TREASON TRIALS DEFENCE FUND

PRESS SUMMARY

NO. 56.

This is the fifty-sixth issue of a regular bulletin giving a factual resume of the proceedings of the Treason Trial.

Period Covered : 6th to 13th March, 1961.

TRENGOVE CONCLUDES CROWN ARGUMENT

Concluding the Crown argument on Monday March 6th, Adv. Trengove continued with submissions on the Defence witness Chief Luthuli. The witness had failed to explain the extravagant language used in relation to the events in Kenya, which did not accord with the picture he had tried to paint in his evidence in chief. The Crown submitted that it was quite clear that Luthuli must have known of the attitude of the ANC towards the division of the world into two camps and the placing of the U.S.A. in the warmongering camp and the USSR and China in the peace-loving camp. Either he was out of touch with the ANC or else he wouldn't admit his knowledge. The Crown submitted that facts which it had placed before the Court were entirely different from the picture of moderation painted by Chief Luthuli. It was also submitted that the Court should reject the evidence of Chief Luthuli on the volunteers as understating the position; the volunteers were expected to obey orders to commit illegal acts; this was clear from the whole Western Areas Campaign. The type of discipline called for by Resha would have not been required for a purely organisational body as suggested by Luthuli. In his evidence in chief, he had gone out of his way to give a harmless picture of the volunteers, but this was not the true picture. Either he had insufficient knowledge or else he concealed the true position.

AVERTING THE BLOODBATH

Dealing with the ANC campaigns, the Crown submitted that it was clear that they would hinder and hamper the state in the enforcement of its laws and the maintenance of peace and order. Chief Luthuli had said that he did not think that the ANC had been connected with the burning of passes by the women in Winburg, because that would not be a solution to the problem; it must be in an organised form, a campaign. He had denied commending isolated burning of passes; he had said that he had forgotten about the recent demonstrations against passes. On the Western Areas Campaign the Crown submitted that Luthuli would have had no difficulty in being kept fully informed and suggested that his evidence on this campaign was equivocal. He had persisted in saying that the ANC had not expected a violent clash, yet he had agreed with the report that said that the ANC had averted the bloodbath which would have arisen from the provocative action of the government. The Crown submitted that it was clear from the evidence of Luthuli that the ANC would carry on the campaign, whether it was lawful or unlawful.

The evidence of Chief Luthuli on the three lectures had been that he saw nothing in them contrary to ANC policy.

The Crown submitted that many aspects of Luthuli's evidence were entirely unsatisfactory. The defence might refer to the fact that he had been only five days in giving evidence in chief and twenty one days in cross examination, but the Crown pointed out that during the period there had been frequent adjournments and he had been in the witness box for reduced hours so that the daily average was not more than three hours.

NEW STATE

Dealing with the Crown position concerning the Congress of the People and the Freedom Charter, the Crown admitted that mere participation alone could not

Page 2 / ..... amount

amount to High Treason, but in relation to the accused, the Crown submitted that the Congress of the People and the Freedom Charter had been in pursuance of the conspiracy to the extent that the overthrow of the state by violence was not to establish anarchy but to establish a new state founded on the Freedom Charter. Mr. Justice Bekker referred to the Programme of Action which set out the methods to be pursued by the Congresses and asked whether the eight accused who had attended the Congress of the People were alleged to be going to establish their demands by violent means. The Crown replied that if there were a conspiracy to overthrow the state by violence and replace it with a state founded on the Freedom Charter, then the Freedom Charter would be in pursuance of that conspiracy and would be an overt act of treason.

CONSUMMATION

It was submitted that the Court had seen that the ANC had no scruples in employing lawless and illegal action for the coercion and overthrow of the state, and that their methods would lead to violent conflict with the state. Their strategy was based on the fact that a modern state could not be overthrown until it was ready to fall by its own weight, therefore the uprising would have to wait; the revolution would be the consummation of a long process. The Crown submitted that if it failed to show that the accused were in the conspiracy, then the part of the indictment referring to the Freedom Charter and the Congress of the People would fall away, but if there were a conspiracy, then any accused involved in this act saw in the Freedom Charter a new state to take the place of the present state. Finally Adv. Trengove submitted in a reply to Mr. Justice Bekker that all the Congresses had agreed that the road to democracy lay along the 1949 Programme of Action.

The Crown argument which had begun on November 6th 1960 concluded on March, 6th, 1961.

MAISELS OPENS DEFENCE ARGUMENT.

Adv. Maisels, Q.C. the leader of the Defence team opened the Defence argument by referring to the indictment; the Defence hoped to satisfy the Court that the present case as argued by the Crown was very far removed from the case as pleaded; the case as presented was not covered by the indictment at all.

The Defence submitted that the Crown case was in fact that the accused had conspired to overthrow the state by a form of contingent retaliation. This was the highest that the Crown case could be put. The Defence would put it to the Court that apart from whether contingent retaliation was covered by the law, the Crown had not even pleaded it.

CONDITIONING.

The Crown had said that the ANC had tried to obtain support for its struggle by preaching non-violence and recruiting people, but that it didn't believe in non-violence and was conditioning the people for the violent overthrow of the state and that the ANC had set out to organise campaigns against the laws of the state, which the state might have to use violence to suppress. If so then possibly retaliation might have been encouraged; the ANC had presented the victims of state action as heroes and martyrs and had further influenced the masses. That was as far as the "wicked plan" had gone in practice, but, when the people were ready, they would organise a general strike and if the state didn't make concessions and tried to suppress it by violence, then they would have to use violence by the masses to retaliate or would rely on the likelihood that the masses would so retaliate. "That is the Crown case." - the case which had not even been pleaded, let alone put to the witnesses.

The Crown had submitted in its opening address that the conspiracy had originated in an international Communist inspired Liberation Movement, of which

Page 3 / ..... there

there was a counterpart in South Africa, which sought to achieve its ends by Communist methods inspired by Communist fanaticism. The Congress of the People was one of the less culpable objects of this Liberation Movement, in which the ANC was the most blatantly violent of the organisations. The Defence submitted that that was a fair statement of the indictment and the particulars. The Court had already found that the case against the accused was that they were members and supporters of revolutionary organisations in the sense of violent revolution, because they knew they supported the overthrow of the state by violence. There was no room in this case for finding that the accused conspired between themselves apart from the organisational conspiracy and the Crown must prove that each of the accused knew of and supported the plan for violent revolution.

NOTHING PROVED

The Defence submitted that the Crown had failed to prove any allegations, even on the basis of probabilities. To find the accused guilty, the court would have to reject creditworthy evidence given by a number of persons, such as Luthuli and Matthews. The Crown failure to prove the material allegations was the root of the Crown case and but for these non-proven allegations the case would never have been brought.

Of the approximate total of 10,000 speeches made during the indictment period, only a fraction had been brought to Court, only a fraction of the totality of the documents, and on this fraction the Court was asked to infer that these organisations, which had been existing lawfully for years, had then become violently revolutionary. The Crown must have known that it couldn't prove its allegations and but for the non-existent background the Crown case would not have been made. Even on the alleged international liberation Movement, the Crown had been in difficulties, for the "expert" witness knew nothing about any such international movement. That allegation had not been proved. The Crown had suggested that this did not matter because the ANC merely regarded itself as one of the countries struggling for liberation. The idea of mass movements struggling for liberation was not new, for the ANC even in the years before the Crown case, had been a movement led by peaceful persons but still described itself as a mass liberation movement.

A MERE SMEAR.

The Defence submitted that the Reference by the Crown to the fact that members of the Communist Party were on the Joint Planning Council and were the first defiers was a mere smear and of no significance. It was not true that the policy of the organisation was to subvert and overthrow the state, not true that it was to make active preparation for violent revolution, not true that it was to disturb and impair the safety and security of the state, or to hinder and hamper the state in the enforcement of its laws. If non-co-operation and passive resistance amounted to High Treason, then the accused were guilty, but it was plainly not the same and it was not charged. If there were a case, it depended upon the so-called violent speeches and documents. Replying to a question by Mr. Justice Bekker as to the other methods set out in the Programme of Action, and illegal and unconstitutional methods to compel the state to take action and thus to precipitate violence, Adv. Maisels pointed out that the Programme of Action had not been put in by the Crown. The case against the accused depended upon the speeches and documents and the defence would analyse them in detail and show that they fell very far short of the violent revolutionary nature alleged by the Crown. Why, if the conspiracy had been nationwide, as said by the Crown, had it not produced one piece of direct evidence?

NO SECRET POLICY

Adv. Maisels then made the submission that the ANC had no secret policy. It was significant also that the Crown had not been able to lay at the door of the organisations one single act of violence, and this in the fact of the

Page 4 / ..... situation

situation of the non-whites as conceded by the Crown witness, Professor Murray. This tended to support the Defence case that the policy of non-violence was genuine. The allegation in the indictment that the accused intended to subvert and overthrow the state by violence meant that they would commit or prepare to commit violent acts, and the next part of the indictment set out the means which they were alleged to have employed. The allegation was made that the campaigns were campaigns of violent resistance. Why was the case pleaded in this way if the central theme were different, Was the indictment to disclose or to conceal the Crown case? In the summary of facts relating to the indictment there had not been a word of provoking violent action. When Mr. Justice Bekker referred to the Crown's opening address, Adv. Maisels replied that Counsel had been told to ignore the opening address. Mr. Justice Rumpff intervened to say that it was not Counsel who had been told this, but the accused. Adv. Maisels pointed out that the Crown had mentioned the exploiting of local grievances as part of the means employed, but this was surely not an important means, yet the technique of provoking violence by the state was not mentioned. There had been no hint of the Crown view and the Crown, from examination of the indictment and the particulars, did not seem to have any inkling of that aspect.

WHY DIDN'T THEY SAY THIS?

Asking how this inference of a violent policy was arrived at, the defence said that surely the Crown in its particulars ought to have said that it was not insurrection that was aimed at but to provoke violent reprisals from the state, which would lead to violence by the masses. It was submitted that unconstitutional action including violence was not the same as unconstitutional action leading to violence. If the Crown wanted to say this why didn't they? It would have been the easiest thing in the world, but there had been no suggestion of the present case. The defence had never been told to consider campaigns that were non-violent, but intended to lead to violence by the state which would then lead to violence by the masses. The defence had been entitled to believe that if the proposition that the campaigns would involve violence failed, the case would be at an end.

Continuing the following morning, the defence referred to the Crown submission that the accused called for imitation of the revolt in Kenya, not that they intended to convey incitement to violence by retaliation. It was submitted that if the Crown had intended to make the case as now pleaded, it was vital to have pleaded it so. Nor had it been put to the defence witnesses. The questioning of the accused Helen Joseph by the Presiding Judge, had been on lines which had obliquely indicated the present Crown case. Mrs. Joseph had denied such intentions and it had not been taken up by the Crown or put to witnesses, either before or after her, not one!

OBLIQUE.

The Defence read from the record the questions and the answers by Helen Joseph who had said that the possibility of violence was envisaged, but not hoped for; it was what might happen. "Non-violence might not prevent violence against us." It was suggested by the defence that it was because Mrs. Joseph's answers were satisfactory that this line was not again pursued. It was not put to Professor Matthews, and to Chief Luthuli in a different context, nor as planned retaliation as part of a planned conspiracy. Mr. Justice Rumpff pointed out that the line of his approach to Mrs. Joseph had been on expectation, not on a plan. Adv. Maisels agreed , it had been an oblique approach. Adv. Maisels referred to the judgement in the Doornhoek case, which had laid down that an accused must be informed in clear unmistakeable language of the case which he had to meet. The Court should find that the Crown case did not cover the case as set out in the indictment. It was submitted that the Crown had admitted its failure to prove the overthrow by violence; it was now contingent retaliation and the Crown had not even proved part of its

Page 5 / ..... indictment,

indictment, but had introduced entirely new allegations at the stage of argument.

Mr. Justice Rumpff asked whether the allegation by the Crown that the organisations were preparing the population for violence did not indicate direct violence by the masses and not by the organisations. The acme of the Crown case was that the masses were to be used to overthrow the state by violence. Adv. Maisels explained that the indictment had not said that the people were to be prepared to provoke the state to use violence so that masses would retaliate. The Crown had chosen the form of its indictment and could not now twist and say that it had pleaded this but meant something else. Adv. Maisels asked, "Could anyone reading the indictment have thought that it meant provoking the state to use violence?"

ESOTERIC

Mr. Justice Kennedy said that he quite agreed. Adv. Maisels : "Are the accused supposed to extract an esoteric meaning from the indictment. The Crown has had long enough. Why didn't it say it?" He added that the indictment was supposed to speak and tell the accused what the case was, the case was not supposed to be inferred from the indictment. If they meant provoking the state to violence for the sake of retaliation this was the place to put it in. In the opening address the Crown had said that non-violence in fact meant violence when used by the accused, and now said it meant non-violence as long as it was convenient, but that the accused would provoke the government to do something which would lead to retaliation by the masses when they were educated. This seemed strange after all the shouting and screaming about Resha's speech. The concept had grown up of treason by retaliation because of the minimal number of speeches which contained violence compared with the totality. This was the only way out of the Crown difficulty. When Mr. Justice Bekker asked whether the Crown pleadings on the Western Areas would not cover this, Adv. Maisels replied that what had been pleaded was acts of resistance against the removals. The plan was to commit violence, the ANC were inciting people to resist the law violently. Put quite simply, the Crown case was that the accused were planning to change the present situation where they were disfranchised to a situation where they would have the vote and enjoy the results from being franchised. The Crown said they wanted to achieve this by violence. The defence had said, "Nonsense, it was to be by non-violence." The Crown then said, "O.K. but that means that you provoke the people to do what would lead to violence against them." That was nowhere in the indictment.

NICHOLAS CONTINUES DEFENCE ARGUMENT.

Adv. Nicholas continued the defence argument with submissions on the nature of the overt acts of High Treason. The defence contended that it was not correct as decided by the Court in its interim judgement that any act could be an act of treason, but submitted that to be an overt act of treason it must be capable of supporting the inference that the doer had the hostile intent, the intention of overthrowing the state. The enquiry would not be as to the state of mind, but what did the act in itself reveal? There was no South Africa treason case where the overt act did not bear the hostile intent upon its face. The Court should not have regard to English cases for the nature of the overt act. The South African law was Roman Dutch in origin and Roman Dutch sources must be looked at. The South African Law was common law, as against the statutory English law of treason and should not be concerned with the glosses of English judges. The Defence submitted that the Court was free, if it were satisfied that it had expressed a wrong view, to correct it at this stage, and the Defence submitted that the judgement on the nature of an overt act had been erroneous.

Mr. Justice Kennedy asked whether if the act were done in pursuance of the conspiracy it did not contain within itself the hostile intent. Adv. Nicholas submitted in reply that a treasonable conspiracy was a conspiracy to commit treasonable acts. The Crown had argued that any act would do;

Page 6 / ..... that

that would be alright if the setting were that of a war-like act, but not otherwise. The Defence submitted that the authorities applied always to warlike acts.

TRANQUILITY

Referring to the Shreiner judgment, Mr. Justice Bekker suggested that force as used there might mean illegal pressure, but the defence submitted that it could not. When Mr. Justice Schreiner had said that there was no other way which could succeed, he had not been laying down a rule of law, but dealing with practical politics. He had not said that other methods such as strikes would imply force, he was just saying that they don't bring about a change of government. When Mr. Justice Bekker suggested that disturbing the tranquility of the state amounted to the crime of High Treason, the Defence replied that only forceful action could do that. Mr. Justice Bekker pointed out that the Crown said that it could also be done by mass lawlessness.

LAW OF CONSPIRACY

The second part of the argument by Adv. Nicholas was concerned with the law of conspiracy. In South African law criminal conspiracy consisted of the agreement of two or more people to commit a crime, and nothing short of an agreement would be sufficient, not discussion or intention. It was not necessary for allthe conspirators to agree at the same time or to have met together, or to have communicated with each other. The conspiracy could be proved also by circumstantial evidence, but the circumstances must show the existence of a conspiracy. It was not enough to say that an inference could be drawn, it must be, and so that no other inference could be drawn. In the conspiracy the acts of each conspirator could be admissible against the rest. Adv. Nicholas submitted that these submissions were borne out by the authorities which he would submit to the Court.

ANC MACHINERY

The Defence submitted that the Crown would have to prove the single conspiracy on which it relied, entered into by various persons at various times. It had to show the policy of the organisations to overthrow the state and that the members had knowledge of the policy and had adopted it. The Defence then outlined the machinery through which policy could be decided and adopted in a political party. In the case of the ANC ,the policy making body was the National Conference; whether they had made themselves party to a treasonable conspiracy would be for the Court to decide. The constitution of a voluntary organisation would be its charter and it was submitted that the Crown could not contend that the ANC could disregard the provisions of its constitution and by silent unexpressed individual concurrence alter itself into a treasonable organisation. The Crown based its case on the organisation and could not now base it on individuals; they must prove the policy of the ANC through a duly passed amendment or else through the concurrence of al members. If there were an unofficial policy that would be the policy of certain members, not the policy of the organisation. The Defence quoted authorities to support the contention that mere silence of the members could not amount to consent in the alteration of a contract. In this case there was no question of the general consent of the members to the adoption of a policy of treasonable conspiracy; if it had been otherwise than at a National conference, it could not possibly have been with the consent of the members, and would not be policy. Even the majority of the members could not change the constitution if the change were such that the objects would be changed. The organisation would have to dissolve and reform.

INCOMPATIBLE.

The Defence submitted that where a political organisation of members was committed to certain political objects, and it turned its back on its aims and methods and decided to discontinue its legal actions and carry on illegally that would be so incompatible an alteration that non-consenting members could

Page7 / ..... not

not be bound by it. The Defence submitted that there was no consent by all the members of the ANC to the adoption of a treasonable conspiracy and no evidence of amendments adopted at conference: the Crown failed to prove that the policy of the organisation was treasonable, yet it had pinned its colours to the mast and had said that it would prove that the ANC policy was treasonable. But no matter how many and how important the members, the Crown could not prove its case through proving the policy of individuals.

KENTRIDGE ON PROOF OF CONSPIRACY

Adv. Kentridge took over the Defence argument to address the Court on the proof of the conspiracy. The Crown had sought to prove a nation-wide conspiracy to overthrow the state by violence. There was no direct evidence, only circumstantial evidence; therefore the Crown would have to satisfy the Court that the inference must be drawn. The basic rule of evidence was that the inference must be consistent with all the facts and that the facts must exclude every other reasonable inference. Before there could be conviction on circumstantial evidence, the Court must be satisfied that guilt was the only rational conclusion. The Defence submitted that this had been overlooked by the Crown in some of its submissions and added that in a criminal case the conclusion must be wholly inconsistent with innocence, not merely consistent with guilt. The Crown said that it would not be necessary for every piece of evidence to point to guilt, but the accumulated mass of evidence must point conclusively and exclusively to the guilt of the accused. The Defence submitted that most of the circumstances on which the Crown sought to rely, e.g. vehement expressions of ill will towards the government, were mere makeweights of no probative value and could not really be put in the scale at all. The Defence referred to the U.S.A. case in which it had been held that no inference at all could be drawn from expressions of ill will to the government unless there were something else besides. Criticism or praise alone did not count.

SPURIOUS ARGUMENT

The Defence submitted that the Crown argument in trying to construct a chain of circumstances had been spurious; it had tried to construct without the natural link between the circumstances, not just a resemblance. With circumstantial evidence, however long and apparently strong the chain, the reasoning leading to an inference might be fallacious. In the Crown approach there had been a tendency to attach importance to expressions by the accused, because this was a case of high treason and they had thus acquired a sinister meaning, for example the expression "over my dead body." In this case all the documents were not before the Court and a single case that would be inconsistent would be more important than all the cases of consistency. The Defence submitted that if all the circumstantial evidence were not before the Court it could not be satisfied.

On the manner of proving the case, the Crown relied on circumstantial evidence alone, but it was submitted that if the Crown were correct then there must have been direct evidence available to the Court. This was a nation-wide conspiracy involving a dozen organisations with a changing membership of thousands. The Crown case had been that in the Western Areas the ANC had been telling thousands of householders to do certain things; there must have been thousands who could speak to this, police informers, members who had been expelled, etc. It was inconceivable that the ANC could have had a policy of overthrowing the state by violence and that there was no one to give direct evidence.

NO DIRECT EVIDENCE.

The Defence submitted that in the indictment the Crown had merely referred to "policy", there had been no suggestion of secret policy and it was astonishing to find that no direct evidence had been brought. The absence of direct evidence was destructive of the Crown hypothesis. The Crown could

Page 8. / ..... not

not succeed without showing that the only inference was the alleged conspiracy - not any other conspiracy. If the actions of the accused were illegal or improper, it didn't matter, they must point to the conspiracy charged. Several possibilities could have been submitted in relation to the policy of non-violence such as that it had never been discussed in conference, or that the policy had been changed or that some of the members might have doubtful views about the policy or even have been spasmodically disloyal to the policy, or there might have been members who wanted a change from non-violence to violence. For the Crown to succeed, it would have to show that the evidence not only excluded non-violence but also all these possibilities. The Defence submitted that the Crown had not succeeded in excluding all inferences other than those of the Crown concerning the policy of the ANC, either as pleaded or as argued.

SHADES OF MEANING

During the cross-examination a lot had been heard of "inconsistent with the policy of the ANC", but inconsistent had to be used in its precise sense and Adv. Kentridge gave examples of the shades of meaning, and then submitted that there was really no inconsistency in an ANC member making violent speeches; an individual might deviate from the organisational policy. The Defence submitted that there had been a constant advocacy of non-violence which pointed to a genuine policy. The Crown would have to show that the speeches excluded all except the policy of violence and show that the non-violent speeches somehow were consistent with the Crown suggestion of a violent policy. It was an impossible task for the Crown, yet the Crown was compelled to perform this task not once, but twice. The Defence then referred to the two witness rule, pointing out that the conspiracy was the first overt act, but the other acts were in pursuance of the conspiracy, therefore the conspiracy would have to be proved a second time. Even if the Court did not accept the argument of Adv. Nicholas, and upheld its former judgement, the Defence submitted that according to the indictment, pursuance of the conspiracy was an integral part of each overt act and therefore there would have to be double proof of the conspiracy. The Crown had failed to do this.

DOUBLE PROOF.

The Defence pointed out that in treason the same witness could not prove two overt acts, and quoted authority to support this. What was required here was really double proof, or one credible eye witness and a chain of circumstantial evidence, or two such chains where there was no direct evidence. Where there were not two adequate chains there would have to be two credible witnesses. For the proof of overt acts through circumstantial evidence, there would have to be two chains and no overlapping; the Crown would have to prove its case through two independent chains or by one chain in which each link was proved by two independent witnesses. It was submitted that this had been established by the highest authority.

The Crown had indicated that it accepted that the Congress of the People and the Freedom Charter were not in themselves acts of treason, but became so only in pursuance of the conspiracy. The conspiracy would then have to be proved again, for each of the accused and if there were e.g. five overt acts laid against an accused, the Crown would have to have 10 witnesses; it might only need one overt act for conviction but in respect of the punishment, it would need the 10 witnesses.

INTENT

The Defence submitted that the Court had accepted that an act would be an overt act only if it manifested the criminal intent and this led to proof of the surrounding circumstances. The overt act in Parts C. D. and E of the indictment could not be proved unless allthe surrounding facts were proved

Page 9/ ..... by

by independent proof of the conspiracy. There was no authority for proposing that overt acts could be proved by two witnesses in isolation from the treasonable design. In the case of Leibbrandt there had been no effort by the Attorney General to prove speeches, criticisms of the government, etc. because there would have been no advantage; he would have had to re-prove the conspiracy to prove each overt act.

ENORMOUS DIFFICULTIES.

On the following morning, replying to questions by Mr. Justice Bekker, the Defence submitted again that unless the conspiracy was manifest, or a speech in itself showed the conspiracy, there would have to be two witnesses. Adv. Kentridge explained that the problem was for the Court to consider whether for the second manifestation of the hostile intent the conspiracy must be proved twice. There could be no vicarious liability for the overt acts, therefore unless the accused personally took part, they could not be held responsible. Adv. Kentridge quoted cases to support this submission and went on to submit that it would have to be proved against each accused that the ANC had the policy of violence. There was enormous difficulties even on the Crown approach; the witnesses to the overt act had to be left out of the conspiracy. For example, there were two overt acts laid against the accused Lilian Ngoyi, apart from the conspiracy, the meetings of 18/9/55 and 26/6/56. On the Crown's own approach, the witnesses Coetzee and Schoeman, who were used for the meetings, could not be used for the conspiracy, and all their evidence with regard to the violent policy of the ANC would have to be disregarded. The Court would have to decide whether without their evidence there would be enough to prove violence. In considering the adherence of Lilian Ngoyi to the conspiracy, the Crown had relied on the speech of the co-conspirator Jundla, but to show that he was a co-corspirator, the Crown had relied on Coetzee and Schoeman, therefore they must leave out all three. The permutations and combinations even on the Crown approach were insuperable.

NOT EVEN ONE CHAIN

After giving other examples of the difficulties involved, the Defence submitted that the Crown had not addressed the Court on how the chains of evidence were worked out, but the Defence submitted that there was not even one chain, let alone two. The Crown attitude was that the Court must take allthe facts together to find the conspiracy and didn't suggest two chains. The defence submitted that the Court could not be satisfied even on one chain and couldn't find two chains! It was for the Crown to work out twenty nine different chains of evidence for the accused; it had chosen to try the accused in this way, with twenty nine accused, twenty seven co-conspirators and twenty five organisations over a period of four years, and the Court would not shrink from applying the two witness rule.

CROWN "CLEARLY FAILED".

Mr. Justice Bekker: "Is there any room for shrinking? We must apply it." Mr. Kentridge concluded this portion of the argument by submitting that if the Crown could not satisfy the Court on the double chains of evidence, and did not attempt to do so, it had failed on this ground alone. The Defence submitted that the Crown had clearly failed.

The Presiding Judge indicated that the Court would like to hear the Crown reply to the points of law raised by the Defence, before going over to the argument on the facts, so that the legal argument would not be pushed into the background. Adv. Maisels pointed out that these points ought to have been anticipated by the Crown and it was finally agreed that the Crown would address the Court as soon as possible and that the Defence would continue argument in the meantime.

Page 10 / ..... DEFENCE

DEFENCE ARGUMENT ON FACTS

Adv. O'Dowd rose to address the Court on the Crown argument on Communism and began by pointing out that the Crown relied on Communism only in so far as it was relevant to the Crown allegations of violence. The Crown had succeeded in showing that there was some Communist propaganda in some of the documents, but would have to show that this was the Communist doctrine of violent revolution and that it represented the views of active members of the Congresses, but the Crown had not shown that the accused believed in any violent revolution. In order to reach that goal, the Crown would have to take certain steps. It would have to show that the documents which it relied on do contain Congress policy; that the documents were a fair reflection of Congress policy, that the documents were exclusively Communist; that the documents showed that the Congresses accepted the whole of Communist doctrine; that the Congresses believed in and advocated violent revolution and that the active members had knowledge of the Communist doctrine of violent revolution. The Defence submitted first that if any of these steps were missing, then the rest would be invalid, and then said that the Crown had failed to prove these steps at all, in relation to the documents it relied on. None of the documents were exclusively Communist; the defence argued that it was quite possible for part of Communist doctrine to be accepted and not the whole; the Congresses did not accept the whole. The Crown had not proved that the Congresses advocated violent revolution and had failed to prove the required knowledge in respect of the individual accused.

Adv. O'Dowd referred to the evidence of Professor Murray in which he had said that it would be dangerous to draw any conclusion concerning the views on other matters and pointed out that that was what the Crown had been trying to do; from the views of the accused on imperialism, capitalism and fascism, the Crown had tried to show their views on violence. The Defence submitted that Professor Murray was correct on this point and referred also to his concession that even his own writings could have given rise to an unfounded suspicion and asked what conclusion therefore the Court could draw from concerning a group of laymen, some of whom were barely literate?

THREE ESSENTIALS OF COMMUNISM

The Defence drew the attention of the Court to the explanation by Professor Murray that the acid test of what was exclusively Communist centred round the theory of revolution; it had been established that the theory of the dictatorship of the proletariat was exclusively Communist and also the theory of the essential difference between reformism and revolution. If either of these theories were not accepted then the exclusively Communist attribute fell away. In addition the theory of the role of the Communist Party which would lead the workers to the revolution was essentially Communist. In cross-examination Professor Murray had agreed that unless you know the view of a person on these three aspects of Communism it could not be known whether he was a Communist or not, and that if he rejected them he certainly could not be Communist. If any one of these views were missing then a man could not be branded as Communist. The Defence submitted that the most that the Crown could contend was that violent revolution might be inferred if the theory of the dictatorship of the proletariat and the role of the Communist Party were established, but unless the Crown could show that the Congresses had adopted both these theories, it could not proceed and the defence submitted that the Crown had not attempted to show that amongst all the documents on which the Crown relied, there was only one in which the Crown submitted that there was any reference to the dictatorship of the proletariat and the Defence would argue against that, but it was also clear that the Crown could not argue that from a single document, the whole Congress movement adopted this doctrine. It was noatble that among the eight heads under which the Crown had classified the documents in argument, neither the dictatorship of the proletariat nor the role of the

Page 11 / ..... Communist

Communist Party appeared.

LABOUR PARTY

Adv. O'Dowd submitted that there were other political parties which would go part of the way with Communism and would differ only on certain essentials, such as British Labour Party and that in the case of the accused, even if they adopted some of the ideas of Communism, they did not adopt Communism as a whole. Any person interested in politics, tending towards the left, might read Communism and might say that some of the ideas were right, but that wouldn't make him a Communist who believed in violent revolution. The presence of the whole could not be inferred except from the whole, or from allthe parts. The Crown was trying to say that from the presence of the parts, the presence of other parts could be inferred. The Defence contended that it was clear from the evidence that whatever ideas were found to coincide with Communism, the Congresses did not accept Communism as a whole.

On the question of the Communist doctrine of violent revolution, the defence submitted that the Crown must show the relevance, in that this doctrine admits of no exception or that South Africa was no exception. The Crown argument on the exceptions was not supported by the evidence. Submitting that it was not inflexible Communist doctrine that the Communist revolution must always be violent, the Defence referred to concessions made by Professor Murray, including the speech of Krushchev to the twentieth Congress of the Communist Part and submitted that the Crown case collapsed on the central point that the doctrine of violence was not applicable in the situation with which they were dealing.

SOCRATES A COMMUNIST?

Adv. O'Dowd then took the aspects of Communist dogma analysed by the Crown in argument, showing that for example when the Crown contended that complete nationalisation of industry was an exclusively Communist feature, the submission was unfounded. Similarly the Crown argument that dialectical materialism was also exclusively Communist would not hold, for the evidence of Professor Murray had established that there was nothing exclusively Communist about this philosophy; it occured in Hegel and went back even to Socrates. Dealing with the theory of the division of the world into two camps, the defence submitted there was no suggestion in Professor Murray's evidence that these ideas were exclusively Communist. It was difficult to understand what was exclusive about it, it was just a trite statement of fact. The Crown had relied on the World Peace Council propaganda and had said that a "front organisation" would conceal its true nature. It was quite indefensible to any in the same breath that its propaganda was esclusively Communist.

PEOPLE'S DEMOCRACY

Dealing with the other aspects of the Crown thesis on Communism, the Defence pointed out that anti-reformism did not necessarily indicate Communism. On the point of people's democracies, the Crown had regarded this concept as exclusively Communist but the Defence would say, No, it might be correct that there were no known existing people's democracies except the existing Communist states, but that did not dispose of the evidence that people's democracies were democracies of all the people. There was a large body of Defence evidence on this point to the effect that the Congresses had a different view from the Crown of the phrase "people's democracy." The Crown submitted that the ANC interpretation was consistent with the plain meaning of the word, although the actual expression "people's democracy" might have found its way into ANC parlance from Communist sources.

The Defence submitted that the significance of support for the Soviet Union must depend upon the basis for the support. A Russion might support Russia out of loyalty, an Egyptian might support Russia because of support from Russia in the Egyptian crisis. These would be no basis for an inference of Communism, but if a man supported Russia because it was a Communist country, then it might well imply support for Communism.

DOCUMENTS

Dealing with documents, the defence stated that it was not submitted that there was no breach of Communist influence; it was admitted that there were Communists, some were in high positions; it might even be said that in youth leagues Communist influence was perceptible, but the Crown contention went further; it said that the Congresses were Communist organisations under a Communist High Command working for a Communist revolution. The issue was not whether there were traces of Communism, but whether the Congresses were omnibus organisations with Communist influence in them or outright Communist organisations.

Adv. O'Dowd then dealt with the 40 documents relied on by the Crown in relation to the African National Congress, pointing out that it was a small selection of the total. The Crown had submitted that 22 of these documents were exclusively Communist and the rest merely consistent with Communism. The Defence contended that none of these documents were in fact exclusively Communist; the principles set out in them were not the exclusive principles of Communism. It was significant moreover that one third of these documents were to be found in one small sector of the movement. If the ANC had been the organisation that the Crown said, why was there not an equal amount of Communism in allthe journals and documents?

CROWN'S REPLY

When the Court resumed the following morning, Adv. Trengove addressed the Court on the subject of the argument required from the Crown, pointing out that the Defence might argue further on the point of contingent retaliation which it alleged was not covered in the charge sheet, and might later advance arguments on other points of law. Mr. Justice Rumpff replied that the Crown was only expected to argue its reply to the submissions already made, and whether what it said was the Crown case was treason. The Crown need not prepare any argument on the part of the argument prepared by Adv. Nicholas in which the submission was made that an overt act in isolation must manifest the hostile intent.

STALIN'S DEATH

Adv. O'Dowd continued the Defence argument on Communism, referring to the balance of the ANC documents on which the Crown relied. Dealing with the resolution of the Youth League that they would never go to war with the Soviet Union, it was submitted that this might well have been the view of a pacifist. Even though the resolutions might tend towards Communist views, was the resolution of such a kind that everyone who voted for it, did so out of Communist motives? Similar submissions were made in respect of the resolution on the death of Stalin, which the Defence submitted was merely an obituary testimonial. Mr. Justice Rumpff asked whether the same would apply if it were the case of Hitler, suggesting that there might come a time when the person personnifies his policy and that commonsense could be suspicious about say, a fullsome resolution on Hitler. Mr. Justice Kennedy commented that it didn't follow that adulatory praise would necessarily be either Communist or Nazi in such circumstances.

Concluding his argument on these documents, Adv.O'Dowd submitted that all that emerged from them was some sign of Communist activity in 1953.

YOUTH LEAGUE LECTURES.

Referring to the lectures, The World We Live In, the Defence indicated that these would be the subject of a later argument. It was conceded that they did show some Communist influence and had been written by a Communist, but it was submitted that they did not reflect ANC policy. On the Youth League Summer School lectures, the Defence pointed out that the Crown had stigmatised only one; the remaining three were not even held to be consistent with Communism. The Defence submitted that this was not consistent with the Crown idea of a Communist High Command. Defence witnesses had said that the lectures were for purposes of discussion and presented a variety of points of view. The one lecture was consistent with extreme left wing socialism, but it was submitted that no exclusively Communist elements were shown to be present.

Page 13 / ..... The

The lecture What Every Congress Member Should Know was the solitary document in which the Crown claimed to find mention of the dictatorship of the proletariat; this the Defence denied, submitting that it depended on the interpretation of the phrase "the government of the people as a whole". It did not say expressly the dictatorship of the proletariat. If the expression "the people" were to carry the Communist interpretation, then it might be a veiled reference to the dictatorship of the proletariat, but there was no indication of that interpretation, and the Defence submitted that this document did not contain any reference to the dictatorship of the proletariat.

On the Youth League Journals, the Defence submitted that some articles published in the Lodestar showed Communist influence but this did not prove the Crown case and even if the Crown were correct, it still didn't suggest that the articles were so obviously Communist that the ordinary member would see their Communist nature.

KOTANE AND JOE MATTHEWS

Dealing with other articles in such journals as New Age and Liberation, the defence submitted that they could not be held to reflect ANC policy. It was admitted that Moses Kotane, the author of South Africa's Way Forward had been prominent in the Communist Party of South Africa, but it was submitted that in any case this document was not exclusively Communist. Similarly, with articles written for Liberation by J. G. Matthews the submission was made that they expressed the personal views of the writer. It was however not conceded that these articles were exclusively Communist.

In conclusion, the Defence submitted generally on these documents that they did not come anywhere near proving the allegations by the Crown of a Communist organisation under a High Command.

O'DOWD ON INDIAN MOVEMENTS.

Adv. O'Dowd then dealt with the Indian Congress documents relied on by the Crown, pointing out that there was only one document which was directly connected with the Transvaal Indian Congress; there was one speech by a member of the Natal Indian Congress and one recommendation concerning the pamphlet South Africa's Way Forward in the Natal Indian Congress newsletter. It was pointed out that the Crown had not dealt at allwith features in the Indian Congresses which were submitted to be clearly contra-indications, for example, the strong religious element and the adherence to the principles of Gandhi; the defence submitted that religion, though not entirely incompatible with Communism was definitely non-Communist.

SOVIET VIEWPOINT

The Defence submitted that the Transvaal Indian Youth Congress as testified by Defence witnesses was not part of the Indian Congress itself, though it would not be correct to say there was no connection at all; there was some over-lapping of membership. In judging the Youth Congress the Court should remember that it was a youth organisation, its view was not finely crystallised and the same inferences could not be drawn from it as from the senior Congresses. The Defence pointed to the actual change in the journal New Youth; it was clear that at some stage the Transvaal Indian Youth Congress no longer wanted the same links with the journal and there was no evidence that the views of the Youth Congress were influenced by the Journal. The Crown relied on 4 articles. While in some cases the praise of China went very far it didn't show that it came from an informed acceptance of Communism and was not exclusively Communist. The total position of the Youth Congress was that over three years in these documents and some issues of New Youth, there was an acceptance of the Soviet point of view on certain international issues, but there could be no inference of Communism from that.

CONGRESS OF DEMOCRATS' DOCUMENTS

Sixteen documents were relied on by the Crown for the case against the

S.A. Congress of Democrats, of which only 9 were said to be exclusively Communist. The Defence admitted that the authors of two of them were former Communists, but drew attention the fact that they had been shown to be documents read at the inaugural conference of the SACOD, but not adopted. They were referred to the branches for discussion, after which they were not heard of again. The Defence submitted that these two documents were not exclusively Communist, but if they were found to be so, the Defence submitted that in any case they merely showed that a person with Communist interests played a prominent part in the Congress of Democrats. Only one document amongst those relied on could be taken as a policy document, a national conference resolution, and in this the only exclusively Communist feature claimed was a reference to a people's democratic Government. The accused Helen Joseph had shown that the COD had the same idea as the ANC on this aspect and the Defence submitted that the document was not exclusively Communist. On the discussion notes on Liberation Struggles in Asia, the defence submitted that although they might have been written by a person who wanted to influence people, the only question was whether the organisation wanted to influence its members. The defence submitted the document was not more than consistent with Communism and not exclusively Communist. In one issue of the SACOD journal Counter Attack, there had been a reference to the people's democratic government, but the term people's democracy had not appeared. The Crown submitted that if a people's democracy was what the SACOD wanted it would have said so; the evidence on the Congress of Democrats only proves that some Communists played a prominent part in that organisation.

SACTU LECTURES.

Referring to the allegations against the S.A. Congress of Trade Unions the Defence submitted that there was not much evidence as to the status of the trade union lectures which had been prepared and used and which the Crown submitted were exclusively communist; certainly the lectures were consistent with Communism but in any event their mere existence was not enough to prove the character of an organisation which consisted of several constituent bodies. The Crown said that SACTU was a Communist organisation, but it had not said whether allthe affiliated Trade Unions were Communist or whether it was the national Executive that was Communist. The Court would have to know more before it could draw that inference. As far as the S.A. Coloured People's Organisation was concerned, the Defence submitted that the three lectures, The World We Live In etc. were the only documents relied on by the Crown and the evidence showed that the only connection with the lectures was the SACPO representation on the National Action Council, which had issued them. On the S.A. Peace Council and the S.A. Society for Peace and Friendship with the Soviet Union, the Defence argued that the evidence showed nothing more than a bias in certain views expressed by these organisations, which it was submitted were very unimportant to the case.

"FRONT" ORGANISATIONS

On the alleged international front organisations, it had been conceded that there was no evidence as to what they in fact were, but only a general statement by Professor Murray as to what they should be, in theory, and it was submitted that no inference could be drawn from that concerning the persons who supported them. The only relevant submission that the Crown could make would be that the Congresses might have held these organisations to be Communist, but defence evidence had shown that some ANC members had held the World Federation of Trade Unions and the World Federation of Democratic Youth not to be Communist organisations.

DEFENCE ON FORMER COMMUNIST PARTY

The Defence submitted that the evidence on the former Communist Party of S.A. was so incomplete that no fair view of the policy could be obtained, particularly on the vital issues of the dictatorship of the proletariat and the theory of violent revolution. All that emerged from the evidence was that the Communist Party had certain views on fascism, liberation and other

Page 15 / ..... phenomena

phenomena and that there had been a resemblance between these and ANC views. Nothing could be inferred from such a resemblance; the ANC might have taken them from the Communist Party of South Africa or it might have been the other way round.

On the journals Advance, New Age, Liberation and Fighting Talk, the Defence would submit a separate argument, but submitted that they could not be assumed to express the policy of the Congresses. A separate argument would also be advanced on the Freedom Charter; the Defence would rely on the evidence of Professor Murray, that the Freedom Charter was consistent with bourgeois socialism. Replying to Mr. Justice Rumpff, Adv. O'Dowd said that the Defence did not think it necessary to advance further argument on the other submissions by the Crown on various aspects of Communism.

MAISELS ON ANC POLICY

Adv. I. Maisels Q.C. continued the Defence argument submitting that the issue in the case was the organisational policy, particularly that of the African National Congress. The Defence case would be that it was NOT the policy of the African National Congress to use violence against the state; it had decided to avoid violence. The Defence would rely on the Constitution, resolutions and the statements of responsible leaders. The Governing body of the ANC was the National Conference and the Crown case was that at some time the ANC National Conference had taken the decision to overthrow the state by violence. It was not disputed that the case could be proved by circumstantial evidence and this was what the Crown had tried to do, but it had to be remembered that circumstantial evidence had two sources of error, the fallibility of the testimony and the fallibility of the inference. One fact that was inconsistent could destroy the Crown inference. Moreover there were certain points on which the Crown might have been expected to bring direct evidence and it should not be forgotten that the Defence did call direct evidence - of the people who must have been there for any decision for violence. The defence would analyse the so-called violent speeches very thoroughly, even though it might take six or eight weeks.

Mr. Justice Rumpff : "Why do you mention the time?"

Adv. Maisels : "It's a horrible thought to me!"

Mr. Justice Rumpff commented that he had thought it had been accepted that time was not an issue in this case. Adv. Maisels said that he thought that the accused would not go allthe way with his Lordship on this!

DID NOT REFLECT POLICY

Adv. Maisels added on the meetings that the argument would involve the credibility of the witnesses in most cases and the Defence would submit that the longhand reporters did not give sufficiently reliable reports for any inference, even of the violent speeches and that the balance of the speeches contained nothing to justify the inference of a violent policy. There were references to death and sacrifice, but these were plainly capable of other meanings. Those speeches which did contain a suggestion of violent action, from the evidence, did not reflect the ANC policy. The Crown had argued that speeches of a certain kind had been made consistently from ANC platforms and that therefore they represented a certain decision. The Defence denied that it was consistent and submitted that no inference could be drawn from the sporadic appearance of a certain theme in the speeches; the Crown had only shown a sporadic appearance of violence, and it was submitted that the speeches led in evidence were only a fraction of the total of speeches made. The Defence would make particular reference to the evidence of Professor Matthews, a witness who had unrivalled and undisputed knowledge of ANC policy. His evidence, if true, destroyed the Crown case completely, yet he had not been challenged on vital points in cross examination and only half heartedly in the Crown argument.

Page 16 / ..... CHRISTIAN

CHRISTIAN DOCTRINE.

The Defence submitted that there was no mystery about the ANC policy, it was a policy of non-violent extra-Parliamentary action and pressure on the Government. The Crown argument had been lacking in detail about the events of 1952, but the events of this period clearly illustrated the non-violent policy. The defence would show from the statements of Chief Lithuli that the idea of sacrifice was plainly rooted in Christian doctrine and this was of far more importance than the outbursts of lesser men.

Although the three main policy documents of the ANC were the African Claims, the 1949 Programme of Action and the Freedom Charter, the Crown had acted only on the Freedom Charter and the other two had been introduced by the Defence. The Programme of Action was most directly relevant to the forms of struggle to be adopted by the ANC and didn't envisage violence. The Defence commented that when the Crown realised it couldn't deny the importance of the Programme of Action, it set up a most elaborate structure of interpretation.

AS IT MIGHT HAVE BEEN

The Crown had frequently exlaimed "THEY KNEW!" but the Defence submitted that the Crown knew that much of what they relied on were bits of paper expressing the views of members of the ANC in highly metaphorical language. The Crown had argued that violence would follow the methods envisaged in the Programme of Action, that it could have been foreseen as the inevitable result of civil disobedience with a brutal fascist government, but the Defence would argue that this was not so. There were many possible results of non-violent resistance to the government. The hopes and intentions testified to by the Defence witnesses were far more reasonable than the Crown theory. The essential feature of the Crown case was a plan of retaliation, though admittedly vague and not specifying when or how. But the direct Defence evidence was that there was to be no retaliation, and this was never contradicted by any evidence. The Defence looked on the Defiance Campaign as it actually was; the Crown only looked at it as it might have been -and that was all sorts of things!

The Defence would say that the phrases such as sacrifice, liberation - seen by the Crown as swear words, smear words - were used by organisations peacefully pursuing their objects over the years.

NOTHING SINISTER

Referring to the Freedom Charter, Adv.Maisels said that it had declined sadly in importance in the Crown case, yet the Crown had said that the changes set out in it could only be obtained by violence. But Professor Murray had pointed out that once the universal franchise had been achieved, the other reforms would follow constitutionally. The Freedom Charter went no further than the basic demand for equality. It was based on the disabilities of the people; there was nothing sinister about it.

Adv. Maisels submitted that the Crown case on the alleged International Communist inspired Liberation Movement had collapsed and it was now trying to make something out of a hotch potch of statements to suggest through foreign policy statements an approval of violence. The Defence said that this was not so at all. Replying to a question by Mr.Justice Rumpff, the Defence emphasised that to show a change of principle the Crown would have to show more than speeches and documents.

The Court then adjourned until Monday, March 13th.

Issued by : THE TREASON TRIALS DEFENCE FUND (W.O. 2092)
5, TRADES HALL, 30, KERK STREET,
P.O. BOX 2864, JOHANNESBURG. 'PHONE 33.5901.

23 MAY 1961

TREASON TRIALS DEFENCE FUND

PRESS SUMMARY No. 57

This is the Fifty-seventh issue of a regular bulletin giving a factual resume of the proceedings of the Treason Trial

Period Covered : 13th/17th March, 1961.

DEFENCE ARGUMENT OF A.N.C. POLICY CONTINUED

DEATH OF E.P. MORETSELE.

When the Court resumed on Monday March 13th, Adv.Maisels informed the Court that one of the accused, E.P. Moretsele, had died during the weekend. Resuming his argument on the policy of the African National Congress, Adv. Maisels submitted that the policy could only be derived from three sources, the objects as set out in the constitution, the decisions of the National Conference, consistent with the policy and duly adopted by the policy making body or by the unanimous decision of all the members. The Defence agreed in reply to Mr. Justice Rumpff, that if the leaders all over the country were, for example, to propagate violence and this were not to be taken notice of by conference after conference, it might be said that the policy had changed, even if there were a small remote district which had not heard of the change. The defence submitted, however, that in the case before the Court the policy had not changed; and that it could not be changed by anything less than a National Conference resolution; any circumstantial evidence to the contrary would have to be tested.

A HOTCH POTCH.

Adv. Maisels submitted that when the Crown allegations about the International Liberatory Movement had collapsed, it had turned to a hotch potch of documents and statements to suggest a so-called approval of violence in other countries. The Defence contended that in fact the Congresses had approved of the achieving of independence by colonial countries and had denounced efforts to suppress it. Sympathy for one side in the fighting would not be taken as urging similar methods in South Africa. From the Crown allegations on the desire for a new State had emerged only that the Congresses had a strong dislike for the present state because of discriminatory laws. The real question was how did the ANC propose to get rid of the government? The answer was by the methods of the Programme of Action. The Crown had tried to build on isolated fragments from journals, documents and speeches, but even then had only been able to find a very few passages that were at all relevant. It had not even been able to show that these journals had a policy of violent revolution, let alone the ANC.

SUICIDE.

On the question of the ANC policy as shown by the activities, the Defence pointed out that the Crown had tried to show that in the Western Areas Campaign, the organisation had incited persons to acts of violent resistance. This approach had been abandoned for lack of evidence and now the Crown fell back on there being a plan to provoke the police to a massacre and to prepare the people for retaliation. The Defence submitted that such a plan was in the highest degree improbable, and would amount to attempted suicide. The fact that the Crown was reduced to theories of this nature really disposed of the matter, but the Defence would submit that in the Western Areas there was a genuine grievance, and the policy was for the people to refuse to move voluntarily as a demonstration. There were no plans for violent resistance, in fact the people did move and the worst that could be said was

Page 2/ ..... that

that there were sometimes hot headed speeches, and the decisions lacked precision. The evidence showed that the ANC had not been reckless, but had taken precautions successfully and had in fact avoided violence. The Defence pointed to the lack of direct evidence; if there had been an evil plan it would have been communicated to thousands of people; why was there no direct evidence.

VOLUNTEERS.

The Bantu Education and Anti-Pass campaigns had been submitted by the Crown to be examples of unconstitutional action flowing from the Programme of Action and the Defence was content with this approach, but the Crown's dramatic allegation concerning the Freedom Volunteers had suffered a remarkable attenuation. The defence submitted that the volunteers were simply the most active members, and propagandists; any other implications were limited to a few speeches which were not representative of ANC policy.

GÖTTERDAMMERUNG.

The Defence asked the Court to consider the submissions in the light of probabilities. The defence submitted that the ANC had a delicate and difficult but rational task; it had realised that it could not achieve its aims by supplication, violence was not desired and there would be no hope of succeeding by violence, therefore they took a middle course; maybe they were over optimistic but it was the only reasonable course. Against this was the suggestion by the Crown of a Wagnerian twilight of pointless massacre, planless violence, ill-defined activity by ill-defined masses carried out by a cumbersome organisation like the ANC without a word of their deliberations leaking out. The Court would hesitate to accept such allegations even were there any direct evidence, but here it would be quite out of the question.

The main allegations in regard to the ANC were that :-

It obtained support for the struggle by preaching non-violence in order to recruit people.

It campaigned against certain laws so that the State would resort to violence to suppress the campaign.

It would then encourage retaliation and present the victims as heroes and martyrs so as to influence the masses.

It told the volunteers to refrain from violence and avoid provocation and to carry out non-violent duties, while at the same time conditioning the people for violence.

When the people were "ready" the ANC would call for a general strike or a stay at home.

If the State did not then make vital concessions and tried to suppress the strike by violence (probable, not even certain) they would then use the masses to retaliate in the final onslaught on the State (or they relied on the likelihood that this would happen).

A THEORY.

All the accused were alleged to have agreed on this and it had been known to them all by February, 1954, yet there was no document or speech to show any such plan, and no direct evidence that it had been agreed upon and communicated to allthe accused and co-conspirators. Yet the Crown invited the Court to say that this was the only theory to fit the case. The

Page 3/ ..... Defence

Defence submitted that there were gross improbabilities in the theory of the Crown. Firstly, it was improbable that an organisation such as the ANC would come to such an agreement without evidence of discussion and the defence pointed to the years of preparation and discussion of the Programme of Action, the two conferences devoted to discussion of the Freedom Charter, the chaos over the campaign against Bantu Education, and the endless talks on the M. Plan. The Constitution had taken years of discussion which were reflected in official documents and private memoranda, yet this conspiracy went smoothly at a secret conference and was accepted unanimously by the ANC and other organisations. It would be expected that such a plan and its implications would have been discussed, but this was not to be found anywhere in the evidence, and if the Crown did not contend that there was agreement on the various terms of this plan, then it could be expected that there would be some evidence of discontent, or discussion. On the suggestion that it had been assumed by the ANC that in the case of a general strike, the brutal fascist government would suppress it by force and use violence to break it, the Defence pointed out that this carried different possibilities. Why should it be considered more probable that strikers would resist than that they would not?

The Defence submitted that although there might have been contemplation of the possibility of violence, it was not part of the agreement, and it was not an intended result.

BAND OF ASSASSINS.

Referring again to the volunteers, the Defence asked how it was possible that if the ANC were training a band of non-assassins, it could suddenly switch to a band of assassins, How were they to be trained, It was improbable that the ANC would have carefully worked out, asthey did, a scheme for the avoidance of violence by the volunteers, and also have had a plan to proceed to violence which would have had no chance of success. The efforts of the Crown to have it both ways were not impressive. What political organisation let alone the loose unorganised, disorganised organisation of the type of the ANC during the indictment period, could adopt so impractical and delicate a policy? It would require an organisation of trained social psychologists to be able to balance the non-violent speeches of such people as Luthuli, Naicker and Matthews with the Africanists of Alexandra township to get the right mixture. If non-violence were merely a veneer, and the discipline of the volunteer merely a check on premature violence, then it was improbable that the importance of non-violence would have been so frequently discussed. None of the police officers who had given evidence had even suggested that non-violence had been put forward insincerely, and this was also borne out by the evidence of the man in the street which had not been challenged. Adv. Maisels exclaimed that it was "nonsense" to suggest that a band of revolutionaries would not plan sabotage, etc., but would wait for a possible reaction by the government and on top of that expect that people whom they had been telling to be non-violent would suddenly become violent. The suggestion of the Crown of dependence on events that might never happen and which would be out of the control of the accused was too vague; it left too many questions unanswered. When was the agreement made? When were the volunteers brought in? By whom was it made in the first place? When was each accused brought in and how? By 1954 they were all in, so what Resha said in November 1956 didn't help. Who decided who should be let into the secret? These points were not dealt with by the Crown, they kept on saying look at the facts and circumstances, but they did not enquire into the agreement. The defence said that there were no answers to these questions; could the Crown give any coherent account at all of the conspiracy or was it like Topsy? - "it just growed. "

SUCKED OUT OF THE AIR.

Mr. Justice Rumpff repeated that the Crown contended that there had been a conspiracy to take a certain course of action and the accused were deemed

Page 4/ ..... to

to be responsible for and to have known the natural consequences. The agreement was not to expect certain consequences. Adv. Maisels said that was just the problem. It was doubtful if the principle of reasonable and natural probable consequences could be applied. Anyway those contended by the Crown weren't such. The difficulty of the Crown was that there was no such agreement; it had just sucked it out of the air. The Crown could not have it both ways; if non-violence were held to be a deviation, why should not violence be a deviation? The Defence referred to the unchallenged evidence of Professor Matthews and submitted that the Crown had failed to deal with the probability of the agreement or to put the agreement as stated finally.

KENTRIDGE CONTINUES DEFENCE ARGUMENT ON A.N.C.

Adv. Kentridge continued the argument for the Defence, dealing with the extra-Parliamentary activity of the ANC. The Crown had relied heavily on the dictum of Mr. Justice Schreiner that there were only two methods of constitutional change, the ballot box and the illegal use of force. The Crown used this dictum in relation to the reliance of the ANC on extra-Parliamentary action, but the defence said that to support this there would have to be some inference r lating to the use of force, and there was none.

The Defence submitted on this dictum that what was really stressed was the violent element, the essential element of treason; the Judge had been concerned with the ordinary sense of force as a violent or warlike action, not extra-Parliamentary pressure; he had not been concerned with the subject of non-violent extra-Parliamentary action.

LEIBBRANDT CASE.

The Defence pointed out how radically different the Leibbrandt case was from the present case in which there was, inter alia, no oath that had to be signed in blood, no wartime plot, no foreign agents, no secret organisation, etc. It would be a travesty to suggest that the oath of Leibbrandt provided any comparison with ANC membership; Leibbrandt's extra-Parliamentary action was on the lines of sabotage, not boycotts or strikes. The Defence would show that the ANC extra-Parliamentary action was in fact along the lines of the ballot box.

Replying to questions by the Presiding Judge, Adv. Kentridge submitted that if the government agreed to surrender, it would be by negotiation, and not by force and would not be treason; if it were brought about by a successful stay at home, then it would be the exercise of non-violent pressure. If there were to be a strike, short of violence so that the country might be plunged into confusion, the gaols full, etc., the government taken over, and the police thrust aside, then there might be the required element of force and it would be treason, but if there were to be a successful stay at home and the use of the army and police force would be futile, and the government were asked to accede to the demands of the people and agreed to do so, then that would not be treason.

ENLIGHTENED SELF-INTEREST.

The Defence pointed out that in the S.A. Constitution, the government could be changed by a defeat in Parliament or at the polls. The Government was sensitive to public opinion and the electorate could change its mind. For this change of mind it was not necessary for the electorate to be willing, it might be reluctant. It was the whole basis of the democratic system, that the government would work on the basis of enlightened self interest. Replying to a question by Mr. Justice Bekker as to whether what the Crown called the pointing of a pistol at the Government's head would be legitimate pressure, the Defence said that they were only concerned with what was treasonable, not with what was legitimate. There could be no treason without violence. If a new state came about through everyone having the vote, there would be no

Page 5/ ..... treason

treason, but if there were to be a taking over of Parliament and the Union buildings without any intermediary Parliamentary process, then that would be High Treason. If the policy of legal demonstrations changed to illegal demonstrations, that would not be treasonable, because it was the element of violence, not illegality that constituted High Treason. When Mr. Justice Schreiner had spoken of force, he had meant force, that there were only two ways to change the laws, violent revolution or the ballot box. He was not dealing with methods of making the government change its mind. The Crown had overlooked this; the Defence was dealing with how the electorate might be persuaded to change its mind, without force.

DIVIDING LINE.

Resuming the argument on the following day, the Defence submitted that the law of treason fixed force as the dividing line for the safety of the state, and that the attitude of the S.A. Criminal Courts was not to extend the orbit of the common law. It was submitted that the Court would not take the Leibbrandt judgement as referring to anything less than force; "unconstitutional" could not be held always to have the implication of the use of force and violence. It was clear that the use of the expression "unconstitutional" by the African National Congress was by way of comparison with the former methods of supplication, and it was submitted that there was nothing in the dictum in the Leibbrandt judgement to support the Crown's inference on unconstitutional activity.

SPECULATION.

The present case dealt with extra-Parliamentary action by people who had no vote. If the Crown were correct in its inference of treason, there would be far-reaching political and social consequences but the Defence submitted that it could not be so according to the indictment. The real issue was whether the accused had a genuine belief in the extra-Parliamentary methods they followed, but the onus was on the Crown to prove that they had no such belief.

Replying to a question by Mr. Justice Bekker on the statement in an article by Nelson Mandela that to achieve the aims of the Freedom Charter, the political and economic set up would have to be smashed, Adv. Kentridge explained that this did not mean more than setting aside the present economic system. The defence asked why one could not believe that a tyrannical government would succumb as a result of economic pressure? In the realms of speculation it went very far to say that the accused did not believe this. The reference by Sejake in his speech to an armed clash may have meant that the police might callout the army. The Crown had argued that if the accused didn't believe in non-violence, then they would have believed in insurrection, but there was no evidence of this. The ANC in fact rejected armed struggle, as was made clear in the speech of Professor Matthews in 1952. It was true that the accused gave examples of struggles in Malaya, Kenya, and Indo China as well as in India and Ghana; it was often put by the Crown to witnesses that the struggle in India and Ghana were not the same as the struggle here, but it was never put that the struggle in Malaya and Kenya was not the same. There was no reason to believe and no evidence of any belief by the accused that armed insurrection was more likely to succeed than non-violence nor was there any sign of preparation for armed insurrection.

NEGLIGENCE.

Replying to Mr. Justice Rumpff, the defence submitted that the effect of the ANC policy was that even if the government became more tyrannical, and sacrifices had to be made, they would win in the end by the sheer weight of non-violence and boycott. These matters might not have been put in clear cut speeches, but that was the effect. Mr. Justice Rumpff suggested that, in the case of the masses being prepared for action and having feelings of grievances instilled in them, there might be the creation of a

Page 6/ ..... dangerous

dangerous instrument of force which might eventually be used by the state. If the needs of the people were accentuated and also the nature of the government and yet it was not stressed that the end was to be a non-violent end, a machine might be prepared that could in the end be used for other than non-violent purposes.

Adv. Kentridge replied that that would be treason by negligence.

CHANGE OF HEART.

The Defence submission would still be that nothing had been said as to what would happen in the end. Stress had been laid in the documents and speeches on non-violence, there was an enormous mass of evidence of non-violent campaigns and why should a violent one be expected - rather the contrary. It would be dangerous if nothing was said about a violent end to deduce that it was intended; there was nothing that pointed to a violent end rather than a non-violent end. The possibilities which were being discussed in the argument showed how speculative was the Crown argument on the belief of the accused, and revealed the thinness of the material on which the Crown had to rely. The accused might have said that they didn't believe in a spontaneous change of heart, but it would be difficult to say that the mind of the electorate could not be changed by economic pressure. The Defence submitted that the possibilities arising from extra-Parliamentary activity were very wide and it could not be said that they must lead to violence. The Defence said that these methods could work without violence and there was no reason to accept that the accused did not believe in the efficacy of non-violent methods. It appeared that the Crown was arguing that the use of methods which might lead to the use of force by the government amounted to High Treason.

UNREALISTIC.

The Defence submitted that it was unrealistic to expect that speakers would explicitly say that at a certain stage the government would be expected to open negotiations; what did economic pressure mean if not intended to lead to negotiations? Political parties did not make such prophecies; the Crown had not understood how political parties worked, and this aspect was really no more than a political criticism of the ANC which might be right, but did not justify an inference that something was being concealed. Politicians did make vague statements, but this was not treasonable. The Crown would have to show that any idea of a non-violent victory was rejected. What inference could be drawn from the fact that the ANC thought the government had hardened? That merely because the Government had not given in they should go over to violent methods. The answer was frequently given by the ANC - "We will go on trying, even if it takes a long time."

HYPOTHESIS.

Mr. Justice Rumpff suggested that although the Crown argument could not stand in isolation, it should be taken in the context of the case. The members had been told to read certain journals, where they would read the opinion of the writer that non-violence could not be guaranteed. The Defence replied that the opinion of Ruth First as expressed in the magazine was not important, the only thing the Crown could find was that victory could not be expected without sacrifice, but this did not mean that they were to go over to violence. The ANC had not expected that violence might occur, but they could not guarantee that it would not. Adv. Kentridge reminded the Court of the answer given by the Defence witness Professor Matthews to Adv. Hoexter, "Why is your hypothesis better than mine?" The Defence submitted that the Crown hypothesis was based entirely on political speculation and possibly on some political prejudice, for there was no evidence that the campaigns could not be carried out without violence.

INTENTION OR INFERENCE.

It was submitted that the Crown must show violence against the state;

Page 7/ ..... it

it would not help to show methods which might lead to the state using force, unless it could be shown that there was the intention to compel the state to use violence; but for example, in a stay at home the government would not be compelled to use force. It was not enough for the Crown to show that the possibility of retaliation could not be excluded and moreover the Crown had overlooked the elementary proposition that to die did not mean to kill. On the issue of violence, the defence submitted that the Crown had failed to show that the ANC had intended to use methods designed to result in violent retaliatory insurrection against the state. There was not the slightest basis for the proposition that the natural and probable consequences of their methods would be violence and there was nothing which could be used to assist the Court in drawing the inference that violence was intended.

MAISELS ON THE ANC CONSTITUTION.

Adv. Maisels, returning to the Defence argument submitted that the constitution of the ANC made it clear that the policy making body was the National Conference of the ANC and also that it was established that all major campaigns had been decided by the National Conference. It could not be challenged that policy was decided only by resolutions and decisions of the National Conference. If it were the Crown case that the policy had been changed at a National Conference, this had never been suggested to Defence witnesses,nor that the policy had been changed by any other body. It was inconceivable that the Crown could not lead direct evidence about this. The Court would have to accept as unchallenged that the National Conference was in fact the policy making body.

The main policy documents were the Constitution, the Programme of Action, the Africans' Claims and the Freedom Charter.

The Constitution during the indictment period had been in existence since 1943; prior to that there had been the constitution since 1919, in which peaceful propaganda had been specified and Professor Matthews had testified that there had been no change involved in the succeeding constitution.

AFRICANS' CLAIMS DOCUMENT.

Africans' Claims, put in by the Defence, had remained the basic policy of the ANC up to the time of the adoption of the Freedom Charter, certainly at the time when the accused were supposed to be in the conspiracy. The Crown had tried to show in the cross-examination of Chief Luthuli the difference between the Africans Claims and the Freedom Charter and the Defence suggested that as Africans' Claims actually used the expression "new order", the Crown should have put this document right in the forefront of its case. But it had never been suggested by anyone that the adoption of this programme might indicate a departure from peaceful means. The Defence submitted that the contention of the Crown that grievances were created and exploited by the ANC was false, "demonstrably false". This document proved conclusively that every one of the ANC campaigns arose out of grievances; the discriminatory laws were felt by the people against whom they were directed. The Defence submitted that the Crown had failed to put this document in because it was a perfectly legitimate statement of the policy and aims of the ANC, and it went some way to destroy the Crown case.

There was nothing undertaken in the indictment period which could not have originated in this document; why must the Crown look elsewhere? Could it be said that the aims set out in the Africans' Claims and the Programme of Action could be treason? The Defence contended that it could not be so on a true analysis of the documents. Replying to Mr. Justice Rumpff, the Defence agreed that this document had not been put to the Crown "expert" witness, Professor Murray; this was because it had been

Page 8/ ..... considered

considered unnecessary. The document had been found with a number of witnesses, and if the Crown could have extracted Communism from it they would have put it to Professor Murray.

PROGRAMME OF ACTION

The Programme of Action showed that for many years the Africans had been suffering and the organisation had tried to find means to improve conditions; of this document the Defence said that if the accused had not drawn attention to it, the Crown would not have known of its existence. Giving it its plain ordinary meaning it was a programme of non-violence, boycotts, strikes etc., but now the Crown had added an implied term that the ANC knew that these methods would inevitably result in state violence, which would result in mass retaliation and the violent overthrow of the State. According to the Crown submission, this implied term should have been present at the time of the drafting of the Programme of Action, but if so then this conspiracy should have started in 1949. But that was not alleged and the Crown had indeed conceded that the Defiance campaign had not been conducted in pursuance of the conspiracy, but it was in pursuance of the Programme of Action.

The Defence submitted that this was a strange concept of a term coming in subsequent to the agreement and in a still stranger way by virtue of a change in the expectation of the contracting party. This was quite insupportable.

"WHERE IS THE START?".

Mr. Justice Rumpff suggested that as he saw it, the Crown made the Freedom Charter the overt act and was satisfied with the four years of the indictment and to rely on the Freedom Charter. The Defence submitted that it was very clear that from the outset the ANC had been adopting the means of passive resistance and when Mr. Justice Rumpff queried the start Adv. Maisels exlaimed, "Where is the start? We have been trying to find out."

Continuing the following morning, the Defence submitted that in fact the Programme of Action was the central theme of the Crown case. When one took the period after 1949, the argument of the natural and probable consequences received a serious blow. The Crown had ignored passages in the Defence evidence on the state of mind of the witnesses and the organisations in relation to state violence and mass retaliation. When the possibility of violence by the state had been put to the Defence witnesses, their evidence had been strongly in favour of there being a possibility but not a certainty; there had been no systematic attempt by the Crown to put to witnesses that this sort of violence was inevitable rather than possible. Quoting Defence witnesses Adv. Maisels referred to Moulvi Cachalia as a "bit of a philosopher".

Mr. Justice Rumpff : "What's wrong with that?"

Adv. Maisels : "He is able to see more sides of a question than most people".

GOLDEN THREAD.

Mr. Justice Rumpff suggested that the Crown had not tried to argue that the probable natural consequence would be that the Government would use force, but that situations were created for a certain purpose, for the destruction of the state and the acquiring of a new state, and if it was known that from such a situation there might be violence against the State, that would be High Treason. The Defence in reply quoted from the Crown argument, "They knew ... that their unconstitutional means would involve loss of life in coercing the government." Mr. Justice Kennedy agreed that

Page 9/ ..... this

this had been stated several times by the Crown. The Defence said that this ran like "a golden thread" and was the basis for the Crown's new conspiracy; because there had been no evidence of direct violent overthrow, the Crown had sought to eke out its case by this kind of statement. Professor Matthews had really put this matter of provoking violence to sleep in a way which should prevail with anyone with commonsence. The Defence submitted that the fact that the ANC could not be certain in the future whether defiance or strikes would be successfully kept on the non-violent plane could not be construed as expectation or intention. To deny the possibility would have been humanly impossible. But there had been not one word of retaliation or provoking of the police in any of the campaigns or in the mass demonstration of women at the Union Buildings. The Programme of Action in concept and in commission supported the Defence case. The Defence submitted that if the Crown had really intended to build its case on the Programme of Action as it had done in argument, then the truthfulness of Prof. Matthews on the Programme would have been challenged. The evidence of this utterly creditworthy witness had not been challenged by the Crown, and the defence submitted that if it were accepted, then it destroyed the Crown case.

NOT MENTIONED

The Crown had said that the ANC policy was non-violent only in that the state would use violence first, and that the Programme of Action was unlawful intimidation calculated to lead to a violent conflict with the State and to achieve the violent overthrow of the State. This allegation was wholly unjustified and remarkable in view of the evidence before the Court; the Programme of Action had never been mentioned in the policy of violence schedule, or been put as an overt act.

POLITICAL ORGANISATION DOCUMENT.

Dealing with the document Political Organisation, the Defence submitted that it was not of much importance but would be dealt with fully as the Crown thought it important in relation to strikes. All that its author had really said was that political struggles could not be inflexibly planned and it dealt with the methods open to the ANC. The Crown had relied on it for proof that the ANC realised that strike action would lead to violence by the masses. The Defence submitted that from the general discussion in the document on strike action, it could not be inferred that the author favoured violent action. The lecture must be looked at in the light of the author's unquestioned understandong of the ANC policy of violence; his reference to the strikes of 1912 and 1946 were mere historical reference. There was no suggestion of the results of these strikes. The Defence witnesses had denied that this lecture dealt with violent retaliation. It could be clearly seen that there was nothing more to it than a statement of what could happen in a strike. It was the efficacy of the strike that was the cardinal point and there was not one suggestion of the non-efficacy of non-violence as a method in the document.

UTMOST OUNCE.

Mr. Justice Rumpff put it that an ANC member reading this document might infer that if you failed along the road to soften the government, the final clash might be in the form of a strike and that the government might resort to violence leading to violent retaliation. Adv. Maisels said that he could not concede that the ordinary ANC members, knowing of the non-violent policy of the ANC, could read violence into this document. He submitted that it would be trying to extract the utmost ounce to say there may be violence from the government; the highest that could be said of this lecture was that it stated that strike action can and often does lead to rebellion, insurrection and armed clash. The Crown had alleged that it deliberately provoked violent action, but this contention failed

Page 10/ ..... on

on its own case; this document belonged to 1952, yet the Crown said that the violence was to be at some indefinite date, not even in the indictment period. The probabilities were overwhelming that the ANC would not overthrow by violence. What guns did they have? What aeroplanes? What army?.

PLANS FOR ORGANISATION DOCUMENT.

The next document to be dealt with by the Defence was a typed document, Plans for Organisation, unsigned and undated, of which the Crown had said that the/ author would not have referred to armed conflict in any context if it had not been in his mind. The defence pointed out that there was only one copy of the document in existence. Mr. Justice Kennedy said that he did not remember that this document had been in any way useful and speaking for himself thought that the Crown had made a wrong submission. The Defence submitted that to rely on this document was mere nonsense.

MARRYING THE M.P.s DAUGHTER.

On the probability of what could have been foreseen in the light of logic, the Defence submitted that to prophesy political events in the indefinite future was a task on which few wise men would venture, and yet the Court had been asked to infer how someone else had prophesied. The Opinions as to the logical results of political consequences were various and could be illustrated by the suggestion that to have Coloured M.P.s would lead to miscegenation, - a mere speculation, based on the idea that Coloured M.P.s might be invited to tea and meet the daughters of other M.P.s and then marry them. Yet there would even be a greater precedent in history for that speculation than for what the Court was asked to do in this case. Political parties were not always logical and the Defence submitted that the idea of a "final strike" was a mere figment of the imagination; no such thing was planned. It had merely been said that industrial action was the highest form of action; there was no such plan to proceed inexorably to a master strike, and the last contingency of violence by the government to get workers back to work by force was only one of several possibilities. Moreover this idea was so outmoded in modern times that the Defence was surprised that the Crown should suggest it. The Crown case was that Africans had no right to strike for political rights, because this might lead to the state becoming vicious and therefore it would be treason, because the state might use violence, and on this the Court was asked to find the conspiracy. Leaving aside the possibility that people without arms could not have a violent clash, why was there a greater possibility of violence envisaged by the ANC than that the government would negotiate?

The Defence pointed out that not one single act of violence had been laid at the door of the ANC and it was submitted that the Crown argument should not prevail with the Court.

HAVING IT BOTH WAYS.

Dealing with the use of the expression "sacrifice", the Defence pointed out that the bitter history of the African people showed that Africans had been killed and nobody else and therefore in any protest against State action there might be lots of trouble. But the Crown equated the word "die" with "kill" - the Defence did not, and nor did any of the Defence witnesses. In any case if constant references to death constituted incitement to violence, what became of the Crown theory of the concealment of violence. in order to attract the crowds? The Crown attempt to have it both ways was singularly unimpressive; they had never faced up to the probabilities of their own contention - it would in fact be natural suicide for the ANC to go over to violence. The Defence referred to the

Page 11/ ..... contention

contention by the Crown that the belief of Chief Luthuli in the innate goodness of man was merely his personal belief in the witness box in 1960 and not the view of the ANC and submitted that the ANC believed in a middle course; if it had not there would have been no Programme of Action.

CROWN BEGINS ITS REPLY TO DEFENCE ARGUMENT.

On the following morning the Crown began its reply to the Defence argument on the law, as requested by the Court. Adv. Trengove indicated that the argument would be dealt with in four sections, the reply to Adv. Maisels' submissions on the variance between the Crown argument and the indictment, the reply to the argument by Adv. Nicholas on the sources and the proof of policy, the reply to the argument on the two witness rule, and finally the way in which circumstantial evidence should be approached and the drawing of inferences.

TOTALLY WRONG.

Adv. Trengove opened the first part of the argument on the Defence submission that the highest that the Crown case could be put was there was a conspiracy to overthrow the state by violence through some form of contingent retaliation. The Crown would submit that the Defence construction was wrong both in fact and in law. To judge of the variance between the indictment and the argument the Court must consider how far the case as proved fell short of the indictment. In certain cases Courts had held that variance had been to the prejudice of the accused and had acquitted but in others the variance had been held not to be material. Under the relevant Act, there was also provision for the Court to order a charge to be amended in the case of variance. The Crown submitted that the Defence argument was inaccurate, misleading and totally wrong. Even if it had been correct, it would be the duty of the Court to consider whether the variance were material between the charge and the evidence, not between the charge and the argument.

Replying to a question by Mr. Justice Bekker as to whether it would not be correct to enquire whether the accused had been misled since their defence might have been laid in a different fashion, Adv. Trengove replied that the test was what was the variance and whether the accused had been prejudiced.

GIST OF THE CROWN'S CASE.

The Crown submitted that their case was that the ANC wanted the volunteers to be violent in the ultimate resort when the order would be given; the ANC not only expected that there would be violence by the State, but that the people would retaliate by violence, and the purpose of the volunteers was to lead the people into violence at that stage, when the State would be overthrown by violence. It had been conceded that there was no evidence that the final onslaught had been intended to take place during the indictment period. The Defence had now said that the Crown argument amounted to some form of contingent retaliation.

The reply of the Crown was that their argument had shown quite clearly that plans had been laid for the overthrow by violence, for preparing the people for violence, at the moment that the ANC would consider as opportune. There was nothing contingent in the plan other than getting the mass to the stage when they would be ready for the onslaught.

BELL OR ROCKET.

Mr. Justice Rumpff suggested that the real difference between the Defence and the Crown was that the Defence argued that the indictment was based on the masses attacking the state and the argument on the theme that

Page 12/ ..... the

the State first had to use violence and then the people would retaliate. The Crown replied that this phrase of the Defence "contingent retaliation" was meaningless. The action against the state was never indirect, it was always direct action by the masses. The Defence wanted to create differences where there were none. There was no difference between attacking the state by direct violence and attacking the state by violence in other circumstances. The only matter of consequence was whether the accused had conspired to overthrow the state by violence. If so the plan would proceed and on what contingency would not matter. Mr. Justice Rumpff suggested that in such a case, the Defence might prepare themselves for example on the ringing of a bellfor the signal for an insurrection and then the Crown might say that it was not the ringing of a bell, but the firing of a sky rocket. The Defence might then say that was quite different and their time had been wasted because it had not been put. The Crown replied that it did not affect the issue whether the indictment gave rise to the inference that violence might ensue only if the State attacked or irrespective of whether the State attacked first.

Mr. Justice Rumpff suggested that the defence argued that the Crown had been saying that it was not simple violence, but an intricate programme to provoke the state to violence, and then to use that violence to go over to violence by the people, whereas in the indictment it was a simple agreement to organise the masses to use violence. The Crown replied that the Court must decide whether there had been a plan to overthrow the state by violence and if so, then there was no variance and the Crown case had been proved. The Crown submitted that the means alleged for the conspiracy had been inter alia those specified in the charge and it had never been argued that these were the only means to effect the ultimate purpose of the conspiracy.

IRRELEVANT.

Mr. Justice Rumpff pointed out that what was in the indictment was what the accused were called upon to meet. The Crown in reply asked whether there were any differences between preparing the masses for violence either to attack or to carry out an order to attack the State at the moment when State suppression was committed against them. Mr. Justice Rumpff said that the Court was concerned with the terms of the agreement and the Crown replied that it was in essence the same if there were an agreement to do certain things, even though the words were not used, but there was the inference to attack the State. The Crown case showed that over a period of years the ANC had been conditioning the masses, who had to be ready to attack. The circumstances of the attack were entirely irrelevant and did not make the plan any less treasonable.

NON-VIOLENCE A RUSE.

The Crown case was that the ANC non-violent policy was a ruse and that they in fact had the opposite policy and also that their telling the people in certain circumstances not to be provoked to violence was purely opportunist. The Crown argument had been that you can't say you have a policy of non-violence when everything you do points to violence. The Crown had never argued the case on the limited basis suggested by the Defence, all along it had been said that the plan was to overthrow the state by violence and there had been no suggestion of contingent retaliation as the basis of the case. The Crown said that at the time of planning the accused had not made up their minds. Whether the retaliation was to be accidental or uncertain, was not the Crown case; the accused had made up their minds to overthrow the State by violence, but whether violence would ultimately be necessary did not affect the issue. The whole process of dividing the ultimate stage of the clash on the basis of retaliation was artificial and unrealistic.

EVIDENCE OR ARGUMENT?

The Crown submitted further that the Court should compare the

Page 13/ ..... evidence

evidence and the indictment, not the argument and the indictment. The Defence had argued that the Crown case was based on whether the masses might retaliate. This was not a proper construction; the case was that the masses would retaliate and the Crown submitted that their case as argued, on the proper construction and not on the Defence construction was covered by the indictment. Assuming that the Court accepted that there was a conspiracy to overthrow the state by violence and the Crown could not say when or how the final plan would be put into operation, could the Defence then say the Crown had failed? Obviously that could not be.

Replying to a question by Mr. Justice Kennedy as to whether the means to overthrow the state by violence were not the mainstay of the Crown case, the Crown replied that they did not have more relevance than any other factor.

UNNECESSARY.

The indictment had set out the Crown averments and even if the planned provocation could have been pleaded, it was not necessary and there was no duty in the absence of that averment to find that there was any variance with the indictment. The Crown case showed beyond any doubt that the conspiracy was bent on destroying the State through mass action.

On the Defence objection that there had been no cross-examination on the lines of contingent retaliation, the Crown submitted that the cross-examination had been properly conducted on the basis that they preached the doctrine that the state was brutal and vicious and that they knew that the effect of their campaigns would conflict with the state and that the safety and security of the state would be jeopardised. Adv. Trengove submitted that this argument of the Defence should be rejected.

HOEXTER TAKES OVER - TWO WITNESS RULE.

Adv. Hoexter took over the Crown argument to reply to the Defence argument on the two witness rule, first submitting that it was clear that there were two parts to an overt act, the physical and the mental. The Crown said that difference and confusion could be eliminated if the Court at each stage asked what was the essential part of the overt act, the mental or the physical. The Defence had urged that the conspiracy would have to be re-proved for each overt act, but the Crown submitted that to infer that an overt act was in pursuance of a conspiracy was not to infer that the conspiracy was actually part of the overt act, and there was no authority to prove that the mental state accompanying an overt act needed two witnesses. The Defence argument was wrong through two fundamental misconceptions, the true meaning and real effect of the conspiracy and the difference between the mental and physical nature of the overt act.

The Crown submitted that the two witness rule applied only to the physical element of the overt act; the mental element was a matter for inference and it did not matter if this were from one or more, or even from the same witnesses who testified to the other overt acts. The law only required proof by two witnesses of as much of the overt act as is overt, or can be perceived, otherwise it would be impossible to prove High Treason.

IMPOSSIBLE.

Continuing on the following morning, Friday, March 17th Adv. Hoexter was asked by the Presiding Judge what was the object of the provision in the Code for the two witness rule which laid down that no person should be convicted of treason except on the testimony of two witnesses to one overt act or one witness for each overt act if there were more than one overt act of treason. The Crown had said that in Leibbrandt's case it was decided that the hostile intent need not be proved by two witnesses and the Court asked the Crown where this was stated. The Crown in reply referred to the

Page 14/ ..... fact

fact that the submission by the Defence in the Leibbrandt case that this section of the code related to the state of mind as well as to the overt act had been rejected. Mr. Justice Rumpff asked from where the Crown was assuming that proof of the state of mind required only one witness and the Crown referred to the judgement which had held that the state of mind could only be proved by inference and not by direct proof; only one witness would be needed to prove the state of mind and the Crown submitted that there was no other possible interpretation of the judgment; to hold otherwise would make it impossible ever to prove High Treason. The only enquiry was as to whether the section related to the physical element or to the physical and also to the mental element. and the real question raised by the Defence was whether links in the chain of circumstancial evidence needed to be proved by one or two witnesses when establishing the guilty hostile intent. Mr. Justice Rumpff asked why the section should apply only to the physical element, if the mental and physical were equally important. The Crown objected that the Court was putting what was not part of the Defence argument. The Crown conceded that the overt act was not more important then the hostile intent and the Presiding Judge asked why then should the legislature go out of its way to make it so?

A FULLER INVESTIGATION.

Adv. Hoexter then referred to the biblical history of this principle of proof, and after further argument and quoting of an Irish case, the Crown suggested that the historical background to the two witness rule would be of assistance to the Court, and as this had not yet been investigated fully, it was agreed that this part of Adv.Hoexter's argument should stand down and that Adv. Trengove should proceed with the Crown's reply to the Defence argument on the proof of policy.

Before the Crown proceeded, Mr. Justice Rumpff pointed out that in relation to the argument on the two witness rule, the simple questions were, if the Crown were wrong what would be the effect on the case and if the Crown were right what would be the effect on the evidence. The attention of the Court had not yet been drawn to these implications. Mr. Kentridge then said that if the Crown was correct, then the Defence submission would be that the conspiracy was part of the overt act, not merely mental but actually part of it. The Defence would withdraw any concession that in the case of Leibbrandt, the Court had not stipulated that the double proof was necessary.

PROOF OF POLICY

Replying to the Defence argument on policy, the Crown submitted that the word policy had been used by the Defence and the Crown to indicate the aims, purposes, objects, programme and policy of the organisations and when the Court had ordered further particulars, the Crown had provided the policy schedule. It was quite clear that policy had not been used in the restrictive sense of a formal document, but as the agreed objects which were to be found in the constitution. The Defence had argued that the constitution could not be changed except in the terms laid down in the constitution and also some changes would be so fundamental that they could not be so changed, even with a majority but would require the agreement of all the members. The Defence had submitted that for the ANC to agree upon treasonable conspiracy would be so drastic that it would require the consent of all the members and that there was no evidence of any National Conference adopting it, therefore it had not been proved that their policy could be treasonable.

TAINTED WITH ILLEGALITY.

The Crown contended that this argument was subject to fatal and fundamental weakness. Firstly it was clear that political parties were not subject to the same strictures of immutability as, for example, Church Councils. Members would realise that for reasons of political expediency

Page 15/ ..... policy

TREASON TRIALS DEFENCE FUND

PRESS SUMMARY No. 58

This is the Fifty-eighth issue of a regular bulletin giving a factual resume of the proceedings of the Treason Trial.

Period covered : 20th/23rd and 29th March, 1961.

THE FINAL DAYS OF THE TRIAL

HOEXTER CONTINUES CROWN REPLY.

When the Court resumed on Monday, March 20th, Adv. Hoexter continued the Crown reply to the Defence argument as far as it had gone, as requested by the Court. The Crown had maintained that the decision in the case of Leibbrandt was clear and that despite the provisions of Section 256 of the Criminal Code, there was no need for two witnesses to the intention, only to the overt act itself.

Mr. Justice Rumpff pointed out that the Crown had also dealt with colourless acts shown to be in pursuance of the conspiracy; these were essential to the Crown case.

Adv. Hoexter replied that the Defence had argued that an act in pursuance of the conspiracy was not the same as the hostile intent; the Crown would have to show hostile intent with regard to for example, a particular speech, even if it were shown that it were in pursuance of the conspiracy, but the Crown had argued that it would be enough to show the hostile intent.

RELIEVING THE CROWN.

Mr. Justice Rumpff restated the requirements as put forward by the Defence: the proof of the act itself, evidence to link it with conspiracy and proof of the hostile intent; the hostile intent and the conspiracy were regarded as distinct for each overt act; a speech might even show hostile intent but not be shown to be linked with the conspiracy. Adv. Hoexter replied that the vital question was still whether the conspiracy as an overt act was part of subsequent overt acts; the Crown submitted that the hostile intent did not need to be reproved for overt acts subsequent to the proved conspiracy, but conceded in reply to Mr. Justice Rumpff that there was no decided case on this aspect. The Crown submitted that once the conspiracy were proved, a speech intended to be in furtherance of the conspiracy could be used against the co-conspirators. Replying to a question by Mr. Justice Rumpff, the Crown submitted that if the Crown had elected to charge the accused with only one overt act, the conspiracy, it would then have been required to call two witnesses to prove the conspiracy. Defence Adv. Kentridge pointed out that the Crown had not replied to the whole argument of the Defence and that they would have no further right of reply. The Crown replied that the balance of the Defence argument dealt with the inferential process and did not affect this part of the enquiry. The Crown then submitted an alternative argument to show that the legislature had intended some relief to the Crown in requiring only one witness to the second and following overt acts; there was nothing to suggest that the hostile intent had to be proved separately for each overt act. This contention was based on the interpretation of the section, the Crown arguing with particular reference to the phrase "of treason" which it claimed had particular significance. It was probable that the legislature intended there should be two witnesses for both components of the crime, not for each component. Mr. Justice Rumpff commented that this appeared a very artificial distinction if the Crown were to suggest that it was the intention of the legislature to bring relief to the Crown through the use of the word "two". The Crown submitted that once the treason were established, the original two witnesses to it would suffice and there would be no need for reproof,

Page 2 / ..... provided

provided that the overt acts were animated by the same hostile intent. The Crown conceded that if there were a significant separation of time there would have to be proof that the overt acts were in pursuance of the same conspiracy. The link was purely mental. The Defence had argued that the conspiracy must be proved separately in respect of each of the overt acts. The hostile intent was however a constant feature, whereas the overt act was variable. The Crown submitted that since the conspiracy was constant in the same way as the hostile intent, recurring proof was not required and the Court could look at the whole of the evidence for proof. The Court would construe the section as meaning avoiding the recurrent proof of the hostile intent for each subsequent overt act.

TRENGOVE SUMS UP.

Continuing the Crown argument, Adv. Trengove summed up the implications of the Crown argument. If the Defence interpretation were correct, the Court would insist that the conspiracy would have to be reproved by at least one independent witness for each subsequent overt act, in that case the burden on the Crown would be increased with every subsequent overt act beyond the second and there would be no point in the Crown asking the Court to find anything more than the overt act of conspiracy. The Crown respectfully submitted that in that case the Court should be relieved of that duty of finding a current conspiracy with overt acts flowing from it, and should view each accused on the point of conspiracy only, subject to the admissions made and whether the conspiracy had been proved by two witnesses.. The effect would be that since the overt act had to be proved by two direct witnesses, the Court would determine whether the two chains of circumstancial evidence for each accused had been established. For example, in the case of Tshuma, the Court would look to the facts admitted, to the signature on documents, and to the Defence witnesses. Mr. Justice Rumpff asked whether the Court would have to construct the two chains of evidence for the Crown and the Crown agreed that that was possible, adding that for example, in the case of the African National Congress there was not a single fact that in its essential features had not been established by the evidence of more than one witness on every occasion. The task of the Crown was to satisfy the Court that the essential facts had been proved by more than one witness. The facts and the evidence showing the adherence of the accused to the conspiracy had been proved by two witnesses and it did not matter if they were the same witnesses to prove the conspiracy as to prove the overt act. Replying to questions by Mr. Justice Rumpff on the proof of the overt acts in the case of L.Ngoyi, the Crown conceded that the witness essential to prove the conspiracy would then fall out as a witness to the subsequent overt acts. The Crown submitted, however, that notwithstanding the volume of evidence, the facts supporting the existence of a conspiracy were in a fairly narrow ambit. A hard and fast rule could not be laid down in the case of each of the accused; where an accused had given evidence the case might be easier to establish than otherwise, or the position of the accused in his organisation, might render the evidence so abundant that there could be no doubt. If there were any doubt the Court would discharge.

GYMNASTICS.

Reverting again to the example of the witnesses to the overt acts of L. Ngoyi, Mr. Justice Rumpff asked the Crown whether this had been taken into account where the Crown was submitting its argument. Adv. Trengove replied that it had been constantly taken into account. Mr. Justice Rumpff asked again whether it had been put to the Court that the evidence of the shorthand writers must be taken into account for the conspiracy but ignored for the overt acts, and also ignored for the evidence of Fundla in relation to L. Ngoyi, commenting that to divest and invest the evidence was somewhat of a gymnastic performance. Adv. Trengove replied that he thought that in the case of the first accused, the Crown had pointed out that the evidence of a witness to the overt act, if it had already been given in respect of the conspiracy would have to be ignored. The argument on all the accused would be subject to the application of this procedure.

Page 3 / ..... Mr.

. Mr. Justice Rumpff pointed out that the Court had not been told of the practical application or the factual effect of the evidence of the witnesses being excluded. The Crown replied that the argument on the conspiracy would not be affected by the exclusion of any single witness; what remained would be sufficient. For example, the Defence had tried to show that the witness Masilele might have to be excluded, and that would affect everything that Masilele said. The Crown agreed that, except for admissions, there was not the same evidence against allthe accused, their overt acts were not the same, and also their participation in the conspiracy varied, although the grand object remained the same. If the conspiracy were proved by two witnesses the other overt acts could be disregarded. The Court would still have to consider the case of each of the accused on the evidence.

"OPPRESSIVE MAGNITUDE"

Mr. Justice Rumpff commented that the magnitude of the task of the Court was oppressive, and asked whether the Crown had presented to the Court the evidence which they must consider against each accused, or had left it to the Court to consider the volume of the evidence and what should be used for each accused and also the implications, as for example in the case of L. Ngoyi. The Court would then have to work out and look up the evidence in relation to possible co-conspirators and then might have to discard them. That would be the procedure for allthe accused, except in the case of T.Tshume, where only the conspiracy was now charged.

Adv. Trengove replied that for example the case of Resha, Conco or Tshunungwa would not require any mental gymnastics, but Mr. Justice Rumpff reminded the Crown that Resha was involved in some of the evidence against L. Nogyi and whatever counted against L. Ngoyi would have to count against Resha and vice versa. The Crown must first prove the conspiracy and then satisfy the Court that each accused had been party to that conspiracy. If the Court had to exclude the evidence relating to those who were not proved to be co-conspirators the problem would be to find proof of any conspiracy since, if any conspirator were to be excluded, then that person could be used against others.

TWO STREAMS.

Resuming the Crown's reply on the following morning, Adv.Trengove submitted that the Crown as not necessarily relying on the speeches of co-conspirators as such if what they had said had been said at ANC meetings. In connection with the two streams of evidence, the Crown could have divided the witnesses into two streams, and the Court would then have come to the conclusion that the conspiracy had been proved by two streams; but the Crown had in fact, as in the case of Leibbrandt, taken various topics for the inference of the conspiracy and had addressed the Court on them to the extent that the facts had been proved. The Court would then consider and find that each of the essential ingredients to be inferred had been proved over and over again. In the ultimate result the Crown had relied mainly on the documents, rather than the speeches. These matters had been proved over and over and the Court would find that the exclusion of any one particular witness would not affect the case. The role of the meetings in the proof of the conspiracy was really a minor role; most of the important speeches had been admitted and the role of the meetings was to show that the ANC was propagating its policy, as outlined by Defence witnesses and in documents. They were also important to show how the accused participated in the various activities, that is in the adherence to the conspiracy.

IDUBLE PROOF.

On the point of hostile intent, the Crown submitted that the Court could rely on the evidence other than that relevant to the proof of the conspiracy as such, but the Crown also submitted that evidence as to their state of mind was to be found in the possession of more than one accused... For example in the case of Nokwe, there were important documents to show

Page 4 / ..... his

his state of mind; one had been found in his possession on one occasion and two others on another occasion. Therefore, concerning his state of mind, there had been two separate sources of evidence pointing to the same conclusion. The state of mind had been therefore proved by double proof.

CROWN REPLY ENDS.

The Crown submitted that there was more than one overt act, the Court should find, that at least one chain of evidence had been proved abundantly in respect of the conspiracy and that for the second and other overt acts, they had either been admitted or they depended on evidence which, if excluded, would not affect the evidence on conspiracy one iota as it had been abundantly proved. With this the Crown concluded the argument on the implications of Section 256 of the Code and the Crown reply to the Defence argument was terminated.

DEFENCE ARGUMENT CONTINUES

Defence Adv. Kentridge submitted that the Crown had made certain statements of fact which must be refuted. The Defence rejected the suggestion that the Crown had ever argued double proof and added that in fact there were a large number of matters which had only been proved once, for example, the meetings testified to by the Detectives Segone, Gazo, Masilele and Wessels.

IS IT COURT'S TASK?

Adv. Kentridge contined by saying that of the 93 meetings contained in the policy of violence schedule (93 out of the thousands of meetings that had been held) only 15 had been reported by shorthand writers, and then had only been proved by one witness. Also in relation to the documents, the admissions had been very qualified and did not go as far as the Crown claimed. The Court would observe that in some cases where there were witnesses in addition to the shorthand writers, they had only testified to the people present at the meetings. The Defence asked whether the Court were expected to make its own schedule of the meetings in relation to the witnesses. The Crown had said that the Court's task was not as formidable as it appeared, but the question was whether it was the Court's task at all. The Crown should have argued the two witness rule; it was not for the Court or the Defence to do the Crown's work. Even if the two witness rule were to be interpreted as the Crown had submitted, it appeared that the Crown had not done what it said it had. For example in the case of the accused Tyiki, the Crown ought to have excluded the evidence of the shorthand writers who had testified to 12 out of the 15 "violent" meetings reported by shorthand writers. But then there would be nothing left, for the three meetings left did not relate to Tyiki. The Defence gave other similar examples and submitted that the Crown had not directed its argument to the two witness rule, had not presented two chains of evidence and had not considered the effect of the application of the two witness rule to the evidence. The Crown could not do it now and no one could do it for the Crown. It was for the Crown to make out its own case.

MAISELS ON PROGRAMME OF ACTION.

Adv. Maisels continued the general argument for the Defence on the Programme of Action, referring to the evidence of Professor Matthews who had denied any suggestion of going over to violence. The Crown had not cross-examined this witness on this vital part of his evidence and yet he was most well informed. The Crown had, however, submitted that he appreciated the ANC attitude towards the unconstitutional struggle and foresaw the likelihood of violence and bloodshed by the state as a result of the illegitimate methods to be used. It was extraordinary that he had not been cross-examined on the Programme of Action. Similarly this witness had not been cross examined on the significance of economic pressure, although he had given evidence in chief of his belief in economic pressure. Nor had other Defence

Page 5 / ..... witnesses,

witnesses, such as Mkalipe, Mandela and Chief Luthuli been specifically cross-examined on the Programme of Action.

The Defence submitted that the submission which Adv. Trengove had felt impelled to make that the Programme of Action did not relate to persuasive pressure but to unlawful intimidation for the overthrow of the state, was baseless and flew in the face of a mass of uncontradicted evidence, and also of the probabilities. There was no foundation for it. If the Court were to hold that the mere use of unconstitutional, illegal and extra-Parliamentary methods did not indicate the intention to overthrow the state by violence, unless there was in fact an element of violence, then the Crown had failed to establish such an element. The Crown would have to show that these methods were to be used in conjunction with violence for the violent overthrow of the state, and the Crown had sadly failed to prove its case in this respect. The reference to "such other means" in the Programme of Action had been denied by the Defence witnesses to imply violence, and the Crown suggestion had not been persisted with and had not even been put to Professor Matthews.

The Defence submitted that the Programme of Action was not a break with the past - the leaders were the same, and also the constitution - but the means of pressure were to replace supplication.

85 OUT OF 15,630 MEETINGS.

Adv. Maisels informed the Court that he would now deal with the evidence about meetings and speeches. The Defence had been astonished - to put it at its very lowest - to hear the Crown say that the meetings played a minor role. This had not been stated in the opening address, or in the Crown's main argument; in fact it had then been submitted that the meetings played a vital role as a gauge of what people were doing. The Crown had submitted that the masses were to play a vital part in the struggle and it followed that to obtain the support of the masses, the methods had to be propagated through meetings which were a most important medium to get to the hearts and minds of the masses. The Crown had maintained that the insistence on violence ran through the speeches like an unbroken thread, that they bristled with reference to blood, and that the boldest exponent of this had been Resha. Yet despite the fact that there had been thousands of meetings during the indictment period, the Crown had led evidence on only a small fraction and this selection had been reduced when a number of meetings were abandoned. The Defence submitted that there could be no inference of the policy expressed at meetings unless either the whole corpus of the speeches were examined or else a scientifically significant sample, and this would not be just picking out the ones you want. The Crown would have to show the Court that no other inference save that of violence was possible. Of 249 meetings relied on by the Crown, for all purposes, 229 related to the ANC and of these only 85 appeared in the so-called violence schedule. Even assuming that these 85 established violence, all the witnesses called by the Crown had given evidence that they had testified to more meetings at the preparatory examination, and that they had attended far more than that. There could only be one inference from that - that the remainder of the meetings did not support the inference that the Crown wanted the Court to draw. The admissions made by the Defence did not account for the reduction in the number of meetings. The Defence then set out an analysis of the number of so-called violent meetings according to the different provinces, showing that out of an estimated total of 15,630 meetings during the indictment period, the Crown had produced only 85 so-called violence meetings, and it also could be assumed that all the meetings omitted were not capable of a violent interpretation. Now the Crown had said that it was irrelevant that only a small fraction of the meetings had been dealt with, and that it was for the Defence to show why, with a non-violent policy, the accused "had said these things so often." But the Defence submitted that no argument could excuse the Crown failure to prove violence by inference. The Crown had also submitted that the accused had to be subtle and had not therefore always advocated

Page 6 / ..... violence

violence; the Defence asked how non-violent masses could be good material for a violent revolution? The Crown had resorted to the argument of "subtle", to avoid the consequences of the mass of evidence which showed that non-violence was in fact preached. But this had not been put to one Defence witness.

On the Crown submission that it relied on important meetings, the Defence submitted that it was not candid. Crown witnesses had not been re-examined to show that these meetings were important; was it the violent speech that made a meeting important? Not one of Chief Luthuli's speeches had appeared in the violence schedule.

"FORGET ABOUT THEM".

Adv. Maisels referred again to the fact that out of 15,000 meetings only 85 had appeared in the violence schedule - .6% - what a nation-wide conspiracy! And of this 85, over 70 had been reported by longhand writers. The Defence hoped to convince the Court that little or no reliance could be placed on the long-hand writers and that the Court should forget about them.

GARBLED

The police had sent longhand writers to the meetings. Normally the Crown was not in a position to select its witnesses, but in this case they could; they could have had experienced shorthand writers or mechanical machines, so that in fairness to the Court, let alone the accused, a full record of the speeches could have been had. This the Crown did not do! They chose to rely on the garbled version of longhand writers whose literacy and ability were open to serious doubt. The Defence submitted that the wholesale employment of longhand writers was most unsatisfactory; the guilt or the innocence of the accused should not depend on part of what some person says he heard the accused or some other person say years ago!.

On the question of interpretation, the Defence submitted that the Court would know how difficult it was to convey the exact meaning, and this difficulty could be at its greatest in the case of idioms at political meetings. The Defence asked how much confidence the Court could have in the ability of such a witness as Segone to interpret into English; he had said he had a good working knowledge of English, but he could not even understand a relatively simple question put to him in Court. Yet the words used by the speakers were the very act the Court was concerned with. Even if every second sentence had been accurately reported, what about the portions omitted? The Crown had relied not on the whole speeches, but on the extracts and phrases which seemed to favour its case. What sort of evidence was that? At political meetings the audience listened to the speeches as a whole, yet the Crown was asking the Court to consider the extracts without the whole speech.

SELECTIVE REPORTING

What was the Court supposed to do with such a reporter as Masilele? Any word that he had reported could be a mistake, yet the liberty or imprisonment of the accused might depend on that word. The witness Gazo had been selective; he had not written down what he thought was unimportant; he could not keep up with the speakers and had left out what didn't make sense. The Defence submitted that it would be extremely unsafe for the Court to place any reliance on the longhand reporters.

Adv. Kentridge led the Defence argument on the interpretation of speeches by the Court, submitted that the circumstances in which the words had been spoken must be taken into account. The Crown had asked the Court to infer that the bulk of the population was more likely to be influenced by violent speeches and had promised to lead expert evidence on this, but it had not done so. There had been no evidence of a violent mood or a

Page 7 / ..... mood

mood prone to violence among the young Africans in the Western Areas. The The Court would not share this assumption by the Crown that the people of the Western Areas were dangerous. The Defence submitted that in South Arica the Courts had adopted a robust approach to strong political language, and without evidence would assume a catastrophic result. Allowance had always been made for the use of metaphorical language and they would not try to extract the last ounce of meaning. The Courts had not curtailed the rights to express opinions by drawing unjust inferences.

NO VOICE.

Continuing his argument on the following day, Adv. Kentridgequoted the case of Roux where the Judge had said that it must be remembered that the native in South Africa had no voice im Parliament and could be expected to use strong terms. Despite the strong language it had been a protest and not an incitement against the State. The Crown witness, Professor Murray had also agreed on the use of strong political language in South Africa while the Defence witness Professor Matthews had said that youth expressed themselves strongly and more vigorously than did their fathers. The Defence submitted that even the shorthand reports must be considered in the context of the well known concept of non-violence; also the Crown had frequently failed to give the full text of a speech. Replying to a question by Mr. Justice Bekker on the references in speeches to the presence of the police, the Defence pointed out that this sort of vituperation could really mean anything, not necessarily violence; it could be an undefined form of intimidation to some extent or a threat of ostracism. The Court was not asked to approve this sort of language, but it could be nothing more than a vague expression of dislike.

JUDGING THE SPEECHES

The Defence submitted that the Court would bear in mind the frequent use of metaphor, the absence of evidence about the atmosphere in which the speeches were made, the dangers of translation, the difficulty of distinguishing between political content and real intent and the leaning of the Courts towards freedom of political speech. The Court would also bear in mind that a speaker might be in an angry irritable mood, worked up or not even a clear speaker. Dealing with the speeches which were alleged to advocate a violent overthrow of the state, the enquiry involved a number of decisions; which reporters were reliable? which speeches were interpreted? was the interpretation reliable - or even admissible? And after allthat, the Court would stillhave to decide whether the speech capable of implying violence against the state and even then what was the status of the speaker in the ANC and whether it were not a speaker representing the feelings of the people on some local issue, and whether the speech stood alone or in some context.

CROWN'S"STEW".

Continuing the argument Defence Adv. Fischer submitted that the Defence would show that the Crown had slung everything into the pot to see what sort of stew it could produce. But there was no speech in allthe thousands of ANC speeches which said that it was the policy of the ANC to use violence to overthrow the state by violence; nor was there any speech which said that the ANC policy was to recruit people through non-violence, to teach them not to be provoked, to allow them to be shot for the sake of propaganda and then to call upon them to proceed to violent insurrection at any given moment. There were no speeches to overthrow the state by violence, though there were some which could be termed incitement to violence.

CROWN UNCERTAIN

The Defence submitted that the speeches would have to be examined with great care to establish their precise meaning; the Court could not condemn the accused on a suspicion that his or some other person's speech contained a suggestion of violence. It was impermissible of the Crown not to have

Page 8 / ..... stated

stated exactly what it meant. The task of the Court would be to examine the bricks and mortar of the Crown house - which the Defence said was no house at all. The Crown had been so uncertain of its case that at one time it had been the Congress of the People which had been the supreme act of treason, then it had been the Western Areas and then the third stage of the Defiance Campaign. The uncertainty was because the Crown had never made up its mind about the conspiracy which it said had been entered into. No theory had been advocated by the Crown about the agreement to the policy of violence, and there had been only vague hints at the end of the case about the Programme of Action. But however reluctant the Crown was to make up its mind, it was asking the Court to decide about the speeches and how the conspiracy was entered into. There was no alternative but for the Court to proceed to a detailed examination to see if the speeches demonstrated the existence of a violent conspiracy. The Defence did not say there were no violent speeches and Defence witnesses had themselves admitted that some speeches seemed to approve violence, but the real issue was whether the speeches assisted the Court to draw the inference as to the agreed plan, of which violence must be part, the plan to overthrow the state. The Court must be able to say at the end that this was the only reasonable inference. The Defence would say that this examination would bring startling results and no support for the Crown case.

DEVIATION.

The Defence submitted that the Congresses had a peaceful non-violent policy, but they had an imperfect control of their speakers and there was sometimes deviation from policy. If the speeches expressing violence could be shown to be sporadic, then there was no reason why they should form part of the alleged plan, and they may have been made for other reasons. They would then be consistent with the Defence argument and not with the Crown argument. This was apart from the question whether the speeches displayed any deviation from or indication of change of policy.

TWO CAMP THEORY.

Mr. Justice Bekker indicated that the Crown had suggested that the overall plan arose from the division of the world into two camps, but the Defence replied that there had been no evidence or suggestion that the two camps would come to war. The two camp theory did not take the Crown anywhere; it did not imply the use of violence. Replying to further questions, the Defence pointed out that the idea of the conditioning of the masses for violence had formed only a part of the Crown's original indictment. In the indictment the Crown had alleged that the Western Areas Campaign involved violent resistance, directly and immediately, not conditioning for the future; that idea only arose later from the mounting evidence of non-violence. Even senior members of the police had said that the policy of the Congresses was non-violent. In the policy schedule there had been a suggestion of direct violence in every part but there had now been a complete change of front in the Crown case, and the pattern must be sought. But the Crown argument did not fit, because there was no plan for violence. There had been disparaging reference to whites, but this arose out of the conditions in which the speakers lived, not from advocacy of civil war or violence against them. In view of the repetition almost ad nauseam of the refusal to be provoked, the matter would be laughable if it were not so serious. The Court would be asked to dismiss the evidence of the longhand reporters as not thoroughly reliable, and also to look at the contradictions of the speakers themselves. The most that could be said was that their views sometimes changed.

FISCHER ON CAPE SPEECHES.

At this point, the Court requested Adv. Fischer to submit the argument on the speeches reported in shorthand. Adv. Fischer then submitted that although the Crown had abandoned the meetings reported by the shorthand writer White, the Defence would refer to 36 extracts which showed that leading members of

Page 9 / ..... Congress

Congress in the Cape speaking thus could not possibly have known of the nationwide conspiracy to overthrow the State by violence, nor were these speeches consistent with inciting the masses to violence. If these speeches were read together, and the Court must look at the speeches as a whole, there could be no question but that the policy of peace was being put forward. The resolutions passed at the meetings were balanced, reasonable and had nothing to do with the sweeping away of the state. It would take a morbid mind to read violence into these speeches.

After dealing in detail with the speeches in the Cape, the Defence submitted that whichever theory of the Crown were accepted, immediate or retaliatory violence, there was no trace of it in the Cape and this area should be excised from the alleged conspiracy.

OTHER AREAS.

Turning to the Eastern Cape, Adv. Fisher pointed out there were no shorthand writers there and Adv. Plewman would deal with the longhand writers. In the Northern Cape there was also no trace of the conspiracy. In Natal there had been both shorthand and mechanical recordings, and replying to Mr. Justice Rumpff, the Defence said that generally speaking the shorthand writers' reports were accepted as correct and also in the Transvaal except for one or two errors. The African detectives took their own notes in longhand, one reporting a total of 198 speeches. It was clear that the Congress affairs were well looked after in Natal. Practically all the important documents from this area were before the Court and the affairs and activities of the Congress movement there were completely open and above board.

Resuming the argument the following morning, Adv. Fischer pointed out that according to the further particulars, the ANC had demanded and propagated, as an immediate object, the substitution of a new state. In the policy schedule the speeches of Resha and Dr. Motala in Pietermaritzburg had been relied on to show the desire for a new state through the use of violence. It was noteworthy however that the Crown had omitted many important passages dealing with policy and had placed together a number of gobbets which gave an incorrect picture and one would ask why such a myopic eye should be turned on a speech which really set out policy. The Defence then quoted from the speech of Dr. Motala to show that there was nothing subversive or hostile in the speech, which in fact gave a balanced but critical view of the situation in South Africa and it was out of this sort of criticism that the Crown tried to weave the Marxian story of the crumbling and withering away of the opposition; the speaker's comments on exploitation had been highlighted, but would any economist deny it in South Africa?

OPTIMISTIC.

The Defence contined that it was a matter of fact that non-whites were looking to other countries where the non-whites had freedom and they were entitled to be optimistic about this. Adv. Fischer submitted that Resha's speech was important for the optimistic view it took of the march of events and it was out of character with a policy of violence. The speaker had said, "Congress believes in non-violence but we won't be responsible for what will happen if the leaders are taken away from us". The whole meeting would have created the impression on the audiance that the Congress was prepared to work steadily despite suffering towards a multi-racial state.

On other Natal meetings which he dealt with in some detail, Adv. Fischer said that by themselves they destroyed the Crown case and drew particular attention to the evidence of a senior special branch detective Truter, He added in reply to Mr. Justice Rumpff that in fact the Defence relied very strongly on the evidence of shorthand writers and recording machines. In the Orange Free State also, the special Branch detective had said that he had seen no violence in the speeches.

Page 10 / ..... In

In the Transvaal the evidence against 40 of the 80 branches had been wiped out because there was nothing against them. Only a small area was left, Johannesburg and its environs.

NOT INFALLIBLE

At this point Mr. Justice Rumpff interrupted the Defence to ask for submissions only on the shorthand writers. The Defence replied that the shorthand writer Coetzee was well qualified professionally and no doubt very competent, but the Court ought not to give too much weight to each particular phrase or sentence. He had himself said that he did not claim infallibility and apart from the possibility of human error, his accuracy must depend on how well he heard. The conditions of reporting were not ideal in the case of open air meetings and the Defence also pointed out that at one meeting where there had been a longhand reporter as well as a shorthand report, there had been differences. Not only had the longhand report left out portions contained in the shorthand report but it contained things not found there. This might be due to the interpretation of the speech and it showed that accurate reporting might well depend on the language used.

Replying to further questions by Mr. Justice Rumpff, the Defence said that their submissions on the other shorthand writers would be substantially the same.

COURT ADJOURNS

Mr. Justice Rumpff then stated that the Court had considered whether there might be some aspects on which it would not be necessary to hear the Defence, and wanted to consider the position for a few days in the interests of shortening the case. In order to study the case sas so far advanced, the Court would adjourn until the following Wednesday, March 29th.

END OF TRIAL - ALL DISCHARGED.

When the Court resumed on the morning of March 29th, Adv. Trengove first submitted on the point of variance between the charge and the evidence that Section 180 of the Criminal Code provided that if variance existed, the Court could either discharge or invite the amendment of the indictment, The Crown wished to indicate that if the Court were to decide that there was a variance, the Crown would ask leave to argue on an amendment to cure the defect.

The Court then gave the verdict on the trial, declaring all the accused to be NOT GUILTY.

(Judgement will be attached).

ISSUED BY The Treason Trials Defence Fund (W.O. 2092)
P.O. Box 2864, JOHANNESBURG.
Phone : 33-5901.