am instructed, according to the best information the Crown has at the moment, the facts as conveyed are not correct. I don't wish to go into all the details.

BY MR. KENTRIDGE :

My Lord, I didn't intend to say that the facts were correct, I was indicating how they were understood by my clients.

BY MR. DE VOS :

My Lord, as to the possible form of indemnity, the Crown is prepared to approach the Minister on this basis, My Lord, that no statement made by any witness will be used for any purpose of the Emergency Regulations. No statement made by any witness in the course of his evidence before this Court will be taken into consideration for any purposes of the Emergency Regulations.

BY MR. JUSTICE BLKKER :

Aren't you placing is in a somewhat invidious position, Mr. de Vos? You see if you say that that assurance will be given and you ask us to say at this stage that that will be good enough, aren't we being saddled with an onus with which we should not be saddled? Isn't it for the Minister to decide what form of indemnity he is prepared to grant and then for you to come to this Court and say well this indemnity is wide enough. Why must we give it a blessing in advance?

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BY MR. DE VOS :

My Lord, obviously there is no obligation on Your Lordship to do so.

BY MR. JUSTICE BEKKER :

Then why mention the indemnity to us at this stage?

BY MR. DE VOS :

But My Lord, in view of the opinions expressed by the Court so far, the Crown feels that it should have the sanction of the Court as far as it is deemed fit by the Court to give it, to proceed...

BY MR. JUSTICE RUMFF :

We can't give our sanction now, but the point is, at the previous occasion on the 1st April, the Crown submitted that we should go on. Now you tell us that there may be a way of getting an assurance from the Minister or an indemnity from the Attorney-General. Now, you have not got that yet?

BY MR. DE VOS :

I haven't got it yet, My Lord.

BY MR. JUSTICE RUMFF :

Now we have had the benefit of the Defence views, and it seems to me that we may have to consider any indemnity and assurance if and when it is put before us, whether if and when it is put before us, the Court should proceed or not. You haven't got that now, you may get it in this form.

BY MR. JUSTICE KENNEDY :

I doubt, speaking for myself, whether the Minister can give any indemnity, possibly he can give an assurance.

BY MR. DE VOS :

As Your Lordship pleases, that would possibly

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be formally speaking a more correct term to use.

BY MR. JUSTICE KENNEDY :

I think it must come from the Minister through the Crown, not through the Court, and then the Court must consider whether it alters the position at which we had arrived on the 1st April.

BY MR. JUSTICE RUMFF :

I take it this means that there is - that no statement made by any witness in the course of his evidence before this Court will be taken into consideration against him.

BY MR. DE VOS :

That is what is intended, My Lord.

BY MR. JUSTICE RUMFF :

For any purposes of the Emergency Regulations.

BY MR. DE VOS :

That is what is intended, My Lord. My Lord, reverting to His Lordship Mr. Justice Kennedy's remark, the Crown merely feels that it should not, specially under the present circumstances, approach the Minister unless there is some indication that what the Crown proposes doing may alleviate the position and enable the Court at least consider proceeding with the hearing.

BY MR. JUSTICE BEKKER :

I don't think we are called upon to express any opinion. Speaking for myself, it is not our function to express an opinion in advance as to what might or what might not be satisfactory. I don't see how you can expect us to do it.

BY MR. JUSTICE RUMFF :

Mr. Kentridge, have you got anything to add on this suggestion by Mr. de Vos, or is it covered by your

general submission?

BY MR. KENTRIDGE :

My Lord, it is covered in general, but this morning I mentioned to the Accused before Court, knowing what had happened at the Judicial Enquiry to which my learned friend had referred and in view of indications given to us by the Crown, we gave a rough indication of the sort of thing which we felt was - what might be forthcoming to get instructions on it. We haven't discussed the particular form mentioned by my learned friend, and I wouldn't like to do my clients an injustice, I think we would like to put the specific form to them, ask them perhaps if there is something which they can think of to add to it.

BY MR. JUSTICE RUMIFF :

That is how I see the position at the moment. They have their views, the witnesses may have their views. But they are anxious for the case to go on, we are trying to find a way, even if it may not be wholly satisfactory to every witness, at least the Accused may want to consider this particular form. After all, they also may want to give evidence.

BY MR. KENTRIDGE :

As Your Lordships says, the indemnity would really have to come from the Minister, but possibly it might save time if after the adjournment of the Court we could discuss this particular form with the Accused, if there is some other suggestion they have to make, convey it to my learned friend, to be conveyed to the Minister, so that when this Court assembles again, - I suppose it would fix a date in any event - one could perhaps, if anything can be done, it would be done within that time and one wouldn't have to discuss it again.

BY MR. JUSTICE RUMPF :

I take it that is a suggestion which could be followed up?

BY MR. DE VOS :

Yes, that is so, My Lord.

BY MR. JUSTICE RUMPF :

Obviously the Accused would like to study the form of this assurance. Now in order to allow the Defence to study this and perhaps to convey any opinion or the absence of any opinion to the Crown, and in order to get in touch with the Minister, how long should we adjourn for?

BY MR. KENTRIDGE :

I don't really know, My Lord. Really our best opportunity to speak to the Accused is when they are all together right here now. Possibly, My Lord, if Your Lordships would adjourn until half past eleven, we might be able to do something by then.

BY MR. JUSTICE RUMPF :

Yes, we will do that.

COURT ADJOURNS.

COURT RESUMES :

BY MR. DE VOS :

My Lord, just before we proceed, there is one formal matter which I should have raised right in the beginning this morning. Accused No. 24, Mkwai, is absent today, he has been absent before, and unless there is further information forthcoming about his position, I apply for a warrant for his arrest.

BY MR. JUSTICE RUMPF :

Was he here on the 1st April?

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BY MR. DE VOS :

He was not here before, My Lord. He was not here on the 1st April.

BY MR. JUSTICE RUMIFF :

What was the position of the Accused before? Was he out on bail?

BY MR. DE VOS :

No, My Lord, no he was not. He was out ...

BY MR. JUSTICE BEKKER :

On no conditions at all. He was merely summonsed to appear?

BY MR. DE VOS :

That is so, My Lord.

BY MR. JUSTICE BEKKER :

Well, what does the Code say in this regard?

BY MR. DE VOS :

My Lord, I will have to find the relevant section.

BY MR. JUSTICE RUMIFF :

Have you any information in regard to this Accused, Mr. Kentridge?

BY MR. KENTRIDGE :

My Lord, at the last hearing I received a medical certificate saying that Mkwayi had been ill and therefore he hadn't attended, but I must say that since then, My Lord, we have no information about him and I am afraid we can't say where he is at the moment at all, we can't give Your Lordship any information about him. My recollection of the Code, My Lord, is that where the Accused aren't in custody and the Court remands a case to a particular date, it is deemed to be a summons to the Accused to attend on that date. What the position

is where the Accused isn't in Court on the date of remand
I don't know.

BY MR. JUSTICE RUMFEE :

He was not here on the 1st April when we
adjourned...

BY MR. KENTRIDGE :

Unfortunately, My Lord, I can't give any informa-
tion.

BY MR. JUSTICE RUMFEE :

What is the position Mr. de Vos?

BY MR. DE VOS :

I am just finding the section, My Lord ...

BY MR. JUSTICE KENNEDY :

I think it is 156(2), and there is an amend-
ment, I don't know whether it effects it, - if an Accused
absents himself during a trial without leave, the Court
may direct a warrant to be issued for his arrest.

BY MR. DE VOS :

That is so, My Lords. If the Accused absents
himself during the trial without leave, the Court may
direct a warrant to be issued for his arrest and if
arrested should be brought before the Court forthwith.

BY MR. JUSTICE RUMFEE :

Now on the first of April he was not here.
The fact was not mentioned, was it?

BY MR. DE VOS :

It was mentioned in Court.

BY MR. JUSTICE RUMFEE :

That was on the 31st March, not on the 1st
April. I have an entry to that effect on the 31st March.

BY MR. DE VOS :

I beg Your Lordship's pardon. That may well be.

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BY MR. JUSTICE RUMFF :

Well, then the Court ordered the proceedings to continue in his absence.

BY MR. DE VOS :

That is so, My Lord. On the 1st of April he was absent again, but that wasn't mentioned in Court on that date.

BY MR. JUSTICE RUMFF :

What is the position if a witness was not in Court - an Accused was not in Court when the case was adjourned?

BY MR. DE VOS :

I suppose he should have informed himself of the position as to what was happening in Court, he could not just remain away, and he had to be here the next day in any event, My Lord, he wasn't here on the 1st April, and that was the day after his case was mentioned in Court. In any event, My Lord, I submit Your Lordships could have issued a warrant on the position as it occurred on the 31st in terms of 156(2). My Lord, that seems the only means of getting the Accused before the Court, if he doesn't come on his own and no warrant can be issued for his arrest, at least to bring an excuse if he has any, offer it to the Court, it seems to me that there would be no remedy for a position like this if it were to be interpreted on that basis.

BY MR. JUSTICE RUMFF :

Have you got anything, Mr. Kentridge...

BY MR. KENTRIDGE :

My Lord, I am afraid there is nothing I can say. We have no explanation of his absence at this stage.

BY MR. JUSTICE BLKKER :

Is there anything you can advance why we shouldn't issue a warrant?

BY MR. KENTRIDGE :

My Lord, I take it that the purpose of the warrant would be to bring him to Court at the next sitting of the Court, whenever that may be. I must say, My Lords, not having any reason for his absence, I can't advance any reason against the grant.

BY MR. JUSTICE BLKKER :

Then he can show cause...

BY MR. KENTRIDGE :

Yes, I take it he would show cause. I know what sometimes happens when an Accused isn't present in Court in the Magistrate's Court, is that he is summonsed to appear on a further day. What happens is that an officer of the Court serves a summons on him to appear on a subsequent day and show cause why he shouldn't be convicted to contempt of Court. I don't know that people are necessarily detained in the meantime.

BY MR. JUSTICE BLKKER :

Under the section to which reference has been made, that seems to be the procedure.

BY MR. DE VOS :

My Lord, that is not correct in the Magistrate's Court I am instructed, that is not the procedure to be followed even there. The second summons is only issued if the first had not been personally served in terms of the Rules, My Lord.

BY MR. JUSTICE KENNEDY :

If he hadn't attended under summons.

BY MR. JUSTICE RUMFITT :

We will deal with this after we have disposed of the other matter.

BY MR. KENTRIDGE :

My Lord, the accused have discussed the suggestion made by my learned friend amongst themselves, and they then discussed it with Counsel and their attorney. My Lord, there were certain difficulties about the form of the assurance, but unfortunately there was no point in our discussing them with my learned friends for the Crown, because we are instructed, My Lord, that unfortunately in present circumstances the accused do not feel that they can accept or place reliance on an assurance of the type offered. They also advise us for what it is worth at this stage, My Lord, that in their opinion they do not think that any person who is a member of any of the organisations concerned in this case would accept that assurance. Further, My Lord, all that I am instructed to say is that although they are distressed at the idea of a long postponement, they instruct me to say that they find themselves in respectful agreement with the Judgment of Your Lordships and that they do not feel that under the present situation they would be in a position properly to place their defence before the Court. Apart from that, My Lord, they leave it in the hands of the Court. If the case must go on, it will go on under these difficulties. If Your Lordships adhere to the previous judgment and continue to postpone it, there is no submission to be made on that.

BY MR. JUSTICE KENNEDY :

Mr. de Vos, I speak for myself - at any rate nothing has happened in this Court beyond the possibility

of a Ministerial assurance that witnesses will not be touched under the regulations. Now is the Minister entitled, having regard to the regulations, to give that assurance?

BY MR. DE VOS :

Yes, My Lord, I submit yes.

BY MR. JUSTICE KENNEDY :

Despite the written regulations?

BY MR. DE VOS :

My Lord, in most instances the name, the Minister, is mentioned specifically as the person authorised to act. In certain possibly total irrelevant instances for the purposes of this case, other persons are also mentioned, but they are all part of the Department of Justice and fall under the jurisdiction of the Minister concerned, and I submit My Lord, it would be highly technical to argue that the Minister could not control the position completely within his department insofar as other persons may have been mentioned as those entitled to act in terms of the regulations.

BY MR. JUSTICE KENNEDY :

There are other officials who are entitled to act under the regulations?

BY MR. DE VOS :

Under certain circumstances, yes, My Lord, or a Magistrate, a commissioner officer, police officer.

BY MR. JUSTICE KENNEDY :

Are they bound by the assurance of the Minister?

BY MR. DE VOS :

I submit yes, My Lord.

BY MR. JUSTICE KENNEDY :

At any rate I have no doubt that they are

bound, or could be bound. Now is the proper way to allay the fears of the witnesses by a Ministerial assurance, or by an amendment of the regulations?

BY MR. DE VOS :

Technically speaking, My Lord, I submit that either of the two courses could be followed. It is a question really, I submit My Lord, for the Minister in his executive capacity...

BY MR. JUSTICE KENNEDY :

Well, from his point of view I have no doubt that is so. Is it the same from the witness' point of view, when he knows the regulations themselves exempt him in terms of the regulations from anything that may be said in this Court.

BY MR. DE VOS :

My Lord, it may be so, though I would submit that whatever the circumstances may be, an objective test of reasonableness should be applied by the witness concerned. It cannot merely - he cannot merely raise any totally unreasonable fear and ask that that be taken as a factor to be taken into consideration, and I submit My Lord that the reasonable fears that might possibly arise under the circumstances should be allayed by any formal assurance given by the Minister in the terms suggested. Your Lordships may realise the technical difficulties may also occur if regulations were promulgated really to determine the position ad hoc for a certain particular instance, a certain trial, and that is for the moment all that we are really concerned with.

BY MR. JUSTICE RUMFEE :

But why should that present any difficulty?

BY MR. DE VOS :

My Lord, I am merely - I am trying to see it from the Minister's point of view. He may find himself in the position that he would prefer this position to be regulated ad hoc for this particular trial and hearing as it now occurs, as in other instances he has done so far.

BY MR. JUSTICE RUMFEE :

Well, the suggested assurance as stated by you is a very wide assurance, isn't it?

BY MR. DE VOS :

For the purposes of this case, yes, My Lord, that is so.

BY MR. JUSTICE RUMFEE :

I takes the witnesses in regard to what they say in this Court outside the scope of the Emergency Regulations.

BY MR. DE VOS :

That is so, My Lord.

BY MR. JUSTICE RUMFEE :

So that in fact what we have, if an assurance were to be given in the terms that you have suggested, the Emergency Regulations would not apply to the witnesses who give evidence in respect of anything they say.

BY MR. DE VOS :

That is correct, My Lord.

BY MR. JUSTICE RUMFEE :

It exempts them from the operation of the Emergency Regulations.

BY MR. DE VOS :

That is so, My Lord.

BY MR. JUSTICE RUMIFF :

Fro tanto. The position now is, Mr. de Vos, that nothing has happened to change the position as far as our reasons are concerned, given on the 1st April. We can't go on today, on the strength of the reasons given by us on the 1st April. Now you have suggested a means of meeting some of the difficulties that may arise, - that have arisen under the regulations, and we have in fact nothing before us now on which we should alter our view as to the continuation of the trial. Until we have something more, something further before us, we cannot go on.

BY MR. DE VOS :

That is so, My Lord, I realise the position.

BY MR. JUSTICE RUMIFF :

Mr. de Vos, I may add this. At the moment we have no assurance before us. An assurance may or may not be put before us. If the assurance is before us, we will have to study the terms of the assurance. But it may well be in the light of what my Brother Kennedy has said that - and having regard to what has been advanced on behalf of the accused and their views, and generally the view that witnesses may take, it may well be that the question may arise then whether the terms of that assurance are sufficient or that something more is required to allay the fears that have been referred to.

BY MR. DE VOS :

Yes, I realise that, My Lord.

BY MR. JUSTICE RUMIFF :

For instance the amendment of the regulations, It is impossible for us now to deal with it, because we have got nothing before us.

BY MR. DE VOS :

Yes, My Lord. May I ask for a very short

adjournment of about a quarter of an hour, My Lords?

BY MR. JUSTICE RUMFEE :

I take it, Mr. Kentridge, that you may or may not have considered the position on the basis of an amendment of the regulations?

BY MR. KENTRIDGE :

No, we haven't, My Lord, but one would have to consider it. I think I can say, My Lord, if it is the sort of amendment which one might have confidence which could perhaps be tested in a Court of law, I think it might well effect the position.

BY MR. JUSTICE RUMFEE :

Well, isn't the position this, that if the regulations are amended to take the witnesses out, then they don't rely on an assurance.

BY MR. KENTRIDGE :

No, quite, it is the element of discretion. If it is law, and not discretion - yes, My Lord, certainly nothing that I have been instructed to say has been connected with that possibility. It wasn't a possibility which we had thought of before His Lordship mentioned it.

BY MR. DE VOS :

My Lord, the Crown has indicated certain possibilities, and under the circumstances may I apply for an adjournment until next Monday. That may then give certain opportunities for investigating the position further.

BY MR. KENTRIDGE :

My Lord, I don't know whether my learned friend means that between now and Monday he will be able to clear up the position with the Minister.

BY MR. JUSTICE RUMFEE :

That is obviously the object of the adjournment. Having regard to what has now come from the Bench, obviously that can't be settled one way or another in a day.

BY MR. KENTRIDGE :

My Lord, our difficulty is we wonder whether it can be settled between now and next Monday. We had thought perhaps when we came today there might be something definite from the Minister. It didn't prove possible. There are certain difficulties in having Counsel here. If it isn't fixed by Monday - I wonder whether one couldn't suggest something a little longer than Monday to make it quite certain.

BY MR. JUSTICE RUMFEE :

Does it inconvenience Counsel?

BY MR. KENTRIDGE :

Well, it is a question of ...

BY MR. JUSTICE RUMFEE :

I presume it doesn't inconvenience the Accused.

BY MR. KENTRIDGE :

No, My Lord, it is a question of multiplying the appearances. My Lord, I am told that Monday is the only visiting day for the Accused. If we could make it perhaps say next Wednesday? The only point I am making, My Lord, is that we would prefer it if ...

BY MR. JUSTICE RUMFEE :

Well, does it not suit Counsel?

BY MR. KENTRIDGE :

No, My Lord, Counsel can come on any day. The point is that we would rather have only one appearance

and not two, that is to say in case the Crown isn't ready by Monday, and it has to be postponed again to get the Minister's decision.

BY MR. JUSTICE RUMFEE :

I may be. I don't know what is going to happen. But one thing is certain, that assume nothing would have happened, Counsel would be here, the case would have gone on.

BY MR. KENTRIDGE :

Yes, My Lord, that is so. But it just struck us that if it is a question of an amendment to the regulations, between now and Monday may be a little short.

BY MR. JUSTICE RUMFEE :

The amendment might be, but one would like to have some basis. We don't want to postpone this case for too long a period without knowing what is going to happen.

BY MR. KENTRIDGE :

In that case, My Lord, the only request I have to make on behalf of the Accused is to make it not on Monday, which is the visiting day, but on Tuesday or Wednesday, any day that suits the Court then.

BY MR. DE VOS :

My Lord, May I suggest Tuesday then, the 26th April, 1960.

BY MR. JUSTICE RUMFEE :

That does not inconvenience Counsel?

BY MR. KENTRIDGE :

No, My Lord, there will be some Counsel who can come - My Lord, it wasn't a matter of Counsel's convenience, it was just a matter of money, I am instructed. But My Lord, there is no objection to that day at all.

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BY MR. JUSTICE RUMEFF :

Yes, we see no other way out than to adjourn the case for a week, that is till next week Tuesday, the 26th April, 1960.

BY MR. DE VOS :

Your Lordship will bear in mind that the matter of Mkwai is still outstanding.

BY MR. JUSTICE RUMEFF :

Well, it seems to us that the Accused is absent without leave, and we are prepared to accede to the request of the Crown and we direct that a warrant should be issued for his arrest, and he should be then brought to Court, if arrested, on Tuesday.

CASE REMANDED TO THE 26TH APRIL, 1960.

COURT ADJOURNS.

COURT RESUMES ON THE 26TH APRIL, 1960.

APPEARANCES AS BEFORE.

BY MR. DE VOS :

My Lords, the Accused Mkwai is not yet in Court. I take it the Court may proceed in his absence if the Court so wishes. He has not been apprehended yet.

BY MR. MAISELS :

We can only say, My Lord, that we don't know whether he has been apprehended or not. He has not been in touch with us.

BY MR. JUSTICE RUMPF :

Any comment on whether the Court should go on in his absence or not?

BY MR. MAISELS :

Not in regard to that point, My Lord.

BY MR. JUSTICE RUMPF :

The Court will proceed in his absence.

BY MR. DE VOS :

My Lord, there is a preliminary matter which the Crown wishes to mention in Court before proceeding further. This has regard to a certain statement that was made by my learned friend Mr. Kentridge for the Defence on the last occasion. Regarding a certain incident which was said to have occurred in Cape Town, it was put in this way by Mr. Kentridge - he said, 'One of the things which my clients had in mind is an incident which happened in Cape Town a few weeks ago. A certain African was leading a crowd of thirty thousand people, he was asked to send them home, he said yes, he would, if he could have an interview with the Minister of Justice. He was told yes, he could, he was given that

assurance, the crowd went home. It had since been admitted that that assurance was not given effect to.' My Lord, quite obviously that version of the facts is a serious reflection on the Minister and the bona fides of the Minister. Subsequently the Crown limited itself to saying that 5 the facts as conveyed to the Court were not accepted as correct, and Mr. Kentridge then said he did not intend to say that the facts were correct, but he was indicating that they were so understood by his clients. My Lords, in view of the statement that has been made in Court, the Crown has 10 in the interim during the adjournment investigated the position, and it wishes quite shortly just to state the true facts to clarify the position as far as the Minister is concerned, and also possibly to disabuse the minds of the Accused, as to any misconception on the basis of the 15 facts as stated in Court. The position was that on that occasion the crowd led by the Native concerned was confronted by a senior police officer. The Native leader asked for an interview with the Minister; the police officer replied that he could not at that time grant his request, and he undertook 20 to convey the request to the Minister. My Lord, it is quite clear that there was no prior knowledge, no knowledge at the time of the incident by the Minister, he knew nothing of it, he in no way authorised anything to be said in his name, and in any event no promise was made that any 25 interview would be granted. In fact, subsequently, an interview was granted with the Secretary of Justice. I merely wanted to put these facts to clarify the position in fairness to the Minister and, as I say, also to clarify the facts in the minds of the Accused as to what really 30 happened at the time. My Lords, since the Court last met, the position of witnesses before this Court have been

materially effected in terms of a Government Gazette Extraordinary No. 6425 published in Cape Town on the 22nd of April, 1960, which I beg leave to hand in now. It reads as follows, My Lord : "The following regulation is inserted after Regulation No. 26." "Evidence which may not be used or taken into account : Regulation 27..." - which is the one now added - "Notwithstanding the provisions of these regulations, no evidence given by any person after the coming into operation of this regulation in a criminal trial commenced in any Court of law prior to the 29th day of March, 1960, (a) shall be used in evidence against him in any criminal prosecution on a charge of contravening any provision of the regulations, and (b) shall be taken into account by the Minister, Magistrate or commissioned officer for any of the purposes of the regulations". My Lords, in terms of these regulations as they now read, the Crown submits that obviously the position of a witness cannot in any way be effected by any evidence he may give before this Court in terms of the Emergency Regulations, they will pro tanto not effect his position at all because of any evidence he may choose to give in this Court. Under the circumstances, My Lord, the Crown submits that the hearing can now continue where it has been terminated, at this stage.

BY MR. MAISELS :

My Lord, may we make our position clear. Your Lordship will recall that on the 31st March Your Lordships adjourned the trial holding that it should not proceed in view of the promulgation of the Emergency Regulations, and the Court, Your Lordships will recall, drew attention in particular to Regulation 4 governing the question of detention; Regulation 5, governing the question of subversive

statements and Regulation 11 governing the question of interrogation. Your Lordships' Judgment is to be found on pages 12040 to page 12045 of the record. Your Lordships, in the course of the Judgment on page 12044, lines 10 to 20, pointed out that the activities and policy of the African National Congress were factors given rise to the declaration of the State of Emergency. The Judgment reads, My Lord, "One of the issues involved in this Court is the policy of various organisations including the African National Congress. It was suggested by the Defence that this very issue prima facie gave rise to the present state of emergency and the regulations promulgated in pursuance thereof. This was not disputed by the Crown. The witnesses for the Defence are to be called on this very issue, and the very fact of their being called, apart from any evidence which they may give, may render them liable, at least, to an interrogation under regulation 11." Your Lordships held, that it was obvious, and I quote here My Lords the ipsissima verba which Your Lordship will find at page 12043 of the record, line 30, :

"It is obvious to us that any witness called by the Defence may reasonably apprehend that if he is called to give evidence, his evidence may result in certain provisions of the regulations being used against him", and the Court consequently, My Lord, was satisfied that - and again I quote, My Lord, from the foot of page 12043 : "We are satisfied that in the circumstances prevailing, a witness is presently not in a position to speak as freely and frankly on the issues before us as he would have been if the regulations had not been passed." And the Court, My Lord, also - and this concludes my references to the record for the moment, My Lord, - mentioned the

undesirability of witnesses making statements in Court which might offend against the objects of the regulations. Your Lordship said this : "A further consideration is this, it is not inconceivable that a Defence witness in the course of his evidence may testify to something which offends the very purposes for which the Emergency Regulations were passed which may not be in the interests of the State". Now My Lord, may we say with respect, that we should like to say that we agree, if we may say so, My Lord, respectfully, with the Judgment of the Court on the points referred to. Now My Lord, may we make our position quite clear. Our clients naturally do not welcome any indefinite postponement. But, if the case goes on, as far as they are concerned, it will go on subject to all the difficulties and the disadvantages referred to in the Judgment. In our submission, My Lord, the amendment does not really alter the situation which gave rise to the Judgment, and the question is, My Lord, does the amendment really remove the fear of administrative action against a witness? And that was the main point, My Lord. From the point of view, My Lord, of an A.N.C. member asked to give evidence which will reveal the extent of his activities, his importance in the organisation, and his views on political method, the fear will naturally remain. And My Lord, may I exemplify that with a simple example. How My Lord, one may ask, can the Minister or a police officer acting perfectly bona fide, My Lord, in deciding whether to detain a person expunge from his mind relevant facts revealed at this trial? The Minister may, perfectly bona fide, My Lord, consider a certain attitude to pass particularly dangerous at the present time. An African National Congress member, or even a lawyer, if I may be

permitted to say so, My Lord, may wonder how the Minister could in considering a case, really put out of his mind what a witness says are his views on that very subject. How is it possible? Moreover, My Lord, one assumes that the Minister must to a greater or to a lesser extent, act 5 on the advice of his police officers. He may ask advice on how 'dangerous', and I use the word 'dangerous' My Lord in inverted commas, if I may, from the police point of view, an A.N.C. member is. The police officer is directed by the regulations to disregard statements in this Court. 10 But can he, My Lord, in giving his advice really be expected to do so?

BY MR. JUSTICE BEKKER :

Wouldn't any person so affected have a right to test the position in a Court of law? 15

BY MR. MAISELS :

No, that is the very point My Lord which we will address Your Lordship. We will show Your Lordship, My Lord, that one of the weaknesses of this is that there is absolutely no sanction at all. 20

BY MR. JUSTICE BEKKER :

But assuming the Minister bona fide on the line you suggested uses, perhaps inadvertently or unknowingly, uses material in conflict with these provisions. Could not such a person approach the Court and say well, I maintain 25 that despite what the Minister says, he was influenced by this material? If so, couldn't a Court of law then order that that detention is illegal?

BY MR. MAISELS :

No, My Lords, with respect not, because Your 30 Lordship appreciates the Minister is never called upon to give reasons in matters of this nature.

BY MR. JUSTICE BEKKER :

Well, if he doesn't, it may be a factor which weighs with the Court. My point is this, Mr. Maisels, this would confer jurisdiction on a Court to test the validity or otherwise of the Minister's action.

BY MR. MAISELS :

My Lord, with respect, we would submit not. It does not confer any greater jurisdiction than the Court already has under the original power to detain. My Lord, may I refer Your Lordship to Section 4? Section 4 of the Regulations - I'll read it to Your Lordship : "The Minister or the Magistrate or commissioned officer may cause to be arrested and detained or himself arrest and detain with or without warrant or other order of arrest or detention, any person whose arrest and detention is in the opinion of the said Minister, such Magistrate or commissioned officer, desirable in the interests of the public order or safety or of that person or for the termination of the state of emergency (?)." Your Lordship will see that there is an absolute discretion in the opinion of the Minister, and there is no ...

BY MR. JUSTICE BEKKER :

Save this, save that nothing happens in a Court of law - happening in a Court of law under the new regulations shall be used by him to form any opinion whatsoever. And if it does, he is not acting in terms of the regulations.

BY MR. MAISELS :

My Lord, how does one ever know?

BY MR. JUSTICE BEKKER :

Well, that is a question of fact, but it doesn't preclude access to a Court of law.

BY MR. MAISELS :

My Lord, I submit it does really. Under these regulations the situation is really no different from what it was in regard to any person who has been picked up from his house and locked up today. Has such a person any opportunity of coming before the Courts? Because, My Lords, that is the test. The test in regulation 4 is whether in the opinion of the Minister his detention - or a commissioned officer, I am using the term "Minister" as a generic term to cover all those persons - any police officer or army officer, may consider it desirable in the interests of public order or safety...

BY MR. JUSTICE BEKKER :

Mr. Maisels, would you say it is incorrect to suggest if a person is detained say today, that that person could approach the Court and allege - I am leaving aside the question of proof - and allege that I was detained by the Minister wrongly because he used information which he should not have used.

BY MR. MAISELS :

Your Lordship means as a pure matter of form it is not excipiable? But Your Lordship will appreciate how the thing works. As a pure matter of form, My Lords, one could - a detainee could not approach the Courts under Regulation 4 ...

BY MR. JUSTICE BEKKER :

Whether he comes before a Court on a matter of form or in any other way, he is in Court, the Court must listen to him. The Court must consider on the facts then presented whether that allegation is correct or not.

BY MR. MAISELS :

My Lord, it is impossible of proof. Otherwise,

My Lords, I could tell Your Lordship that there would be one thousand five hundred applications now before the Court.

BY MR. JUSTICE RUMPF :

Are we concerned with the case of a person who comes to give evidence, who gives evidence, and is thereafter detained, in the first instance - I am not talking about evidence by detainees.

By MR. MAISELS :

No, My Lord, not at all. That is the very reason for Your Lordship's Judgment.

BY MR. JUSTICE RUMPF :

Why do you say not at all?

BY MR. MAISELS :

Because, My Lord, Your Lordship hears the evidence - I am sorry, perhaps I misunderstood Your Lordship.

BY MR. JUSTICE RUMPF :

You may have misunderstood me. The first difficulty is that there may be a witness required by the Defence to give evidence who is not detained. Are there any such?

BY MR. MAISELS :

My Lord, there are, we hope - as far as we know some of them are not detained. Then there are other witnesses...

BY MR. JUSTICE RUMPF :

There may be some, let us put it that way. As far as their position is concerned, they may not want to disclose that they know something about the A.N.C. It would be remarkable, because we have got all the lists here of members on which the Crown relies, people, accused, co-conspirators,...

BY MR. MAISELS :

Freedom Volunteers?

BY MR. JUSTICE RUMPF :

Yes, there may be some whom the Crown does not know about, ...

BY MR. MAISELS :

Or does not know much about.

BY MR. JUSTICE RUMPF :

Yes, who could give information on the policy of the A.N.C. Shall we become practical, Mr. Maisels? This is academical so far. Doesn't it depend on each and every case, in connection with the person that the Defence wants to call?

BY MR. MAISELS :

My Lord, let us become practical. I accept Your Lordship's invitation. Let us consider the position...

BY MR. JUSTICE RUMPF :

If I may put it this way. We have the witness Luthuli in the box at the moment. I don't know what his views are or what the Defence views are in regard to this witness. As far as we know he has been detained. He is under detention, as far as we know. As far as detention is concerned, that is no longer a fact ...

BY MR. MAISELS :

No, My Lord, with respect, that is where one comes to the practical issue, because it is not only detention, there is the question of the period of the detention, and there is a question of release. My Lord, may I be permitted to continue with the argument, and I hope to be able to satisfy Your Lordships that there are practical considerations.

BY MR. JUSTICE RUMPF :

May I put it to you this way, let us deal with this particular witness. What is the Defence attitude in

regard to that particular witness?

BY MR. MAISELS :

My Lord, we have not discussed with him, obviously what his position is, because we are not allowed to. That is all I can tell Your Lordship.

BY MR. JUSTICE RUMPF :

I don't suppose you have suggested to the Crown that you wanted to discuss matters with him?

BY MR. MAISELS :

No, all - I have seen Luthuli this morning, merely to ask him what his condition of health is, that is all, in the presence of two police officials. That is all.

BY MR. JUSTICE RUMPF :

Why can't the Court go on in regard to his evidence?

BY MR. MAISELS :

My Lord, I don't know what his attitude is. He may be prepared to, I don't know. My Lord, may I continue with my argument ...

BY MR. JUSTICE RUMPF :

A name was mentioned of a Professor, the next witness that the Defence intended calling had this not happened. I don't know if that particular professor has been detained.

BY MR. MAISELS :

I can assure Your Lordship I don't know whether I am allowed to tell Your Lordship that fact.

BY MR. JUSTICE RUMPF :

I say I don't know, he may be detained.

BY MR. MAISELS :

All I can tell Your Lordship is that he is not in Pretoria.

BY MR. JUSTICE RUMPF :

Well, he may be detained. Now, has he any -
do you know whether he has any fear?

BY MR. MAISELS :

My Lord, we don't even know if he is detained,
where he is detained.

BY MR. JUSTICE RUMPF :

I don't suppose you have asked the Crown where
he is?

BY MR. MAISELS :

No, I don't know whether the Crown knows.

BY MR. JUSTICE RUMPF :

You could have done that?

BY MR. MAISELS :

Yes. I couldn't have asked the Crown, as Your
Lordship pleases, I could have asked the Commissioner of
Police.

BY MR. JUSTICE RUMPF :

Either directly or through the Crown. I take it
that in a case like this, having regard to the situation,
the Defence would seek the assistance, if I may call it
that, of the Crown. They are as interested in the matter
as you are. So we don't know at this stage what the wit-
ness Luthuli's attitude is, we don't know at this stage
what the next witness' attitude is. Are you making your
submissions on the basis that you haven't consulted any
of the witnesses, is that correct?

BY MR. MAISELS :

My Lord, I am making my submission on the basis
of Your Lordships' Judgment.

BY MR. JUSTICE RUMPF :

You haven't consulted any of the witnesses, and
you cannot put before the Court whether they are satisfied

with this or whether they have any fears.

BY MR. MAISELS :

My Lord, will Your Lordship allow me for one moment. Your Lordship will recall that Your Lordships' Judgment was given on the last occasion, quite independent of consulting the witness in question. That is the basis upon which we put the argument to Your Lordship.

BY MR. JUSTICE RUMPFER :

It may be of course that a witness may say 'I have no fears at all, I want to give evidence, I want to say the truth about the policy of the A.N.C. I have no fears whatsoever'. It may be. So we don't know what the position is in regard to witnesses, but you say you argue on the Judgment as given on the first occasion.

BY MR. MAISELS :

My Lord, I had dealt with the position of the approach of the officer in charge exercising his discretion. And I think I had reached the stage, My Lord, where I had made the point that the Minister must to a greater or lesser extent act on the advice of his officers. The police officer, My Lord, is told under this proclamation to disregard statements in Court. But can he, My Lord, in giving his advice be expected to do so? My Lord, may I say again that the persons whom we would want to call as witnesses may be forgiven if they find difficulty in accepting that there would be such a degree of detachment. My Lord, we can illustrate our position perhaps better by considering the case of the persons already detained, hoping perhaps for a release in the not too distant future. My Lord, could such a witness, however bold Your Lordship may think he is, could he really be confident that frank statements in Court wouldn't affect the mind of the Minister or his adviser?

My Lord, indeed, and I make this point advisedly, one wonders how the Minister can conscientiously do his duty if he is required to close his mind to relevant facts known to him.

BY MR. JUSTICE RUMPF :

Well, now let us take the case of a person detained who was previously charged, and he is now a co-conspirator.

BY MR. MAISELS :

There are two classes, Your Lordship appreciates. There are those against whom the prosecution was withdrawn in the Magistrate's Court, and there are those who ...

BY MR. JUSTICE RUMPF :

I am referring to those who were before this Court.

BY MR. MAISELS :

They are not charged.

BY MR. JUSTICE RUMPF :

They were charged with High Treason.

BY MR. MAISELS :

Yes, and they were prepared to face their charge of high treason. My Lord, further, and I make this point too, My Lord...

BY MR. JUSTICE BEKKER :

Mr. Maisels, may I just take you back to this other position. Do you state, how can an accused be satisfied that the necessary degree of detachment will be present in the mind of a Minister. That may very well be the position. A witness may not be satisfied, but does not the fact that he is given access to Court to show if he can, or the Minister to show the contrary if he can.

BY MR. MAISELS :

My Lord, that is exactly the same position as the person who is now detained. The person who is now

detained, My Lord, can come to Court and say, I was detained by the Minister originally. I would have been released long ago because I haven't taken any part in political activities in this country for twenty years, the last time I had anything to do with politics was when I was at the university and I was then a member of the Communist Party, I happen to be on the list, and I have been detained. The Minister says - and I thought I would be released because some of my friends were released, and he says the only reason that I can think why I have been treated differently to anybody else, is that I was one of those people who gave evidence.

BY MR. JUSTICE BEKKER :

He says, all things were equal, excepting one thing, I gave evidence...

BY MR. MAISELS :

No, the Minister says, or the officer who is responsible for his continued detention says, no, no, all things weren't equal. I am not prepared in the public interest to disclose what the other things were that weren't equal. Your Lordship knows from experience that that is exactly the answer that is given, and with respect, My Lord, Your Lordship cannot and no Court can go behind that.

BY MR. JUSTICE BEKKER :

Well, the fact that an administrative officer elects not to give reasons, is a factor which is taken into account...

BY MR. MAISELS :

Not where he says, My Lord, - because otherwise the privilege becomes nugatory - not where he says for reasons of public interest. Your Lordship is dealing with the type of case of the Licensing - the Municipality. My Lord, I make that point on the authorities which were

considered during the law war, because the very object of a Minister having - the very fact that a Minister has to disclose the reasons may defeat the very purpose of the detention, and that My Lord has always been held. Your Lordship will remember the famous Judgment of Lord Adkins, where he - I think it is Liversage's case in England, during the last war, he vigorously dissented from that attitude, but it is undoubtedly the law, My Lord, and there is no - My Lord, may I put the position this way. This assurance or this - I don't use the term "assurance" - this regulation does not effect the matter at all. My Lord, may I pass on to submit my argument on that point...

BY MR. JUSTICE RUMPF :

Except that you gave an example of a man who for twenty years had not been actively engaged in politics. Must we assume then that he is a witness on the policy of the A.N.C.

BY MR. MAISELS :

No, My Lord, if Your Lordship pleases, I was giving that as an example of a case - yes, there may very well be such a case. There may very well be such a case. My Lord, before I deal with the regulation itself, there is just one further submission I want to make. Your Lordship will bear in mind that witnesses have been asked in Court about the part played by the A.N.C. - played in the A.N.C. by other persons, for example, was X at that meeting, was Y a member, did Z take some part, who was on the committee, who was responsible for writing that document, who was the author of this. Now My Lord, can one visualise any witness answering a question under those circumstances, because he would immediately expose those others to administrative action, not to legal action, to administrative action.

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13000.

BY MR. JUSTICE RUMPF :

But he might have exposed them to a charge of high treason in any event.

BY MR. MAISELS :

My Lord, we are prepared - My Lord, may I make the point again, that we are prepared to face a charge of high treason in a Court of law, where the proper procedures and where the proper facilities are available for a person to defend himself. That, My Lords, is far removed from administrative action under the Emergency Regulations. Now My Lord, I pass now to deal more specifically with the point which Your Lordship Mr. Justice Bekker has raised with me. We submit, My Lord, that the amendment contains no sanction and no remedy to ensure that its provisions relating to detention are observed. No reasons for detention need be given, and none are given in practice, - unless My Lord, he happens to be a foreign correspondent, apparently. Nobody who was detained on giving evidence could ever prove that he had been detained because he gave evidence. Even assuming, My Lord, complete bona fides on the part of the person making the detention order, the purpose of the amendment could be avoided, if not evaded with great ease. For example, a man states in evidence in this Court that he was a member of the A.N.C. in 1956. He has hitherto escaped the notice of the police. A detective sitting in Court hears this, and thereupon investigates the matter, he finds other evidence to confirm the statement, lays that before the Minister who signs the detention order, without ever knowing, My Lord, that the person concerned was a defence witness in the case. The Minister has acted in good faith, the detective has merely done his duty in investigating a hitherto unknown

Collection: 1956 Treason Trial
Collection number: AD1812

PUBLISHER:

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

Location:- Johannesburg

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